

Analysis of Decisions Granting Child Custody to the Biological Father

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Article Info	Abstract
Corresponding Author: rezarachman001@gmail.com History: Submitted: 19-06-2023 Revised: 19-01-2025 Accepted: 18-07-2026 Keyword: Biological Father; Child Custody; Hadhanah; Religious Court.  Copyright ©2026 by Syahrial Nugraha Rahman. All writings published in this journal are personal views of the authors and do not represent the views of the Estudiante Law Journal.	Article 105 of the Compilation of Islamic Law provides that custody of a child who is not yet <i>mumayyiz</i> belongs to the mother, yet in Decision Number 470/Pdt.G/2022/PA.Gtlo the Gorontalo Religious Court awarded custody to the biological father. This article examines the legal basis on which child custody is determined and the considerations that led the court to depart from Article 105. The study uses normative legal research drawing on statutory provisions, the court decision and secondary legal materials, supported by information from the court registrar. It finds that the mother's priority in <i>hadhanah</i> is not absolute: where the mother is shown to be unfit, custody passes to the nearest relative who satisfies the requirements under Article 156 of the Compilation of Islamic Law, and a child who is <i>mumayyiz</i> may choose between the parents, subject to the chosen parent's capacity to guarantee the child's physical and spiritual welfare. Islamic law, the Compilation of Islamic Law, the Marriage Law and the Child Protection Law converge on the best interests of the child, which justified the court's <i>contra legem</i> reasoning in this case.

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1. Introduction

Divorce is the abolition of a marriage by a judge's decision or the demands of one of the parties to the marriage. The law does not allow divorce by consensus only between husband and wife, but there must be a valid reason. Divorce has consequences for children who are still underage, namely the power of the parents can turn into guardianship. Therefore, if the marriage is decided by a judge, it must also regulate guardianship of minors. The judge determines a guardian after hearing from the family from the father's or mother's side who are closely related to the child.¹

The younger generation or children are the next generation and substitute for parents as well as the generation of hope for the nation. If parents can educate these children well, then these children can be expected to become the nation's successors. Parents, both physically and spiritually, are responsible for educating and caring for children until they grow up to be smart, healthy, devoted to parents, pious to God Almighty and capable of carrying on ideals based on Pancasila. Divorce may occur where household life is no longer harmonious and cannot be expected to become harmonious and peaceful again. Divorce should only be carried out as a last resort after the efforts and efforts that have been made to improve their married life, there is no other way that can be taken except by carrying out a divorce between husband and wife.

The breaking up of a marriage due to divorce is as much as possible only as an emergency solution, if divorce is the last resort then peace processes should have been carried out either by the initiative of the couple or by the family business called "hakamain" or peacekeepers and by the peace efforts that a judge is always required to attempt in court before the hearing proceeds, the peace effort should be a consideration that must be absorbed by the parties who want a divorce.²

This is clearly not in accordance with the purpose of marriage according to article 1 of the Marriage Law Number 1 of 1974 (hereinafter referred to as the Marriage Law) which states that, marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a family or home. happy and lasting family based on belief in the One and Only God. Forming a family means forming a small community unit consisting of husband and wife and children. Forming a household means forming a unitary relationship between husband and wife in one container called a shared residence. While being happy means there is harmony in the relationship between husband and wife or children in the household. Eternal means that it lasts continuously for life and cannot be cut off or dissolved according to the will of the parties. In addition, the purpose of marriage is to produce good offspring to continue the family struggle and make the family proud.

¹ Masayu Robianti dan Siti Rahmah, "ANALISIS YURIDIS PUTUSAN HAKIM TENTANG PEMBERIAN HAK ASUH ANAK KEPADA BAPAK (Studi Perkara Nomor: 44/Pdt. G/2012/PA. Kbji)," *Audi Et AP: Jurnal Penelitian Hukum* 1, no. 02 (2022): 143–50.

