



Loss of Child Custody to a Father

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Abstract: This study aims to determine the transfer of child custody to a father. The method used in this study is normative research methodology and uses a statutory and shirt approach as well as descriptive analysis techniques. The results of this study indicate that according to the Compilation of Islamic Law, the custody of a child to a father after a divorce is the right of the mother to take care of a child who is not yet mumayyiz or not yet 12 (twelve) years old. But if you look at the contents of decision number 448/Pdt.G/2018/PA. But where the judge imposes child custody on a father, after analysis the judge does not only refer to the applicable laws and regulations, but the judge has the authority to assess, analyze and decide under the facts presented in court and prioritize the interests and welfare of children.

Keywords: Drop; Custody; Child; Father;

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1. Introduction

An absolute requirement for state sovereignty is the existence of a society that obeys the constitution and its government.¹ Indonesia is the highest agreement of the state's formers, even though it experienced a constitutional test when the 1945 Constitution was amended into the Constitution of the United Republic of Indonesia in 1949, even so, the recognition of the regions under the auspices of the State of Indonesia is still recognized. ²The 1945 Constitution of the Republic of Indonesia as a product of the House of Representatives did not come from a vacuum but is an actualization of political will. As a consequence of constitutional democracy, the constitution must contain fundamental aspects, including arrangements regarding guarantees for the human rights of its citizens.³ The state is firmly obliged to try to fulfill the rights of every citizen.⁴

One form of action performed by every human being is marriage. As explained in Law no. 19 of 2016 Amendments to Law no. 1 of 1974 Concerning Marriage, it is said that Marriage is a physical and spiritual bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on Belief in the One Almighty God. Marriage is the beginning of the life of a man and a woman who decide to live together and form a happy family. A marriage will be said to be valid if it is carried out according to statutory regulations, both carried out according to religious law and positive law. ⁵Law is a political product, because the character of the contents of each legal product will be determined or colored by the balance of power or the political configuration that gave birth to it.⁶

A problem in a marriage is that there is a divorce from the husband and wife themselves, so that there are important things that will be sacrificed after the divorce. One of them is child care or in other words child custody, where there must be a binding judge's decision who will get custody of the child obtained from the husband and wife. Therefore, all matters related to marriage, be it divorce, child custody and so on, are basically regulated in regulations that are

¹ Mellisa Towadi and Nur Mohamad Kasim, "An Indication of China ' s Policy towards Uighurs and Its Implications by International Law Aspects." *Jambura Law Review*. 3, No. 01 (2021): 55-71., 69

² Novendri M. Nggilu, "Tinjauan Yuridis Pengaturan Sanksi Pidana Dalam Peraturan Daerah Provinsi Gorontalo," *Lambung Mangkurat Law Journal*. 5, No. 2 (2020): 109-121., 110

³ Fence M. Wantu Novendri M. Nggilu, "Menapaki Jalan Konstitusional Menuju Zaken Cabinet : Ikhtiar Mewujudkan," *Jurnal Hukum*. 15, No. 1 (2020): 126-140., 127

⁴ Julius Mandjo, "The Right to Obtain Free Assistance and Legal Protection for The Indigent People Through Legal Assistance Organizations." *Jambura Law Review*. 3, No. 02 (2021): 365-77., 375

⁵ Dolot Alhasni, "Determinasi Perlindungan Hukum Pemegang Hak Atas Neighboring Right " Determination of The Legal Protection of Right-Holders To," *Jambura Law Review*. 2, No. 01 (2020): 65-82., 67

⁶ Ahmad dan Nasran, "Comparison Of Judicial Review: A Critical Approach To The Model In Several Countries" *Jurnal Legalitas* 14, No. 2 (2021): 85-105., 88

currently in effect in Indonesia. Being an important point for the author in this study is the acquisition of custody of minors who fall on a post-divorce father, so the author tries to study it from the point of view of religious law, among others, seen from the Compilation of Islamic law. The Compilation of Islamic Law regulates the maintenance of children after the breakup of the parents' marital relationship in Article 105 which states that in the event of a divorce: 1. The maintenance of a child who is not yet mumayyiz or not yet 12 years old is the right of the mother; 2. The maintenance of a child who has been mumayyiz is left to the child to choose between his father or mother as the holder of the right to care for him; 3. Maintenance costs borne by his father. The maintenance of a child who is already mumayyiz is left to the child to choose between his father or mother as the holder of his maintenance rights; 3. Maintenance costs borne by his father. The maintenance of a child who is already mumayyiz is left to the child to choose between his father or mother as the holder of his maintenance rights; 3. Maintenance costs borne by his father.⁷

