



The determination of *hadhanah* rights of children who are not *mumayyiz* given to the father (study of decision number 635/Pdt.G/2020.PA.Skg)

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ABSTRACT

Mothers are thought to have greater empathy, tolerance, and attention, and they are the people best suited to perform *hadhanah* for children who have not yet been *mumayyiz*. This raises a concern, particularly on how the reflection and *ijtihad* strategy of the appointed authority resolved case number 635/Pdt.G/2020/PA.Skg guarantees *hadhanah* rights for young children who have not yet attained the status of *mumayyiz* to their father. The research administered in this study was an exploration that was humanistically or experimentally valid, and the methodology used was a case approach with a graphical strategy, which is utilized to depict everything associated with the subject precisely. The decision to give custody of children who were not yet *mumayyiz* to their father was made after a thorough investigation. The results of the study show that the decision of the panel of the judges related to the guarantee of granting *hadhanah* to the children who have not yet been *mumayyiz* to their father, in this case, according to the researcher, is because of reflection. This is to help the children, especially if the situation and obligation of the father to complete *hadhanah* for their children are better than the mother's circumstances. In addition, the mother of the children has also given up the freedom of the children who have not been *mumayyiz* to their father. Therefore, the decision-making still needs to focus on three components: the rules of legal certainty, expediency, and justice.

Keywords: *Mumayyiz*, *hadhanah* rights; decision of the religious court SKG

1. INTRODUCTION

As we may know, Allah SWT creates humans for them to know each other and become two by two so that they can care for, care for, and love each other. For Muslims residing in Indonesia, there are provisions governing their respective livelihoods, as referred to in the Law of the Republic of Indonesia Number 1 of 1974 Article 1, which states that "marriage is a legal and valid bond between a man and a woman as husband and wife to form an eternal and happy family based on the belief in the One God" (Law of the Republic of Indonesia Number 1 of 1974 concerning marriage, n.d.).

The purpose of the Shari'a introduced by the Prophet is to regulate human affairs both in the world and ukhrowi (the afterlife), including marriage. The Fiqh teachings divide this regulation into four parts: regulating human relations with their Creator, regulating human relations in their interactions when fulfilling their daily needs, regulating human relations within the family environment, and regulating their safety in a civilized manner and social relations to maintain harmony.

Children are one of the parties who suffer from their parents' divorce. Parenting is a duty and a gift from Allah SWT, and children must always be protected because they have intrinsic dignity and worth that must be maintained. Children are the future of the nation and state. There is a need to uphold the law on raising young children because to do otherwise would put their young children at risk.

Determining *hadhanah* is one of the things that commonly happens during a divorce. Etymologically, *hadhanah* means an obligation to uphold, educate, and oversee all the needs and interests of the children who have not yet become *mumayyiz*. Child maintenance in Arabic is called *hadhanah*. The word means taking care of, educating or caring for babies/small children who cannot yet look after and manage themselves.

Hadhanah itself, in Fiqh terms, means protecting children from all risks that might befall them, caring for them physically and spiritually, maintaining their security and cleanliness, and ensuring their education so that they are ready to face life as Muslims.

In the determination of *hadhanah*, which the writer found in Sengkang, Wajo Regency, although *hadhanah* of the children who have not been *mumayyiz* should fall on the mother, the custody fell on the father's side. If there is a divorce, then it is in line with Article 105 of the Compilation of Islamic Law (KHI) which stipulates that:

The mother is legally obligated to provide for her children who have not reached the *mumayyiz* age (12 years old).

