

Hadhonah Rights of Children (Not Mumayyis) Based on Compilation of Islamic Law and Child Protection Act

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Abstract: This study aimed to determine the *Hadhonah* Rights of Children who have not been *Mumayyiz* to Biological Fathers According to the Compilation of Islamic Law (KHI) and Law No. 23 of 2002 Concerning Child Protection. This type of research is qualitative, which produces descriptive data from observations. This research is in the form of an analysis of cases relating to the Decision on *hadbanah rights* to biological fathers for children who have not *mumayyiz* according to Compilation of Islamic Law (KHI) and Law Number 23 of 2002, which occurred in the Religious Courts stab. An important finding in this research is the Judge's Consideration in deciding case Number: 1242/Pdt.G/2017/PA.Stb., which gives the *hadhanah* rights of children who have not been *mumayyiz* to biological fathers after a divorce, does not follow the provisions of the Compilation of Islamic Law articles 156 and 105, Law No. 1 of 1974 concerning marriage, and Law No. 23 of 2002 concerning child protection.

Keywords: *Hadonah, Mumaayyis, Compilation of Islamic Law, Chil Protection Act.*

Abstrak: penelitian ini bertujuan mengetahui Hak Hadhonah Anak Yang Belum Mumayyiz yang jatuh kepada Ayah Kandung Menurut KHI Dan UU.No.23 Tahun 2002 Tentang Perlindungan Anak. Jenis penelitian ini adalah penelitian kualitatif, yaitu penelitian yang menghasilkan data-data deskriptif dari pengamatan Penelitian ini berupa analisis terhadap kasus yang berkenaan dengan putusan hak *hadbanah* kepada ayah kandung bagi anak yang belum *mumayyiz* menurut KHI dan Undang Undang Nomor23 Tahun 2002 yang terjadi di Pengadilan Agama Stabat. Temuan penting dalam penelitian ini adalah Pertimbangan Hakim dalam memutus perkara Nomor: 1242/Pdt.G/2017/PA.Stb. yang memberikan hak *hadhanah* anak yang belum *mumayyiz* kepada ayah kandung setelah terjadi perceraian memang tidak sesuai dengan ketentuan Kompilasi Hukum Islam pasal 156 dan 105, Namun putusan tersebut telah sesuai dengan Al-Qur'an surat an-Nisa ayat 9, ketentuan pasal 41 (a) Undang-undang Nomor 1 Tahun 1974 tentang perkawinan, dan Undang-undang Nomor 23 Tahun 2002 tentang perlindungan anak.

Kata kunci: *Hadonah, Mumaayyis, Kompilasi Hukum Islam, Undang-Undang.*

Introduction

According to Jurisprudence, marriage is one of life's most important basic principles in a perfect association or society.¹ Marriage regulates household life and offspring and introduces one person to another². According to Law No. 1 of 1974, 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 the one and only God."³ However, as time goes by, in carrying out the ark of household life, it cannot be denied that maintaining a marital status that follows the goals of marriage and the provisions of the relationship between husband and wife as expected is not easy. Humans cannot escape mistakes, mistakes, and sin—continual bickering and disputes in a household.⁴

Quarrels sometimes go as far as pronouncing the word divorce, both sharia (obviously) and *kehinayah* (innuendo meaning divorce), but it can also be a fight in the form of indifference (no communication) and silence to each other, which shows there is no hope for the two of them to live in harmony again. Household. If a husband and wife divorce while they have children from their marriage. So his wife is more entitled to look after the child until *mumayyiz*. After that, the child is given the right to choose between his parents. Whomever he chooses between the two, then the child is handed over to him⁵. Abu Dawud narrated from 'Amru bin Syu'aib from his father from his grandfather that Rasulullah SAW was visited by a woman and said, "O Rasulullah! This son needs his stomach as his vessel, his breasts as his drink, and my lap." Rasulullah SAW said, "You have more right to care for him as long as you are not married."⁶

Hadhanah, according to the language, means to put something near the ribs, such as carrying or placing something in the lap. A mother breastfeeds, puts on her lap, and protects herself from everything that hurts her—born until he can look after and regulate himself. There are seven requirements for raising a child: intelligent, independent, religious, able to maintain self-respect (a good woman), trustworthy, living in a clear area/place, and unmarried. If less than one, the right to care for children from the divorced wife is lost.⁷ Hadhanah is also a matter of caring for children by educating them to look after them when they need a nanny.

In this case, they agree that it is the mother's right.⁸ Moreover, the priests of the school of thought agree that the right to care for the child (*hadhanah*) rests with the mother as long as she is not yet married.⁹ Maintaining children's survival is the responsibility of parents, which should not be ignored. Article 45UU. No. 1 of 1974 concerning the Principles of Marriage, stipulates that parents are obliged to look after and educate children who are not yet *Mumayyiz* until the children concerned are adults or can stand on their own.¹⁰

Actually, research on *hadhanah* is often done. As the material for comparison and assessment in research, researchers present relevant studies in the form of research carried out by other relevant studies that the author will carry out. First, research by Aditya Nur Pratama, 2009 Ahwal Al-Syaksiyyah Study Program, Concentration on Religious Courts, UIN Syarif Hidayatullah Jakarta. The title is "Revocation of Child Custody Rights from Mother (Study of Analysis of Decisions of the Depok Religious Court No.430/Pdt.G/2006/PA.Dpk)". It contains the theoretical basis around child custody (*hadhanah*), including the understanding of *hadhanah*, the legal basis of *hadhanah*, the conditions for *hadhanah*,¹¹ the hadhanah period, as well as an analysis of the Religious Decision regarding the revocation of parental rights from the mother, in general, the research discusses the revocation of child custody (*hadhanah*) children from the mother, while the author's research on child custody (*hadhanah*) has not been *mumayyiz* to biological father according to Article 105 KHI and Article 10 UU.NO.23 of 2002. Second, Siti Maryam (

¹ Achmad Muhajir, "Hadhanah dalam Islam (Hak Pengasuhan Anak dalam Sektor Pendidikan Rumah)," *SAP (Susunan Artikel Pendidikan)* 2, no. 2 (December 5, 2017): 170, <https://doi.org/10.30998/sap.v2i2.2089>.