² 150101049 Nelly Rosita, "Pemberian Hak Asuh Kepada Ayah Bagi Anak Yang Belum Mumayyiz Pasca Perceraian (Studi Analisis Putusan Mahkamah Syar'iyah Banda Aceh Nomor 0200/Pdt.G/2015/MS.Bna)" (undergraduate thesis, UIN AR-RANIRY, 2020), <https://repository.ar-raniry.ac.id/id/eprint/14589/>.

In the view of Islam, the purpose of marriage, among other things, is for the husband and wife to be able to foster a peaceful life physically and mentally and love each other in a happy household. Besides that, it is also hoped that household life will last forever, therefore, Islam has given instructions or ways to be taken if at any time there is a dispute in the household. However, in reality, based on observations, many of the goals of marriage have not been fully achieved. This has just been achieved regarding the formation of a household, whereas happiness and eternity have not been achieved because of many divorces.³

The consideration of the article is that as a country based on Pancasila where the first precept is Belief in the One and Only God, marriage has a very close relationship with religion, not only the physical or physical elements but the mental or spiritual elements also have an important role. With the occurrence of divorce, it will result that parental authority ends and turns into custody. Therefore, if the marriage is terminated by a judge, it is necessary to regulate custody of children who are underage. Children are valuable assets of a nation and state whose rights must be maintained and protected. This is because in the hands of children the progress of a nation can be determined. As a modern nation, greater attention should be paid to creating conducive conditions for the growth and development of children in the framework of child protection.

Law Number 35 of 2014 concerning Child Protection defines custody as the power of parents to care for, educate, nurture, foster, protect and develop children according to the religion they adhere to and their abilities, talents and interests. In the framework of optimizing the implementation of child custody, when parents as the holders of custody authority over children are incapacitated or neglect their obligations. In this regard, the Child Protection Act provides an alternative in the form of transferring parental authority from parents as the main authority on the part of the family.⁴

In Article 41 of the Marriage Law, it is stated regarding the things that must be done by the wife and husband after a divorce as follows:

1. Both mothers and fathers are obliged to care for and educate their children, solely based on the interests of the children, if there is a dispute regarding the control of the children, the Court shall give a decision.
2. The father is responsible for all the maintenance and education costs needed by the child, if in reality the father cannot fulfill these obligations, the Court may determine that the wife must share these costs.
3. The court may oblige the ex-husband to provide living expenses and to determine an obligation for the ex-wife.

³ Muhammad Khoirur Rofiq, "PEMBERIAN HAK ASUH ANAK DALAM PERCERAIAN KARENA PERALIHAN AGAMA (MURTAD)," *Journal of Islamic Studies and Humanities* 6, no. 2 (28 October 2021): 97–110, <https://doi.org/10.21580/jish.v6i2.8171>.

⁴ Ahmad Syairopi, "Pemberian hak asuh anak kepada suami yang non muslim (analisis Putusan Nomor:1429/Pdt.G/2013/PA.Tng.)," (bachelor's thesis, Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta, 2016), <https://repository.uinjkt.ac.id/dspace/handle/123456789/42583>.

In accordance with the mandate of the Child Protection Law and the Marriage Law that if a husband and wife are divorced, then the obligation to care for and care for children remains their obligation, in other words it is not only an obligation of the husband or wife.

Furthermore, in the Compilation of Islamic Law article 105 states that the care of children who are not yet mumayyiz or who are not yet 12 years old is the right of the mother, but the reality that occurs in the field is not in accordance with these rules because there are still some mothers who feel entitled to care for their children but the right was awarded to the father by the decision of the panel of judges.

Based on the term fiqh maintenance of children after a divorce is called *Hadhanah*. In a more complete sense is the maintenance of young children after a divorce. This is discussed in fiqh because practically there has been separation between husband and wife while children need help from their father and mother. However, what needs to be emphasized here is that there is a difference between material care responsibilities and caring responsibilities. The responsibility for material care in the Islamic concept is the father's obligation, while the responsibility for nurturing is the mother's responsibility. In various fiqh literature, those who are most entitled to child care are given to mothers as long as the child is not yet mumayyiz. And if the child is mumayyiz, then the child is asked to choose between his father and mother.