According to the author, the consequences for children if they are not cared for by both parents, as we see in society, there are children who are abandoned as a result of their parents' divorce and some even often commit criminal acts. Therefore, in our daily lives, even in society, to make ends meet there are often crimes and violations committed by certain people and people who threaten some members of society, which in legal science is known as criminal acts.⁸

Caring for young children is legally obligatory, because neglecting them means exposing young children to the danger of destruction. Child custody (*hadhanah*) is a right for young children because they need care, supervision, implementation of their affairs, and someone who educates them. Education that is more important is the education of a child in the lap of his mother and father, because with good supervision and treatment it will be able to grow his body and mind, cleanse his soul, and prepare the child to face his life in the future. After that, the child's custody period begins since the child was born and ends when the child is an adult and able to stand alone and able to take care of his own basic needs.⁹Custody is the power of the husband or wife's parents who have the right to care for children in the event of a divorce, while childcare is the real maintenance, care and education of the child.¹⁰

Regarding the issue of child custody, for native Indonesian citizens their respective customary laws apply. As for the law, child custody in the event of a divorce of the parents has been explained in several articles. Among them are Article 45 Paragraph (2), Article 98, and Article 105. With the existence of a legal

⁷ Ahmad dan Nasran, "Comparison Of Judicial Review: A Critical Approach To The Model In Several Countries" *Jurnal Legalitas* 14, No. 2 (2021): 85-105., 88

⁸ Dian Ekawaty Ismail and Mohamad Taufiq Zulfikar Sarson, "Criminology Analysis of Women's as Perpetrators of Domestic Violence Crimes," *Jambura Law Review*. 3, No. 1 (2021): 57-76., 58

⁹ Slemet Abdidin dan H. Aminuddin., *Fiqh Munakahat*. (Bandung: CV. Pustaka Setia, 1999)., 172

¹⁰ Slemet Abdidin dan H. Aminuddin., *Fiqh Munakahat*. (Bandung: CV. Pustaka Setia, 1999)., 172

basis and governing laws, it is hoped that children will remain prosperous and grow as they should even though their parents are separated. Even though it has been clearly stated in Article 105a of the Compilation of Islamic Law (KHI) that: The maintenance of children who are not yet mumayyiz (under 12 years old) is the right of the mother. If the child is an adult, it is up to the child's decision whether to choose with his mother or with his father.¹¹

Regarding child custody, as explained above, that a child who is not yet 12 years old according to the regulations of the Compilation of Islamic Law, the mother will have custody, however this is different from one of the judge's decisions in case Number 448/Pdt.G/2018/PA.Lbt . where in the judge's decision that child custody fell on a father, whose respective children's ages the son was 2 years old and the daughter was 7 months old. In the process of proving the plaintiff, in this case the mother of the children, only presented one witness, so the judge considered it was not considered considering the doctrine of one witness not a witness (*unus testis nullus testis*).¹² Therefore, the testimony of the Plaintiff's Witness will not be considered by the panel of judges in the trial. In contrast to the case of decision No. 9/Pdt.G/2022/PTA.Gtlo, where the three children who were underage fell to a mother, where each of the first children was 12 years old, the second child was 11 years old and the third child was 4 years old. If you look at the contents of the decision, the evidence and witnesses are very influential in the judge's considerations in making a decision. Therefore, if the witness or evidence in the trial is insufficient, where two pieces of evidence cannot be met, then the judge cannot directly consider it, especially if there is only one witness in the trial.

