

Dialectics of Supreme Mother's Rights in Caring for Children Who Are Not Mumayiz in Children Rights Dispute in Indonesia

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Abstract

This paper examines the custody of the child in which the child is still 1 year and nine months old, while the other case is five years old. This paper is here to analyze cases of child custody through court decisions and also to investigate more deeply the rules. Two things that the writer emphasizes in writing, first, why is the judge granting custody of the child to the father, even though the child is still a minor. Second, how the rules are arranged in classical books, the goal is to know the specific rules in classical books, especially child custody. This study uses a psychology perspective. This paper reveals that the judge has not been so sensitive to the custody of children who are still mumayiz because the judge considers that what the mother does is part of the neglect of the child, even though it is quite clear in the decision regarding the reasons that have been put forward properly so that the mother should have a greater right to care for young children. So that the psychological and mental aspects of the child can be fulfilled even though they are not complete as safety for parents who are still living and raising children together.

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1. Introduction

Child custody is one part of a lawsuit filed by a husband or wife when divorced, although not all divorce claims include child custody in their lawsuit. Plaintiffs usually include a lawsuit to ask the judge to judge justice to determine who has the right to care for and guide the child after the ex-wife or husband is legally divorced. The rules regarding child custody in Indonesia are not specifically regulated; for example, the marriage law only stipulates that the care of children after divorce is the obligation of the mother and father to care for and educate the child, while material financing is borne by the father according to the ability set out in a court decision.⁵ The rules of child custody are further contained in the Compilation of Islamic Law. Article 105 states that children who are not mumayiz care for the mother, while children who are mumayiz may choose between taking part in the care of the father or mother. Unmumayiz child custody can fall to the father if the mother has passed away.⁶

Research related to child custody has been widely researched by previous researchers. Ahmad Zaenal Fanani, for example, examines child custody rights starting from the rules and examines it through a gender perspective. He revealed that KHI articles 105 and 156, which are one of the sources of child custody law, are not gender-responsive because these rules are given based on gender, not based on aspects of morality, health, and the ability to care for and educate children.⁷ In addition, Irfan and Aini discussed the case of control over the custody of minors that fell to their father in terms of positive laws in force in Indonesia. The article argues that the father can win custody of the child because what is prioritized is the child's

⁵ Law No. 1 of 1974 article 41.

⁶ Compilation of Islamic Law Article 156.

⁷ Ahmad Zaenal Fanani, "Sengketa Hak Asuh Anak Dalam Hukum Keluarga Perspektif Keadilan Gender" *Muslim Heritage* Vol. 2, No 1, Mei-Oktober 2017, pp 173

interests.⁸ The research was not specifically stated regarding the classification of children's interests as meant.

The right of child custody does not always fall on the mother, for example, research conducted by Sufyan Ilyas. The research revealed that the hadhanah of an underage child fell to his father because the mother had a bad temper, such as going out at night just to play with her friends, and also had an affair in front of the child, so the husband wanted the child to be in his care because the mother's actions are not good for the child's development. In this case, the mother also surrenders her child to be cared for by her husband because she has remarried another person.⁹

The studies above reveal that judges can give custody of children to fathers with certain conditions according to the rules that have been applied according to the applicable regulations. While the author's research focuses on two cases of child custody in which the judge determines that an immature child falls to the husband. In addition, the author also investigates more deeply through classical books and tries to classify the child custody considerations that are regulated in it. The writer did this because classical books were one of the main grounds for judges to determine the law.

The reasons above make the author interested in investigating more deeply about the custody of children who are minors but fall on their fathers. Is it true that the mother falls into the category of having a bad temper or not. The author uses a psychological approach. There are two things that the authors emphasize in this study, namely why the judge decides the right to custody of children who are not mumayiz to the father. Furthermore, the author investigates the opinion of the madzhab priest about child custody, as stated in the classical books, to make a dialectical typology of opinion regarding child custody. The author chooses to focus

⁸ Irfan Islami dan Aini Sahara, "Legalitas Pengasuhan Hak Asuh Anak di Bawah Umur (Hadhanah) kepada Bapak Pasca Perceraian" *ADIL: Jurnal Hukum* Vol. 19 No 1, pp 163-164.

⁹ Sufyan Ilyas, "Judge's Consideration of the Custody to a Husband (Research at the Syar'iyah Tapaktuan Court)." *Budapest International Research and Critics Institute-Journal*. Volume 2, No 1, February 2019, p. 319-321.

on two cases that the author can randomly; the cases are disputed to the religious court to the high religious court.

Judge's Decision in Providing Immature Child Custody to Husbands

1. Dialectics of Legal Considerations of Judges in Deciding Custody of 5 Years Old Children Falling to Their Husbands.

The legal dictionary defines Hadhanah as caring for and educating someone who is not mumayiz or whose intelligence is not optimal because he cannot fulfill his own needs.¹⁰ Child custody or Hadhanah is one part of the consequences of divorce because previously husband and wife looked after and nurtured and cared for children together in a marriage bond; when the husband and wife decided to divorce, then indirectly the child care would be on the one hand.

The case that the author found was originally filed by a wife who filed a lawsuit at the Malang Religious Court; she wanted a divorce from her husband's eyes and asked for child custody. The result of the marriage of the plaintiff and the Defendant having two children, the first child aged 20 years 10 (girl) and the second child aged five years two months (boy).¹¹ The first child is considered mumayiz and is allowed to choose to live with the mother or the father, but the second child is not considered mumayiz because he is five years old, so he is not allowed to choose between living with his father or mother¹²

Judges have the authority to decide cases according to their main duties and functions; this case is in accordance with their main duties and functions and is part of the judge's duty to give decisions for both parties. Therefore, before a judge decides a case, he weighs various things in accordance with positive law in Indonesia and Islamic law. The judge gave consideration to child custody in decision No 0777 / Pdt.G / 2017 / PA. Mlg, starting from the psychological and biological aspects,

¹⁰ Dzulkifli Umar, *Kamus Hukum*. Surabaya: Grahamedia Press, 2012. pp 182.