In the case of *hadhanah* determination in Kota Sengkang, the father was given custody of the child. It is interesting to conduct a study with the title "The determination of *Hadhanah* rights of Children who are not *Mumayyiz* given to the Father (Study of Decision Number 635/Pdt.G/2020/PA.Skg)" by taking into account the cases that occurred. The purpose of this research was to 1) find out the judges' judgment in deciding the *hadhanah* case of the children who are not *mumayyiz* under the care of the father at the Religious Court Sengkang, and 2) investigate the legal analysis used by the judges in deciding the *hadhanah* rights of the children who are not *mumayyiz* under the custody of the father the Religious Court Sengkang with Decision No. 635/Pdt.P/2020/PA.SKG. The advantages of this research are: 1) Analysis. Theoretically, research findings are expected to provide concepts to expand the body of knowledge; 2) Analysis from the implementation aspect. The findings of this research can provide suggestions and solutions as well as information about the judges' review of the *hadhanah* case at the Sengkang Religious Court.

2. METHODS

This research was field research, specifically sociological or empirical legal research, where the researcher conducted research directly in the research site, which was located at the Religious Court Sengkang.

Moreover, the primary data in this study were collected from the first source. The data consisted of the result interviews of the judges at the Religious Court Sengkang, who acted as the primary informants in this study. In determining the judges as sources, the researcher took into account the following factors:

- a. The judge has served at the religious court for more than five years.
- b. The judge is still in office at the Sengkang Religious Court.
- c. The judge is responsible for considering, adjudicating, and deciding on cases involving *hadhanah*.

The secondary data source or the information was obtained voluntarily from the researcher through surveys and documentation. The decision file for the case of *hadhanah*, who is not *mumayyiz*, was placed under the father's care with Decision No. 635/Pdt.P/2020/PA.Skg was the secondary data referred to in this study. The data also covered several books and journals relevant to the research, which were used to correlate with the primary data collected. In data collection, the researcher administered the following methods:

a. Observation

The observation in this study was conducted at the Religious Court Sengkang, where the researcher directly visited the research site to observe space, place, actors, activities, objects, time, events, goals, and feelings.

b. Interview

The interview was administered using a systematic interview model based on the guide. To collect the data, the researcher determined the questions and recorded the interviews in which the judges were asked the questions listed.

c. Documentation

The documentation was carried out to seek or collect data sources related to the judges' consideration concerning the *hadhanah* case. These covered books discussing considerations of the judges and the Compilation of Islamic Law. This documentation also included articles or other related documents in the form of files obtained by the researcher which aimed to add research references as well as research intellectual property.

The next stage is the data analysis, which is the final stage of the series of research stages before discussing the research results to achieve the research objectives. In this stage, the data collected and grouped beforehand by the researcher were analyzed by connecting and interpreting the facts found about the considerations used by the judges concerning *hadhanah* of the children under the care of the father with Decision No. 365/Pdt.P/2020/PA.Skg.

3. RESULTS AND DISCUSSION

In the fiqh term, parenting is called *hadhanah*, and it is defined as caring for young children who have not yet known and have not been able to live independently. This mainly includes meeting their needs, ensuring their safety, educating them physically and spiritually, and encouraging their intellectual development, which will lead them to take responsibility for their own life.

Hadhanah becomes an issue when the dissolution of marriage occurs between a husband and a wife. Because the husband and the wife who have ended their marriage want to do everything in their power to take care of their child, the child's custody right has often led to disagreement. Regardless of the marriage situation and assets owned, child custody has nothing to do with *hadhanah*.

Parenting is a process (Jane B. Brooks, the author of "The Process of Parenting") and is referred to as the actions and interactions that parents take to assist their children's growth. Moreover, parenting is a process of interaction between parents and children that is influenced by the culture and social structure in which the child is raised. Parenting is not a one-way relationship where parents are the only ones influencing the children.

Mumayyiz

Mumayyiz is derived from the word *mawayza*, which means to distinguish. Later, it was pronounced *mumayyiz*. Thus, linguistically, if someone is named *mumayyiz*, it is hoped that he will be able to differentiate. Concerning the definitions, limitations, and standards for *mumayyiz*, experts disagree on defining the term "jurists".