Referring to previous research conducted by Seorya S, it was said that the judge as a law enforcement officer has a duty as one of the determinants of a case decision from the disputing parties. In order to be able to resolve a problem or dispute for which a decision is requested, in the process of making a decision the judge must be independent and free from the influence of any party. The judge in making a decision is only bound by relevant events or facts and legal rules that become or are used as a juridical basis.¹³ The efforts and role of law enforcers play an important role in eradicating every problem.¹⁴

¹¹ "Pasal 105a Kompilasi Hukum Islam"

¹² Ni Made Et AL., "Asas Unus Testis Nullus Testis Dalam Tindak Pidana" 2, No. 1 (2021): 191-195., 192

¹³ M Guntur HM. Soerya Respationo and Hamzah, "Judge Decision: Towards Reflexive Legal Rationality in Law Enforcement" *Yustisia Journal*. 2, No. 2 (2013): 101-107., 43

¹⁴ Aniza Lakoro, Lisnawaty W Badu, and Nuvazria Achir, "Perjudian Togel Online ' Weak Polices In Handling Criminal Actions Online Togel Gaming '" *Jurnal Legalitas*. 13, No. 01 (2019): 31-50., 33.

2. Method

The research method used is empirical research using a qualitative descriptive approach and using qualitative data analysis techniques.

3. KnowJudge's Decision on Child Crime Crimes

One of the problems that often arises from divorce is regarding child custody. Who is most entitled to child custody if the parents' marriage is broken up by divorce? Referring to Article 45 paragraph (2) of the Marriage Law above, it indicates that parents' affection for children should not be cut off or hindered. The existence of formal control of children by one of the parties is essentially to end the dispute over the child. If the dispute is not decided in court, it will drag on, so that the impact will be on the child being victimized, although it must also be admitted that many do not question child custody after the divorce process because both of them agree to raise and educate children together.¹⁵This is in line with Article 41 of the Marriage Law which regulates the consequences of breaking up a marriage due to divorce as follows:¹⁶

1. Both mother and father are still obliged to look after and educate their children, solely based on the interests of the child; if there is a dispute regarding the control of children, the Court shall give its decision;
2. The father is responsible for all the child's maintenance and education costs; if in reality the father is unable to fulfill this obligation, the Court may determine that the mother must share the costs;
3. The court may oblige the ex-husband to provide living expenses and/or determine an obligation for the ex-wife.

According to the author, regarding who is entitled to child custody rights, it is contained in article 41 of Law no. 1 of 1974, states that both the mother and father are still obliged to care for and educate their children, solely based on the interests of the child, if there is a dispute over the control of children, the court gives its decision. In this case, both father and mother can be given the same rights to care for and educate their children after the divorce. Therefore, divorced couples can agree on who will look after their children. If it is difficult to reach an agreement, the matter can be submitted to the court. The court will select and determine which of them will take care of the child's interests.

If it is connected with case Number 448/Pdt.G/2018/PA.Lbt where custody by the judge was handed down to the father because the mother who was also the

¹⁵ Eldo Egusta, "Akibat Hukum Perceraian Terhadap Hak Asuh Anak Menurut Undang - Undang Nomor 1 Tahun 1974 Tentang Perkawinan" (Universitas Islam Riau Pekanbaru, 2022), 28

¹⁶ "Pasal 41 Undang Undang No. 16 Tahun 2019 Perubahan Atas Undang Undang No. 1 Tahun 1974 Tentang Perkawinan."

applicant before the court could not prove that the child was in her pet. In addition, in the judge's consideration that the child who has not yet been mumayiz has been living with the father after the two husband and wife couples separated. The judge also saw the benefits and interests of the child while in the care of the father. Because in court the mother could not provide more than one witness, as the author explained above, the witness could not be taken from the testimony or his testimony could not be considered in the trial, bearing in mind that one witness was not a witness.¹⁷

Related to child custody after divorce is not regulated by Law 1 of 1974 as amended into Law no. 16 of 2019 concerning marriage. There is no word of child custody in these provisions. The Marriage Law only states that parents are obliged to look after and educate their children properly.¹⁸Therefore, parents must be obliged to raise children even though the two of them have separated, this is a mandate from the marriage law. As stated by the judge that:

