



Rechtvinding in Resolving Child Custody Disputes

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Abstract— Deciding child custody is an intricate and delicate legal matter that necessitates striking a balance between legal considerations and the child's welfare. In the realm of Islamic law, especially within Fiqh (the study of Islamic law), the allocation of child custody frequently involves adherence to distinct madhabs or schools of thought, leading to differences in decision-making processes. This study aims to examine how the legal process is applied or found in resolving disputes related to child custody. The research employs a normative legal method (juridical-normative). The results indicate that Rechtvinding, or legal search, is the process of finding legal solutions in a specific context. In the field of child custody, especially in Islamic and Indonesian Marriage Law, the concept of "Hadhanah" is relevant to the principles of rechtvinding. Articles 104 and 105 of the Compilation of Islamic Laws (KHI) show legal concern for child protection, emphasizing custody rights based on family circumstances. Law No. 1 of 1974 emphasizes parental responsibilities, and the court plays a role in hadhanah issues, reflecting a holistic legal search. Civil Code Articles 319 H and 319 F adjust decisions on parental release and dismissal based on specific child circumstances, aligning with rechtvinding's context-specific legal determination. The views of Islamic legal experts on the duration of child custody reflect variations, aiming for equality and justice after divorce, in line with rechtvinding. The steps in determining child custody, covering balance, parent-child relationships, the child's physical and emotional aspects, and the best interests principle, underscore the need for a holistic legal search tailored to the specific circumstances of each case.

Keywords- *Rechtvinding, Determining, Child custody.*

I. INTRODUCTION

The high rate of divorce and conflicts in parent relationships can lead to an increase in disputes over child custody, as both parents may have different views on the best way to care for their children after divorce. Emotional conflicts and differences in parental responsibilities may necessitate involving the legal system in determining child custody.[1]

A child in the early stages of life until a certain age requires assistance from others, both in terms of physical development and moral formation. The execution of the hadanah duty, by someone responsible, plays a crucial role in this matter. Therefore, the issue of hadanah receives special attention in Islamic teachings. The obligation to carry out this duty lies on the shoulders of the parents, and if both parents are unable or do not meet the criteria set by Islam, it is necessary to find a caregiver who meets these criteria. For the sake of the child, the caring attitude of both parents towards the issue of hadanah is crucial. Lack of attention can result in a child growing up without the expected supervision and guidance. Therefore, cooperation between the father and mother in performing this duty is highly anticipated. Although the implementation of the hadanah duty tends to be carried out more by the mother, the role of the father remains crucial, both in fulfilling the needs that support the hadanah duty and in creating a peaceful atmosphere in the household where the child is cared for and raised.[2]

The realization of such expectations becomes challenging in the event of a divorce between the father and mother of the child. Divorce, regardless of the reasons, is considered a disaster for the child. During divorce, the child loses the ability to feel love simultaneously from both parents. Yet, experiencing love from both parents simultaneously plays a vital role in a child's mental development. Divorce frequently affects the neglect of the child-rearing process. Rechtvinding in Resolving Child Custody Disputes in Religious Courts.[3]

II. LITERATURE REVIEW

A. Definition of Child custody

The custody of a child is the right to care for the child, referred to as "hadanah" in the Compilation of Islamic Law (HKI). According to Sayyid Sabiq, hadanah involves taking care of non-discerning children without commanding them, doing things for the child's well-being, protecting the child from harm, and providing both physical and spiritual education to enable the child to be independent and assume responsibilities[4]. In the context of the Islamic Family Law (KHI), hadanah is defined as the activities of nurturing, caring for, and educating a child until they reach adulthood or are capable of standing on their own[5].

B. Legal Principles in Resolving Child Custody Disputes

Legal principles in resolving child custody disputes refer to the foundational rules and guidelines within the legal system that govern the resolution of conflicts related to the custody of children. These principles are designed to ensure a fair and just outcome while prioritizing the best interests of the child [6]. Some key legal principles in this context may include [7]:

Best Interests of the Child: The primary consideration in child custody disputes is the best interests of the child. Courts aim to make decisions that promote the child's well-being, safety, and overall development.

Parental Fitness: The court assesses the fitness of each parent to determine their ability to provide a stable and nurturing environment for the child. Factors such as mental and physical health, financial stability, and living conditions may be taken into account.

Child's Wishes: Depending on the child's age and maturity, their preferences and wishes may be considered by the court. However, this is often balanced with other factors, and the court has the discretion to make decisions in the child's best interests.

Continuity and Stability: Courts may prioritize maintaining the child's existing relationships, routines, and stability. Disrupting a child's life as little as possible is often a key consideration.