The case examined here is that decided by the Gorontalo Religious Court with Decision Number 470/Pdt.G/2022/PA.Gtlo where one of the rulings of the decision stipulates that the child is placed in the care of the father. The position of the panel of judges is basically free to determine the father or mother who has the right to care for the child, depending on who is the most capable or who best remembers the interests of the children. However, nowadays it often becomes a dispute that often continues up to a higher court level because one of the parties is dissatisfied with the decision.⁵

A judge decides that the father is entitled to custody of the child even though the child is not yet old or underage. If you look at the Child Protection Law, husband and wife have the right to care for the child depending on the judge who decides the case. The intent and purpose of this revocation is solely for the proper implementation of child custody and does not mean breaking the relationship between parents and children, revocation of custody as stated in Decision Number 470/Pdt.G/2022/PA.Gtlo which where child custody falls into the hands of the husband, because the wife has been negligent in carrying out or carrying out her obligations. Furthermore, it is necessary to analyze why a judge gives custody to the father, which appears to be contrary to Article 105 of the Compilation of Islamic Law which clearly regulates the custody of minors given to mothers. And what is the reason for the judge determining the father who has the right to care for the child, and whether the judge in deciding the case has paid attention to the provisions of the Law on Child Protection.

⁵ Heru Siswanto dan Elfirda Ade Putri, "Akibat Hukum Penetapan Hak Waris Dan Hak Asuh Anak Oleh Hakim Pengadilan Negeri: Studi Putusan Nomor 282/Pdt.G/2014/Pn.Tng," *Jurnal Hukum Sasana* 7, no. 2 (9 December 2021): 333–44, <https://doi.org/10.31599/sasana.v7i2.867>.

2. Research Method

The type of research used in this study is normative legal research, namely a type of legal research obtained from literature studies, by analyzing a legal issue through statutory regulations, court decisions, research on literature and other reference materials related to Revocation of child custody as stated in decision No. 470/Pdt.G/2022/PA.Gtlo.

3. Determination of Child Custody in Favour of the Father under the Applicable Legislation

3.1. The Hadhanah Case Submission Process at the Gorontalo Religious Court

Basically, the responsibility of caring for children falls on the parents, whether the parents still live in harmony or when their marriage fails due to divorce. The maintenance of children after divorce is called *hadhanah* in *fiqh*. Al-Shan'ani said that *hadhanah* is caring for someone (a child) who cannot be independent, educating, and nurturing him to avoid anything that can damage and bring harm to him.

The place to file a lawsuit/application in a case other than marriage is the same as the place to file a lawsuit/application according to the Civil Procedure Code of the District Court, namely as follows.⁶

1. The principle is generally submitted to the Religious Court which is in the jurisdiction of the defendant's residence.
2. If the place of residence of the defendant is unknown, it is submitted to the Religious Court in the area where the defendant actually resides (is)
3. If there are more than one defendant, do not live in the same area of the Religious Court, it is submitted to the Religious Court which covers one of the defendant's residence according to the choice of the plaintiff.
4. If the defendants are against each other as the first debtor and the guarantor, it is submitted to the Religious Court where the first debtor lives
5. If the defendant is unknown or does not have a place of residence or his place of residence is unknown, it is submitted to the Religious Court where the plaintiff or one of the plaintiffs lives.
6. If the lawsuit concerns fixed objects (onroerende goederen), it is submitted to the Religious Court in the area where the fixed objects are located.
7. If the plaintiff and the defendant have chosen a place for litigation with a written deed, it will be submitted to the Religious Court that has been chosen.

⁶ Sofyan Munawar, "Analisis Putusan Mahkamah Agung tentang hak asuh anak Pascacerai orang tua murtad: perspektif Islam, Hak Asasi Manusia, and Undang-undang perlindungan anak" (master's thesis, Fakultas Syariah dan Hukum Universitas Islam Negeri (UIN) Syarif Hidayatullah Jakarta, 2019), <https://repository.uinjkt.ac.id/dspace/handle/123456789/45992>.

