

ANALYSIS OF CHILD CUSTODY (HADHANAH) AFTER DIVORCE FROM THE PERSPECTIVE OF DHARURIYAH

Written by: Meilan Lestari, Syafrinaldi, and Abd Thalib
Faculty of Law, Islamic University of Riau

Abstract

Divorce is the dissolution of the physical and spiritual bond between husband and wife in building a happy and everlasting household based on the belief in Almighty God. Divorce is an act that is permitted but disliked by Allah, as it has a significant impact on family life, particularly on children.

Children are a trust (amanah) given by Allah to their parents, entrusted to their care so that they may receive complete love and affection from both parents. Every child has the right to be educated, cared for, and nurtured by both parents, both in general and in accordance with religious teachings. Through religious education, a child becomes closer to Allah.

Child custody (hadhanah), according to Article 1 paragraph (g) of the Compilation of Islamic Law, refers to the activity of caring for, maintaining, and educating a child until he or she reaches maturity and can manage his or her own affairs.

The Qur'an also explains that as servants of Allah and believers, we are obliged to protect ourselves and our families (our children) from the fire of Hell. This is intended so that the children we raise become faithful and pious to Allah and His Messenger, and are not led astray into acts that incur Allah's wrath.

Instilling religious values in children from an early age is crucial so that they can protect and preserve their own faith, soul, and intellect. This will allow them to have peace of mind and sound reasoning, and to avoid moral damage or deviance resulting from the divorce of their parents.

From the dharuriyah (fundamental necessity) perspective, child custody (hadhanah) must begin with the protection of religion, life, intellect, and lineage so that the child remains safeguarded from anything that contradicts religious principles.

INTRODUCTION

Allah SWT created humankind in diverse nations, tribes, and characters so that people may know and understand one another. Humans are both individual and social beings who cannot live independently and therefore require interaction with others to fulfill their needs, including the need to form a family through marriage.¹

Marriage is the only legitimate means to establish a family. Without marriage, a family unit cannot exist. Article 1 of Law Number 16 of 2019 in conjunction with Law Number 1 of 1974 concerning Marriage defines marriage as a physical and spiritual bond between a man and a woman with the purpose of forming a happy and eternal family based on the belief in the One and Only God.² Meanwhile, Article 2 of the Compilation of Islamic Law (Kompilasi Hukum Islam/KHI) defines marriage as a very strong contract (*mitsaqan ghalidzan*) carried out in obedience to Allah SWT and regarded as an act of worship.³

Marriage aims to establish a harmonious household characterized by *sakinah*, *mawaddah*, and *rahmah*, as well as to produce legitimate offspring. However, marriage is not merely based on desire but must be oriented toward clear objectives, including forming a happy and lasting family, fulfilling religious obligations, and ensuring the continuity of legitimate lineage within society.⁴

One of the greatest blessings of marriage is the presence of children. Nevertheless, marital life is not always harmonious. Conflicts may arise, and if they cannot be resolved, they may lead to

¹ Busyro, Pengantar Filsafat Hukum Islam, Kencana, Jakarta, 2020, p. 116. Busyro, *Pengantar Filsafat Hukum Islam*, Kencana, Jakarta, 2020, p. 116.

² Article 1 Law of the Republic of Indonesia Number 16 of 2019 in conjunction with Law Number 1 of 1974 concerning Marriage.

³ Compilation of Islamic Law (Kompilasi Hukum Islam), Article 2.

⁴ Mardani, *Hukum Keluarga Islam di Indonesia*, Prenadamedia Group, Jakarta, 2016.

divorce. Divorce terminates the marital bond between husband and wife, either through a court decision or at the request of one of the parties.⁵

Although divorce is permitted in Islam as a last resort, it has significant consequences, particularly for children. Children often become the most vulnerable victims of parental divorce, as they require complete love, care, and protection from both parents.⁶

Children are a trust (*amanah*) from Allah SWT entrusted to their parents. They have the right to be nurtured, educated, and cared for properly, both materially and spiritually. Islamic teachings emphasize that children must be raised with religious values so that they grow closer to Allah SWT and develop moral integrity.⁷

CHILD CUSTODY (HADHANAH) IN ISLAMIC AND POSITIVE LAW

Hadhanah refers to the care, upbringing, and education of children who are not yet able to manage their own affairs independently. According to Islamic jurists, hadhanah includes protecting children from harm and ensuring their physical, psychological, and spiritual well-being.⁸ Amir Syarifuddin defines hadhanah as the care of young children following the dissolution of marriage.⁹

Article 1 point (1) of Law Number 35 of 2014 concerning Child Protection states that a child is any person under the age of 18, including those still in the womb.¹⁰ Both parents are legally and morally responsible for the care, education, and fulfillment of the child's needs. Article 45

⁵ Subekti, *Pokok-Pokok Hukum Perdata*, Intermasa, Jakarta.

