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The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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**CONSISTENCY MODEL OF COURT DESIGNATION TO
FOSTER PARENT RIGHTS AUTHORITY
DUE TO DIVORCE ON CHILDREN**

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ABSTRACT

This paper is entitled "The Consistency Model of Court Designation to Foster Parent Rights Authority Due to Divorce on Children" is the result of research competitive grants funded by the Ministry of Research and Technology. This study found a model: "BP4 Friends of Children". BP4 is an Advisory Board, Development, Preservation of Marriage, which has activities that aims to reduce the number of divorces. In the passage of time, the role of BP4 increases, which also carries out advisory couples who file for divorce / divorce in religious court. This activity is considered highly strategic in order to reduce the divorce rate. However, in case they are unsuccessful, then the role of a mediator BP4 needs to be optimized for husband and wife to make children care power of attorney agreement.

Results of power agreement children custody rights set forth in the minutes that can be used as the basis for the judge in making the determination of rights of custody of the children's power of divorce. Therefore, it is necessary to provide strengthening the role of BP4. The reinforcement is in the form of policy formulation "BP4 Friends of Children", which regulates BP4 role as a mediator for a husband and wife who file for divorce / divorce in making children care power of attorney agreement.

Keywords: BP4 Friends of Children, children care power of attorney.

A. INTRODUCTION

In a family, the presence of children is expected by married couples, because of the presence of children in the family may add to the happiness in the family, and can strengthen the bond of marriage, as well as to realize the purpose of marriage, as formulated in Article 1 of Law of the Republic of Indonesia No. 1 of 1974 on marriage. "Marriage is the emotional and physical bond between a man and a woman as husband and wife with the aim of forming a family (household) to be happy and eternally by divine"

The presence of children in the family has consequences onset of the duty of parents to children, one of which is an obligation in providing welfare in various forms, including providing children care. This obligation has been determined in law, are specified in Article 9 of the Law of the Republic of Indonesia Number 4 of 1979 on Children Welfare, which is determined as follows :

The parents are first responsible for the realization of children welfare well spiritually, physically, and socially. While the definition of the Children welfare is an order of life and livelihood of children to ensure the growth and development of children with a reasonable, well spiritually, physically, and socially. This obligation is reinforced in legislation that aims to provide protection to children. The provisions set forth in Article 76 B Act of the Republic of Indonesia Number 23 of 2002 on Child Protection in conjunction with the Law of Republic of Indonesia Number 35 of 2014 on the Amendment of Act No. 23 of 2002 on Children Protection. This provision threatens criminal sanctions against those who place, let, tell involving Children in situations of abuse and neglect against children. Regulated in Article 49 jo. Article 9 of the Law of the Republic of Indonesia Number 23 of 2004 on the Elimination of Domestic Violence, which threatened criminal sanctions against those who abandon others in the scope of the household, whereas according to the applicable law for him or for consent or agreement he is obliged to provide livelihood, treatment or maintenance to the person. On the other hand, in certain circumstances, it is possible the marriage relationship between husband and wife is breaking up because of divorce. In case of divorce, children should not be victims of the divorce of their parents. Similarly, against both parents, each still has the right and obligation to care for children until the children become adults.

Article 45 paragraph (2) of the Constitution of the Republic of Indonesia Number 1 of 1974 on Marriage, specifies the following:

1. Both Parents are obliged to maintain and educate their children as well as possible.
2. The obligation of parents referred to in subsection (1) applies until the child gets married or

can be independent, where applicable obligations continue even though the marriage between her parents broke up.

Such provisions have been set out clearly, that in the event of divorce both parents, then the duty of parents to care for children is not lost, so wherever the child is, whether to be with the mother, or with a father, should not decide custody of his parents, even though his parents do not live in the same house since divorced. If we talk about the rights of children, the duty of parents to raise and to educate children with the best valid until the child gets married or can be independent. This obligation is valid marriage continues despite both her parents had been severed.