¹¹ The decision of the Malang Religious Court No 777 / Pdt.G / 2017 / PA.Mlg, pp 2. The decision can be accessed on the page www.putusan.mahkamahagung.go.id or Badilag Mahkamah Agung

¹²—Putusan 777..., p 45.

besides that, it is also seen from positive law and Islamic law as well. From a psychological point of view, the judge argued that according to psychology experts that mothers have an important role in the process of child development, starting from childbirth, childbirth, breastfeeding, and caring for children to adulthood; therefore, it is the mother who has a role in caring for. This is also in line with the biological aspect, which has an important role biologically because emotionally, the child is closer to the mother; besides that, the mother also understands more about the child's needs. This is in line with the ulama's opinion 'that it is a mother who has more rights to care for her child in the event of a divorce from her husband.¹³

Judges use the above considerations to decide more specific cases with custody of children by considering several things that support the decisions used to settle the cases of the plaintiff and Defendant. From the above considerations, the judge decided that the custody of the second child (age five years) of the plaintiff and the Defendant fell to the mother, in accordance with the legal bases that the author has described above, while the first child (age 20 years) followed the father because he already has the right to choose. This was not stated in the decision because he was considered an adult and could determine so that his custody was not included in the court decision. So that the two children of the Defendant and the plaintiff lived separately, the first child lived with the father, while the second child lived with the plaintiff (mother).

The Defendant (husband) felt that the verdict was not in accordance with what he expected, so the Defendant filed an appeal to the High Religious Court of Surabaya on the decision that had been determined by the judge of the Malang Religious Court. One of the claims filed by the Defendant at the Surabaya High Religious Court was to overturn the decision of the Malang Religious Court Judge regarding the custody of the second child, which fell to his mother. He asked to assign a second child (age five years) under his care who was originally decided to fall to the wife of the

¹³ Judgment 777..., p 45-47

comparison.¹⁴ The Surabaya Religious High Court has the authority to re-decide the decision of the Malang Religious Court in order to find new legal facts to adjudicate or correct the mistakes of the 1st level court. The aim is that justice seekers can succeed in obtaining justice.¹⁵

Judges at the appellate level also carry out the same duties as the court of the first instance because the religious court and the appellate level court are both *Judex Facts*, so the appellate court gives consideration to the memory and counter-memorandum of appeals submitted by the parties, in addition to the high religious court judges also obliged to make legal findings, so that the decision at the level of appeal can have the same decision as to the court of the first instance and may even be different.¹⁶ As with the decisions in this study, judges have different legal considerations and decisions from the courts of the first instance.

The Surabaya High Religious Court revealed in decision No 484 / Pdt.G / 2017 / PTA. Sby that the appellate-level panel disagreed with the religious court judges' legal considerations regarding child custody submitted by the appellant (husband). These considerations are contained in the decision, the essence of the consideration of the panel of judges at the appeal level, namely: First, the judge considers that in determining child custody it is solely for the benefit of the child. Second, considering that the rules of article 158 letter a in the Islamic Law Compilation stipulate that children who have not reached 12 years of custody of their children rest with the mother, but if the child's interests are not protected, then this rule can be put aside. Third, the judge found the fact that the comparable (wife) left her residence and returned to her parents' house, while her two children were neglected so that they were under the care of the comparator (husband). Fourth, the judge considers that

¹⁴ The decision of the Surabaya High Religious Court Number 484 / Pdt.G / 2017 / PTA.Sby, p 2.

¹⁵ H.A Mukti Arto, *Penemuan Hukum Islam demi Mewujudkan Keadilan*. (Yogyakarta: Pustaka Pelajar, 2018, pp 156.

¹⁶ Mukti Arto, *Penemuan Hukum Islam...*, pp157

while the comparator (husband) is taking care of the second child, there is no evidence that he has neglected and is not responsible for his child.¹⁷

With the above considerations, the panel of judges at the High Court of Religion in Surabaya revealed that the main substance proposed by the appellant (mother) in the religious court was not appropriate and contrary to the legal considerations of the appellate panel of judges, so that the judgment of the first level judge could be put aside. The panel of judges at the appellate level considered that the lawsuit filed by the appeal court (wife) had grounds to be rejected because it was not in accordance with the considerations of the appellate court. The considerations of the panel of judges at the level of appeal were not in accordance with what was considered by the panel of judges at the level of one level, so the panel of judges at the level of appeal decided to cancel the amar that had been decided by the panel of judges of the first level, then the panel of judges at the level of appeal would judge the verdict by themselves.¹⁸

The appellate level panel stated that it accepted the appeal filed by the appellant (husband) regarding child custody and decided to cancel the decision issued by the judge at the first level court relating to child custody, so that the original custody of the child fell to the appealed (wife), with a decision from the court of appeal, it ultimately falls to the appellant (husband). So that the appeal against (wife) at the first level is canceled or rejected by this decision. Wives are sometimes considered not having the right to care for children because they are considered to have a bad temper or a working mother; the judge considers that when a mother works, it is considered that she is not better off to take care of the child because she is considered to have no time to care for and raise her child, whereas This assumption was not asked whether working fathers would have time to raise their children. It seems that the judge has an understanding similar to the classical doctrine that a wife must be at home, while

¹⁷ Putusan Pengadilan Tinggi Agama Surabaya Nomor 484/Pdf.G/2017/PTA.Sby, p 6-8.

¹⁸ Putusan Pengadilan Tinggi Agama No 484..., p 8.

the one who is responsible for providing support is the husband. Even though the wife is, in fact, a wife also has to work to fulfill the needs of her and her child after she is declared divorced from her husband.¹⁹

2. Dialectics of Decisions of Religious Courts and High Religious Courts to Impose Custody of Children Aged 1 Year and 9 Months on Husbands.

