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Analysis of Judges' Considerations Regarding the Transfer of Child Custody Rights from Mother to Father Based on Law Number 1 of 1974 Concerning Marriage and the Compilation of Islamic Law

(Case Study of Decision Number 227/Pdt.G/2024/Pa. Prob)

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ABSTRACT

This research is motivated by the discrepancy between the normative application of Article 105 of the Compilation of Islamic Law, which prioritizes the mother as the party holding child custody, and prioritizing the principle of the best interests of the child in judicial practice. In reality, factual conditions are not always in line with these provisions, so judges are required to use judicial discretion contextually. This is reflected in Decision Number 227/Pdt.G/2024/PA.Prob, which transfers child custody from the mother to the father. The problems analyzed include the legal rules on child custody based on statutory provisions as well as the judge's considerations in Decision Number 227/Pdt.G/2024/PA.Prob and their alignment with the principle of the best interest of the child. The research methodology used is normative juridical with a statutory approach and a case approach. This study provides conclusions that show that judges do not apply the provisions of Article 105 of the Compilation of Islamic Law rigidly, but rather use judicial discretion based on trial facts. The transfer of custody to the father was based on evidence of the mother's negligence in fulfilling her parenting duties, failure to meet the child's basic needs, and the father's greater ability to provide care and protection. However, this study found weaknesses in the psychological evidence aspect because it did not involve independent experts such as child psychologists.

Keywords: child custody, divorce, best interests of the child.

INTRODUCTION

Divorce cases in Indonesia not only result in the termination of a marriage but also give rise to complex legal issues, one of which concerns child custody (hadhanah). In judicial practice, child custody disputes are often the primary issue debated by the parties because they directly relate to the best interests of the child, which must be a primary consideration in every judge's decision.[1]

[1]James M. Turner, Child Custody and the Best Interests of the Child, (New York: Oxford University Press, 2019), p. 45.

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Normatively, the rules regarding child custody in Indonesia are outlined in Law No. 1 of 1974 concerning Marriage, as amended, and Law No. 35 of 2014 concerning Child Protection. Both regulations emphasize that all decisions regarding children must prioritize the child's best interests, including determining custody after a divorce.[2]

From the perspective of Islamic law, which underpins the authority of Religious Courts in Indonesia, provisions regarding child custody are regulated in the Compilation of Islamic Law (KHI), specifically Article 105, which in principle stipulates that children under 12 years of age are under the care of their mothers, while children who are mature can choose to be cared for by their fathers or mothers. However, this provision is not absolute, as judges retain the authority to make judgments based on the facts of the trial to ensure the best interests of the children.[3]

In judicial practice, the transfer of child custody to the father can occur if it is proven that the mother no longer meets the eligibility requirements for custody or if there are circumstances that do not support the child's best interests. The judge's considerations are not limited to normative provisions but also based on empirical facts revealed in court, such as the child's psychological condition, environmental stability, morality, and the parenting abilities of each party.[4]

This is reflected in the case that is the object of this research. The Plaintiff filed a divorce suit electronically through the e-Court of the Probolinggo Religious Court on May 20, 2024, based on a lawsuit dated May 13, 2024. The Plaintiff and Defendant had previously been married on November 13, 2011 and were blessed with one daughter. The marriage ended with a divorce decree that had permanent legal provisions in 2020. After the divorce, the child lived with the Defendant as the biological mother. However, the Plaintiff filed a child custody application on the grounds that the Defendant was deemed negligent in carrying out his duties as a parent, providing insufficient attention and affection, and the care conditions were deemed unsupportive of the child's development. Thus, the Plaintiff requested that child custody be granted to him as the biological father.[5]

However, as time goes by, there are still dynamics and variations in judicial decisions in child custody cases, including those related to the transfer of custody from the mother to the father. This indicates considerable judicial discretion in interpreting the principle of the best interest of the child, potentially leading to differences in legal considerations in similar cases.[6]

Based on this, the issues examined in this study include the legal provisions on child custody based on the provisions of the Law as well as the judge's considerations in Decision Number 227/Pdt.G/2024/PA.Prob and its alignment with the principle of the best interest

[2]Law Number 1 of 1974 concerning Marriage; Law Number 35 of 2014 concerning Child Protection.
[3]Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, Article 105; see also M. Yahya Harahap, National Marriage Law, (Jakarta: Sinar Grafika, 2016), p. 220.
[4]Satria Effendi M. Zein, Problems of Contemporary Islamic Family Law, (Jakarta: Kencana, 2018), p. 145.
[5]Decision Number 227/Pdt.G/2024/PA. Prob.
[6]R. Subekti, Civil Procedure Law, (Jakarta: Intermasa, 2014), p. 98.