History of Caregiving: The court may review each parent's historical involvement in the child's life, including caregiving responsibilities, emotional support, and overall commitment to the child's well-being.

Evidence-Based Decision-Making: Legal principles dictate that decisions should be based on credible evidence presented in court. This may include witness testimonies, expert opinions, and relevant documentation.

Non-Discrimination: Courts are expected to make decisions without gender bias, ensuring that fathers and mothers have equal opportunities to be awarded custody based on their individual merits as parents [8].

III. METHOD

This research employs the normative legal method (juridical-normative), which is a type of study that adopts an approach based on legislation by examining legal materials. To obtain optimal and relevant data for the research objectives, the researcher conducts library research, involving the exploration and evaluation of various books or scholarly writings relevant to the research title.[9]

IV. DISCUSSION

The term "rechtvinding" comes from the Dutch language and can be translated as "legal search" or "legal determination." It denotes the idea or procedure in law that entails endeavors to discover, find, or ascertain legal solutions applicable to a particular context.

Child maintenance is termed as "Hadhanah" in Arabic. Linguistically, this term signifies the protection of a child, who is not yet capable of self-care, from potential harm due to not having reached the stage of tammy. Consequently, hadhanah is a concept that encompasses the upbringing and care of a child from birth until they attain independence and can care for themselves, typically undertaken by family members or the child's family.[10]

Article 104 of the Islamic Family Law (KHI) stipulates that the father bears the financial responsibility for covering all expenses related to the nursing of the child. In the event of the father's demise, the obligation to cover nursing costs falls upon the individual obligated to provide financial support to the mother or the child's guardian. The nursing duration is set to a maximum of two years but can be concluded earlier with the mutual agreement of the child's father or mother. This article emphasizes the father's comprehensive duty to financially support the nursing of his child. In the unfortunate event of the father's death, the responsibility for nursing expenses is transferred to the person who is obligated to financially support the child's mother or guardian. The article introduces a maximum two-year period for the nursing process but allows for flexibility by permitting earlier termination if agreed upon by the child's father or mother, reflecting legal considerations for the unique circumstances and needs of families.[11]

Article 105 of the Islamic Family Law (KHI) outlines that in the event of divorce, the custody rights for a child who is either not yet mumayyiz or is under the age of 12 automatically revert to the mother. If the child is mumayyiz, they have the liberty to choose between the father or mother as the custodian. It is the father's responsibility to cover the child's maintenance expenses. The provision underscores that in the case of divorce, custody rights for a child not yet mumayyiz or under 12 years old automatically shift to the mother, underscoring the KHI's emphasis on safeguarding and caring for children in need of special attention.[12] For a mumayyiz child, the autonomy to select the custodial parent acknowledges the child's maturity to make decisions regarding their custody. The father continues to be accountable for the child's maintenance costs, encompassing various financial aspects crucial for meeting the child's needs, such as living expenses, education, and overall well-being.[13]

In Law No. 1 of 1974 regarding marriage in Indonesia, the obligations towards children are outlined in Article 45, which can be summarized as follows: a. Both parents are obligated to provide optimal care for their children. b. The parental duty mentioned in Article (1) persists until the child marries or achieves financial independence, and this responsibility endures even if the marriage of the parents is terminated. From these articles, it can be deduced that under the Marriage Law, both parents are obliged to nurture and support their children until they marry or attain independence. The father is specifically responsible for covering all the expenses related to the child's maintenance and education. In this context, the Court holds the authority to determine Hashanah-related matters, deciding whether to assign it to the father or the mother. The hadhanah obligation continues to be applicable even in cases where the marriage between the parents concludes through a divorce.[12]

In Chapter Fourteen, Part Two A of the Civil Code Book, which pertains to the Liberation and Dismissal of Parents, there are Articles 319 H and 319 F. Article 319 H stipulates that if minors are not legally under the jurisdiction of parents, guardians, foundations, or charitable institutions and a court decision deems it necessary for them to be under parental guardianship or if they are not yet under the jurisdiction of parents or guardians, the same decision must include an order to transfer the children to the party who, as specified in Article 319 F, the fifth paragraph, gains authority over them.[14]

Article 26 of Law No. 23 of 2002 on child protection, within the fourth section addressing the duties and responsibilities of families and parents, outlines that parents bear the duty and responsibility to: a. Provide care, nurturing, education, and protection for the child. b. Contribute to the child's growth and development in alignment with their capabilities, talents, and interests. c. Take measures to prevent early marriages. In situations where parents are absent, their whereabouts are unknown, or they are unable to fulfill their obligations and responsibilities, these duties and responsibilities can be transferred to the family and executed by prevailing laws and regulations.[15]