² H. Sulaiman Rasjid, *Islamic Fiqh*, (Bandung, Sinar Baru Algensindo, 2010), p.374

³ Mohd.Idrus Ramulyo, *Marriage Law, Inheritance Law, Religious Court Procedure Law, and Zakat According to Islam*, (Jakarta: Sinar Graphic, 1995), p.43

⁴ Jumroh Jumroh, "Hak Hadhanah Bagi Anak Yang Belum Mumayyiz Kepada Ayah: (Studi Analisis Putusan No. 1235/Pdt.g/2017/PA.Srg)," *Syaksia: Jurnal Hukum Perdata Islam* 19, no. 1 (June 13, 2018): 37, <https://doi.org/10.37035/syaksia.v17i1.1114>.

⁵ Mustafa Dub Al-Bugha, *Complete Islamic Fiqh Shafi'I School* (explanation of Islamic laws), Solo:Media Zikir, 2009), p.417

⁶ Mustafa Dub Al-Bugha, *Complete Islamic Fiqh Shafi'I School* (explanation of Islamic laws), Solo:Media Zikir, 2009), p.418

⁷ Aditya Nur Pratama "Hadhanah", The article above was accessed on August 3, 2018 from <http://Nova.A.blogspot.com>.

⁸ Shaykh al-'Allamah Muhammad bin'Abdurrahman ad-Dimasyqi, *Jurisprudence of the Four Schools*. (Bandung: Hasyimi, 2010), p 416

⁹ Muhammad Jawad Mughniah, *Fiqh of Five Schools*. Jakarta: Lantern, 2010 cet. 26, p. 415

¹⁰ Nyimas Lidya Pertiwi, "Hadhanah Dan Kewajiban Orang Tua Dalam Perspektif Hukum Islam," *Syakhshiyah Jurnal Hukum Keluarga Islam* 2, no. 1 (June 14, 2022): 52.

¹¹ Meta Riskia, "Implementation Of Mudharabah Financing On Baitul Maal According Majelis Ulama Indonesia," *Journal of Nusantara Economy* 1, no. 1 (December 9, 2022): 7.

108044200013), *Hadhanah Rights of Children Not Mumayyiz Due to Wife Nusyuz* (Analysis of Case Decisions No. 2545/Pdt.G/2010/PA. East Jakarta) analyzes positive legal views, concepts, and the essential considerations of judges in deciding hadhanah cases, determining case No.2545/Pdt.G/2010/PA .JT. This paper refers more to determining hadhanah in the East Jakarta Religious Court.

From the several research titles above, it is clear that the discussion differs from the research the author will discuss.¹² This research focuses on a case study with an analysis of the jurisprudence of the panel of judges' decisions regarding Hadhanah rights that have not yet been *mummy is* to biological fathers according to Article 105 and Article 10 UU.NO .23 of 2002 concerning child protection with case number 1242/Pdt.G/2017/PA.Sbt. A divorce lawsuit can invite various problems; in addition to the divorce lawsuit, other problems arise as a result of the granting of the divorce certificate, such as the problem of dividing joint assets child. The problem will become more complicated if each of the two parents does not want to budge. This is because there are principal considerations in the view of both parties.¹³

According to the Islamic Law Compilation (KHI) Article 105 letter a, "Care for a child who is not yet mumayyiz or not yet 12 years old is the mother's right ".¹⁴ Moreover, according to Law No. 23 of 2018, article 10 states, "Every child has the right to express and be heard, receive, seek, and provide information according to the level of intelligence and age for the sake of self-development following the values of decency and decency."¹⁵ However, the Panel of Judges at the Stabat Religious Court has ruled on *hadhanah rights* which should fall on the wife but give *hadhanah rights* to the husbands; this is very contrary to the Compilation of Islamic Law. refuted by Law Number 23 of 2002 concerning Child Protection with the reality that occurred in the Stabat Religious Court, the authors are interested in raising the research title regarding "Hadhanah Rights of Children Who Have Not Mumayyiz to Biological Fathers According to KHI and UU. No. 23 of 2002 concerning Child protection.