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of the child. This study is expected to contribute academically to the process of developing IPR in Indonesia, especially regarding the criteria and limitations of judges' considerations in the transfer of child custody, so that it can serve as a reference in resolving similar cases in the future.[7]

Research can reference a number of previously conducted studies, which can serve as benchmarks or references for the study. Therefore, reviewing previous research is crucial to determine its relevance to the current study. Here are some examples of similar studies that have been conducted:

1. Research by Anastasia Tua Imelda (2024) in her thesis entitled "Legal Review of the Transfer of Custody of Minors to Fathers After Divorce (Study of Decision Number 1183/Pdt.G/2015/PA. Mdn)" confirms that the transfer of custody to the father can be legally justified as long as it is based on considerations of the child's interests and there is evidence in court that shows that care by the mother no longer meets the child's best interests. The research tends to focus on normative analysis regarding the legal basis for the transfer of custody and its legal legitimacy based on the provisions of the Marriage Law and the KHI.[8]In contrast, this research focuses on the empirical analysis of judges' considerations, particularly in examining how judges construct legal arguments (judicial reasoning) based on trial facts, so as to be able to describe a more contextual and actual legal reasoning process.
2. Furthermore, research by Siti Rahmawati (2019) in her thesis entitled "Legal Analysis of the Transfer of Child Custody Rights from Mother to Father in an Islamic Law Perspective" revealed that the transfer of child custody rights can occur if the mother is proven to be negligent, misbehaving, or not providing an environment that supports the child's growth and development. The study emphasized that the main principle used by judges is the best interest of the child.[9]However, these studies remain at a normative level and have not yet fully elaborated on how this principle is operationalized in judicial deliberations. Therefore, this study aims to fill this gap by analyzing in more depth how judges apply the principle of the best interests of the child through concrete indicators, such as neglect of parenting, meeting the child's needs, and parental emotional involvement in court proceedings.

Based on previous research, no study has been found that specifically examines Decision Number 227/Pdt.G/2024/PA Prob from the perspective of applying the principle of the best interest of the child and the limits of judges' discretion in transferring child custody from the mother to the father. Therefore, this study offers a novelty in the form of an in-depth analysis of the parameters of the judge's considerations in this decision.

[7]Ahmad Rofiq, Islamic Civil Law in Indonesia, (Jakarta: Rajawali Pers, 2017), p. 189.
[8]Anastasia Tua Imelda, Legal Review of the Transfer of Custody Rights of Minor Children to Fathers Post-Divorce (Study of Decision Number 1183/Pdt.G/2015/PA Mdn), Thesis, Medan Area University, 2024.
[9]Siti Rahmawati, Legal Analysis of the Transfer of Child Custody Rights from Mother to Father in the Perspective of Islamic Law, Thesis, (Yogyakarta: UIN Sunan Kalijaga, 2019), p. 65.

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Based on these various comparative studies, the conclusion is that the transfer of child custody from mother to father is not unlawful, but rather a form of implementing the principles of justice and child protection. Therefore, it is important to further analyze the judge's considerations in Decision Number 227/Pdt.G/2024/PA Prob to determine the extent to which these considerations are based on applicable legal principles and previous judicial practice.

RESEARCH METHODS

This research is classified as a normative juridical legal study, namely a study that places law as a norm in a positive legal system. The analysis was conducted on various legal sources, including statutory regulations, court decisions, and legal doctrine. The approach methods used include a statute approach and a case approach. The statutory approach is taken by examining regulations related to child custody (hadhanah), such as Law Number 1 of 1974 concerning Marriage and its amendments, Law Number 35 of 2014 concerning Child Protection, and the Compilation of Islamic Law (KHI), specifically those regulating hadhanah. The case approach is carried out through an in-depth analysis of Decision Number 227/Pdt.G/2024/PA Prob to identify the judge's legal considerations in determining the transfer of child custody to the father.