"Basically, even though the parents are separated or divorced, in my opinion, both of them still have an obligation to provide the rights and obligations of the child. Both the growth and development of the child and the child's education. Because children are a gift from God that is given to husband and wife, they must be cared for and developed properly.¹⁹

"Indeed, in KHI, especially in Article 105, it is stated that if the child is under 12 years old, then the mother has the right to custody, but as a judge, you have to look at other factors, for example, the child's life expectancy"²⁰

Basically, if based on this article, it is unable to penetrate the legal objectives and experiences a gap with the expected legal objectives, so that this article cannot fulfill a sense of justice, so it is necessary to have a legal breakthrough, reinterpretation and redefinition of articles and hadiths as mentioned above by returning to basic principles and redevelop through legal principles and legal theory to display the real function of law, namely to fulfill a sense of justice.²¹By the judge as said that:

"The basis of the judge is clear which refers to the Compilation of Islamic Law and the Civil Code and at the same time we as judges have full responsibility in terms of making decisions not only considering in terms of

¹⁷ Made et al., *Op. Cit.* Hal 194

¹⁸ "Pasal 45 Ayat 1 Undang Undang No. 16 Tahun 2019 Perubahan Atas Undang Undang No. 1 Tahun 1971 Tentang Perkawinan"

¹⁹ "Hasil Wawancara Bersama Bapak Olis Moh. Tuna Selaku Hakim Pengadilan Agama Limboto. Selasa, 29 November 2022, Pukul 12:10 Wita,"

²⁰ "Hasil Wawancara Bersama Bapak Ahmad R. Fuadi Selaku Hakim Pengadilan Agama Marisa. Selasa, 15 Desember 2022, Pukul 13:15 Wita"

²¹ "Decision of the Supreme Court of the Republic of Indonesia Number 110 K/AG/2007"

the law but will also consider the facts revealed in the trial according to our analysis and conclusions"²²

In addition to the reasons for the judge's consideration above where the judge saw various kinds of facts presented in the trial. Then the judge's other reasons in the decision are: The decision of the Supreme Court of the Republic of Indonesia Number 110 K/AG/2007 dated December 7, 2007 basically stated that:
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"The main consideration in the matter of hadhanah (child rearing) is the benefit and interests of the child, not merely those who normatively have the most rights, even if the child is not yet 7 (seven) years old... whereas so far it has been proven that the child has lived a calm and peaceful life. with his father, then for the sake of the benefit of the child his hadhanah rights are handed over to his father.

As explained by the previous author that witnesses are the main key for judges in giving decisions, this is also corroborated by the Supreme Court's decision as described above. Then with the reason that the child has never been proven to experience a lack of life while being cared for by his father, indirectly this will strengthen that a father is able to care for his child.

In the opinion of researchers that a mother has the greatest right to child custody in Islam. This is true because from conception to childbirth to breastfeeding, the mother is the closest person to the child. In cases where the child is a minor or less than 12 years of age, the mother is granted full custody. However, the father may also be granted custody of the child if the judge determines that the mother's bad behavior put the child in danger. Therefore, the Compilation of Islamic Law also stipulates that a mother will not have custody. For example, there are a number of things regulated in the Compilation of Islamic Law that prevent child custody from falling into the hands of the mother:²⁴

- a. Mother is not Muslim or converted to another religion
- b. Bad behavior, such as drinking, gambling and abusing
- c. Experiencing mental health disorders.

The right to love is a more important gift from both parents. Compassion is the main right and foundation for educating and raising children. How can rights be granted without full affection? If it is related to the Marriage Law, Article 41 explains the dissolution of marriage due to divorce. The obligation of both parents to care for and raise children, all costs incurred for children who are born are the full burden and responsibility of the father. This matter is in accordance

²² "Putusan Mahkamah Agung RI Nomor 110 K/AG/2007"

²³ "Putusan Mahkamah Agung RI Nomor 110 K/AG/2007"

²⁴ Haryani., "Hak Asuh Anak Setelah Perceraian,," accessed November 17, 2022, <https://lsc.bphn.go.id/>.