Literature Review

What is meant by child rearing is nurturing and educating children until they are adults or able to stand on their own.¹⁶ The maintenance of children is taken from the meaning of the Arabic term "*hadhanah*" or can also be read "*badhanah*," which comes from the word "*al badnu*," which means: ¹⁷side, side, direction, stomach, ribs, limbs from the armpits to the hips.¹⁸ Moreover, put something on the ribs and lap because when breastfeeding her child, the mother puts it on her lap or the side of her ribs, which seems to protect and care for her child. ¹⁹In terms of terminology, the meaning is taking care of small children, weak people, crazy people who have grown up and not yet *mumayyiz* from what can harm him, taking care of his education, taking care of his benefit in the form of cleanliness, feeding and trying whatever makes him happy.²⁰

Sayyid Sabiq defines *hadhanah* as taking care of children who are still small boys and girls and are already big but not yet *mumayyiz* without orders from them. Providing something that hurts and damages them educates their body, mind, and spirit so that they can stand alone in facing life and carry responsibility.²¹ According to Wahbah Zuhaili, that educates and nurtures people who cannot protect themselves from things that can hurt them because they are incompetent,²² like small children and crazy people. ²³A more straightforward definition is defined in the Islamic Encyclopedia, namely caring for small or abnormal children who have not or cannot live independently, namely by meeting their needs, protecting them from harmful things, providing physical and psychological

¹² Eli Martati and Firdaus Firdaus, "Hak Hadhanah Dalam Putusan Pengadilan Agama," *JURIS (Jurnal Ilmiah Syariah)* 17, no. 2 (December 31, 2018): 237, <https://doi.org/10.31958/juris.v17i2.1195>.

¹³ Vevi Alfi Maghfiroh, "Diskursus Radha'ah Dan Hadhanah Berperspektif Gender," *Equalita: Jurnal Studi Gender Dan Anak* 2, no. 2 (December 7, 2020): 262, <https://doi.org/10.24235/equalita.v2i2.7426>.

¹⁴ Abdurrahman, *Compilation of Islamic Law in Indonesia cet.IV*, (Jakarta: Akademika Presindo, 2015), p.138

¹⁵ Law Number 23 of 2002

¹⁶ Muhammad Kurtubi, "Child Playing Online Game in the Sadd Al-Zari'ah's Perspective," *NUSANTARA: Journal Of Law Studies* 1, no. 1 (December 14, 2022): 17.

¹⁷ Ahmad Warson Munawwir, *Complete Dictionary of al-Munawwir Arabic Indonesia*, (Surabaya: Progressive Library, 1997), p 274

¹⁸ Eka Aprilia Wulandari et al., "Hadhanah Anak Pada Ayahnya Dalam Putusan Nomor 2386/PDT.G/2018/PA.SRG," *Ma'mal: Jurnal Laboratorium Syariah Dan Hukum* 2, no. 4 (2021): 22, <https://doi.org/10.15642/mal.v2i4.94>.

¹⁹ Jamaan Nur, *Fiqh Munakahat*, (Semarang: Dina Utama, 1993), p.119

²⁰ Kamal Muchtar, *Principles of Islamic Law Concerning Marriage*, Cet. 3rd (Jakarta: Crescent Star, 1993), p.137.

²¹ Al-Sayyid Sabiq, *Al-Fiqh Sunnah Terjemah*, p.288

²² Wahyu Ziaulhaq, "Buying and Selling Used Clothing: An Islamic Economy Law Perspective," *Journal of Nusantara Economy* 1, no. 1 (December 10, 2022): 35.

²³ Wahbah az-Zuhaili, *Al-Fiqh al-Islami wa-Adillatahu, jus X*, (Dimasqy: Dar al-Fikr), p.7295

education, and developing their intellectual abilities so that they can carry the burden of responsibility.²⁴ *Hadhanah* differs from *Tarbiah* in *hadhanah*; it contains caring for physical and spiritual children. Besides the notion of education for children, educators may consist of the child's family and may also not be from the child's family, and it is a professional job. *The child's family carries out Hadhanah*, except if the child does not have a family, then this can be done by every mother of other relatives.

Methods

This type of research is qualitative, which produces descriptive data from observations. This research is in the form of an analysis of cases relating to the Decision on *hadhanah rights* to biological fathers for children who have not mumayyiz according to KHI and Law Number 23 of 2002, which occurred in the Religious Courts stab. Then the primary and secondary data were analyzed using descriptive methods, namely explaining and explaining the aspects related to the research problem in depth. The method used to collect data in this study is as follows: first, Case Decision Number 1242/Pdt.G/2017/PA.Stb, namely the data collection technique, copying the Decision, and then the author's analysis. Second, in-depth interviews (indent interviews), namely data collection techniques to obtain information by asking questions and asking for explanations from the Judge who decided the case. Third, documentation, to understand theories and concepts related to the Judge's *ijtihad* method through various books and literature that are seen as representative and related to the research object.

Result and Discussion

Hadhanah According to Islamic Law

The Al-Qur'an stipulates concepts and rules regarding child protection and demands for behavior throughout his life. There are several general rules and basic principles as guidelines in which Islam teaches that maintaining child survival and development is a must.²⁵ Underestimating or relaxing the implementation of these principles - these basic principles are considered a grave sin; these basic principles are found in al-QS Annisa (4): 9, which means: And let the fear of Allah be those who, if they leave behind them weak children, who they are worried about their (well-being). Therefore they should fear Allah and let them say the right words. (QS. Annisa: 9) What is meant by weak children or weak humans in verse includes mental and spiritual weakness. Therefore the Qur'an At-Tahrim (66): 6 means: O you who believe, protect yourselves and your families from the fires of hell whose fuel is humans and stones; guardians of angels who are rough, harsh, and obey Allah in what He commands them and always do what they are ordered to do.