The decision of the High Court of Religion, in this case, is not much different from what happened as in the case above. This is because the Makassar Religious High Court handed down custody of children aged one year nine months to the plaintiff's father or husband. This custody lawsuit does not coincide with filing for divorce as in the case above, but a divorce suit was filed in 2014,²⁰ while the child custody case was filed after one year of a divorce suit, namely in 2015 as stated in the decision Number 12 / Pdt.G / 2015 / PA.Pkj. The plaintiff (wife) asked the judge at the Pangkajene Religious Court to give him custody of a child who was one year and nine months old. The reason the child custody lawsuit was filed was that she felt that her very young child needed the love of her biological mother; besides that, she also revealed that her ex-husband did not have a permanent job. This made her husband unable to carry out his main obligation to provide a living. In addition, because the plaintiff's child is in the care of the Defendant, the plaintiff asks that his child be submitted to him voluntarily and unconditionally.²¹ If one of the parties controls a child who is still under the public, then he or she is justified in submitting custody of the child to the court as was done by the plaintiff.²²

The Defendant gave an answer in the trial. In fact, he thought that the plaintiff (wife) had abandoned his child so that he had no right to care for his child. When he

¹⁹ Euis Nurlaelawati, "The Legal Fate of Indonesian Muslim Women in Court: Divorce and Child Custody." This paper is written in a collection of books entitled *Religion, Law, and Intolerance in Indonesia*. New York: Routledge, 2016, pp 362-363.

²⁰ Putusan Nomor 74/Pdt.G/2014/PA.Pkj

²¹ Putusan 12/Pdt.G/2015/PA.Pkj, p. 3-4.

²² Rahmida Erliyani and Nurunnisa, " Execution of Religious Judiciary in Child Custody." *Hamdard Islamicus*, Vol 43 No 2 2020, pp 378.

was one week old, the plaintiff brought the child, who was still a toddler, to him, even though at that time, the child still really needed breast milk. That is what makes the Defendant think that the plaintiff has neglected his child and has no right to care for his child.²³ The statement of the Defendant was denied by the plaintiff; he revealed that he entrusted his child when he was one week old, not without reason. At that time, he was doing KKN for three months and continued his studies for five months. He did this because it was impossible for him to invite KKN children and go to college because the distance was far enough to travel to the places where the plaintiff and Defendant were. Several times he tried to visit his son, but Defendant stopped him.²⁴

The judge gave several legal considerations in the above case; the judge stated that the person who cared for the child had to be able to guarantee the child's growth and development and not leave the child neglected. The judge considered that when the child was in the care of the Defendant, it did not indicate a violation, so the lawsuit filed by the plaintiff (wife) was not sufficiently grounded. In addition, the judge also saw that the child had been with his biological father since the age of 1 week, so the judge considered that the father could guarantee and make life easier for the child. Therefore, the judge of the plaintiff's claim regarding child custody must be rejected.²⁵ The judge gave several legal considerations in the above case; the judge stated that the person who cared for the child had to be able to guarantee the child's growth and development and not leave the child neglected. The judge considered that when the child was in the care of the Defendant, it did not indicate a violation, so the lawsuit filed by the plaintiff (wife) was not sufficiently grounded. In addition, the judge also saw the above considerations; the judge handed down custody of the child to the Defendant (husband) while still giving the birth mother the opportunity to do things that were best for the child's physical, mental, educational, and future interests. One week old has joined his biological father, so the judge thinks that the father can guarantee and make peace for the child's life. Therefore, the judge of the plaintiff's claim regarding child custody must be rejected.²⁶

The plaintiff filed an appeal to the Makassar High Court, but the panel of judges did not grant the applicant's request to take care of his biological child. The panel of

²³ Decision Number 12...p 6.

²⁴ Decision Number 12... p 8-14.

²⁵ Decision Number 12...p 46-48.

²⁶ Decision Number 12... p 53.

judges affirmed the opinion of the religious court that children who are under their father's care do not feel uncomfortable, look healthy, so that the petitioner was rejected by the panel of judges and determined that the child was in the care of the father or husband.²⁷

Based on the main standards of child custody, mothers have the highest rights in child care or to obtain custody of children after divorce, especially if the child is still underage unless the mother has a bad temper. Sometimes one party has controlled the disputed biological child in court. One party sometimes does not accept the judge's decision that the child is under his control and must be handed over to a party who is considered capable of caring for his child so that the person who controls the child often does not want to give a child to an ex-husband or wife.²⁸

Examining the Concept of Haḍānah According to Imam Madzhab in Classical Books

1. Time for care and provision of livelihood

An immature child really needs love, protection, and the provision of support from both parents.²⁹ Therefore, Islam requires both parents to take care of their children in order to fulfill the child's basic physical and spiritual needs.³⁰ *Haḍānah* is part of the implementation of *hifzu nasl* in Islamic family law, which aims to prevent neglect and violence against children.³¹ This is in accordance with the essence of sharia, which requires every Islamic law to be based on justice, wisdom, and the

²⁷ The decision of the Makassar High Religious Court Number 79 / Pdt.G / 2015 / PTA.Mks, p 14-17.

²⁸ Alizah Ali dkk, " Guardianship and Custody of Divorced Couple's Children: Welfare of the Children or Best Interest of the Child, A Comparison Study Between Malaysia and Indonesia." *Insight Journal* UiTM Cawangan Johor Malaysia. Volume 5. Pp 195-198.

²⁹ Mudasra Sabreen, "Custody in Islamic Law: A Law Based on Presumptions," *Islamic Research Institute, International Islamic University, Islamabad* 56, no. 3/4 (Autumn-Winter, 2017): 223.

³⁰ Sayyid Sābiq, *Fiqh al-Sunnah* (Beirut: Dār al-Kitāb al-‘Arabī, 1977), Juz. 2, pp. 338.

³¹ Abū Syujā’ Muḥammad bin ‘Alī, *Taqwīm al-Naẓr fī Masāil al-Khilāfiyyah wa Nabẓi Maẓhabiyyah Nāfi’ah* (Riyad: Maktabah ar-Rusyd, 2001), Juz. 4, p. 46.

benefit of mankind in the world and the hereafter.³² The Imam of the Madzhab has different opinions about the time to care for boys and girls.