According to the Maliki school of thought, the period of guardianship for a male child extends from birth until puberty, while for a female child, it continues until marriage. In the Hanbali school, both male and female children are under care for seven years, after which the child is given the choice to reside with either the mother or father. The Hanafi school, however, specifies a seven-year care period for males and nine years for females. The Shafi'i school, in contrast, contends that there is no fixed time limit for guardianship. A child stays with their mother until they are capable of making their own choice. If a male child opts to live with his mother, he can stay with her at night and with his father during the day. Similarly, if a female child chooses her mother, she can stay with her at all times. In the absence of a child's preference or if they choose to live with both parents, a draw is conducted, and if no choice is provided, the child stays with their mother.[16]

The Hanbali school designates a care period of two years for a male child and seven years for a female child. Afterward, the child is given the option to choose their living arrangement. Meanwhile, the Imamiyah school sets a two-year care period for a male child and seven years for a female child. Subsequently, custody is granted to the father until the child reaches nine years if female and fifteen years if male. After this period, the child is free to choose whether to reside with the mother or father.[17]

Scholars from various schools concur that caregivers in such scenarios should prioritize qualities such as sound mind, trustworthiness, personal hygiene, abstention from dancing or alcohol consumption, and not neglect the children under their care. These criteria aim to protect and ensure the child's health and moral development, and they apply equally to male caregivers. The term "rechtvinding" has its origins in the Dutch language, and it can be translated as "legal search" or "legal determination." It encompasses the concept or process in law where efforts are made to seek, find, or determine legal solutions relevant to a specific context.[18]

In Arabic, child maintenance is referred to as "Hadhanah." Etymologically, this term signifies the act of safeguarding a child who is not yet capable of self-care, protecting them from potential harm due to not reaching the stage of tanyiz. Hadhanah, therefore, involves the education and care of a child from birth until they can achieve independence, carried out by relatives or the child's family.[19]

According to Article 104 of the Islamic Family Law (KHI), the father is obligated to cover all costs related to nursing the child. If the father is deceased, the responsibility for nursing costs shifts to the person obligated to provide financial support to the mother or the child's guardian. The nursing process is limited to a maximum of two years and can be terminated earlier with the consent of the child's father or mother. This article emphasizes the father's complete obligation to bear all nursing costs. In the event of the father's death, the responsibility for nursing expenses transfers to the person obligated to support the mother or guardian. While the nursing process is regulated with a maximum limit of two years, the article allows flexibility by permitting an earlier termination with the consent of the child's father or mother, demonstrating legal concern for the specific situations and needs of families.[20]

Article 105 of the Islamic Family Law (KHI) addresses custody rights in the event of divorce. If a child is not yet mumayyiz or is under 12 years old, custody rights automatically go to the mother. A mumayyiz child, however, has the choice to select either the father or mother as the custodian. The father is responsible for the child's maintenance expenses. This provision reflects the KHI's focus on protecting and caring for children who are still at an age requiring special attention. A mumayyiz child is empowered to decide between the father or mother as the custodian, acknowledging the child's wishes and maturity in making decisions about their custody. The father remains financially responsible for the child's maintenance, covering aspects such as living expenses, education, and overall well-being.[21]

V. CONCLUSION

Rechtvinding, also known as legal search, encompasses the process of identifying legal solutions within a specific context. In the realm of child custody, such as in Islamic law and the Marriage Law of Indonesia, the concept of "Hadhanah" aligns with the principles of rechtvinding. Articles 104 and 105 of the Islamic Compilation of Laws (KHI) illustrate legal attention to child protection, emphasizing the right to custody while considering the unique circumstances of each family. In Law No. 1 of 1974, the articles outlining obligations towards children reflect rechtvinding principles by underscoring the shared responsibility of both parents. The court's authority in matters of hadhanah further reflects a comprehensive legal search process. In the Civil Code, particularly in Articles 319 H and 319 F, regulations regarding the liberation and dismissal of parents tailor decisions to the specific needs of children, aligning with the concept of rechtvinding that requires a legal determination based on the context of each case. The diverse perspectives of Islamic jurists on the duration of child custody reveal variations in time limits and responsibilities, demonstrating endeavors to achieve fairness and justice in determining custody post-divorce, consistent with the principle of rechtvinding. The steps and approaches involved in determining child custody, encompassing balance, parent-child relationships, the child's physical and emotional well-being, and the principle of the child's best interests, underscore the notion that this process necessitates a holistic legal search tailored to the specific circumstances of each case.

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