According to Islamic teachings, the concept of child rearing contains a mission of "rescue," namely saving the child's life in this world and hereafter. Therefore, from a moral perspective, the mission of *hadhanah* is for the benefit of the child being cared for. Therefore caring for and caring for children is an obligation for parents because if children are not cared for, and educated, then children will be hurt;²⁶ if parents neglect children's education, then they will pray, and when they are small, children still need the care of their parents. ²⁷The fuqaha' agree that the right to care for the child (*hadhanah*) rests with the mother as long as she is unmarried. ²⁸Meanwhile, the priests of the madhhab have different opinions regarding divorced husbands and wives, even if they have one or more children. In the opinion of the Hanafi priest in one of his narrations: The mother has more rights over her child until the child grows up and can stand alone in fulfilling daily needs such as eating, drinking, clothing, stepping on, and performing ablution. After that, the father has more rights to care for her. For girls, the mother has more right to look after her until she is an adult and is not given a choice.

Imam Maliki said: Mothers have more right to look after a daughter until she marries a man and has intercourse with him. For boys it is also like that, in the opinion of the famous Maliki, until the child grows up. Imam Syafi'I said: Mother has more right to look after her, both boys and girls until he is seven years old. If the child has reached the age of seven years, the child is given the right to vote to follow his father or mother. Imam Hambali, in this case, has two traditions:²⁹ the mother has more rights over the son until he is seven years old. After that, he may

²⁴ Robi Musthofa Al Ghazali, "Boarding House Rent Refunds During Covid 19 Based On Sharia Economic Law," *Journal of Nusantara Economy* 1, no. 1 (December 10, 2022): 43.

²⁵ Muhamad Imam Muddin, "Inheritance System Mayorat on the Komering Tribe in Urf Perspective," *Nusantara: Journal Of Law Studies* 1, no. 1 (December 16, 2022): 28.

²⁶ Abdul Hakim, "Maxim Law Fiqh And Its Application During The Covid-19 Pandemic," *Nusantara: Journal Of Law Studies* 1, no. 1 (December 14, 2022): 5.

²⁷ Muhammad Jawad Mughniyah, *Fiqh of five Schools*, p.612

²⁸ Muhammad bin Abdurrahman, *Jurisprudence of the Four Schools*, (Bandung:Pustaka Setia,2004)h.416

²⁹ Siti Afifah Nurullah, "Practice Services Between Sale and Purchase of Coffee Syari'ah Economic Perspective," *Journal of Nusantara Economy* 1, no. 1 (December 10, 2022): 17.

join his father or remain with his mother. As for a daughter, after she is seven years old, she stays with his mother and should not be given a choice. Secondly, according to Imam Hanafi, the mother has more rights over her child until the child grows up and is independent in fulfilling daily needs such as eating, drinking, clothing, stepping, and performing ablution has the right to care for him until he reaches maturity and is not given a choice.³⁰

The Concept of *Hadhanah* According to Compilation of Islamic Law

The Compilation of Islamic Law (KHI) in various respects refers to the applicable laws and regulations. In addition, it also refers to the opinion of the *fuqaha*, which is very well-known among scholars and the Indonesian Islamic community. This shows that the Compilation of Islamic Law (KHI) is the implementation of laws and regulations, especially those relating to the applicability of Islamic Law (for Muslims) in the field of marriage as stipulated in the provisions of article 2 paragraph (1) of Law Number 1 of 1974.³¹ The Compilation of Islamic Law also accommodates various views of the *fuqaha*, originating from the teachings part of Islam has become a living law in society. These two foundations are used as a juridical and functional basis in preparing KHI. ³²Therefore, KHI refers to two different legal orders and bears the burden of integrating them.³³ In the Compilation of Islamic Law (KHI), there are several articles on child rearing, and for more details, the preparation of the *hadhanah* issue is regulated and put forward in articles 105 and 156 as follows: ³⁴For more details can be seen in the table below:

Tabel 1. Preparation of The *Hadhanah*

No	Article 105 (Consequences of Divorce)	Article 156 (Due to the breakup of marriage due to divorce)
1	The maintenance of a child who is not yet <i>mumayyiz</i> or who is not yet 12 years old is the right of the mother;	Children who have not yet been <i>mumayyiz</i> are entitled to <i>hadhanah</i> from their mothers, unless the mother has passed away, then their position is replaced by: Women in a straight line up from mother, father, Women in a straight line up from father, Sisters of children who concerned, Women who are blood relatives according to the side line from the mother, Women who are blood relatives follow the side line from the father
2	The maintenance of a child who is already <i>mumayyiz</i> is left to the child to choose between his father or mother as the holder of his maintenance rights;	Children who are already <i>mumayyiz</i> have the right to choose to get <i>hadhanah</i> from their father and mother.
3	His father bears maintenance costs;	<i>hadhanah</i> holder cannot guarantee the physical and spiritual safety of the child, even though the <i>hadhanah</i> maintenance costs have been sufficient, then at the request of the relative concerned, the Religious Courts can transfer the <i>hadhanah rights</i> to other relatives who also have <i>hadhanah rights</i> .
4		The father bears all costs of <i>hadhanah</i> and child support according to his ability, at least until the child is an adult and can take care of himself (21 years). ³⁵

The concept of *Hadhanah* Based on Law No. 23 of 2002 concerning Child Protection

In article 1 of Law no. 23 of 2002 concerning child protection stipulates that a child is someone who is not yet 18 (eight) years old, including children who are still in the womb. ³⁶An important thing that needs to be considered

³⁰Muhammad bin Abdurrah, *Jurisprudence of the Four Schools*, p.417

³¹ Dwi Astuti Wahyu Nurhayati and Novi Tri Oktavia, "Relevance Of Al Mawardi's Reflection In The Development Of Islamic Economic Activities," *Journal of Nusantara Economy* 1, no. 1 (December 10, 2022): 50.

³²Ms. Hasan Bisti, *Islamic Court in Indonesian Society*, cet.1, (Bandung: Rosdakarya, 1997), p.29.