From the observations of the various printed and electronic media showed that in case of divorce, a lot going on "grabbing kids" who have not mumayyis or child who is not 12 years old, so the power of the right child custody stipulation filed with the court. In terms of the power of child custody stipulation filed with the Court, the judge also specifies a power of attorney custody to one parent, or others. And in fact, a lot of power right child custody determination that implementation is not consistent, so it is necessary to find a model for the implementation of child custody determination power of attorney can be implemented consistently. This phenomenon is the background to do the research, the results of which are presented in the call for papers.

B. PROBLEMS

How does the model for the implementation of policy formulation determination of power of

attorney parenting of children of divorce can be carried out consistently ?

C. DISCUSSION

1. Consistency-setting power of attorney foster parents of children due to divorce

One of the consequences of divorce, is the emergence of issues related to child care or maintenance that has not mumayyis or not 12 years old yet. The issue is : who will be followed by the child. Will the child join his mother or father. In most couples who divorce, the issue can be resolved by mutual agreement (husband-wife) without causing problems. But in most of the other partner, it becomes a source of contention prolonged, even been a scramble for child resulted in the emergence of legal issues or

implications for new issues. Such a condition is possible, because divorce itself is a result of the conflict between husband and wife.

If there is a dispute in which each party requires care and maintenance of children, the petition may be filed concurrently with the divorce or filed separately, after their divorce to the Religious Court where his wife lived.

With the request, the judge will assess, children will be better taken care of the applicant or respondent. Referring to the norm in the Compilation of Islamic Law, a child who is not 12 years old yet *mumayyis*, parental rights / *hadhonah* can be given to his mother. However, the judge may decide otherwise, in accordance with the principle of child protection, namely the best interests of the child. The best interests of the child embodied in the form of protection of children's rights so that children can grow up with a reasonable and normal in accordance with human dignity. Therefore, the judge needs to understand and analyze the rights of children well.¹

However the decision handed down by the judge, who need to know more about is the implementation should be consistent. In this study, the definition is consistent with the correspondence between the court decision implementation. While the consistency of execution of court decisions regarding the right power parenting on children due to divorce, is compatibility between the determination of the rights of foster parents with the power of execution.

The results showed that there is an inconsistency between the court ruling on rights of custody of the child with the power of execution. This was evident in the case of divorce couples artist, call it by the name of AA (the husband) and UU (wife), who have been blessed with 3 sons. The third child, when the divorce happened not 12 years old yet, and the Court determines that the power of attorney custody of the child falls on Act (mother). But in fact, during the process of divorce, children are in the care of their father, and the public know that AA is not willing to hand over their children to the law, and make it even does not allow the children to see their mother and does not allow the mother to see the children.

This condition is very detrimental to the children, even feared to affect the growth and mental development in children. This paradigm is increasingly often reported in the media, and the results of research conducted in some Religious Court in Central Java, the data found inconsistencies in implementation of the court ruling on children custody

¹ Ahmad Zaenal Fanani, *Pembaharuan Hukum Sengketa Hak Asuh Anak di Indonesia*, UII Press Yogyakarta, Yogyakarta, 2015, hlm. 159.

rights of power caused by the divorce of their parents. The data are followed by a description of the judges, and the results are as follows:

- 1). Applicant is the mother, children custody invoke power of attorney for the father agrees to a divorce, as long as the children join the father ; The judge ruled the power of custody rights falls on the mother, because the children were living with their mother.
- 2). Applicant is the mother, children custody appeal for the right power because after the divorce, the children are taken by the father ; The judge decides custody rights falls on the mother's power.
- 3). Applicant is the mother, begging for power of attorney custody after the divorce, the children are taken by the father ; The judge decides custody rights falls on the father's power, because the children are closer to their father.
- 4). Petitioner is the father, pleading for the right to power foster mother married again and converted, while the child was in the care of the mother; The judge sets a power of attorney custody of the children falls on their father.
- 5). Judge gives power of attorney regarding the determination of children custody to one parent with a view, in fact the child was in the care of the father or the mother. If the children have joined the mother, it will be set to follow their mother. Vice versa, if the children have joined the father and closer to their father, the judge will set the power of custody rights to their father.
- 6). In order for a court warrant can be ignored and implemented, then the interested parties submit the petition to do the implementation of the court ruling on children care power of attorney. However, the execution / implementation of the determination of children custody rights of power can not always be implemented.