The process of applying for child custody after the divorce at the Gorontalo Religious Court was explained by Mr. Fikri Hi. Asnawi Amiruddin, S.Ag. as Deputy Registrar of Law of the Gorontalo Religious Court:

"The plaintiff or applicant can directly submit their application to the Gorontalo Religious Court. In addition to the written method, the plaintiff or applicant can submit their case to the Court orally which will be assisted by the head of the court in making a letter of claim or application requirements based on the name of the Gorontalo Religious Court. Where the contents of the lawsuit or application are in accordance with the wishes of the parties, and or the application is in accordance with the wishes of the parties, and usually the plaintiff/applicant cannot file his own lawsuit or application, the plaintiff/applicant will submit his case to a person who has been authorized by power of attorney to submit the case to the Gorontalo Religious Court."⁷

Matters prepared for the Gorontalo Religious Court in filing a Hadhanah lawsuit/application are as follows:

1. Submit a case or lawsuit to the Gorontalo Religious Court.
2. Object of the case (child custody, *hadhanah*).
3. Photocopy of KTP showing as an Indonesian citizen and residing in which area.
4. Marriage certificate as legal basis for lawsuit (Legal Standing).
5. The existence of a divorce certificate (if already divorced).
6. Submit a court fee perscot or case fee manager when the lawsuit is registered at the clerk's office.

After the above matters have been prepared, especially the marriage book and KTP, the Hadhanah lawsuit or Hadhanah application can be submitted to the Gorontalo Religious Court and then the case will be processed through three stages.

First: Case Examination Stage.

Counter I: acceptance of cases by the Head of Sub-Registry of Claims for lawsuits and Head of Sub-Registry of Applications for petition cases. Here it is carried out and checks on the identity of the candidate. And whether the Religious Courts have the authority to adjudicate both from the point of view of relative competence and absolute competence. The Head of the Sub-Registry Office provides an explanation as necessary, then the Registrar informs the amount of the down payment for court fees. For those who are able to be given an order to pay court fees (*Surat Kuasa Untuk Membayar*, SKUM). Those who can't afford it must bring a letter

statement of incapacity from the Lurah/Kades, then the person concerned is given a Certificate of Exemption (SKB) of 3 copies of the fee.

⁷ FADILA TATIA SEPTIA, "ANALISIS PERALIHAN HAK ASUH ANAK DI BAWAH UMUR DARI IBU KE AYAH (STUDI PUTUSAN NOMOR 685/PDT.G/2022/PA.LT)" (undergraduate thesis, Universitas Mataram, 2023), <http://eprints.unram.ac.id/35279/>.

Counter II: the Head of the Sub-Registrar's Office of Finance (Special Treasurer) serves the down payment of court fees that have been determined in the SKUM and the person concerned is given receipts as proof of payment of 3 sheets, 2 sheets for the plaintiff/applicant and 1 sheet kept by the treasurer as accountability. For those who submit SKB, no fee is charged. The SKB is stamped "free of charge", as many as 3 sheets, 2 sheets for the plaintiff/applicant and 1 sheet in the treasurer's possession.⁸

Counter III: case registrar staff registers cases in the case register. In the payment receipt or SKB (in the case number column) here the number corresponds to the number in the list, one sheet is returned to the plaintiff/applicant as evidence of the case and the second sheet, together with the case file in one folder which has been numbered according to the number in list of cases. Then the case file is returned to the Head of the Registrar's Office concerned.

Second: Research and Case File Checking Phase.

1. The head of the relevant sub-registrar's office checks the completeness of the case file, then forwards it to the case clerk and finally examines it again by the Chief Registrar. Here the case file is equipped with the PMH form (appointment of the panel of judges) and the PHS form (determination of the hearing day). Furthermore, when deemed complete and perfect, it is submitted to the chairman of the Religious Court.

The process of receiving a case may not take more than 7 days, starting from the date of giving the case number until it is submitted to the head of the Religious Court.

Third: Session Preparation Stage.

The Chief Justice receives and examines the case files.

Appoint a panel of judges with a decision letter (PMH) no later than 3 days after receipt of the case files. Submission of case files to the appointed panel of judges.