with Article 45 of the Marriage Law which also stipulates that: "(1) Both parents are obliged to look after and educate their children as well as possible. (2) The obligations of the parents referred to in paragraph (1) of this article are valid until the child marries or is able to stand alone, which obligations continue even if the marriage between the parents is broken. " From the two Articles, it can be seen that after a divorce, both parents of a child are still obliged to care for their child. This obligation is then determined by the court which is referred to as child custody. This is also in accordance with what was said by a couple who had separated where it was said that:

"I myself, even though I have separated from my husband, still my ex-husband still pays attention to the life of the child, besides me making a living for my children, there is also an ex-husband who is also the father of my child, still providing a living for his child"²⁵

The statement above can provide an understanding that even though the two couples have separated, they still pay attention to the life of the child. Can prove that the marriage relationship is over, but attention to the development of the child is very important, this gives a signal that the blood relationship between children and parents will never be interrupted for whatever reason. However, this is different from one of these couples, who chose not to receive a living from the child's father. As it is said that:

"Until whenever money or goods will be sent or given by my ex-husband, then strictly speaking I will not accept it, I can still afford to pay for my child"²⁶

The author's analysis of the description of the sources' statements above shows that a divorce basically has its own consequences, one of which is hating each other. One of them is a statement above where the mother no longer wants to accept anything that will be given by the father rather than the child himself. In fact, if you look at the husband's intention, it is one of providing a living for his child, where the child has been cared for by the mother. Many marriages choose between each other to live alone or separate. So that you can sacrifice your baby or child who is the result of the love of your second marriage. Marriages that are no longer suitable or no longer romantic, then one way is to separate. because if it continues, it will cause many things, one of which is domestic violence. Therefore according to researchers that a divorce in general cannot break blood relations with children. So that whenever parents still have the obligation of full responsibility to children. The above can be seen from a woman who has divorced her husband, where it is said that:

²⁵ "Hasil Wawancara Bersama Ibu Ijah Selaku Masyarakat. Kamis, 10 November 2022, Pukul 15:10 Wita"

²⁶ "Hasil Wawancara Bersama Ibu Sitriyani Selaku Masyarakat. Kamis, 10 November 2022, Pukul 09:13 Wita."

"There were many factors that made me choose to separate from my husband, one of which was disharmony in the family, frequent fights and of course there are many other reasons that I cannot convey in words"²⁷

Whatever the problems in the family, in general, it often occurs in the family environment. Whether they are newly married or couples who have been married for a long time. It's just that it takes strong patience to go through and get through these problems. Therefore, not many families are separated as a result of a problem that arises within the family itself.

Based on the previous explanation that if there is a divorce and if the child is not yet 12 years old, then as stated in Article 105 of the Compilation of Islamic Law that the child is the right of the mother. On the other hand, if you are mumayyiz or over the age of 12, it is up to the child to decide whether the father or mother is the custody rights holder. Based on Article 49 letter (a) and its explanation in number (9) of Law Number 7 of 1989 concerning the Religious Courts as in the second amendment to Law Number 50 of 2009, it stipulates that the Religious Courts have the duty and authority to examine, decide and resolve cases at the first level between people who are Muslims in the field of marriage including divorce lawsuits. The stages for obtaining child custody begin by submitting an application to both the Religious Court and the District Court. This is in accordance with what was said by the Judge that:

"In obtaining child custody basically has its own legal procedure, for example making an application to the court in a certain area"²⁸

Children also need social connections. Children need other people to help them improve their skills because they are born with all their defects, making it psychologically impossible for them to develop to normal human levels without help from adults and parents. Therefore, a child in the growth and development stage needs attention, affection, and a place for his development. Children also have their own feelings, thoughts and desires, all of which require adults who are present as a whole to pay attention to the phases of child development because development in one phase serves as the basis for the next phase. In addition to totality, it also takes someone who is reliable and has noble character to help with education and raising children.

Article 7 paragraph (1) of the Child Protection Law "Every child has the right to know his parents, to be raised and cared for by his own parents". Article 14 of Law 35/2014: (1) Every child has the right to be cared for by his own parents, unless there are valid reasons and/or legal regulations indicating that separation is in the best interest of the child and is the final consideration. (2) In the event of

²⁷ "Hasil Wawancara Bersama Ibu Sitriyani Selaku Masyarakat. Kamis, 10 November 2022, Pukul 09:13 Wita."