In this research, the legal materials used are classified into three categories: primary, secondary, and tertiary legal materials. Primary legal materials consist of relevant laws and court decisions that serve as the object of analysis. Meanwhile, secondary legal materials consist of legal literature, books, scientific journals, and previous research results related to the issue of child custody in family law. Tertiary legal materials include legal dictionaries, encyclopedias, and other relevant supporting sources. The collection of legal materials was carried out through a library research method, namely by collecting, reading, and reviewing various literature and legal documents related to the focus of the study.

DISCUSSION

Legal Regulations Concerning Child Custody Rights After Divorce from the Perspective of Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law

The legal provisions regarding child custody (hadhanah) after divorce in Decision Number 227/Pdt.G/2024/PA.Prob demonstrate the integrated application of the Marriage Law, the Basic Agrarian Law, and the Compilation of Islamic Law (KHI), all of which are oriented towards the principle of the best interest of the child. In this decision, the judge not only implemented legal norms in a textual context but also interpreted them contextually based on the facts revealed in court.

From the perspective of Law Number 1 of 1974 concerning Marriage, particularly Article 41, it is emphasized that divorce does not eliminate the obligation of both parents to care for and educate the child. This provision is neutral and does not give absolute priority to either party, either the father or the mother. In this decision, the judge used this provision

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as a basis that responsibility for the child remains attached to both parents, so the main focus is who is more capable of carrying out this responsibility optimally. The judge also referred to Article 49 of the Marriage Law, which authorizes the court to revoke or transfer parental authority over a child if the parent is proven to have neglected their obligations or behaved badly. In the a quo case, the fact that the mother no longer directly cares for the child, does not visit, and hands over care to another party (the grandmother) indicates an indication of negligence in carrying out her duties as a parent. Therefore, the transfer of custody to the father has a clear legal basis in Law Number 1 of 1974 concerning Marriage.[10]

Furthermore, from the perspective of the UUPA, the judge expressed the importance of fulfilling children's rights comprehensively. Article 4 states that all children have the right to live, grow, develop, and receive protection from violence and discrimination. Meanwhile, Article 13 prohibits all forms of neglect. In this decision, the fact that the child experienced a lack of attention and even unmet basic needs indicates the existence of conditions that contradict these provisions. Article 14 of the UUPA states that children have the right to be cared for by their parents, unless there is a legitimate reason that the separation is in the best interests of the child. The judge in this case explicitly used this provision to justify the transfer of custody from the mother to the father. This means that although in principle the child is cared for by his biological parents (in this case the mother), if these conditions do not guarantee the child's welfare, the court has the authority to make a different decision in the interests of the child.[11]

From the perspective of the KHI, specifically Article 105, it is stated that children who are not yet mumayyiz, that is, under the age of 12, are essentially under the care of their mother. In this case, the child is still 11 years old, so normatively the right of custody lies with the mother. However, the judge did not apply this provision absolutely. The judge emphasized that this provision must be understood within a broader framework, namely the principle of the best interests of the child. The judge also referred to Article 77 paragraph (3) of the KHI which emphasizes that parents are obliged to care for and maintain children, both physically, spiritually, and educationally. In relation to this case, the mother was deemed not to have carried out this obligation optimally, so that in substance she did not meet the requirements as the party holding the child's custody rights. In fact, the judge strengthened his consideration by referring to fiqh literature (Kitab Kifayatul Akhyar) which states that the mother's custody rights can be revoked if the requirements are not met, including if she no longer cares for the child or does not provide proper attention.[12]

These three legal instruments ultimately lead to the principle of the best interest of the child. In this decision, this principle is implemented concretely through several indicators.

[10]L Ayu, B Latupono, and S Fataruba, "Implementation of Child Custody Decisions and Legal Certainty Regarding Ternate Religious Court Decision Number 623/Pdt.G/2020/PA," SANISA: Journal of Law Student Creativity 4, no. 2 (2024): 84–94, https://doi.org/10.47268/sanisa.v4i2.3019.
[11]AP Dewi et al., "Custody Rights in Divorce According to the Perspective of Islamic Law and Positive Law," Tambusai Education Journal 8, no. 1 (2023), https://doi.org/10.31004/jptam.v8i1.13069.
[12]M Junaidi, "Analysis of the Loss of Child Custody Rights to the Biological Mother from the Perspective of Islamic Law and Positive Law in Indonesia," Journal Smart Law, 2025.