The haḍānah time for boys, according to Ḥanafī maḏhab, starts from when the child is born until he is seven or nine years old, while the haḍānah time for girls has two opinions; the first opinion states that the haḍānah time for girls starts from birth until he experiences menstruation. . The second opinion states that the haḍānah time for a girl starts from birth until she reaches the limit of lust which usually occurs at the age of nine.³³ Another opinion was put forward by Imam Malikī; he argued that the haḍānah time for a boy starts from the time he is born in the world until he reaches puberty. Meanwhile, the haḍānah time for a girl starts from the time of birth until she gets married and has intercourse with her husband.³⁴ If, after the age of seven, both parents continue to take care of him, then this is still allowed. Contrary to the previous opinion, the Maḏhab Syāfi'ī states that there is no specific time limit in haḍānah..³⁵ Meanwhile, maḏhab Ḥanbalī argues that the haḍānah time for girls and boys is the same, that is, from the time the child is born to the age of seven.³⁶

A father is obliged to provide for his child,³⁷ While a mother educates and pours love for her child.³⁸ However, haḍānah can be disputed between the two parents in the event of a divorce, although not all divorce suits include child custody disputes in their lawsuit. In classical jurisprudence, the right to break the marriage bond is only monopolized by the husband by means of divorce.³⁹ However, contemporary Islamic

³² Ibnu Qayyim al-Jauziyyah, *I'lām al-Muwaqī'in an Rab al-'Ālamīn* (Beirut: Dār al-Kutub al-'ilmiyyah, 1991), p. 11.

³³ 'Abd al-Ganī, *al-Lubab fī Syarḥ al-Kitāb* (Beirut: al-Maktabah al-'ilmiyyah, t.t), juz. 3, pp. 103.

³⁴ Mālik bin Anas al-Madanī, *al-Mudawwanah* (t.tp, Dār al-Kutub al-'ilmiyyah, t.t), juz. 2, pp. 258.

³⁵ 'Abdullah bin Aḥmad bin Muḥammad bin Qudāmah al-Ḥanbalī, *al-Kāfi fī Fiqh al-Imām Aḥmad* (t.tp: Dār al-Kutub al-'ilmiyyah, 1994), juz. 3, pp. 247-248.

³⁶ 'Abd al-Rahmān al-Jazirī, *al-Fiqh ala al-Maḏāhib al-Arba'ah* (Beirut: Dār al-Kutub al-'ilmiyyah, 2003), juz. 4, pp. 524.

³⁷ Umar bin Ruslān al-Balqīnī, *al-Tadrīb fī fiqh al-Syāfi'ī* (Riyad: Dār al-Qiblatain, 2012), Juz. 4, pp. 23.

³⁸ Muḥyi al-Dīn Yaḥya bin Syarf al-Nawawī, *al-Majmū' Syarḥ al-Muḥaḏab* (ttp.:.: Dār al-Fikr, tt), Juz. 15, pp. 295.

³⁹ Muhammad Fauzinuddin Faiz, "Pembacaan Baru Konsep Talak: Studi Pemikiran Muḥammad Sa'id Al-'Asymāwī," *Epistemé: Jurnal Pengembangan Ilmu KeIslaman* 10, no. 2 (November 12, 2015): pp 285.

legal thinkers, such as Muḥammad Sa'id al-Asymāwī, reconstructed the concept of talak by making wives also have the right to mentally as well as husbands.⁴⁰ Wife to break the marriage bond was adopted by the courts in Indonesia; this equality is realized by the filing of divorce by the husband and divorce filed by the wife to the Religious Court. The right of haḍānah can be filed by the husband or wife in a divorce suit or divorce suit, and it can also be filed through a lawsuit for reconciliation. Judges often provide legal judgment based on classical books. This is often found in judges' legal considerations in court decisions.

2. Post-Divorce Parenting: Not Yet Mumayiz and Already Mumayiz

When there is a dispute over the rights of haḍānah between husbands and wives against their children who are not yet mumayyiz, classical jurisprudence stipulates that the rights of haḍānah are in the hands of the mother.⁴¹ This is based on the hadith which tells of the Prophet Muhammad's decision, regarding the dispute over haḍānah rights as follows:

عمرو بن شعيب، عن أبيه، عن جده عبد الله بن عمرو، أن امرأة قالت: يا رسول الله، إن ابني هذا كان بطني له وعاء، وثديي له سقاء، وحجري له حواء، وإن أباي طلقني، وأراد أن ينتزعه مني، فقال لها رسول الله صلى الله عليه وسلم: أنت أحق به ما لم تتكحي.⁴²

The hadith above tells about the complaint of a woman who has been divorced by her husband, she complained to the Prophet Muhammad about her husband who wanted to take custody of her young child after mentoring herself, even though she had been pregnant with her child, breastfed her and her room became a bed. His son. Hearing these complaints and complaints, the Prophet (saw) finally decided that the woman had haḍānah rights to her child as long as she had not remarried.⁴³ When a

⁴⁰ Muḥammad Sa'id Al-'Asymāwī, *Ma'ālīm al-Islām* (Kairo: Sina' li al-Nasyr, 1989), p. 31-33.

⁴¹ Abdulmumini A. Oba, "Judicial Practice in Islamic Family Law and Its Relation to 'Urf (Custom) in Northern Nigeria," *Islamic Law and Society* 20, no. 3 (2013): pp 302-303.

⁴² Abū Dāwud Sulaimān, *Sunan Abī Dāwud* (Beirut: al-Maktabah al-'Aṣriyyah, tt), Juz. 2, pp. 283. No Hadits, 2276.