From this research, it turns out there is a discrepancy / inconsistency between the Court decision with implementation due to various problems.

From the findings of this study can be said that the court ruling that has become the law is not always enforced. As Satjipto Rahardjo said that Law enforcement is the problem is not a simple problem, not only because of the complexity of the legal system itself, but also the complexity of the association between the legal system to the social

system, politics, economics, and culture. As a process, the rule of law is essentially a variable that has a correlation and interdependence with other factors.²

The problem of law enforcement is a problem that is not simple. This is evident from the results of studies showing that the determination of children custody rights of power that has been set by the judge, not always workable. Whereas the determination of rights of custody of the children is the product of the power of the laws made by judges and must be implemented. Implementation of children custody determination of power can be used as a yardstick to determine the achievement of law enforcement. If the determination of the judge is not workable / inconsistent, then the law becomes unenforceable. While the determination of rights of custody that power can not be implemented, due to the complexity of the association between the legal system to the social system and culture. The legal system governing the rights of foster children due to divorce power should be done by request determination Religious Court judges, as well as for the implementation / execution required the submission of application to the Chairman of the Religious Court. The legal system that has been built is not always followed by the social system and culture. Cultural community to obey the law no warranty, present some inconsistencies establishment of children care power of attorney. There are various reasons that cause unenforceable determination of child custody rights of power, therefore it is necessary to find out more problems that affect the determination can not be implemented children care power of attorney, so it is said to be inconsistent.

2. The problem that causes the inconsistency of establishment of power of attorney foster parents to children.

Problems that cause the inconsistency of determination of children custody rights obtained authorization further information, as follows:

- 1). Because it involves the interests of the child (human), are certainly not as easy as the verdict of the goods. Implementation of the decision to object goods, in case of trouble, they can do a forced effort. But concerning with the children, it could not be forced as it will give a psychological impact to the children concerned.

² Satjipto Rahardjo, *Penegakan Hukum Suatu Tinjauan Sosiologis*, Genta Publishing, Yogyakarta, 2009, hlm.viii.

- 2). The Court has set a power of attorney custody of the children falls on their mother. But their father and the father brought the children not wanting to give to mother, even mother hindered to see her children.
- 3). The child's father intimidates and vilifies the mother, so that children do not want to see their mother, the children refused to join their mother,
- 4). Children can not be presented as taken away (to the outer islands or abroad). Children's rights are set to be in the power of the foster mother, but because the mother converts (usually due to get married again), the children eventually transferred to join father ;

There are several related factors that determine the law enforcement process as disclosed by Lawrence M Friedman, which is a component of substance, structure, and culture. Some of these components include the scope of the working of the law as a system. All these factors will determine the process of law enforcement in the community and can not be simplified by one another. Failure in one component will impact on other factors.³

As the opinion of Lawrence M Friedman in Satjipto Rahardjo, it can be said that the working of the law in society is affected by the component substance, structure and culture. From these results, it can be seen that the components that affect the consistency of the implementation of children custody determination power of attorney is a component of the substance, structure and culture.