Mumayyiz is a small child who can understand khithob (verbal communication) and participate in conversations. This means that the child can understand the intentions and meanings of the talk of intelligent people and provide good responses if spoken to.

Their responding skills, however, cannot be used to measure their ability. Simply put, the comprehension capacity of a child is less advanced than an adult. Children can understand spoken communication in general at this age but have difficulty comprehending the specifics. Al-Amidi emphasizes the difference between the level of understanding of *mumayyiz* and adults in his work *Al-Ihkam fi Usul Al-Ahkam*. Ibnu Farhun and Ibnu Jama'ah define *mumayyiz* as a small child who understands khithob and can participate in oral communication. This aligns with An-Nawawi's view, as seen by Tahriru Alfazh At-Tanbih and Al-Majmu. Al-ḥanābilah scholars typically adhere to this definition.

Legal Basis of Hadhanah

The Holy Qur'an

The children are a part of the family; therefore, parents are responsible and obligated to raise their children well. This is in adherence to God's command to protect oneself and his family from the fire of hell. The legal basis for this can be found in the Qur'an Surah 66 At Tahriim verse 6:

يَا أَيُّهَا الَّذِينَ آمَنُوا قُوا أَنْفُسَكُمْ وَأَهْلِيكُمْ نَارًا وَقُودُهَا النَّاسُ وَالْحِجَارَةُ عَلَيْهَا مَلَائِكَةٌ غِلَاظٌ شِدَادٌ لَا يَعْصُونَ
اللَّهَ مَا أَمَرَهُمْ وَيَفْعَلُونَ مَا يُؤْمَرُونَ

Meaning:

“Believers, guard yourselves and your kindred against a Fire whose fuel is human beings and stones, a Fire held in the charge of fierce and stern angels who never disobey what He has commanded them, and always do what they are bidden.”

The verse above explains that Allah SWT urges His believers to keep Allah's mandates, leave Allah's prohibitions, including family members mentioned in the Qur'an, and protect themselves and their families, including children, from condemnation.

Generally, it is known that parents are responsible for the upbringing of their children. The father is responsible for covering the costs of raising the children and paying for the wife's maintenance, while the mother is primarily responsible for nurturing the children. According to God's Word, providing for a wife and children is required by law.

As explained in the Qur'an Surah Al-Baqarah verse 233, Allah SWT expects parents to take good care of their children and that a mother must breastfeed her child until the baby is two years old and a father must provide for his wife and children. If both parents agree, the mother may wean her child (stop breastfeeding) before the child turns two years old. In addition, the mother can take another woman to breastfeed her child on the condition that she receives a fair wage.

It is important to provide for children from an early age because a failure to do so will put them at risk. Young children have the right to celebrate *hadhanah* because they need adult supervision, care, and education from adults. In this case, mothers specifically are obliged to carry out *hadhanah*. This is stated in the Qur'an Surah An-Nisa verse 9:

فَلْيَتَّقُوا اللَّهَ وَلْيَقُولُوا قَوْلًا سَدِيدًا ۗ يُحْشِ الدِّينَ لَوْ تَرَكُوا مِنْ خَلْفِهِمْ ذُرِّيَةً ضِعَفًا خَافُوا عَلَيْهِمْ

Meaning:

“Let those (disposing of an estate) have the same fear in their minds as they would have for their own if they had left a helpless family behind: Let them fear Allah, and speak words of appropriate (comfort).”

The verse above illustrates how parents should care when their children are to leave the house in a poor condition. This implies that parents are responsible for raising and educating their children so they can grow and develop normally in the future. This section has a secondary interpretation concerning the process of providing education. Every family needs to wisely and responsibly consider and plan their children's future.

***Hadhanah* in the Indonesian Positive Law**

It has been explained that the laws and regulations clearly state that nurturing, taking care of, and protecting children is a vital concern relating to the topic of *hadhanah*. Regulations that have been made, among others, is Law Number 1 of 1974 concerning marriage, which also regulates the issue of *hadhanah*.