³³ Yusi Tasika and Giyarsi Giyarsi, "The Effectiveness of the Discussion Method to Increase Students' Understanding and Activeness in Islamic Religious Education Subjects," *Nusantara Education* 1, no. 1 (December 15, 2022): 85.

³⁴Abdurrahman, *Compilation of Islamic Law in Indonesia*, p 41.

³⁵Abdurrahman, *Compilation of Islamic Law in Indonesia*, (Jakarta; Akademika Pressindo, 2015), p. .151

³⁶Sulistiani lis siska, *Children's Legal Position*, (Bandung: PT. Refika Aditama, 2015), p. 15

in laws and regulations relating to children is that the consequences of their application are linked to various factors such as economic conditions, social politics, and community culture. Various laws and regulations have different provisions governing children, which are motivated by various factors. This is the basic principle for issuing the relevant laws and regulations relating to the condition and protection of children.³⁷

Child protection is the effort and activity of all levels of society in various positions and roles who are well aware of the importance of children for the homeland and the nation in the future.³⁸ If they have matured in physical as well as mental and social growth, then it is time to replace the previous generation. Everyone seeks child protection, including parents, family, community, government, and the State. Article 20 of Law Number 23 of 2002 stipulates: "The state, government, community, family, and parents are obliged and responsible for the implementation of child protection"³⁹ In the case of parents who are divorced, or their whereabouts are unknown or due to some reason, the obligations and responsibilities referred to in paragraph (1) cannot be carried out, they can be transferred to the family, which can carry out following the provisions of the applicable laws and regulations.

The rights of children regulated in Law Number 23 of 2002 concerning child protection are:

1. The right to be able to live, grow, develop, and participate fairly following human dignity and receive protection from violence and discrimination (article 4)
2. The right to a name as identity and citizenship status (article 5)
3. The right to worship according to their religion, think and express according to their level of intelligence and age, under parental guidance (6)
4. They have the right to know their parents and be raised and cared for by their own parents. If for some reason, the parents cannot guarantee the child's growth and development, or the child is in a neglected state, then the child has the right to be cared for or adopted as a foster child or adopted child by another person following applicable laws and regulations (article 7).
5. The right to obtain health services and social security following physical, mental, spiritual, and social needs (article 8).
6. The right to receive education and teaching in the context of personal development and the level of intelligence according to their interests and talents, especially for children with disabilities, are also entitled to special education (article 9).
7. The right to express and be heard, receive, seek and provide information according to the level of intelligence and age for self-development following the values of decency and decency (Article 10).

Research on Decision Results on Case No. 1242 /Pdt.G/2017/PA.Stb.About Hadhanah Rights .

This divorce lawsuit case was registered with the Stabat Religious Court class IB clerkship on October 27, 2017, in the case of registration Number: 1242/Pdt.G/2017/PA.Stb.⁴⁰ The parties to the lawsuit are the Plaintiff, 33 years old, with high school education, housewife work, residential address in Langkat district, in this case giving attorney to Zulchairi Pahlawan SH, Sunardi SH,MH, Junjung.N.Tampubolon, SH, Legal consultant advocate at the law office "Pahlawan & partners" having its address at Jalan Brig.Jend.Zein Hamid Komplek Katamso Indah Blok B No.6 Medan, based on an extraordinary power of attorney dated October 18, 2017, in the future referred to as Plaintiff Meanwhile, Siswandi, 36 Years Old, Islamic Religion, Senior High School Education, Entrepreneurial Work, Residence in Langkat Regency, in the future referred to as the defendant.

Whereas the Plaintiff and the Defendant are legally husband and wife who were married according to the Islamic religion on June 23, 2002 as quoted from the marriage certificate Number: xxx/47VI/2002 dated June 24, 2002 which was issued by the Office of Religious Affairs in the Completed sub-district, Langkat district, Sumatra Province North. That after the Plaintiff and the defendant got married, the Plaintiff and the defendant lived together in one household at the home of the Plaintiff's parents, and the Plaintiff and the defendant had gotten along like husband and wife and were blessed with 2 (two) children named: Kelvin Reynaldi,⁴¹ Male 12-year-old boy and Aira Zaskya Ramadhana, a seven-year-old girl. The Plaintiff's reason for filing a divorce suit against the defendant in the aqua case is that in the married life between the Plaintiff and the defendant, there are continuous fights and disputes caused by the defendant's actions, who often bring up gifts to the Plaintiff's family. At first, the

³⁷ Gultom maidin, *Legal Protection of Children*. (Bandung: PT Refika Aditama, 2014), p. 39

³⁸ Khairudin, "The Practice of Buying and Selling Black Market Goods on The Perspective of Islamic Economic Law," *NUSANTARA: Journal Of Law Studies* 1, no. 1 (2022): 79.

³⁹ Gultom maidin, *Legal Protection of Children*. (Bandung: PT Refika Aditama, 2014), p. 46

⁴⁰ Decision of the Religious Court of Class I Stabat Case No. 1242/Pdt.G/2017/PA.Stbt, p.1

⁴¹ Decision of the Religious Court of Class I Stabat Case No. 1242/Pdt.G/2017/PA.Stbt, p. 2

households of the Plaintiff and the defendant ran in harmony and harmony, and even though there was a dispute, the Plaintiff and the defendant resolved it ⁴².