Meanwhile there is a fact, that the Court Decision is not always in accordance with the provisions of the Act are normative, for example, in Article 105 Compilation of Islamic Law has determined that in the event of divorce, the child is not yet 12 years old or has not been assigned to follow her mother's mumayyis. However, in certain cases, for example, the child refused to participate in the mother, the mother has a tendency to hurt / harm the child, the mother has not commendable behavior, or mother converted, then the judge will assign power of attorney custody of the child to his father. Thus the application of Islamic Law Compilation was not absolute. Similarly, as stipulated in Article 47 of Law No. 1 of 1974 on Marriage, that during marriage, children who are minors under the authority of parents during a power are not revoked. Meanwhile Article 45 (2) of the Act stipulates that:

Both parents are obliged to maintain and educate their children as well as possible;

³ Ibid, hlm.ix

- 1). The obligation of parents referred to in subsection (1) of this section applies until the children are married or can be independent, where applicable obligation continues even though marriages between two people break up.
- 2). This means that each parent retains the right authority foster parents of children as well as custody, care and maintenance as well as educating children. If there is a dispute over control of the children, the court gave its adoption (Article 41a of Law No. 1 of 1974 on Marriage). Either the mother or the father is obliged to preserve and educate their children based solely on the interests of the children.

Information obtained from interviews, that in the event of divorce, it is not always requested authorization determination rights of parents to the child, especially if both parents have agreed on children care; Also before the divorce when one parent leaves the house, while the children cared by the other parent. In many cases of divorce, the two sides have realized the power of attorney not make the problem care of children, because of the growth of the children would be better if both parents are given equal opportunity in educating children, despite having been divorced. Both parents must remain responsible for the care of children, as it has been mandated by legislation.

Judges do not always grant requests authorization rights to children custody filed by an interested party, because the judge considered from both parents who are truly unable to care for the children, both in terms of mental, social and material. In addition to consider the matter, the judge also pays attention to the determination by considering legislation, religion, children psychology, the petition of the father or mother, father and mother's behavior, as well as social and economic factors.

From interviews with judges obtained information that the problems encountered in implementing the power of the Court Decision related to the rights of foster parents of children are:

- a. Their selfishness of the parents so close access to the children's mother or father.
- b. Intimidation to children by one parent.
- c. Both parents are denouncing each other / vilify "the opponent" so that the children become confused or afraid.
- d. The children are taken out of Java or abroad.
- e. The children refuse to join their father or mother as the establishment of the Court.

- f. Lack of supervision of the implementation of the determination of the Court's power of attorney custody of the children.

In Article 49 of the Marriage Act became clear that the children's right to maintain and educate properly, remain attached to the children, even though the power of parenting rights have been revoked. This shows that the right of children to be educated, nurtured and preserved, and financed by both parents remain and are guaranteed by the Act, even if both parents have been divorced, even if the custody of the parents has been revoked.

For a child, to face the divorce of his/her parents is a heavy blow. Especially if the divorce had caused the children scattered, separated from the mother or father, sister or brother separate from (in the case of children "shared" care, no participating mothers and no father involved). This situation could have an impact on growth in psychology, because suddenly separated from the people he loves.

3. Measures to overcome inconsistencies execution of court decision

Recommendation from the results of this study, it is required for the model of consistency on the court ruling power of attorney foster parents of children of divorce. Search of library materials, discovered institution Advisory Board Coaching Marriage, disputes, and Divorce (BP4). This institution is a partner of the Ministry of Religion that was formed with the goal of enhancing the quality of marriage in creating a happy home and prosperous, harmonious family namely, mawadah (loving), warahmah (supportive) by developing Sakinah (happy) Family Movement Program.

The history of the BP4 establishment

With the background of study conducted in 1950 to 1954 by the Ministry of Religious Affairs to the statistics of Marriage, Divorce and Refer (NTR) at the time, discovered the fact that the number of divorce and divorce contested divorce compared with the events of marriage at 60 s / d 70 percent. This is encouraging H.S.M. Nasaruddin Latif, who was then head of the Office of Religious Affairs as Township of Jakarta Raya moved to establish an organization that engages in the Marriage Advisory. The organization is expected to be a solution for the enforcement of domestic life sakinah mawadah warahmah. At the initial step in 1954 he founded the SPP (Section Advisory Marriage), then in 1956 was transformed into P4 (Advisory Marriage and Divorce Settlement). Enterprises establishment of this organization was response from the community and the

Government (Ministry of Religious Affairs) so that later spread to East Java, Kalimantan, Lampung and South Sumatra.