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First, the judge assesses the child's actual condition, including basic needs such as food, attention, and direct care. Second, the judge considers the emotional closeness and active role of the father in the child's life. Third, the judge brings the child to court for a testimony as a form of respect for the child's rights. Furthermore, the judge ensures that even though custody is assigned to the father, the mother retains the right to meet and interact with the child. This aligns with the principle of child protection, which prioritizes a balanced relationship between children and their parents.

However, from a critical analysis perspective, the judge's considerations could be further examined, particularly regarding the parameters of parental negligence. Handing over care to another family member (in this case, a grandmother) cannot always be categorized as neglect, especially in the social context of Indonesian society, which still recognizes collective parenting patterns. Therefore, a more objective measure is needed to assess whether an action is truly detrimental to the child's interests.[13]

Furthermore, the principle of the best interest of the child is the primary basis for assessing whether the transfer of custody from the mother to the father is justified. This principle requires judges to adhere not only to formal norms but also to consider various factual aspects that affect the child's welfare. These aspects include the child's psychological condition, the living environment, the parents' economic capacity, morality, and the emotional and social stability that each party can provide. In judicial practice, the transfer of custody to the father usually occurs under certain circumstances, for example, when the mother is proven to be negligent in carrying out her obligations, has behavior that could potentially harm the child's development (such as drug abuse, violence, or an inappropriate lifestyle), or is unable economically and psychologically to care for the child. Furthermore, if the child has reached a certain age and is able to express his or her opinion, the child's wishes can also play an important role in the judge's considerations.

The Supreme Court, in various decisions, has also emphasized that the best interests of the child must be prioritized, even above general normative provisions. This demonstrates a paradigm shift in Indonesian family law, where the methods used are no longer solely legalistic, but also sociological and psychological. In examining the transfer of child custody from mother to father, it is important to examine how the principle of the best interests of the child is implemented not only at the normative level but also concretely in the judge's deliberations. This principle essentially requires a multidimensional approach encompassing legal, psychological, social, and even moral aspects.[14]

Therefore, the conclusion is that the legal provisions regarding post-divorce child custody in this decision reflect a comprehensive implementation of the principle of the best interest of the child, although there is still room to strengthen the objective parameters for assessing

[13]Soerjono Soekanto, Introduction to Legal Research, Jakarta: UI Press, 2007.
[14]AE Anggraini, S Sukiati, and MY Harahap, "Jurisprudential Analysis of Child Custody Disputes After Divorce (Study of Decision No. 2568/Pdt.G/2020/PA Medan)," Al-Zayn: Journal of Social Sciences & Law 3, no. 3 (2024), https://doi.org/10.61104/alz.v3i3.1657.

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a parent's suitability for custody. The judge's approach demonstrates a shift from a normative approach to a more contextual approach focused on child protection.[15]

Judge's Considerations in Determining the Transfer of Child Custody Rights from Mother to Father and Analysis of Its Compliance with the Principle of the Best Interest of the Child

Based on the main case in decision number 227/Pdt.G/2024/PA.Prob, the Plaintiff has filed a Divorce suit registered electronically through the Probolinggo PA e-Court application with Number 227/Pdt.G/2024/PA.Prob dated May 20, 2024 based on the lawsuit letter dated May 13, 2024. In the lawsuit, the Plaintiff stated that the Plaintiff and Defendant had entered into a marriage on November 13, 2011 which was recorded by the KUA Marriage Registrar of Kanigaran District, Probolinggo City with Marriage Certificate Extract Number 422/66/XI/2011. From this marriage, both of them had 1 (one) daughter named Jihan Ifadatun Ni'mah who was born in Probolinggo on December 10, 2012. Furthermore, the Plaintiff and Defendant have officially divorced based on the Decision of the Probolinggo PA Number 217 / Pdt.G / 2020 / PA.Prob which has permanent legal force with Divorce Certificate Number 0207 / AC / 2020 / PA.Prob dated June 15, 2020. After the divorce, the Plaintiff filed a child custody application on the grounds that the child would be better physically and psychologically if cared for by the Plaintiff, and stated that the child who currently lives with the Defendant is often left alone, including out of town with friends and is suspected of having a relationship with a man, and that the Defendant has remarried without a good approach to the child so that the child is forced to accept this situation. The Plaintiff also considers the Defendant to have given less affection, attention, and is unable to educate the child properly. Based on this, the Plaintiff is of the opinion that the Defendant has been negligent in carrying out his duties as a parent, so the Plaintiff requests that the right to custody and maintenance of the child be given to the Plaintiff as the biological father, and declares his willingness to bear all legal costs incurred.[16]