The chairman of the panel of judges submits the case files to the member judges for study. Then set a trial day with the PHS model, no later than 14 days after receipt of the case file. Finally appoint a substitute clerk/registrar who will assist the panel of judges in the trial

Filing a lawsuit with the Religious Courts is the same as filing other civil rights as stipulated in Articles 142 and 144 R.Bg.. The lawsuit must fulfill the formal requirements of a lawsuit which of course does not need to be explained in detail in this paper. Only in the context of a hadhanah lawsuit is it necessary to reaffirm the formulation of the petitum lawsuit that must exist as follows; (1) granted the plaintiff's claim; (2) legally stipulates that the child on behalf of the child is under the care and care of the plaintiff, or legally stipulates that the plaintiff has the right to care for and care for the child on behalf of the applicant's son/son (3) punishes the respondent for handing over the child on behalf of the child's son/ petitioner's address to the applicant. Against this hadhanah lawsuit, R.Bg.

⁸ M. A. Oktariyadi S dan S. H. Ayu Tria, "PERTIMBANGAN HAKIM TERHADAP PEMBERIAN HAK ASUH ANAK DI BAWAH UMUR KEPADA SUAMI (Studi Putusan Nomor 0144/Pdt.G/2015 MS.Ttn)," *Al-Mursalah* 3, no. 1 (2 October 2018), <http://jurnal.staitapaktuan.ac.id/index.php/Al-Mursalah/article/view/87>.

does not allow confiscation of the object of the case. Thus, children may not be confiscated.⁹

To prevent the later decision of the Religious Court from being illusory (empty) and the interests of the applicant being fully guaranteed, in a hadhanah lawsuit the applicant can submit a provisional application by asking the judge so that before the principal case is decided, the child who is the object of dispute in the hadhanah case is entrusted with a third party. The provisional claim is in the form of a legal entity or individual; (3) in the event that the third party is an individual, the identity and relationship with the applicant must be clearly and completely stated; (4) the third party is believed to be able to look after and care for the child; (5) there is a guarantee or loyalty and good care from a third party for the child in dispute, (6) expressly mentioning the maintenance of the child while he is with a third party.

If a provisional claim is submitted to the Religious Court, then the formulation of the petitum lawsuit reads as follows¹⁰

In provision:

- a) Accept the request of the applicant
- b) Before deciding the principal case ordered that the child on behalf of the child be entrusted with a third party

In the main case:

- a) Accept the request of the applicant
- b) Legally determine the child on behalf of the child is under the care of the applicant
- c) Punish the respondent for surrendering the child on behalf of the child to the applicant.

In the event that a provisional claim is filed, the judge must first decide on the provisional application in an interlocutory decision, provided that after the provisional claim is examined in an incidental trial. If the claim is granted, then before examining the principal case the child must first be handed over and entrusted to the third party designated in the provisional decision, but if the provisional claim is rejected then the principal examination of the case is immediately submitted after reading the interlocutory decision earlier.

Concerning who has the right to submit hadhanah claims to the religious court, of course the parties feel aggrieved. Based on article 47 paragraph (2) of Law Number 1 of 1974 concerning marriage and article 105 letter a Compilation of Islamic Law, if the father does not provide hadhanah costs to children under the age of 12 who are under the care of the mother, then the one who can file a lawsuit the civil right is the mother of the child.

⁹ Nurmansyah Nurmansyah, "Analisis Yuridis Pertimbangan Hakim Terhadap Hak Asuh Anak Di Bawah Umur (Studi Putusan Perkara Nomor : 594/Pdt.G/2020/PA.Ktbm)" (thesis, Universitas Muhammadiyah Kotabumi, 2021), <http://repository.umko.ac.id/>.

¹⁰ Asima Naslah, Rohmad Adi Yulianto, and Moh Zakky, "Penerapan Pemberian Hak Asuh Anak Belum Mumayyiz Kepada Ayah Dalam (Studi Kasus Perkara Nomor 2887/Pdt.G/2017/Pa Js)," *Jurnal Hukum Jurisdictie* 3, no. 1 (2 June 2021): 1–24, <https://doi.org/10.34005/jhj.v3i1.37>.