⁴³ Muḥammad Asyraf, *'Aun al-Ma'būd Syarḥ Sunan Abī Dāwud* (Beirut: Dār al-Kitāb al-'Ilmiyyah, 1994), juz. 6, pp. 265.

wife who has been divorced by her husband remarries another person, then she automatically loses the right of haḍānah to her child, who is not yet mumayyiz.⁴⁴ However, if she remarries someone who still has a mahram relationship with her child, such as her child's uncle from the husband's side (husband's brother), then she can still get haḍānah rights.⁴⁵

Understanding editors “أنت أحق به ما لم تنكحي” The jurisprudence scholars have different opinions on whether a mother's haḍānah rights will fail if she remarries another person who is not the brother of her former husband. In this case, the opinions of the scholars are mapped into three. First, according to the opinion of Imam Syāfi'ī, Mālik, Abū Ḥanīfah, and one of the opinions of Imam Aḥmad, a mother will lose her child's haḍānah rights who are not yet mumayyiz if she remarries and has intercourse with her second husband.⁴⁶ This first opinion does not differentiate between the sex of the child, whether male or female have the same position. Second, according to the opinion of Ḥasan and Ibn Ḥazm, a mother does not at all lose the right of haḍānah to her unmumayyiz child even though she remarries another man on the condition that her second husband has good character..⁴⁷ Third, according to one of the opinions of Abū Musa and Imam A, mad, a mother will lose her son's right to hanahānah if she remarries another person, but she will not lose the right to haḍānah her child who is female until the child grows up even though he remarried.⁴⁸ Differences of opinion also occur regarding a mother who has remarried another person and is then divorced by her second husband. According to the maḏhab Syāfi'ī, Ḥanafī, and Ḥanbalī, a mother who has been divorced by her second husband can regain custody of her child who is not yet mumayyiz from the first husband. This is due to the loss of the causes

⁴⁴ ‘Abd al-Qādir Syaibah al-Ḥamd, *al-Fiqh al-Islāmī Syarḥ al-Bulūg al-Marām min Jam'i Adillah al-Aḥkām* (Madīnah: al-Maṭabi' al-Rasyīd, 1982), juz. 6, pp. 265.

⁴⁵ Abū Muḥammad Ḥusain al-Bagawī, *Syarḥ al-Sunnah* (Beirut: al-Maktab al-Islāmī, 1983), Juz. 9, pp. 331.

⁴⁶ Wahbah al-Zuhailī, *al-Fiqh al-Islām wa Adillattuh* (Damaskus: Dār al-Fikr, t.t), juz. 10, h. 7309.

⁴⁷ ‘Alī bin Aḥmad bin Sa'īd bin Ḥazm, *al-Muḥalla bi al-Ātsār* (Beirut: Dār al-Fikr, t.t), juz. 10, pp. 143.

⁴⁸ ‘Alī bin Sulimān al-Mardāwī, *al-Inṣāf fi Ma'rifah al-Rājiḥ min al-Ḥilāf* (t.tp: Dār al-Turās al-'Arabī, t.t), juz. 9, pp. 416.

that undermine the rights of *haḍānah* by breaking the marriage bond through a divorce from the second husband.⁴⁹ While Maḏhab Mālikī argues that she still cannot regain her child's *haḍānah* rights even though she has been divorced by her second husband.

The right to care for children who are not yet *mumayyiz* is more entitled to be cared for by the mother because the mother feels better and smarter in caring for and educating the child, so when there are two choices between a boy and a girl in caring for a child, the woman who takes precedence.⁵⁰ One example found in the Bogor Religion Court was relinquishing custody of the child from the mother because the mother planned to marry a man, so the judge felt that when the child was cared for by the mother, it would not be maximized because he would start a new family.⁵¹ Child custody is the right of young children. Because he still needs guarding, supervision. This is addressed to mothers because mothers have an obligation to do so *hadhanah*.⁵²

Meanwhile, children who are *mumayyiz* must be given the choice of whether to follow their mother or father.⁵³ This is in accordance with the hadiths:

عن أبي هريرة، أن النبي صلى الله عليه وسلم خير غلاما بين أبيه وأمه.⁵⁴

The policy of the Prophet Muhammad, to give the right to vote for children who are *mumayyiz*, is a policy of Islamic law that is agreed upon and followed by all *fiqh* schools when there is a divorce. The above hadith is strengthened by another hadith that was also narrated by Abū Hurairah, which tells of a dispute over *haḍānah* rights between a divorced husband and wife, where the wife comes to see the Prophet

⁴⁹ Abū Bakar bin Mas'ūd, *Badāi' al-Ṣanāi' fī Tartīb al-Syarāi'* (t.tp; Dār al-Kutub al-'ilmiyyah, 1986), juz. 4, p. 42.

⁵⁰ Beni Ahmad Saebani, *Fiqh Munakahat 2*. Bandung: CV Pustaka Setia 2016, p 24-26.

⁵¹ Euis Nurlaelawati, dkk. *Hukum Keluarga, Pidana dan Bisnis*. (Jakarta: Kencana 2013), p 38-39.

⁵² Tihami dan Sohari Sahrani, *Fikih Munakahat Kajian Fikih Nikah Lengkap*. Jakarta: PT Rajagrafindo Persada, 2018, pp 217.

⁵³ Ahmed Fekry Ibrahim, "The Best Interests of the Child in Pre-modern Islamic Juristic Discourse and Practice," *The American Journal of Comparative Law* 63, no. 4 (2015): pp 861.

⁵⁴ Abū Bakar al-Baihaqī, *al-Sunan al-Kubra* (Beirut: Dār al-Kutub al-'ilmiyyah, 2003), Juz. 8, p. 4. No hadiths, 15757.

Muhammad while complaining about her husband who intends to take custody of his child. Responding to this, Rasulullah Saw., Said to the child: "O son, this is your father, and this is your mother, so hold the hand of one of the two that you want to follow." Then the boy took his mother's hand, so the mother went to take him.⁵⁵ The two hadiths narrated by Abū Hurairah above are understood by scholars' in a context where the child who is fighting for custody is mumayyiz so that it does not contradict the hadith narrated by Amr bin Syuaib where Rasulullah Saw., Decided that child custody was in the hands of a mother without giving the child the right to choose.⁵⁶ Children who have mumayyiz have the right to choose to be under the care of their mother or father because they are considered capable of knowing which of their father and mother love them more and pay more attention to fulfilling their daily needs.