⁶ Muhammad Syaifuddin et al., *Hukum Perceraian*, Sinar Grafika, Jakarta, 2014.

⁷ Qur'an, Surah At-Tahrim (66): 6.

⁸ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, Kencana, Jakarta.

⁹ Ibid.

¹⁰ Article 1 point (1) Law of the Republic of Indonesia Number 35 of 2014 concerning Child Protection.

paragraphs (1) and (2) of Law Number 1 of 1974 affirms that parental obligations toward children continue even after divorce.¹¹

Divorce does not sever the relationship between parents and children. While the marital bond may end, parental responsibility remains intact. One of the legal consequences of divorce is the potential dispute over child custody between former spouses. Such disputes often arise because each parent wishes to retain custody, despite the child's primary need for stability and affection from both parents.¹²

CHILD CUSTODY AFTER DIVORCE

The Compilation of Islamic Law regulates child custody matters comprehensively. Article 105 KHI states that custody of children who have not reached the age of *mumayyiz* (under 12 years old) belongs to the mother; custody of *mumayyiz* children is determined by the child's own choice; and the financial responsibility for child maintenance rests with the father.¹³

However, the mother's right to custody is not absolute. Article 156 KHI allows custody to be transferred to another qualified relative, such as grandparents, if the mother is deemed unfit due to remarriage, negligence, or inability to provide adequate care and protection. This provision reflects Islamic law's flexibility and its prioritization of the child's best interests over parental interests.¹⁴

¹¹ Article 45 paragraphs (1) and (2) Law Number 1 of 1974 concerning Marriage

¹² Supardi Mursalin, "Hak Hadhanah Setelah Perceraian," *Mizani*, Vol. 25 No. 2, 2015.

¹³ Compilation of Islamic Law, Article 105.

¹⁴ Compilation of Islamic Law, Article 156.

Islamic jurisprudence distinguishes two phases in a child's development related to *hadhanah*: the pre-*mumayyiz* phase (from birth until approximately seven or eight years old) and the *mumayyiz* phase (from seven years old until puberty). During the pre-*mumayyiz* phase, the mother is generally considered the most suitable caregiver due to her natural compassion, patience, and nurturing ability.¹⁵

CHILD CUSTODY FROM THE PERSPECTIVE OF AL-DHARURIYYAT

Islamic law is established to realize human welfare (*maslahah*) in both worldly and spiritual dimensions. One of its fundamental objectives (*maqasid al-shari'ah*) is the preservation of five essential elements known as *al-dharuriyyat al-khams*: religion, life (soul), intellect, lineage, and property.¹⁶

In the context of child custody after divorce, these five essential protections must be fulfilled: preservation of life, intellect, lineage, religion, and moral and material well-being. Children affected by divorce are entitled to comprehensive care that fulfills these essential needs. Therefore, custody decisions must prioritize the child's holistic welfare rather than parental preferences.¹⁷

CONCLUSION

Child custody (*hadhanah*) is a shared responsibility of both parents, whether they remain married or have divorced. In Islamic law and Indonesian positive law, children who have not yet reached *mumayyiz* age are generally placed under the care of their mother, provided she is capable and qualified. Nevertheless, custody may be reassigned if it no longer serves the child's best interests.¹⁸

¹⁵ Husnatul Mahmudah et al., "Hadhanah Anak Pasca Putusan Perceraian," *Sangaji*, Vol. 2 No. 1, 2018.

¹⁶ Busyro, op. cit.

¹⁷ Ali Akbar, "Analisis Putusan Pengadilan Agama tentang Hak Hadhanah," *Dialog Legal*, Vol. 1 No. 1, 2025.

¹⁸ Kamarusdiana et al., "Hadhanah Bagi Anak yang Belum Mumayyiz," *Journal of Islamic Law*, Vol. 5 No. 2, 2021.

Children who are victims of parental divorce must receive optimal care and protection, particularly in fulfilling the essential elements of *al-dharuriyyat*. Ensuring the preservation of religion, life, intellect, lineage, and morality is crucial to achieving the child's welfare and future well-being.¹⁹

¹⁹ Syukri Saleh et al., "Perlindungan Hak Asuh Anak Pasca Perceraian," *Al-Zayn*, Vol. 3 No. 3, 2025.

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