

The Principle Of The Best Interest Of The Child In Granting Child Custody Related To Divorce

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Abstract

The principle of the best interest of the child is a fundamental principle universally recognized in the protection of children's rights. This principle is especially relevant in the context of divorce, where decisions regarding child custody must be made with a comprehensive consideration of the child's best interests. The purpose of this research is to analyze the application of the best interest of the child principle and to identify the main factors considered in making custody decisions in divorce cases in Indonesia. This research employs a normative legal research method with legislative and conceptual approaches. The sources of legal materials in this study include primary, secondary, and tertiary legal materials, and the data analysis technique used is qualitative analysis. The research findings reveal that the principle of the best interest of the child is applied in making child custody decisions in divorce cases in Indonesia by considering various factors related to the child's overall welfare, such as the child's age, the emotional bond between the child and the parents, the living environment, the child's safety and well-being, and the parents' ability to provide proper care. Other main factors considered include the parents' physical and mental health conditions, history of domestic violence, and the child's wishes or opinions if they are mature enough. The court will assess and consider all these factors comprehensively to decide on child custody based on what is most aligned with the best interest of the child in the divorce case.

I. Introduction

Divorce is a reality that frequently occurs in society. Although marriage is expected to last a lifetime, in practice, various factors can lead to divorce. Divorce often leaves a significant impact, not only on the divorcing couple but also on the children involved.(Munawara et al., 2021) In situations like this, it is crucial to consider the principle of the "Best Interest of the Child." This principle serves as the primary guideline in making decisions related to child custody following parental divorce.

The best interest of the child is a concept that has been widely adopted in various legal instruments, both at the international and national levels. The best interest of the child is a fundamental principle universally recognized in the protection of children's rights. This principle asserts that in every decision concerning a child, the child's best interest must be the primary consideration.(Muchlis, 2024) The Convention on the Rights of the Child (CRC), adopted by the United Nations (UN) in 1989 and ratified by Indonesia through Presidential Decree Number 36 of 1990, emphasizes the importance of this principle in Article 3 paragraph (1), which states, "In all actions concerning children, whether undertaken by public or private social welfare institutions, the best interests of the child shall be a primary consideration."

In the context of national law, Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 on Child Protection also adopts the principle of the best interests of the child. Article 2 of this law states that "The implementation of child protection is based on Pancasila and grounded in the Constitution of the Republic of Indonesia of 1945 as well as the fundamental principles of the Convention on the Rights of the Child, which include: a. non-discrimination; b. the best interests of the child; c. the right to life, survival, and development; and d. respect for the views of the child."(Prasetya et al., 2023)

In the context of divorce, the application of the principle of the best interests of the child becomes highly relevant and important. Divorce can have a significant impact on a child's life, emotionally, psychologically, and socially. Therefore, decisions regarding child custody must be made with a comprehensive consideration of the child's best interests.(Forslund et al., 2022) In relation to divorce, Law Number 1 of 1974 on Marriage regulates the custody of children after divorce. Article 41 of this law states that "The consequences of the dissolution of marriage due to divorce are: a. Both the mother and father are still obligated to care for and educate their children, solely based on the interests of the child; in the event of a dispute regarding child custody, the Court shall make its decision." Furthermore, Article 45 paragraph (2) emphasizes that "The obligation of parents who are responsible for the care and education of their children remains solely based on the interests of the child, and the court may decide on other matters for the benefit of the child."

Additionally, Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 on Child Protection also underscores the importance of the principle of the best interests of the child. Article 2 states that "The implementation of child protection is based on

the best interests of the child." This indicates that in all efforts to protect children, including in decision-making regarding child custody, the best interests of the child must be the primary principle.(Tang, 2020)

In the Compilation of Islamic Law (KHI), which serves as a guideline for Muslims in Indonesia, there are also provisions that regulate child custody after divorce. Article 105 of the KHI states that "The custody of a child who has not reached the age of discernment or is under 12 years old is the right of the mother." However, Article 156 letter (c) of the KHI also emphasizes that "The consequences of the dissolution of marriage due to divorce are: All property acquired during the marriage is considered joint property, except for those obtained from individual efforts or gifts or inheritance."(Islami & Sahara, 2019)