3. The ability to submit disputes over child custody by the family when the child's rights are not fulfilled by the caregiver.

The author tries to trace haḍānah disputes in the hadith of the Prophet, showing the occurrence of haḍānah disputes between husbands and wives of different religions and beliefs. This is told through the story of Rāfi 'bin Sinān and his wife. Rāfi 'has converted to Islam, while his wife is reluctant to convert to Islam. Then when they were both divorced, Rāfi's wife came to Rasulullah Saw. to control custody of her daughter named 'Amīrah.⁵⁷ But on the other hand, Rāfi 'also went to Rasulullah Saw., To take custody of his daughter. Responding to the dispute over the rights of haḍānah, Rasulullah Saw., Ordered Rāfi 'and his wife to sit on opposite sides of each other, then he sat his second daughter in the middle between the father and mother positions. Then Rasulullah Saw., Ordered Rāfi 'and his wife to call his daughter, then the girl tended to approach her mother, then Rasulullah Saw., Prayed "O Allah, give the child

⁵⁵ Aḥmad bin Ḥusain al-Ramlī, *Syarḥ Sunan Abī Dāwud* (al-Fayyūm: Dār al-Falāḥ li al-Baḥṣ al-'Ilmī wa Taḥqīq al-Turās, 2016), juz. 10, pp. 137.

⁵⁶ Muḥammad bin Ismā'īl, *al-Taḥbīr li al-Idāh Ma 'ānī al-Taisīr* (Riyāḍ: al-maktabah al-Rusyd, 2012), juz. 3, pp. 631.

⁵⁷ Khalīl Aḥmad, *Baḥṭh al-Majhūd fī Halli Sunan Abī Dāwud* (al-Hind: Markaz al-Syaikh Abī Ḥasan al-Nadwī li al-Buḥūs wa al-Dirāsāt al-Islāmiyyah, 2006), juz. 8, pp. 281.

a guide," then immediately the girl leaned toward her father, then her father took him. This shows that religious differences between husband and wife do not cause one of them to lose the right of *haḍānah* over their child, as Abū Ḥanifah argues.⁵⁸ Therefore, children who are *muamayyiz* or adults still have the right to choose to be under the care of one of their parents even though they have a non-Muslim status.⁵⁹ However, on the other hand, it seems that the Prophet Muhammad SAW preferred when a child remained in the care of Muslim parents; this was shown by his prayer to Rāfi's daughter to choose to be under the care of his Muslim father rather than under the care of his mother who reluctant to convert to Islam.⁶⁰ This is because the religion adopted by parents is very likely to influence their *aqidah* and beliefs about God and the religion that they will embrace in the future.

Understanding the hadith narrated by Rāfi 'bin Sinān above, the author finds that the scholars have different opinions about the religious status of people who are entitled to *haḍānah* rights. Maḏhab Syāfi'i, Ḥanbalī, and one of the narrations of Malikī's maḏhab require that people who get the right of *haḍānah* must be a Muslim, so it is not permissible for a person with non-Muslim status to raise a child who is Muslim.⁶¹ This incompetence is shown by the unwillingness of Rasulullah Saw., If Rāfi 'bin Sinān's child is cared for by his wife who is a non-Muslim, so he prays for the child to choose Rāfi' bin Sinān as his caregiver, and this prayer is granted by Allah SWT. On the other hand, Ḥanafī's maḏhab does not require a person to be a Muslim. According to the Ḥanafī maḏhab, non-Muslims with status *ẓimmī*⁶² Have an egalitarian position with a Muslim in terms of *haḍānah*. This is because *haḍānah*, in its

⁵⁸ Muḥammad bin 'Alī al-Syaukānī, *Nail al-Auṭār* (Mesir: Dār al-Ḥadīṣ, 1993), juz. 6, pp. 391.

⁵⁹ Imen Gallala-Arndt, "The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and Southeast Asian Approaches," *The American Journal of Comparative Law* 63, no. 4 (2015): pp 829–58.

⁶⁰ Abū al-‘Aun Muḥammad bin Aḥmad, *Kasyf al-Liṣām Syarḥ ‘Umdah al-Aḥkām* (Kuwait: Dār al-Nawārid, 2007), juz. 6, p. 54.

⁶¹ Abū Muḥammad Maḥmū bin Aḥmad, *al-Binayah Syarḥ al-Hidayah* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2000), juz. 5, pp. 651.

⁶² *Ẓimmī* merupakan konsep fikih klasik bagi seorang non muslim yang hidup di negara Islam dan tidak memusuhi umat Islam, serta tunduk dan patuh terhadap aturan negara Islam.

implementation, must be based on compassion, not on the same religious status.⁶³ It cannot be denied that compassion is inherent in all human beings so that both Muslims and non-Muslims are in an egalitarian position. Meanwhile, Ḥanafī maẓhab argues that an apostate will lose the right of haḍānah, but he loses this right not because of apostasy, but because he must be imprisoned for apostasy. It is automatically impossible to raise a child.⁶⁴

Apart from matters of interfaith, scholars also have different opinions regarding a nanny who is a slave. According to the maẓhab Syāfi'ī, Ḥanafī, and Ḥanbalī a mother who is a slave does not have the right to care for her independent child,⁶⁵ However, Maẓhab Malikī argues that he still has the right of haḍānah to his free son as long as he is not sold by his master, who is the father of his child.⁶⁶

On the other hand, the incidents of child custody at the time of the Prophet, was also mentioned by the close family of the father. The incident began with the ḥudaibiyyah and Umrah al-qaḍā 'agreements, which were accompanied by a dispute over the custody of Ḥamzah's daughter. The ḥudaibiyyah agreement occurred when Rasulullah Saw., Intended to go Umrah to Baitullah in the sixth year of the Hijri month of Dzulqa'dah, but was blocked by the Quraysh tribe so they could not perform at that time.⁶⁷ Then there was a negotiation between the Muslims and the Quraish tribe, which resulted in *ṣulh ḥudaibiyyah*.⁶⁸ One of the contents of the agreement is a ceasefire between the two parties for ten years, and Muslims are not allowed to go to Umrah in that year, but they are allowed to do Umrah in the following year by only carrying a

⁶³ Muḥammad bin Aḥmad 'Ula' al-Dīn al-Samarqandī, *Tuḥfah al-Fuqahā'* (Beirut: Dār al-Kutub al-'ilmiyyah, 1994), juz. 2, pp. 231.