Law Number 1 of 1974 concerning marriage Article 41 states that if a marriage is dissolved through a divorce, these are the following outcomes that may follow:

- 1) Both mother and father are still obliged to look after and educate their children solely for the best interests of their children. The court will decide if there is a dispute over who will have custody of the children.
- 2) The father is liable for the children's maintenance and educational expenses. The court may decide that the mother is also responsible for paying the expenses mentioned above if the father is unable to fulfill these obligations.
- 3) The court may order the ex-husband to pay living expenses or determine the ex-wife's obligation.

***Hadhanah* in the Compilation of Islamic Law**

Article 98, paragraphs 1, 2, and 3; Article 104, paragraphs 1 and 2; Article 105, letters a, b, and c; and Article 106 of KHI contain provisions governing child support (*hadhanah*). These articles emphasize parents' duties to educate their children and give them access to religious and general knowledge that will help them as adults.

Hadhanah is therefore provided to female relatives as the priority even though it originated from the male side and is given to them first when the case cannot be defended or after the wife has passed away. It is done because women are more adept at practising *hadhanah* than men in endurance, love, and patience.

***Hadhanah* in the Law Number 23 of 2002 on Child Protection**

Child protection must be implemented based on Pancasila, the 1945 Constitution of the Republic of Indonesia, and the basic principles of the Convention on the Rights of the Child. The four principles of the Convention of the Rights of the Child consist of:

- a. Non-Discrimination
- b. Children's best interests
- c. Children's right to life Survival and Development
- d. Appreciation of the child's points of view and interests.

Law Number 23 of 2002 concerning child protection article 26 paragraphs (1) and (2) regulates the obligations and responsibilities of families and parents. The law strongly emphasizes how everyone—parents, families, communities, the government, and the state—has a continuing duty to look out for children to support their growth and development in all physical, mental, spiritual, and social spheres.

***Hadhanah* of the children who have not been *Mumayyiz* at the Religious Court Sengkang**

The Sengkang Religious Court has handled many divorce cases, including disputes. The right to raise the children is a concern that arises when a husband and wife divorce and is the focus of a *hadhanah* litigation. An issue may arise if a youngster is still a minor or has not attained *mumayyiz* age (12 years old). Because the child is still viewed as vulnerable at that age, there will be arguments between the mother and father in cases like this. The freedom to live with either parent is then granted to children who are no longer extended minors involved in custody battles. According to the Compilation of Islamic Law, mothers have the right to raise children under 12 years old or who are not yet *mumayyiz*. This is established in the Compilation of Islamic Law, Article 105, letter (a).

Parents are ultimately responsible for raising their children, whether or not they stay married. Children require people in their life until they reach a particular age. The term "nurturing" (*hadhanah*) can also refer to providing care or attention to those still unable to meet their needs. Children who were not *mumayyiz* and mentally ill adults are included in this.

According to the results of the interviews, the following are the considerations made by the judges of the Sengkang Religious Court when deciding *hadhanah* rights: according to Article 105 letter (a) of the Compilation of Islamic Law, in the event of a divorce, the mother is in charge of raising a child under the age of maturity, which is 12 years old. However, children who are already *mumayyiz* can choose who will hold custody, with the father paying for support.

The Child Protection Act or Law Number 23 of 2002 article 2 letter (b) states that "the implementation of child protection is based on Pancasila, the 1945 Constitution of the Republic of Indonesia, and the basic principles of Convention on the Rights of the Child". Even though the three references above suggest that the factors used in *hadhanah* cases are based on the benefit of the child, the Law on Human Rights Number 39 of 1999 mandates that judges must take the child's welfare and comfort into account if applying the Compilation of Islamic Law cannot ensure that children receive justice. Thus, it can be claimed that the judge's judgment, even though it did not follow

the Compilation of Islamic Law, should not be contested because it was based on the judge's conscience and the child's best.