Meanwhile, if the father does not pay hadhanah fees for a child who is aged 18 to 21 years and has never been married, whether he is accompanying his own father or accompanying his mother, then the child who files a lawsuit for rights is the child as stipulated in Article 47 paragraph (1) Law Number 1 of 1974 concerning marriage. From the formulation of this article, it can be interpreted a contrario that the child is seen as an adult and capable of acting legally. If the father does not pay the hadhanah fee for a child under the age of 18 who is accompanying him, then those who are entitled to file a lawsuit are the family members in a straight line, either from the mother's side or from the father's side.¹¹

To ensure that the Hadhanah decision is not illusory (empty) and the interests of the applicant can be fully guaranteed, the applicant can submit an application to the Religious Court so that the assets belonging to the respondent are placed as collateral.

3.2. The Judge's Considerations in Awarding Custody of a Child Who Is Not Yet Mumayyiz to the Father

Law No. 1 of 1974 concerning marriage article 41 letter a describes as follows:

As a result of the breakup of a marriage due to divorce, either the mother or the father is still obliged to look after and look after the child, solely based on the interests of the child; if there is a dispute regarding child custody, the court gives its decision;

Besides that, in the compilation of Islamic law, article 156 letter e states that; if there is a dispute regarding hadhanah and child maintenance, the religious court gives its decision based on letter abd, while those included in letter a describe as follows: a child who has not been mumayyiz has the right to get hadhanah from his mother, unless the mother has passed away, then his position is replaced by:

The women are in a straight line from the mother

Father

The women are in a straight line up from the father

The sister of the child in question

Women blood relatives on the side of the father

Women blood relatives on the side of the father

Based on the provisions above, the judge, when faced with a hadhanah problem, should give custody of the child to the mother, but in the case of fighting over child custody between the applicant and the respondent as stated in decision Number 470/Pdt.G/2022/PA.Gtlo won the applicant as the holder of child custody rights so that

¹¹ Mansari Mansari et al., "HAK ASUH ANAK PASCA TERJADINYA PERCERAIAN ORANGTUA DALAM PUTUSAN HAKIM MAHKAMAH SYA'YAH BANDA ACEH," *Gender Equality: International Journal of Child and Gender Studies* 4, no. 2 (12 September 2018): 103–24, <https://doi.org/10.22373/equality.v4i2.4539>.

it is necessary to question the matters that form the basis of the judge's considerations so that he decides so.¹²

3.2.1. Decision Number 470/Pdt.G/2022/PA.Gtlo

Description of Case, Plaintiff, place and date of birth Gorontalo, 22 April 1980, religion Islam, work Contract Labor at Public Housing Service of Gorontalo Province, high school education, residence on Jalan Kutai, Tamalate Village, Kota Timur District, City of Gorontalo.

ASN jobs. Defendant, place and date of birth Gorontalo, 07 February 1991, religion Islam, no job, high school education, residence on Jalan Kutai, RT.002, RW.002, Tamalate Village, Kota Timur District, Gorontalo City.

- a. Whereas apart from that, the Defendant was in contact with another man named Doni, in this case the Defendant was still the legal wife of the Plaintiff.
- b. the son of the plaintiff and the defendant whose name is a child who is underage and needs the plaintiff's love and guidance as his father.

3.2.2. Legal Considerations

Based on the researcher's interview on November 25, 2022, Fikri Hi. Asnawi Amiruddin, S.Ag. as the clerk who handled the case explained that the judge's considerations in deciding to grant child custody to the applicant included the following:

That the Defendant was unfit to raise children because in 2011 the Defendant was caught in a case of embezzlement of IDR 6,500,000, and the witness himself paid the fee. then in 2015 while still married to the plaintiff, the Defendant was caught in a case of embezzlement of IDR 30,000,000, and the plaintiff paid for it.