At the same time, on October 3, 1954 in Bandung it was established similar organizations with names BP4 (Marriage and Settlement Advisory Overcoming Divorce). The organization was founded on the initiative named Arhatha Head of Religious Affairs Office in West Java which was supported by the Organization of Women's Organizations and Leaders Community leaders. BP4 is rapidly growing in West Java to extend to Central Java. 1957 Special Territory Region of Yogyakarta followed a similar motion to set up a similar organization with the name BKRT (Household Welfare Agency). And quickly BKRT branches set up branches in regencies / municipalities even to the District. All three organizations merged into one organization that is national by the name of BP4 (Advisory Board, Development, Preservation of Marriage), based in Jakarta, and the branches had been established throughout Indonesia. BP4 establishment was confirmed by the Minister of Religious Affairs, the Minister of Religious Affairs Decree No. 85 of 1961 which recognizes that BP4 is the only agency which seeks the Field Advisory Marriage and divorce rate reduction, in order to implement Determination of the Minister of Religion 53, 1958 Article 4 numbers 3 letter F, item 4 letter e and chapter 11 number 5 letter. By the decision of the Minister of Religious Affairs was then BP4 is Semi Official Agency.

In BP4 4th Conference November 16 up to December 20, 1976 set forth in the Articles of Association Article 1 Name and place of the position, stating that the organization was called : the Advisory Board of Marriage, and Divorce Dispute abbreviated BP4, and is based on the domicile of the Central Government.

The decision was experienced improvement on June 18, 1977 to be re-issued Ministerial Decree No. Religion 30 Year 1977 regarding Affirmation of Marriage Dispute Advisory Board Recognition and Divorce (BP4) Center.

Confirming the recognition of the Advisory Board of Marriage, Dispute and Divorce (BP4) Centre was established in Jakarta on July 8, 1961 with the change of the basic articles of association last on December 20, 1976 as the only agency of supporting some of the tasks of Religious Affairs this case the Directorate General of Islamic Guidance in provision of advisory field of household marital discord and divorce. As rung in the AD / ART (Articles of Association/ by laws) Article 3 that BP4 is the profession as a supporting task of Religious Affairs in the field of marriage counseling.

Based on the Decree of the Minister of Religious Affairs of the Republic of Indonesia No. 417 of 2004 changes its name to "Advisory Board, Development and Preservation of Marriage (BP4) Center". The changes also occurred according to the results of the National Council BP4 14th in 2009. The spirit of reform that calls for BP4 became more mature in managing itself after about 48 years as a semi-official government agency is now an organization with legal status social religious and became partner of the Ministry religion of Republic of Indonesia.⁴

Establishment history of BP4 indicates the existence of a role in the preservation of marriage. This existence needs to be improved, so that its role increases, which also acts as a mediator. This role is to resolve inconsistencies implementation of the determination of power of attorney foster parents of children of divorce. BP4 role as a mediator for couples divorced in making child care power of attorney agreement.

The agreement results outlined in the minutes of the agreement made by BP4, and requested their establishment to the Religious Court. Findings BP4 role as mediator in the power of child custody rights deal is the model the researchers call "BP4 Friends of Children". This model can be used as a basis for making policy formulation consistent issue power of attorney foster parents due to divorce.

D. CLOSING.

Conclusion : BP4 Friends of Children is a concept model which is expected to be used as a basis for making policy formulation that can be used to overcome the problem of inconsistency fixing power of attorney foster parents of children as a result of divorce.

⁴ <http://bp4provinsijawatengah.org/berita-142-sejarah-bp-4.html>

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