Furthermore, jurisprudence is also one of the judges' considerations in making decisions in *hadhanah* case rulings. The Jurisprudence indicates that the Supreme Court believes that the welfare and interest of the child should be prioritised over those who are normatively more entitled to by taking into account the circumstances and evidence presented in court. These facts and evidence include the mental or psychological health of the parents as well as their parenting methods. Article 229 of the Compilation of Islamic Law states, "Judges must pay serious attention to the legal values that live in a society in order that their decisions are in accordance with a sense of justice". Therefore, the judge must carefully weigh each consideration to decide whether the mother is deemed deserving of the *hadhanah* right of her child who has not been *mumayyiz*.

As Prof. Dr. Sudikno Mertokusumo asserted, judges should make decisions about right and wrong with objectivity. Judges consider facts and circumstances in addition to the law when making case decisions. The event determines the outcome; applying the law is merely a tool. This is also in line with the viewpoint of Imam Syafi'i, who stated that the person who can obtain *hadhanah* rights are the one who can raise and manage children who are their responsibilities, including taking care of morals, education, health, and property (if the child has one). Imam Syafi'i also believed a person should perform *hadhanah* only if they are trustworthy and can better ensure the children's care. A *mumayyiz* child can live with his father rather than his mother. However, regarding childrearing and education, both parents have parental rights.

Discretion of the Judges

The judges base their decision on or refer to the Child Protection Law No. 23 of 2002 and Human Rights Law No. 39 of 1999 when making decisions regarding childcare (*hadhanah*) cases involving children who have not been *mumayyiz* placed under the care of their fathers (study of the Decision Number 635/pdt.g/2020/pa.skg). The judges will also refer to the Compilation of Islamic Law article 105 letter (a) if the statements between the plaintiff and the defendant bear no differences; however, if the father learns that the mother is in trouble or the mother who is raising the child has committed something wrong, the judges will then consult the Child Protection Act. The sources of law consulted when making *hadhanah* decisions are then made clear to guarantee the child's best interests. As a result, if the child's best interests are not by the rules of the Islamic Law Compilation, the judges do not refer to the Islamic Law Compilation. The interview described above also stated that the Child Protection Act Law No. 23 of 2002 article 2 letter (b) served as the foundation for the judges' discretion.

In addition, the judges held the view that, despite the changes brought about by the divorce, parents' obligations as mothers and fathers continue. According to Article 34, Paragraph 1 of Law Number 1 of 1974 Concerning Marriage, the husband is required to perform and compensate for all costs associated with his children's upbringing. The ex-wife will be held accountable for the husband's failure to fulfill his commitments, and the local religious court will require the ex-husband to pay the *hadhanah* it deems appropriate as retribution.

About Shafi'i school or Madzhab al-Shāfi'ī, some of the results above suggest that parenting is caring for and educating children who are not yet *mumayyiz* (they are still unable to discern between good and wrong). If the mother is still not married to another man, she is thought to be the better caregiver and educator when the child is still young, and the parents are divorced. The informant's viewpoints regarding the conditions of the *hadhanah* holder are likewise consistent with Imam Shafi'i's belief that one of them is the ability to raise and educate the child.

4. CONCLUSION

Based on the explanation above, it can be concluded that according to the judges, Child Protection Law No. 23 of 2002, which aims to make decisions based on the child's best interests, should be taken into account in making decisions concerning *hadhanah* matters in general. The Compilation of Islamic Law Article 105 letter (a) is only applied in the absence of any conflict between parents about rearing their children. The judges also based their decisions on legal events in court and the *Hadhanah* Case No. 110 K/2007AG decision.

When evaluating the decisions, the judges argued that the determination was against the law because the judges put aside letter (a) of article 105 of the Compilation of Islamic Law when deciding on granting *hadhanah* rights to a father of a child who had not been *mumayyiz*.

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