At the time of the trial, it was supported by witnesses who stated that the respondent had had intercourse with another man named Doni. Whereas when the plaintiff and the defendant were still married and living with the witness, what the witness saw was that the Defendant often scolded and even once hit his child. What the judge also paid attention to in making this decision was that based on Law Number 23 of 2002 concerning child protection Article 3 that child protection aims to guarantee the fulfillment of children's rights so that they can live, grow, develop and participate optimally in accordance with dignity. and dignity as well as receiving protection from violence and discrimination with the realization of quality, noble and prosperous Indonesian children. Child custody in the event of a divorce according to the provisions of Law no. 1 of 1974 concerning marriage and the compilation of Islamic law should be the right of the mother (wife). However, it is possible that child custody is the right of the father (husband) if the husband is sufficiently able to prove the bad character/character of the wife so that it is not

¹² Laily Lukita Nilam Sari, Wasis Suprayitno, and Kukuh Dwi Kurniawan, "Pelaksanaan Eksekusi Hak Asuh Anak Dalam Perkara Perceraian (Studi Kasus Putusan No 1618/Pdt.G/2020/PA.Smp)," *Indonesia Law Reform Journal* 2, no. 2 (12 November 2022): 166–81, <https://doi.org/10.22219/ilrej.v2i2.22075>.

appropriate to look after the child. In addition, if it can be proven that the wife is having an affair or the wife abandoned the child.¹³

Even though it has been clearly regulated regarding child maintenance provisions in the event of a divorce, it is possible for judges to apply differently. This is based on the *ius contra legem* principle. This was also stated by M. Yahya Harahap that if the provisions of the existing law are contrary to the public interest, decency, civilization, and humanity, the judge is free and has the authority to take *contra legem* action, namely making decisions that are contrary to the articles of the law. In this case the judge acted *contra legem* because it was considered that the wife was unable to set a good example for her child and for the sake of the child's future, custody of the child was given to the husband as the father.

Whereas according to Article 105 letter (a) of the Compilation of Islamic Law the maintenance of children who have not been mumayyiz is handed over to the mother, but according to the argument of the petitioner which states that the respondent is married and has often entrusted his children to the respondent's parents since 2017 until now thus neglecting the child, this was not denied by the respondent. Therefore the Panel of Judges stipulates Article 49 paragraph (1) letters a and b of Law number 1 of 1974 which reads "One or both parents can have their authority over one or more children revoked for a certain time at the request of the other parent." , the child's family in a straight line upwards and adult siblings or authorized officials, with court decisions in matters of:

- a) he was grossly neglectful of his duty to his son
- b) He behaved badly

From the above statement it can be applied to the Respondent because the Respondent has been proven to have often entrusted his child to the Respondent's mother without the permission of the Petitioner as her husband so that the Respondent's actions have neglected the Petitioner's and Respondent's children, therefore the Panel of Judges needs to revoke the custody of the child from the Respondent as his biological mother and hand over custody and maintenance of the child to the Petitioner and the Respondent to the Petitioner as the biological father.¹⁴

3.3. Analysis

After observing the case between the applicant and the respondent as described above, there is an interesting thing to highlight, namely the fall of hadhanah or the maintenance of a child who has not been mumayyiz to the father.

¹³ Sarah Rosanna Anwar, "PENGABAIAN ASAS PACTA SUNT SERVANDA DALAM PERJANJIAN HAK ASUH ANAK (ANALISIS PUTUSAN MAHKAMAH AGUNG NOMOR 2021 K/Pdt/2020)" (Thesis, 2022), <http://repository.umsu.ac.id/handle/123456789/19224>.

¹⁴ Muthia Rahmah, "Hak asuh anak dalam perkawinan campuran (studi analisis Putusan Pengadilan Agama Jakarta Selatan Perkara Nomor 0208/Pdt.G/2012/PAJS)" (bachelor's thesis, Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta, 2018), <https://repository.uinjkt.ac.id/dspace/handle/123456789/42993>.