²⁸ "Hasil Wawancara Bersama Bapak Olis Moh. Tuna Selaku Hakim Pengadilan Agama Limboto. Selasa, 29 November 2022, Pukul 12:10 Wita."

separation as referred to in paragraph (1), the child still has the right to: meet face to face and have regular personal contact with both parents; receive care, care, education and protection for the process of growth and development from both parents in accordance with the abilities, talents and interests of obtaining life financing from both parents; and obtain other Children's Rights.²⁹

In the event of a divorce, according to Law No. 1 of 1974 concerning Marriage it is stated that if a marriage breakup due to divorce has legal consequences for the child, then both the father and mother are still obliged to look after and educate their children, solely based on the interests of the child, if there is a dispute regarding the custody of the children, the Court renders its decision.³⁰ Legal protection is really needed because of efforts to integrate various needs in associations so that there are no conflicts between needs and can enjoy all the rights granted by law.³¹

Provide an understanding that children have rights and obligations that must be fully protected. Such protection may be provided by the state when the child will be faced with a legal process that will be related to his/her right to life. Quoting what was said by Lisnawaty Badu where it was said that the right to life must also be protected by the state, especially the rule of law.³² Seeing this statement, it is not only parents who can protect their children from various kinds of storms of problems faced by children, but the state also has a role in protecting the lives of the children themselves.

In addition to the case decision Number 448/Pdt.G/2018/PA.Lbt where the custody rights were handed down by the judge to the father, the researcher also saw the decision No. 9/Pdt.G/2022/PTA.Gtlo, where in the contents of the decision, the custody of a child who is not yet mumayyis or underage falls on a mother. By him, if you look at the judge's considerations where a mother can prove that the child really needs her, which needs her love. The first child is 12 years old, the second child is 11 years old and the third child is 4 years old. Therefore according to the author that the decision is in accordance with the provisions of Article 105 KHI, where children who are under the age of 12 are the rights of a mother. So it can be ascertained that the implementation of the article has been applied by the judge, where the judge must prioritize the benefit and welfare of the children themselves. According to Fence M. W, that judges must have professional ability as well as high morale and integrity in order to be able to reflect a sense of justice, provide benefits and legal certainty. In addition, judges must have the ability to communicate and carry out their roles and status

²⁹ "Undang Undang No. 35 Tahun 2014 Perlindungan Anak," n.d.

³⁰ "Pasal 41 Undang Undang No. 16 Tahun 2019 Perubahan Atas Undang Undang No. 1 Tahun 1974 Tentang Perkawinan."

³¹ Jufryanto Puluhulawa, Mellisa Towadi, and Vifi Swarianata, "Perlindungan Hukum Situs Bawah Air Leato / Japanese Cargo Wreck The Legal Protection of The Leato Underwater Site" *Jurnal Reformasi Hukum*. 24, No. 2 (2020): 189–208., 197.

³² Badu Lisnawaty, "Euthanasia Dan Hak Asasi Manusia," *Jurnal Legalitas* 5, no. 1 (n.d.): 1–11. 1

that can be accepted by society. So that from this it can give a sense of trust in the community for the decision given, because it is based on the judge's conviction. In addition, judges must have the ability to communicate and carry out their roles and status that can be accepted by society. So that from this it can give a sense of trust in the community for the decision given, because it is based on the judge's conviction. In addition, judges must have the ability to communicate and carry out their roles and status that can be accepted by society. So that from this it can give a sense of trust in the community for the decision given, because it is based on the judge's conviction.³³

However, what is interesting in the decision is that the judge did not place a limit on a father, in this case the defendant being able to visit a child as if giving affection as if he were a father. Decisions that provide justice as seen from the case above can give us an understanding that the judge in making his decision is of course based on the law, but it does not rule out the possibility that the judge will use it as a basis for analysis, namely facts that can be proven at trial, even though the regulations are not regulated. , because the judge has the authority to analyze and draw conclusions based on the data obtained in the trial so that a decision can be made for the benefit and welfare of the children. Ideally, judges are always required to always be able to interpret the meaning of laws and other regulations that are used as the basis for implementation. Don't let this happen, in the implementation or enforcement of this law there will be unrest in society.³⁴ An alarming phenomenon in the field of law enforcement and justice in court is legal justice which is no longer in line with social justice.³⁵ Quoting as said by Suwitno Yutye Imran that justice serves as a guideline to distinguish between just and unfair actions, elements of the aspect of justice can be contained in substance.³⁶