⁶⁴ Zain al-Dīn bin Ibrāhīm, *al-Baḥr al-Rāiq Syarḥ Kanz al-Daqa'iq* (t.tp: Dār al-Kitāb al-Islāmī, t.t), Juz. 4, pp. 179.

⁶⁵ 'Abdullah bin Aḥmad bin Muḥammad bin Qudāmah al-Ḥanbalī, *al-Mugnī li Ibn Qudāmah* (t.tp: Maktabah Al-Qāhirah, 1968), juz. 8, pp. 237.

⁶⁶ Abū 'Abdullah Syams al-Dīn Muḥammad bin Ibrāhīm, *Jawāhir al-Durar fī Ḥilli al-Alfāz al-Mukhtaṣar* (Beirut: Dār Ibn Ḥazm, 2014), juz. 4, pp. 439.

⁶⁷ 'Abū Salmān Ḥamad bin Muḥammad, *Ma'ālim al-Sunan* (Ḥalb: al-Maṭba'ah al-'Ilmiyyah, 1932), juz. 2, pp. 189.

⁶⁸ Musa Syāhī Lāsyīn, *Fath al-Mun'im Syarḥ Ṣaḥīḥ Muslim* (t.tp: Dār al-Syurūq, 2002), juz. 7, pp. 271.

sword sheathed and living in Makkah for three days.⁶⁹ So in the following year, namely in the leading year of Hijriah, Rasulullah Saw., Carried out 'Umrah al-qadā' with 2000 Muslims for three days in Makkah in accordance with the contents of the ḥudaibiyah agreement.⁷⁰ When they were about to return to Medina, Ḥamzah's daughter, Umamah, appeared.⁷¹ Umamah bint Ḥamzah followed them, and he called out, "O uncle, O uncle." Hearing this, 'Ali bin Abī Ṭālib immediately took his hand, then brought him to Fāṭimah and ordered his wife Fāṭimah to look after and care for Umamah. Seeing this, Ja'far bin Abī Ṭālib who was the sibling of 'Ali, felt more entitled to take care of Umamah. He also said: "I have more right to take care of Umamah because she is my uncle's daughter, and his aunt has become my wife." Hearing these words, Zaid bin Ḥārisah who is a person who has been in the brotherhood by the Prophet Muhammad, with Ḥamzah, also felt entitled to take care of Umamah. He also said, "Umamah is my brother's daughter." In another narration, 'Ali ibn Abī Ṭālib refutes their words by stating that he was the one who expelled Umamah from Makkah according to the message of the Prophet, before 'Umrah al-qadā' 'so that he had more right to take care of Umamah because she was the daughter of his uncle. Ḥamzah.⁷² Knowing the custody dispute, Rasulullah Saw., Immediately became the judge to decide the dispute. Then Rasulullah Saw., Decided that Umamah was under the care of his aunt, namely Asma 'bint' Umais, who had become the wife of Ja'far bin Abī Ṭālib. In this case, Rasulullah Saw., Said: "*Bibi is the same as the position of the mother.*" Then Rasulullah Saw., Said to 'Ali: "*You are a part of me, I am a part of you.*" Then Rasulullah Saw., Said to Ja'far: "*You resemble my physical form and character.*" Then Rasulullah SAW., Said to Zaid: "*You are my brother and my slave.*"

⁶⁹ Yahya bin Syarf al-Nawawī, *al-Minhāj Syarḥ Ṣaḥīḥ Muslim bin al-Ḥajjāj* (Beirut: Dār al-Ihyā' al-Turāṣ al-'Arabī, t.t), juz. 12, pp. 138.

⁷⁰ Ibnu Baṭṭāl 'Abū al-Ḥasan 'Alī bin Khalaf, *Syarḥ Ṣaḥīḥ al-Bukhārī li Ibn al-Baṭṭāl* (Riyād: al-Maktabah al-Rusyd, 2003), juz. 4, pp. 468.

⁷¹ 'Abd al-Raḥmān al-Jauzī, *Kasyf al-Musykil min Ḥadīṣ al-Ṣaḥīḥain* (Riyād: Dār al-Waṭan, t.t), pp. 210.

⁷² Aḥmad bin 'Abd al-Raḥmān, *al-Miftāḥ al-Rabbānī li Tartīb al-Musnad al-Imām Aḥmad bin Ḥanbal* (t.tp: Dār Ihyā' al-Turāṣ al-'Arabī, t.t), juz. 17, p. 64.

The hadith above shows that in terms of haḍānah, the aunt takes precedence over the uncle. This right is because the position of an aunt is equal to that of a mother, while that of an uncle is equal to that of a father.⁷³ From this, it can be understood that the priority order of a person who has haḍānah rights for small children who are not yet mumayyiz is a family that has the closest lineage, namely mother and father.⁷⁴ When both of the child's parents have died, the right of haḍānah can be transferred to the grandmother, grandfather, aunt, and uncle. If none of the family is still alive, and there are several people who want to take care of the young child, then the use of the Quran is a solution given by classical jurisprudence to determine who is more entitled to the child's haḍānah rights.⁷⁵

According to the consensus of fiqh scholars, a mother is more entitled to care for a child who is not yet mumayyiz when divorced from her husband,⁷⁶ however, under certain conditions and conditions, the right of haḍānah can be transferred from mother to father.⁷⁷ This condition can occur when a mother does not fulfill the main requirements of haḍānah, namely baligh and reason. Both of these conditions cause a mother who is young or crazy does not have the right of haḍānah.⁷⁸ Another condition that can invalidate haḍānah rights is blindness. This is because caring for and caring for a child really requires a sense of sight, so it is possible that when a small child is cared for by a blind person, the child's needs will not be fulfilled, or maybe the blind person will harm their child accidentally. However, if a blind mother can still look after, care for, nurture, and fulfill all the needs of her child even without the aid of her

⁷³ Abdullah al-Dārimī, *Sunan al-Dārimī* (al-Mamlakah al-‘Arabiyyah al-Sa’udiyyah: Dār al-Mugnī li al-Nasyr wa al-Tauzī’, 2000), Juz. 4, pp. 1948.