Based on article 105 letter (a) of the Compilation of Islamic Law stipulates that "in the event of a divorce, the maintenance of a child who is not yet mumayyiz or who is not yet 12 years old is the right of the mother"

The Compilation of Islamic Law states that custody of children who have not been mumayyiz is the mother's right. This is because mothers have a higher level of affection and patience, besides that a mother is more gentle when caring for and educating her child, especially for children who are still breastfeeding, mothers have something that not everyone has. If we look at the case above, the attitude of the mother was temperamental and highly emotional and the mother always vented her anger by hitting the children, even the mother and father were divorced because the mother had an affair with another man, and the mother was involved in the law twice in embezzlement cases. so the mother could not take proper care of her children and set a good example for their children.¹⁵

Besides that, children are social beings, just like adults need other people (parents) to help develop their abilities, because children are born with all their weaknesses so that without the help of adults, children cannot possibly reach a normal human level.

If we look back at the custody rights above, the applicant while living with the respondent there are things that the respondent should not have done such as a mother who always vents her anger by hitting the children, they even got divorced because the respondent had an affair with another man, and had been involved convicted twice in embezzlement cases. Judging from this behavior, the respondent is no longer eligible for custody. A child who is not yet mumayyiz is still entitled to care for both parents, even though the parents are divorced as in the case above, and the care is solely for the benefit of the child. If later there is a dispute and control over the child, the court will give the fairest decision without reducing the child's rights in the least. In accordance with the meaning of the law, that in determining the right to care for a child, what must be considered is for the legal interests of the child. so the judge must really pay attention to whether the child is cared for by the mother or the father has better social security and welfare or not.¹⁶

This article therefore agrees with the judgment of the Gorontalo Religious Court which decided that the care of the child fell to the applicant as his biological father, not to the respondent as his biological mother. because in this case, the father shows more concern and affection for his child, and the child certainly feels safer and more comfortable in his father's care. this is where the rights of the child in question must take precedence. Like humans, children also have their own rights, namely the right to protect children which aims to guarantee the fulfillment of children's rights so that they can live, grow and

¹⁵ NIM : 15350047 Fitria Mardanawati, "TINJAUAN HUKUM ISLAM DAN HUKUM POSITIF TERHADAP HAK ASUH ANAK YANG BELUM MUMAYYIZ KEPADA AYAH KANDUNG (STUDI TERHADAP PUTUSAN NOMOR: 639/Pdt.G/2019/PA.Btl)" (undergraduate thesis, UIN SUNAN KALIJAGA YOGYAKARTA, 2020), <https://digilib.uin-suka.ac.id/id/eprint/44917/>.

¹⁶ HUDA NURUL, "PERTIMBANGAN HAKIM TERHADAP PUTUSAN DEKLATOIR DAN KONDEMNATOIR TENTANG PENETAPAN HAK ASUH ANAK KEPADA IBU KANDUNGNYA (Studi Putusan Perkara Nomor:1234/Pdt.G/2018/PA.Tnk, Putusan Perkara Nomor: 0014/Pdt.G/2019/PTA. Bdl Dan Putusan Perkara Nomor : 1376/Pdt.G/2019/PA.Tnk Di Pengadilan Agama Tanjung Karang)" (master's thesis, UIN Raden Intan Lampung, 2021), <http://repository.radenintan.ac.id/15306/>.

develop and participate optimally in accordance with human dignity and dignity, and receive protection from violence and discrimination for the realization of children. quality, noble and prosperous Indonesian children.

4. Conclusion

The Islamic concept of child custody is known as *hadhanah*, the criteria for divorce occur, explicitly it is the mother who is given the right to care for the child according to the rules, that the child is not yet mumayyiz and if the mother does not meet the requirements as a custody right holder, then the custody transfers to relatives closest person who fulfills the requirements, as stated in article 156 of the Compilation of Islamic Law (KHI), As for custody rights for children who are mumayyiz, they are given the option to choose between the father or the mother. However, the option right is not absolute. This means that the child's choice can be granted as long as the person chosen has the ability to ensure the physical and spiritual safety of the child he is caring for. Between Islamic law, the Compilation of Islamic Law (KHI), Law No. 1 of 1974 concerning marriage, international conventions and several laws, there is a similarity of view between the principle of the best interests of the child which is based more on considerations of benefit. Juridically, if there is a dispute regarding child custody for those who are not yet mumayyiz, then the court will decide based on the interests of the child.

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