Basically, court decisions regarding child custody, for those who are Muslim, usually the court gives guardianship and maintenance rights to minors to mothers. This refers to Article 105 of the Compilation of Islamic Law (KHI) which states that children who are not yet 12 years old are the rights of their mothers. After the child is 12 years old, he is given the freedom to choose whether to be cared for by his father or mother. Meanwhile for non-Muslims, referring to jurisprudence (previous court decisions), custody of minors also falls on the mother, as follows: Decision of the Supreme Court of the Republic of Indonesia No. 126 K/Pdt/2001 dated 28 August 2003 stated that: ".In the event of a divorce,

³³ Fence Wantu, "Kendala Hakim Dalam Menciptakan Kepastian Hukum, Keadilan, Dan Kemanfaatan Di Peradilan Perdata" *Jurnal Mimbar Hukum*. 25 No. 2 (2011):205-218., 212

³⁴ Sutrisno, Puluhulawa Fenty, and Lusiana Margaereth Tijow, "Penerapan Asas Keadilan, Kepastian Hukum Dan Kemanfaatan Dalam Putusan Hakim Tindak Pidana Korupsi" *Gorontalo Law Review*. 3, No. 2 (2020): 168-187., 173.

³⁵ Fence M. Wantu, "Kendala Hakim Dalam Menciptakan Kepastian Hukum, Keadilan, Dan Kemanfaatan Di Peradilan Perdata" *Jurnal Mimbar Hukum*. 25, No. 2 (2011): 205-218., 208.

³⁶ Suwitno Yutye Imran, "The Urgency of Regulation of the Ultra Qui Judicat Principle in Criminal Judgments," *Jambura Law Review*. 3, No. 2 (2021): 395-410., 398

children who are underage should be handed over to the person closest and closest to the child, namely the mother.. " Ruling of the Supreme Court of the Republic of Indonesia No. 102 K/Sip/1973 dated 24 April 1975, stated: "Based on jurisprudence regarding child guardianship, the standard is that the birth mother takes precedence, especially for young children, because the interests of the child are the criterion, unless it is proven that the mother is it is unnatural to keep a child."³⁷Everyone else, including the government must heed it, making laws on the basis of natural rights itself.³⁸

The various kinds of statements above can provide an understanding that in child custody basically the judge has the right to assess, examine and decide cases in accordance with the facts revealed in a trial. Therefore, the parties to the litigation generally have to be more active in seeking the truth and defending their arguments on the factual evidence that will be presented before the court. The evidence and facts presented will be assessed and analyzed by the judge who will then decide based on the judge's conviction.

4. Conclusion

Post-divorce transfer of child custody to a father according to the CompilationIslamic law basically takes care of a child who is not yet mumayyiz or not yet 12 (twelve) years old is the right of the mother. However, if you look at the contents of the decision Number 448/Pdt.G/2018/PA.Lbt where the judge imposes child custody on a father, after analysis that the judge does not only refer to the applicable laws and regulations, but the judge has the authority to judge, analyze and decide according to the facts presented in court and prioritize the welfare and welfare of the child.

The government as a regulator should make laws and regulations specifically that regulate child custody to a father, as it is known that the rules in the compilation of Islamic law only fully regulate a mother.

References

Book:

Aminuddin., Slemet Abdidin Dan H. *Fiqh Munakahat*. Bandung: Cv. Pustaka Setia, 1999.

Djatikumoro., Lulik. *Hukum Pengangkatan Anak Di Indonesia*. Bandung: Pt Citra Aditya Bakti, 2010.

³⁷ Iva Shofiya., "Hak Asuh Anak,," accessed November 17, 2022, <https://lsc.bphn.go.id/>.