⁷⁴ Muḥammad bin Aḥmad bin Rusyd, *Bidāyah al-Mujtahi wa al-Nihāyah al-Muqtaṣid* (al-Qāhirah: Dār al-Ḥadīs, 2004), juz. 3, p. 79.

⁷⁵ Majd al-Dīn ‘Abd al-Salām, dan ‘Abd al-Ḥalīm, dkk, *al-Musawwidah fī Uṣul al-Fiqh* (t.tp: Dār al-Kitāb al-‘Arabī, t.t), p. 214.

⁷⁶ “Introduction: Negotiating Parenthood in Muslim Countries: Changing Concepts and Perceptions,” *The American Journal of Comparative Law* 63, no. 4 (2015): pp 822-823.

⁷⁷ Iena-Maria Möller, “An Enduring Relic: Family Law Reform and the Inflexibility of Wilāya,” *The American Journal of Comparative Law* 63, no. 4 (2015): pp 899-900.

⁷⁸ Yahya bin Syarf al-Nawawī, *Majmū’ Syarḥ Muḥaḍḍab* (t.tp: Dār al-Fikr, t.t), juz. 18, pp. 321.

sense of sight, then she is still more entitled to get haḍānah rights than her husband.⁷⁹ In essence, a person will lose the right of haḍānah if he is affected by a disease or disability in the body, which causes him to be unable to raise children. According to the Mazhab Syāfi'i, someone will also lose the right of haḍānah if he/she has a bad character such as often leaving prayer, drunkard, or adulterer.⁸⁰ However, this was denied by Ibn Qayyim; he argued that a person's wickedness does not make him lose the right of haḍānah, because Rasulullah Saw., And the Companions never forbade wicked people to care for and raise their children. On the other hand, imposing good character requirements for child caregivers is an attitude of making it difficult for oneself to be religious, and applying these conditions can actually lead to child neglect. In every village, city, and country, there must be wicked people where they still care for their children, so that if they are forbidden to raise their children because of their wicked nature, then there will be child abandonment.⁸¹

From the above discussion, it can be concluded that there are haḍānah conditions that were agreed upon and disputed by the classical fiqh maḥab- maḥabs. The terms of haḍānah agreed upon by the ulama of the Sunni maḥab are sound-minded, baligh, able to care for and nurture children. Meanwhile, the terms of haḍānah disputed by Sunni maḥab scholars are Islam, freedom, good character, and the condition of a woman (mother) who does not remarry someone who has no family relationship with her child.⁸²

The rules in the classic book above describe how child custody occurs between the two parties. The author's analysis of the case of custody of children who are underage is the right of the mother to care for him unless the mother has a bad temper. Mothers who are in the cases that the author finds are not in the bad temperament

⁷⁹ 'Abd al-Raḥmān bin Abū Bakar al-Suyūṭī, *al-Asybah wa al-Nazāir* (t.tp: Dār al-Kutub al-'ilmiyyah, 1990), pp. 251.

⁸⁰ Muṣṭafa al-Khin dan Muṣṭafa al-Bugā, *al-Fiqh al-Manhajī ala al-Maḥab al-Imām al-Syāfi'ī* (Damaskus: Dār al-Qalam, 1992), juz. 4, pp. 196.

⁸¹ Sayyid Sābiq, *fiqh al-Sunnah* Sayyid Sābiq, *Fiqh al-Sunnah*, Juz. 2, pp. 341.

⁸² 'Abd al-Raḥmān al-Jazirī, *al-Fiqh ala al-Maḥāhib al-Arba'ah*, juz. 4, pp. 522-523.

category. The case of mothers who leave home for certain reasons is not justified in the category of neglecting their children because they have clear reasons such as being educated and KKN so that mothers should be able to properly care for their biological children. A child who is not yet *mumayiz* is more entitled to be cared for by his mother, then the income and needs are passed on to the plaintiff's father or husband.⁸³ Care for children and wife after divorce is the responsibility of the husband because when the wife is officially divorced, the wife has a period of *iddah*.⁸⁴ Although in Indonesia, in fact, there is no institution that ensures that the husband has paid the full *iddah* maintenance fee. This is supported by the absence of strict sanctions so that the rules made are not only rules but also implemented properly.⁸⁵

Conclusion

Custody of children is a series of processes in divorce; although child custody and divorce are not always filed simultaneously, custody of the child arises after the divorce. The two cases that the authors found were cases of custody of children aged five years and one year and nine months. Psychologically, children who are under the age of 5 years have the ability to be cared for by the mother, because through the classical books, the mother also died when she married again or was blind, while the case that the author found was that the mother had no obstacle to care for her child. . Moreover, his son is still *mumayiz*.

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⁸³ Imam Jauhari, "The Implementation of *Hadhanah* Theory on Indonesia Children Rights Protection." *International Conference of ASEAN Perspective and Policy*, pp 372.

⁸⁴ Abd. Munim. " Post-Divorce Custody of Children According to Positive and Islamic Law." *Law Development Journal*. Vol 2 No 1, March 2020, p 25.

⁸⁵ Farida Prihatini, dkk. "The Problem of The Axecution of Child Custody (*Hadhanah*) Decision by the Religious Courts In Indonesia." *Jurnal Syari'ah*, Jil 27 Bil 2 (2019), pp 317.

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