In Decision Number 227/Pdt.G/2024/PA.Prob, the judge's considerations in deciding the case of child custody from the mother to the father were carried out through a comprehensive approach, namely by combining legal, factual aspects, and child protection principles. The judge did not only adhere to normative provisions but also explored the actual conditions experienced by the child to ensure that the decision made was truly oriented towards the best interests of the child.

Normatively, child custody is regulated by Article 41 of the Marriage Law, the Basic Agrarian Law, and Article 105 of the Compilation of Islamic Law (KHI). While Article 105 of the KHI stipulates that children who are not yet legally married are under the care of their mother, this provision is not absolute and can be overruled if it is proven to be contrary to the child's best interests.[17]

[15]Satjipto Rahardjo, Legal Studies, Bandung: Citra Aditya Bakti, 2012.
[16]Decision Number 227/Pdt.G/2024/PA. Prob.
[17]Law No. 1 of 1974 concerning Marriage; Article 105 of the Compilation of Islamic Law; Law No. 35 of 2014 concerning Child Protection, Article 41.

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In this ruling, the judge did not apply Article 105 of the Compilation of Islamic Law rigidly, but rather interpreted the norm contextually. The judge emphasized that maternal custody can be transferred if there is evidence of negligence or inability to fulfill parental obligations, as permitted by Article 49 of the Marriage Law concerning the revocation or transfer of parental authority.[18]

From the evidentiary aspect, the judge based his decision on the evidence submitted by the plaintiff, namely in the form of written evidence and witness statements. From this evidence, it was revealed that after the divorce, the child was indeed in the care of the mother, but in practice the child was actually cared for by the child's grandmother because the mother had remarried and lived out of town. This condition indicates that the mother, as the holder of de jure custody, did not carry out her care obligations directly. In fact, it was revealed that the mother no longer visited or paid attention to the child's condition. Another important fact was the indication of child neglect. The child contacted his father several times to ask for food because he was hungry, which indicated that the child's basic needs were not optimally met while in the mother's care (through the grandmother). This fact was a crucial consideration for the judge because it concerns the fulfillment of the child's basic rights, which are part of child protection under the law. Conversely, the judge also considered the condition of the father as the plaintiff. The decision stated that the father continued to carry out his responsibilities by providing a living, frequently visiting the child, and had sufficient economic capacity to care for and fulfill the child's needs. On the other hand, fathers are also considered to have good moral character and not engage in actions that violate religious or legal norms. This indicates that, in terms of capacity, fathers are more qualified to be child caregivers.

From a legal perspective, the judge referred to several important provisions, including Article 41 of the Marriage Law, the UUPA, and Article 105 of the Compilation of Islamic Law (KHI). Article 105 of the KHI states that children under 12 years of age are, in principle, under the care of their mothers. However, the judge in this case did not apply this provision rigidly. Instead, the judge emphasized that this provision can be set aside if it is not in the best interests of the child. The judge also referred to Article 49 of the Marriage Law, which allows for the transfer of parental authority if proven negligent in carrying out their duties. In this case, the mother's negligence in caring for the child provides a strong legal basis for transferring custody to the father. Thus, the judge's considerations are not only normative but also contextual, taking into account the concrete circumstances.

The judge also considered the child's psychological well-being by bringing him to court for a hearing. Although the child was only 11 years old, the judge deemed him sufficiently capable of providing relevant information. The child's testimony revealed that he lived with his grandmother, was not directly cared for by his mother, and was still dependent on his

[18]Law no. 1 of 1974 concerning Marriage, Article 49

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father for his needs. This strengthened the judge's belief that the mother's care was not functioning optimally.[19]

The judge's considerations demonstrate the use of judicial discretion in deviating from normative provisions for the benefit of the child. This demonstrates that the principle of legal certainty cannot stand alone but must be balanced with substantive justice and the benefit of the child, who is the most vulnerable party in divorce cases.