³⁸ Dolot Alhasni, "Determinasi Perlindungan Hukum Pemegang Hak Atas Neighboring Right " Determination of The Legal Protection of Right-Holders To," *Jambura Law Review*. 2, No. 01 (2020): 65-82., 67

Journal:

Ahmad Dan Nasran. "Comparison Of Judicial Review: A Critical Approach To The Model In Several Countries." *Jurnal Legalitas* 14, No. 2 (2021): 85-105.

Alhasni, Dolot. "Determinasi Perlindungan Hukum Pemegang Hak Atas Neighboring Right " Determination Of The Legal Protection Of Right-Holders To." *Jambura Law Review*. 2, No. 01 (2020): 65-82.

Badu Lisnawaty. "Euthanasia Dan Hak Asasi Manusia." *Jurnal Legalitas*. 5, No. 1 (2012): 1-11.

Egusta, Eldo. "Akibat Hukum Perceraian Terhadap Hak Asuh Anak Menurut Undang - Undang Nomor 1 Tahun 1974 Tentang Perkawinan." Universitas Islam Riau Pekanbaru, 2022.

Hm. Soerya Respationo Dan Hamzah, M Guntur. "Putusan Hakim: Menuju Rasionalitas Hukum Refleksif Dalam Penegakan Hukum." *Jurnal Yustisia* 2, No. 2 (2013): 101-7.

Imran, Suwitno Yutye. "The Urgency Of Regulation Of The Ultra Qui Judicat Principle In Criminal Judgments." *Jambura Law Review*. 3, No. 2 (2021): 395-410.

Ismail, Dian Ekawaty, And Mohamad Taufiq Zulfikar Sarson. "Criminology Analysis Of Women's As Perpetrators Of Domestic Violence Crimes." *Jambura Law Review*. 3, No. 1 (2021): 57-76.

Lakoro, Aniza, Lisnawaty W Badu, And Nuvazria Achir. "Perjudian Togel Online ' Weak Polices In Handling Criminal Actions Online Togel Gaming .'" *Jurnal Legalitas*. 13, No. 01 (2019): 31-50.

Made, Ni, Yulia Chitta, A A Sagung Laksmi Dewi, Luh Putu Suryani, Fakultas Hukum, Universitas Warmadewa, And Tindak Pidana. "Asas Unus Testis Nullus Testis Dalam Tindak Pidana" 2, No. 1 (2021): 191-95.

Mandjo, Julius. "The Right To Obtain Free Assistance And Legal Protection For The Indigent People Through Legal Assistance Organizations." *Jambura Law Review*. 3, No. 02 (2021): 365-77.

Nggilu, Novendri M. "Tinjauan Yuridis Pengaturan Sanksi Pidana Dalam Peraturan Daerah Provinsi Gorontalo." *Lambung Mangkurat Law Journal*. 5, No. 2 (2020): 109-21.

Novendri M. Nggilu, Fence M. Wantu. "Menapaki Jalan Konstitusional Menuju Zaken Cabinet : Ikhtiar Mewujudkan." *Jurnal Hukum*. 15, No. 1 (2020): 126-40.

Puluhulawa, Jufryanto, Mellisa Towadi, And Vifi Swarianata. "Perlindungan Hukum Situs Bawah Air Leato / Japanese Cargo Wreck The Legal Protection Of The Leato Underwater Site" *Jurnal Reformasi Hukum*. 24, No. 2 (2020): 189-208.

Sutrisno, Puluhulawa Fenty, And Lusiana Margaereth Tijow. "Penerapan Asas Keadilan, Kepastian Hukum Dan Kemanfaatan Dalam Putusan Hakim Tindak Pidana Korupsi." *Gorontalo Law Review*. 3, No. 2 (2020): 168-87.

Umul Khair. "Pelaksanaan Hak Asuh Anak Setelah Terjadinya Perceraian." *Jurnal Cendekia Hukum* 5, No. 2 (2020): 291-306.

Wantu, Fence M. "Kendala Hakim Dalam Menciptakan Kepastian Hukum, Keadilan, Dan Kemanfaatan Di Peradilan Perdata *." *Jurnal Mimbar Hukum*. 25, No. 2 (2011): 205-18.