Then around 2005, the Plaintiff and the defendant built a residential building, which in the process of constructing the residential house, the costs were assisted by the Plaintiff's parents, and the Plaintiff's parents gave the parcel of land for the plot.⁴³ After the building was completed, the Plaintiff and the defendant moved from the home of the Plaintiff's parents, and the Plaintiff and the defendant live together in one household. The reason for the move of the Plaintiff and the defendant to the house built by the Plaintiff and the defendant was to avoid the interference of the Plaintiff's parents in their household affairs and also to avoid the Plaintiff's embarrassment to the Plaintiff's parents because the Plaintiff and the defendant often quarreled. However, after the Plaintiff and the defendant lived together, the attitude and actions of the defendant towards the Plaintiff did not change, where the defendant still often insulted and brought up his gifts to the Plaintiff's family and even every defendant In quarrels between the Plaintiff and the defendant, the defendant often beats the Plaintiff, and besides that, the defendant also often does not give birth to the Plaintiff and the children of the Plaintiff and the defendant.

In the lawsuit filed by the Plaintiff, the Plaintiff asked the Panel of Judges of the Class 1 B Stabat Religious Court to ⁴⁴:

- 1) Granted the Plaintiff's claim in its entirety.
- 2) Declare the marriage between the Plaintiff and the defendant was dissolved due to divorce.
- 3) Declare the Plaintiff as the Hadhanah Rights Holder for the Plaintiff's 2 (two) children named Kelvin Reynaldi, a 12-year-old boy, and Aira Zaskya Ramadhana, a 7-year-old girl.
- 4) Punish the defendant to pay for the costs of necessities and education for the 2 (two) children of the Plaintiff and the Defendant named Kelvin Reynaldi, 12-year-old male, and Aira Zaskya Ramadhana, 7-year-old female, in the amount of Rp.5000.000,- five million rupiahs) every month must be paid by the defendant to the Plaintiff no later than the 5th of each month until the 2 (both) children of the Plaintiff and the defendant are adults.
- 5) They lawed the defendant to pay the Plaintiff a past income of IDR 32,000,000 (thirty-two million) in one lump sum and cash.
- 6) They are lawing the defendant to pay the costs incurred in this case.

After a court hearing, the Panel of Judges of the Stabat Religious Court class IB decided on case No.1242/Pdt.G/2017/PA.Stb, as stated in the following order ⁴⁵:

- 1) Dropped the defendant's one ba'in sughro divorce against the Plaintiff.
- 2) Stipulates that 2 (two) children of Plaintiff and the Defendant, each named Kelvin Reynaldi, a 12-year-old male, and Aira Zaskya Ramadhana, a seven-year-old female, are under the hadhanah of the defendant with the defendant's obligation to provide access to the Plaintiff to meet the children -his son;
- 3) Rejecting the Plaintiff's claim for the rest;
- 4) Charge the Plaintiff to pay all costs incurred in this case which until now has been calculated in the amount of IDR 531,000.00 (five hundred thirty-one thousand rupiahs).

The Panel of Judges at the Stabat Class IB Religious Court passed a decision on case No.1242/Pdt.G/2017/PA.Stb, as stated in the following order ⁴⁶:

- 1) Granted the Plaintiff's lawsuit in part
- 2) Dropped the defendant's one ba'in sughro divorce against the Plaintiff.
- 3) Stipulates that 2 (two) children of Plaintiff and the Defendant, each named Kelvin Reynaldi, 12-year-old male, and Aira Zaskya Ramadhana, 7-year-old female, are under the hadhanah of the defendant with the defendant's obligation to provide access to Plaintiff to meet the children -his son;⁴⁷
- 4) Rejecting the Plaintiff's claim for the rest;
Charge the Plaintiff to pay all costs incurred in this case which until now has been calculated in the amount of IDR 531,000.00 (five hundred thirty-one thousand rupiahs).

⁴²See the Ruling of the Class I Religious Court in Case No. 1242/Pdt.G/2017/PA.Stbt, p.2

⁴³ Levi Winanda Putri and Anis Hidayatul Imtihanah, "Hak Hadhanah Anak Yang Belum Mumayiz Kepada Ayah Kandung Perspektif Hukum Islam:," *Jurnal Antologi Hukum* 1, no. 2 (December 31, 2021): 137, <https://doi.org/10.21154/antologihukum.v1i2.305>.

⁴⁴See the Ruling of the Class I Religious Court in Case No. 1242/Pdt.G/2017/PA.Stbt, p.5

⁴⁵See the Ruling of the Class I Religious Court in Case No. 1242/Pdt.G/2017/PA.Stbt, p 26

⁴⁶See the Ruling of the Class I Religious Court in Case No. 1242/Pdt.G/2017/PA.Stbt, p 26

⁴⁷ Supardi Mursalin, "Hak Hadhanah Setelah Perceraian (Pertimbangan Hak Asuh Bagi Ayah Atau Ibu)," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi, Dan Keagamaan* 2, no. 2 (February 5, 2020): 67, <https://doi.org/10.29300/mzn.v2i2.76>.