In its implementation, the principle of the best interests of the child considers various factors, such as the child's emotional, psychological, physical, and educational needs. This is done to ensure that child custody decisions after divorce truly prioritize the child's well-being and optimal development. The court has the authority to assess and decide on child custody based on these considerations.(Brahmana et al., 2024)

The importance of considering the best interests of the child in custody decisions related to divorce is also based on the understanding that a child is a vulnerable individual who needs special protection. Divorce can be a traumatic experience for a child, so decisions regarding child custody must be made with consideration of the long-term impact on the child's overall development.(Mareta & Achmad, 2022)

Thus, the principle of the best interests of the child in child custody matters related to divorce becomes very important and fundamental. The prevailing regulations in Indonesia emphasize the importance of this principle to protect children's rights and ensure their welfare in situations of parental divorce. However, the application of the best interests of the child principle often faces certain challenges and complexities in practice.(Rahman & Rizkianti, 2024) Each divorce case has its own uniqueness, requiring careful and comprehensive consideration from various aspects. Additionally, there is debate regarding the interpretation and application of this principle within the diverse cultural, religious, and social norms in Indonesia. Based on the background explanation above, the author is interested in conducting research entitled "The Principle of Best Interest of The Child in Child Custody Decisions Related to Divorce." The formulation of the issues in this study is as follows:

1. How is the principle of the best interest of the child applied in decisions regarding child custody in divorce cases in Indonesia?
2. What are the main factors considered in applying the principle of the best interest of the child in child custody decisions related to divorce in Indonesia?

II. Research Method

This study uses the normative legal research method. This method is chosen because

the research aims to examine and analyze the applicable legal norms related to the application of the best interest of the child principle in child custody cases during divorce in Indonesia.(Marzuki, 2021) The approach that will be used in this research is the legislative approach and the conceptual approach. The legislative approach involves examining and analyzing relevant laws related to the research topic, such as Law Number 1 of 1974 on Marriage, Law Number 35 of 2014 on Amendments to Law Number 23 of 2002 on Child Protection, as well as other related regulations. This approach aims to understand and analyze the legal provisions governing the application of the principle of the best interests of the child in child custody arrangements related to divorce.(Muhaimin, 2020)

In the meantime, the conceptual approach involves studying and analyzing legal concepts relevant to the research topic, such as the best interest of the child, child custody, and divorce. This approach aims to understand and analyze the meaning, implications, and scope of these concepts in the context of granting child custody related to divorce. The sources of legal materials to be used in this research include primary, secondary, and tertiary sources. Primary legal materials consist of relevant laws, such as Law No. 1 of 1974 on Marriage, Law No. 35 of 2014 on Amendments to Law No. 23 of 2002 on Child Protection, as well as relevant court decisions. Secondary legal materials include books, scientific journals, articles, and other literature discussing the research topic. Tertiary legal materials encompass legal dictionaries, encyclopedias, and other sources that can provide additional explanations related to the legal terms used in the research.

The data analysis technique to be used in this research is qualitative analysis. Qualitative analysis involves systematically and comprehensively collecting, processing, and analyzing the legal materials obtained. This analysis process involves interpretation, legal reasoning, and analysis to understand and analyze the application of the best interest of the child principle in granting child custody related to divorce in Indonesia.(J. Moleong, 2017) A qualitative analysis will be conducted by identifying and examining the legal provisions that govern the application of the best interests of the child principle in child custody matters, as well as analyzing relevant legal concepts related to the research topic. Furthermore, the analysis will connect and relate these legal provisions and concepts to the research problem formulation and objectives. The results of the analysis will be presented in a descriptive-analytic form to address the research problem statement.

III. Results and Discussion

The Principle of the Best Interest of the Child is Applied in Decision-Making Regarding Child Custody in Divorce Cases in Indonesia.

The principle of the best interests of the child is a fundamental principle that must be the primary consideration in decisions regarding child custody in divorce cases in Indonesia.