In relation to the principle of the best interest of the child, this decision can be said to reflect that principle. This is evident from several indicators.

a. First, the judge prioritized the child's interests over the parents'. Although the mother had the greater legal right, the judge still transferred custody to the father because he was deemed more capable of ensuring the child's well-being.
b. Second, the judge considers the fulfillment of the child's basic rights, such as the need for food, attention, and direct care. The fact that the child is experiencing a lack of attention and basic needs is the primary reason for transferring custody.
c. Third, the judge also pays attention to the aspects of continuity and stability of parenting, where the father is considered more capable of providing a stable environment for the child's development.
d. Fourth, the judge maintained the child's right to contact with both parents by granting the mother access to meet and interact with the child. This demonstrates that the decision does not sever the emotional bond between the child and the mother, but rather prioritizes balance for the child's best interests.

One of the judge's primary considerations is parenting capacity. The judge will assess the extent to which each parent is capable of providing adequate care, attention, affection, and education for the child. In this regard, it is not uncommon to find that fathers are more capable of carrying out their parenting role than mothers, both in terms of time, commitment, and the quality of their interactions with their children. If the mother is deemed negligent, irresponsible, or unable to meet the child's basic needs, the judge may decide to transfer custody to the father. The judge also considers the parents' moral and behavioral status. In some cases, mothers can lose custody if they are proven to have behavior that could endanger the child's development, such as drug abuse, involvement in criminal activity, or a lifestyle inconsistent with social and religious norms. From an Islamic legal perspective, this relates to moral worthiness (al-amanah), a primary requirement for fulfilling hadhanah. Therefore, fathers who are deemed more capable of upholding moral values and providing a good example for their children will be given greater priority.[20]

[19]A Avrilliandy and Zulfikar, "Determination of Child Custody Rights to the Biological Father Due to the Wife Having Bipolar Disorder (Study of Decision No. 78/Pdt.G/2020/PA.Bdg)," Arus Jurnal Sosial Dan Humaniora 5, no. 2 (2024), https://doi.org/10.57250/ajsh.v5i2.1635.
[20]Avrilliandy and Zulfikar, "Determination of Child Custody Rights to the Biological Father Due to the Wife Suffering from Bipolar Disorder (Study of Decision No. 78/Pdt.G/2020/PA.Bdg)."

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Judges also consider the child's residential environment. A safe, conducive, and developmentally supportive environment is an important factor in determining custody. If the mother lives in an unhealthy or unstable environment, while the father is able to provide a better environment, this can serve as a reason for transferring custody. In this case, the judge seeks to ensure that the child grows up in an environment that supports their physical, mental, and social development. In relation to the principle of the best interest of the child, a judge's decision to transfer custody from the mother to the father essentially reflects this principle if it is based on objective, rational considerations and is oriented towards the child's welfare. This principle requires that every decision made must be of the greatest benefit to the child, not the parents. Therefore, judges must be able to free themselves from normative bias that automatically prioritizes the mother, and focus more on the concrete circumstances faced by the child.

In practice, there are still challenges in implementing this principle. It is not uncommon to find decisions that tend to be formalistic and do not delve deeply into the psychological and social aspects of children. Therefore, there is a need to improve the capacity of judges to understand child protection issues, as well as collaboration with experts such as psychologists and social workers to provide more comprehensive considerations. The judge's considerations in determining the transfer of child custody from the mother to the father is a complex process and cannot be separated from a thorough analysis of the trial facts and applicable legal provisions. In this regard, the judge acts not only as a law enforcer but also as a protector of the interests of children, who are the most vulnerable parties in divorce cases. Therefore, every decision must be based on objective, rational considerations and oriented towards the principle of the best interest of the child.[21]

One of the main considerations used by judges is the empirical facts revealed during the trial. Judges will assess the evidence presented by the parties, including documents, witness testimony, and expert examination results. These facts serve as the basis for assessing the actual circumstances of each parent in carrying out their parenting role. In many cases, the transfer of custody from the mother to the father occurs because there is evidence indicating that the mother is no longer capable or unfit to carry out her duties as the primary caregiver, whether due to negligence, emotional instability, or behavior that could endanger the child. Judges also consider the moral worthiness and responsibility of the parents. From a family law perspective, particularly one influenced by Islamic legal values, the parent granted custody must possess good moral integrity and serve as a role model for the child. If the mother is proven to have acted deviantly from social and religious norms, such as engaging in substance abuse, promiscuity, or actions that disregard the child's interests, this can serve as a basis for the judge to transfer custody to the father. Conversely, a father who demonstrates commitment, responsibility, and stability in his daily life will be deemed more suitable to care for the child.