Analysis of the Judgment of Religious Court Judges Stabat Class IB Granting Hadhanah Rights for children who are not yet Mumayyiz to biological fathers in Decisions on Case Number: 1242/Pdt.G/2017/PA.Stb

The procedural Law that applies to courts within the religious courts is regulated in Chapter IV of Law Number 7 of 1989, starting from articles 54 to 105. According to the provisions of article 54, "The procedural Law that applies to courts within the religious courts is the procedural Law which Civil Code applies to courts within the general court environment, except for those specifically regulated in this Law. These ⁴⁸provisions indicate that there is a civil procedural law that generally applies to courts within the General Courts and Religious Courts, and there is also a procedural law that only applies to courts within the Religious Courts. The Civil Procedure Code is a series of regulations containing how people must act before the court and how the Courts must act with each other to carry out civil law regulations—procedural Law, which is regulated separately in Law Number 7 of 1989. The applied Law is positive Islamic Law, a subsystem of Indonesia's positive law system. Then the considerations of the Decision will be related to other subsystems of the Indonesian positive law system, and the reasoning will use concepts, notions, constructions, and others from Indonesian Law in general. Several sources of civil procedural Law apply to courts within the general court environment which then apply to courts within the religious court environment. The sources of civil procedural Law include :

- a. Civil Code (Burgerlijk Wetboek Voor Indonesie), abbreviated as BW.
- b. Civil Procedure Regulations (Reglemen op de Rechtsvordering), which during the Dutch colonial period applied to Raad Van Justitie.
- c. The updated Indonesian regulation (Het herziene Indonesich Reglement) is known by the abbreviations HIR and RIB.
- d. Legal Procedure Regulations for Regions Outside Java and Madura (Reglement tot Regeling van bet Recswezen in de Gewesten Buiten Java en Madura), known as the abbreviation Rbg.
- e. Law Number 2 of 1986 concerning General Courts.⁴⁹

In the deliberation of the Panel of Judges of the Stabat Religious Court on Tuesday, March 6, 2018, *Miladiyah*, coinciding with the 18th Jumadil Akhir 1439 *Hijriyah*, by Dra. Emidayati, as the Chief Judge of the Assembly, Dra. Siti Masitah, SH, and Rinalis MH, respectively, as Member Judges, pronounced the Decision on Tuesday, March 20, 2018, to coincide with 3 Rajab 1439 Hijriyah in a hearing open to the public by Dra. Emidayati, as the Chief Judge of the Assembly, Dra. Siti Masitah, SH and Dra . Rinalis MH, each as a Member Judge, assisted by Akma Qamariah Lubis, S.Ag., SH, MA as Alternate Registrar in the presence of attorneys for the Plaintiff and Defendant. As member Judges, the following considerations were given: Before considering further, the Panel of Judges first considered that hadhanah with guardianship are two different issues in terms of definition and legal regulations. What is meant by child maintenance or hadhanah as stipulated in Article 1 letter (g) of Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law is the activity of raising, nurturing, and educating children until they are adults or able to stand on their own.

Moreover, the rule of Law is contained in Chapter XIV of Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law from article 98 to article 106, while what is meant by guardianship is as stipulated in article 1 letter (h) of Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law is the authority given to a person to carry out a legal action as a representative for the benefit of and on behalf of a child who has no parents or both parents or a person who is still alive,⁵⁰ is incapable of carrying out legal action. Moreover, the rule of Law is contained in Chapter XV of Presidential Instruction No. 1 of 1991 concerning Complaints of Islamic Law from article 107 to article 112.

Thus the Panel of Judges thinks that the purpose of the Plaintiff's lawsuit is about child care or hadhanah, not about child guardianship because until now, neither the Plaintiff nor the defendant as parents has had a Court Decision stipulating that the Plaintiff or Defendant have had their powers revoked as parents (stated not competent to perform a legal act). As contained in Article 47 paragraph (1) of Law Number 1 of 1974 concerning marriage, "*Children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents as long*

⁴⁸Law Number 7 of 1989 concerning Religious Courts article 54

⁴⁹Muhammad Hasan, *Compilation of Islamic Law and Religious Courts in the National Legal System*, (Ciputat: PT. Logos Discourse of Science, 1999), p.125

⁵⁰ Aldi Jaya Mandala Putra, "Tinjauan Yuridis Terhadap Pemeliharaan Anak Dibawah Umur (Hak Hadhanah) Akibat Suatu Perceraian Berdasarkan Kompilasi Hukum Islam," *Journal of Law (Jurnal Ilmu Hukum)* 5, no. 2 (August 5, 2020): 6, <http://ejurnal.untag-smd.ac.id/index.php/DD/article/view/4795>.

as their powers are not revoked." Whereas to the Plaintiff's lawsuit, the defendant has provided an answer that the defendant objects if the defendant's children with the Plaintiff are determined to be in the custody or possession of the Plaintiff, with the reasons as contained in his answer, which can be concluded as follows:⁵¹

Based on the considerations mentioned above, the panel of judges concluded that the Plaintiff's lawsuit is proven and has legal grounds and fulfills the reasons for divorce as the will of Article 39 paragraph (2) of Law No. 1 of 1974⁵² jo. Article 19 letter (f) Government Regulation Number 9 of 1975 jo. Article 116 letter (f) Compilation of Islamic Law, thus the Panel of Judges thinks that the Plaintiff's claim should be granted by imposing a divorce of one bain *sugra* of the defendant against the Plaintiff. That the Plaintiff in his lawsuit, besides demanding a divorce from the defendant. The Plaintiff also demands the maintenance of the Plaintiff's and the defendant's children named Kelvin Reynaldi, a 12-year-old male, and Aira Zaskya Ramadhana, a 7-year-old female, so that the Plaintiff is determined as the hadhanah holder until the child reaches adulthood. Then the Panel of Judges will consider it as follows;