This principle is governed by various national laws and international legal instruments that have been ratified by Indonesia. (Saraswati et al., 2021)

The Convention on the Rights of the Child (CRC), adopted by the United Nations (UN) in 1989 and ratified by Indonesia through Presidential Decree No. 36 of 1990, emphasizes the importance of the principle of the best interests of the child. Article 3, paragraph (1) of the CRC states, "In all actions concerning children undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration." (Lestari & Fachri, 2017)

In the context of national law, Law No. 1 of 1974 concerning Marriage regulates the issue of child custody in divorce cases. Article 41 letter (a) states that "Both the mother and the father remain obligated to care for and educate their children, solely based on the best interests of the child. In cases of dispute over the custody of children, the court will make a decision." This provision explicitly affirms that in determining child custody related to divorce, the best interests of the child must be the primary consideration. (Mansari et al., 2018)

Next, Law No. 35 of 2014 on Amendments to Law No. 23 of 2002 on Child Protection also emphasizes the importance of the principle of the best interests of the child. Article 2 states that "The implementation of child protection is based on the best interests of the child." This indicates that in every child protection effort, including in decisions regarding child custody, the best interests of the child must be the primary basis. (Makkarumba & Naim, 2022)

In its implementation, the principle of the best interests of the child involves considering various factors related to the child's overall welfare. Some factors commonly considered in decision-making regarding child custody in the context of divorce in Indonesia include:

1. Child's age

The child's age is one of the important factors considered. A very young child generally requires more intensive care and attention from the mother, so custody is often granted to the mother. However, as the child grows older, other factors such as emotional bonds and the parents' ability to provide adequate care also become important considerations. (Hidayatul Ulya et al., 2021)

2. Emotional bond with parents

The court will consider the emotional bond between the child and each parent. The child is likely to be granted custody to the parent who has a stronger and closer emotional connection with them, as this can provide a sense of security and comfort for the child during difficult times after the divorce. (Azizah, 2019)

3. Residential environment

The living environment of the prospective custodial parent is also an important consideration. The court will assess whether this living environment is safe, comfortable, and conducive to the optimal development of the child. Factors such as

the availability of educational facilities, healthcare, and a good social environment will be taken into account.(Yulianti et al., 2021)

4. Child safety and well-being

The court will consider whether the prospective custodial parent can ensure the child's safety and well-being optimally. This includes financial capability, the time that can be allocated for parenting, and the ability to provide proper care and meet the child's comprehensive needs.(Ginting et al., 2023)

5. The ability of parents to provide adequate caregiving.

The court will assess each parent's ability to provide appropriate care for the child. This includes emotional, psychological, and physical capabilities in raising the child, as well as readiness to provide the attention, affection, and guidance that the child needs.(Ngewa, 20019)

In the decision-making process, the court may seek input from various parties, such as child psychologists, social workers, or marriage and family counseling agencies. Input from these parties can assist the court in evaluating relevant factors and making decisions that are in the best interests of the child.(Rahma, 2019) Although various factors are considered, ultimately, the court has the authority to decide on the granting of child custody based on considerations that best serve the child's best interests in the divorce case. This decision must be based on an objective and comprehensive assessment of the specific situation and conditions faced by the child and both parents. The envoy must ensure that the child's rights and welfare are protected and secured following the parents' divorce.(Siregar & Kusmayanti, 2022)

The application of the best interests of the child principle in child custody matters related to divorce in Indonesia is an effort to protect children's rights and ensure that decisions made truly consider the child's overall welfare and development. Although this process may involve complex considerations, the best interests of the child must remain the top priority in every decision made by the court.(Anwar & Wijaya, 2020) Thus, the best interests of the child principle becomes the primary consideration in decisions regarding child custody in divorce cases in Indonesia. The application of this principle involves assessing various factors related to the child's overall well-being, with the ultimate goal of protecting and ensuring the best interests of the child in their parents' divorce situation.