Overall, the judge's considerations in Decision Number 227/Pdt.G/2024/PA.Prob demonstrate a progressive approach to family law, where legal norms are not applied

[21]Dewi et al., “Custody Rights in Divorce According to the Perspective of Islamic Law and Positive Law.”

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formally but rather adapted to specific circumstances to achieve the principle of the best interest of the child. Therefore, this decision can be used as an example of the application of substantive justice in child custody disputes.

Referring to the analysis of the Probolinggo Religious Court Decision Number 227/Pdt.G/2024/PA.Prob, the author agrees with the judge's consideration that positions the principle of the child's best interests as the primary basis for determining custody, not merely the formal rights of parents. This principle has been recognized in the Indonesian legal system, both in Law No. 35 of 2014 concerning Child Protection and in judicial practice as the primary guideline in child custody disputes.

Referring to the facts of the trial, there were indications that the mother was not carrying out her parenting function optimally, as indicated by the child not being cared for directly, the child's basic needs not being met adequately, and the child's dependence on others for daily needs. This condition can be classified as a form of negligence in carrying out parenting obligations (parental neglect), which has implications for the obstruction of the fulfillment of children's rights as guaranteed by the law.

Legally, this situation can be used as a basis for limiting or revoking parental authority if there is evidence that their obligations are not being fulfilled properly. This is based on Article 45 of Law No. 1 of 1974 concerning Marriage in conjunction with Law No. 16 of 2019, which emphasizes the obligation of parents to care for and educate their children as well as possible, as well as the provisions of Article 14 and Article 26 of Law No. 35 of 2014 concerning Child Protection, which emphasizes the responsibility of parents to ensure the growth and development and protection of children. Therefore, these facts can normatively form the basis for legal considerations for judges in determining the transfer of custody to ensure the fulfillment of the best interests of the child.

Although the judge's considerations were comprehensive, there are some critical points to this decision. The decision was rendered by default due to the defendant's absence, resulting in no defense from the mother. Furthermore, there was no participation from experts such as psychologists or social workers who could have provided a more in-depth analysis of the child's condition. However, this does not diminish the substance of the judge's considerations, which were based on strong facts. The judge's considerations in deciding cases of child custody from the mother to the father are a crucial aspect of family law, particularly in divorce cases. Judges are not only tasked with applying legal norms textually but are also required to explore the values of substantive justice that exist in society. In this context, the principle of the best interest of the child is the fundamental basis for every decision related to child custody.[22]

CONCLUSION

[22]LLN Sari, W Suprayitno, and KD Kurniawan, "Implementation of Child Custody Rights in Divorce Cases (Case Study of Decision No. 1618/Pdt.G/2020/PA.Smp)," Indonesia Law Reform Journal 2, no. 2 (2022), https://doi.org/10.22219/ilrej.v2i2.22075.

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1. Legal provisions regarding child custody after divorce in the Indonesian legal system, both in the Marriage Law, the Basic Agrarian Law, and the Compilation of Islamic Law (KHI), essentially provide a flexible basis for judges to determine child custody based on the principle of the best interest of the child. Although the KHI normatively gives priority custody to mothers for children under 12 years of age, this provision is not absolute and can be set aside if it no longer ensures the welfare and protection of the child.
2. In Decision Number 227/Pdt.G/2024/PA.Prob, the judge transferred custody of the child from the mother to the father, primarily due to the mother's negligence in carrying out her parenting duties, including the failure to meet the child's basic needs and a lack of direct attention and involvement in the child's life. Conversely, the father was deemed to have a better ability to meet the child's physical, emotional, and social needs, and to demonstrate consistent responsibility as a parent. The judge's considerations in this decision reflect the implementation of the principle of the best interest of the child, as evidenced by an assessment of the child's actual condition, the parents' parenting abilities, and efforts to maintain the child's relationship with both parents. However, this decision still has procedural weaknesses, particularly because it was decided by default and did not involve a comprehensive psychological analysis by an expert.

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