Whereas following the provisions in Article 1 paragraph 12 and Article 13 of Law Number 23 of 2002 concerning Child Protection, it is emphasized that children's rights are part of human rights that must be guaranteed, protected, and fulfilled by parents and linked to Law Number 23 2004 concerning the Elimination of Domestic Violence⁵³, it turned out that in the trial the defendant objected to the child being in the care of the Plaintiff as the biological mother of the two children because the Plaintiff is currently in Malaysia, while the mother left the two children of the Plaintiff and the defendant have lived together with the defendant/biological father and the two children have been comfortable and in good condition living with the defendant as their biological father if this is connected with the provisions of Article 105 letter (a) of the Compilation of Islamic Law, in the event of a divorce. The maintenance of children who are not yet mumayyiz or not yet 12 years old is the right of the mother, but in this case the Panel of Judges is of the opinion that because so far the two children have been living with the defendant and also a child named Kelvin Reynaldi, a 12 year old male who was presented at the trial stated chooses to join the defendant in the event of a divorce between the father and mother, this is in accordance with the provisions of Article 105 letter (b), so if the custody of the two children is assigned to the Plaintiff, then the Plaintiff's mother will be the caretaker, not the direct Plaintiff because currently the Plaintiff is in Malaysia, therefore, in the interests of the two children of the Plaintiff and the Defendant, custody/Hadhanah for the two children of the Plaintiff and the defendant after the divorce can be given to the biological father as long as the granting of such custody has a positive impact on the growth and development of the child by taking into account the interests/existence/ a's wish son during the divorce process, thus the Panel of Judges was of the opinion that they rejected the Plaintiff's lawsuit by establishing the defendant as the holder of hadhanah rights to the Plaintiff and Defendant's children named Kelvin Reynaldi, 12 year old boy and Aira Zaskya Ramadhana, 7 year old girl .⁵⁴The court's Decision is as follows:

1. He was determined that the children named Kelvin Reynaldi, male, aged 12 years, and Aira Zaskya Ramadhana, female, aged seven years, were under the hadhanah of the defendant with the defendant's obligation to provide access to the Plaintiff to meet his children.
2. Granted the Plaintiff's claim in part;
3. Dropped one bain *sugra* divorce of the Defendant (Siswandi) against the Plaintiff (Umi kalsum)
4. He rejected the Plaintiff's claim for the rest.
5. Burdening the Plaintiff to pay all costs incurred in this case is calculated in Rp—531,000.00 (five hundred thirty-one thousand rupiahs).

Thus this Decision was handed down at the Religious Courts Stabat Class IB in the Deliberation Meeting of the Panel of Judges on Tuesday, March 6, 2018, *Miladiyah*, coinciding with 18 Jumadil Akhir 1439 *Hijriyah*, by Dra. Emidayati, as the Chief Judge of the Assembly, Dra. Siti Masitah, SH, and Rinalis MH, respectively, as Member Judges, pronounced the Decision on Tuesday, March 20, 2018, to coincide with 3 Rajab 1439 *Hijriyah* in a hearing open to the public by Dra. Emidayati, as the Chief Judge of the Assembly, Dra. Siti Masitah, SH, and Rinalis MH, respectively, as Member Judges, assisted by Akma Qamariah Lubis, S.Ag., SH, MA, as Alternate Registrar in the presence of attorneys for the Plaintiff and Defendant.

⁵¹ Arifin Abdullah and Siti Nursyafiqah Binti Ismail, "Faktor-Faktor Gugurnya Hak Hadhanah Kepada Ibu (Analisis Enakmen Keluarga Islam Pulau Pinang No. 5 Tahun 2004 Ditinjau Menurut Kajian Fiqh)," *El-Usrah: Jurnal Hukum Keluarga* 1, no. 1 (June 19, 2018): 79, <https://doi.org/10.22373/ujhk.v1i1.5565>.

⁵²Law No. 1 of 1974

⁵³Law Number 23 of 2014

⁵⁴Decision Directory. Supreme Court.go.id accessed on 28 December 2018 at 10.00 WIB

Conclusion

Based on the research results, it can be concluded as follows: first, Judge's considerations in deciding case Number: 1242/Pdt.G/2017/PA.Stb. Those who give the hadhanah rights of children who are not yet mumayyiz to biological fathers after a divorce are indeed not following the provisions of the Compilation of Islamic Law articles 156 and 105 concerning the hadhanah rights of children who are not yet mumayyiz or not yet 12 years old are the rights of the mother, as well as with the hadith of the Prophet that the mother has more rights for children who are not yet mumayyiz and for children who are already mumayyiz have the right to choose between mother and father. However, the Decision is following the Qur'an letter an-Nisa verse 9, the provisions of article 41 (a) Law Number 1 of 1974 concerning marriage, Law Number 23 of 2002 concerning child protection, where in carrying out the obligation to care for children must be based on the interests and welfare of children, and also following the text in the book of Fiqh Sunnah volume III which explains that childcare should not be left to people who always neglect household affairs because they often leave the house. Second, in granting custody of minors, the Judge must have other considerations besides the applicable laws. These considerations can be through the facts revealed in court. Third, the basis and considerations of the Panel of Judges case Number: 1242/Pdt.G/2017/PA.Stb in granting custody of underage children to husbands, apart from using the Law as the basis for making the Decision, the Judge has other considerations through the facts revealed in court. The Judge's consideration in deciding to give custody of the child to the husband is that the husband can prove the lousy character/character of the wife so that it is not appropriate to care for the child. In addition, the Judge applies the principle of *ius contra legem*, which allows the Judge to give custody of the child to the father even though it has been stipulated in Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law that the maintenance of the child is the mother's right. The Judge took *contra legem* action because it was considered that the wife could not set an excellent example for her child, and for the sake of the child's future, custody of the child was given to the husband as the biological father.

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