Factors That Are the Main Considerations in Applying the Best Interests of the Child Principle in Child Custody Decisions Related to Divorce in Indonesia

In applying the principle of the best interest of the child in child custody matters related to divorce in Indonesia, there are several key factors that are considered. These factors are regulated by applicable laws and are also based on court practices and the views of legal experts. One of the main factors considered is the child's age. Law Number 1 of 1974 concerning Marriage stipulates that a child who has not reached the age of 12 is under the custody of the mother, unless there are specific reasons that lead the court to decide

otherwise. Article 105(a) states: "In the event of a divorce, a child who has not reached the age of 12 is under the custody of the mother." This provision indicates that the child's age is a significant consideration in granting custody, especially for children under the age of 12.(Puspitosari, 2014)

Another factor to consider is the emotional bond between the child and the parents. In Supreme Court Decision Number 310 K/AG/1995, it is stated that the court must consider "which parent has a stronger emotional bond with the children" when deciding on custody rights. A strong emotional attachment between the child and one of the parents can be a significant factor in determining the best interests of the child. The environment where the child resides is also a primary consideration. Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection emphasizes the importance of a conducive environment for children. Article 20 states: "The state, government, local government, society, family, and parents or guardians are obligated and responsible for the implementation of child protection." A safe, comfortable, and supportive living environment conducive to the child's development is an important consideration in granting custody rights..(Eleanora et al., 2021)

The safety and welfare of children are other factors that cannot be ignored. Law No. 35 of 2014 emphasizes that every child has the right to protection from violence and discrimination (Article 13), as well as the right to survival, growth, and development (Article 14). Therefore, the court must consider whether granting custody to one parent can ensure the child's physical, psychological, and social safety and welfare.(Sudiono et al., 2023)

The ability of parents to provide proper upbringing is also an important factor considered. Law Number 1 of 1974 on Marriage states that "both the mother and the father are still obliged to care for and educate their children" (Article 41 letter a). The court will assess each parent's ability to provide proper care, such as financial capability, available time for child-rearing, and mental and emotional readiness to educate and raise a child.(Matahati & Markoni, 2022) In addition, other factors that may be considered include the physical and mental health conditions of the parents, a history of domestic violence, and the wishes or opinions of the child (if the child is old enough to express their opinion).(Erniwati & Fitriani, 2020)

In practice, the court will consider all these factors comprehensively and thoroughly. The judge will assess and weigh these factors before deciding on awarding child custody to one of the parents or making another decision that is deemed most suitable for the best interests of the child.(Maryati, 2021)

The principle of the best interests of the child is the primary consideration in the decision-making process regarding child custody in cases of divorce in Indonesia. By taking into account factors such as the child's age, emotional bond with the parents, living environment, safety and well-being of the child, as well as the parents' ability to provide

adequate care, the court strives to make decisions that best prioritize the child's best interests in parental divorce situations. (Saraswati & Hadiyono, 2018)

4. Conclusion

The principle of the best interest of the child is applied in making decisions regarding child custody in divorce cases in Indonesia by considering various factors related to the child's overall well-being. These factors include the child's age, the emotional bond between the child and the parents, the living environment, the child's safety and welfare, and the parents' ability to provide proper care. The court will evaluate and consider these factors comprehensively to decide on child custody based on what is most aligned with the child's best interests in such divorce cases.

The main factors considered in applying the best interest of the child principle in determining child custody in divorce cases in Indonesia include the child's age, the emotional bond between the child and the parents, the child's living environment, the child's safety and welfare, the parents' ability to provide adequate care, the physical and mental health conditions of the parents, a history of domestic violence, and the child's wishes or opinions if they are mature enough. The court will take all these factors into comprehensive consideration to decide on custody arrangements that best serve the child's interests.

As a suggestion, there should be more extensive socialization and education to the public about the importance of applying the best interest of the child principle in divorce cases. This aims to raise awareness among parents and relevant parties that decisions regarding child custody should be based on a comprehensive consideration of various factors related to the child's overall welfare, not just the parents' interests alone. This socialization can be conducted through various media, such as seminars, workshops, social campaigns, or information dissemination through digital platforms, involving cooperation between government agencies, civil society organizations, and experts in child protection.

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