

REVOCAION OF HADHANAH AT THE PEKANBARU HIGH RELIGIOUS COURT (DECISION ANALYSIS No.26/ Pdt.G /2023/ PTA.Pbr)*

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Abstract

The purpose of this writing is to know and understand the methods and concepts used by judges to determine the revocation of child custody (hadhanah). The method used in this study is normative legal research. Legal research is a method of examining documentary studies, which includes the use of several materials such as court decisions, legal theories, regulations and laws. The topic of discussion this time is the analysis of the judge's decision regarding the revocation of child custody at the Pekanbaru High Religious Court decision No.26/Pdt.G/2023/PTA.Pbr as the subject of this research. The results of this analysis show that the method for taking hadhanah in the Pekanbaru Religious Court's decision was carried out by the Pekanbaru Religious High Court's panel of judges while taking into account the signs in its decision, especially because the benefit of the life of a child who is not yet 12 years old is the right of the mother. Regarding this matter, according to Article 105 of the Compilation of Islamic Law, it explains in more detail that if there is separation between husband and wife, among other things (1) custody of children under 12 years of age is the mother's right.

Keywords: Child Custody; High Religious Court; Compilation of Islamic Law.

INTRODUCTION

According to Zahry Hamid, marriage, which is called marriage according to syara', is a contract (Ijab Qabul) between the guardian and the prospective groom with certain words and the fulfillment of the harmony and conditions of marriage. In a broad sense, it is "the physical and spiritual bond between a man and a woman for the continuation of life and offspring, which is carried out by the provisions of Islamic law" (Shomad, 2012).

The legal conditions for marriage in Indonesia are that the requirements and procedures must be fulfilled before marriage, which are regulated in the provisions of the Marriage Law (Rizky Amalia, 2022).

Peace in a household is the hope that Islam truly desires. The marriage contract is made once and forever until death, so that husband and wife create a reliable household enjoy love and affection so that we can look after the lives of developing children. However, in reality, divorce can still occur, and Islamic law also provides specific regulations regarding divorce procedures and problems related to the consequences of divorce (Turnip, 2019).

The termination of the parents' marital relationship will have legal consequences in protecting their children. Therefore, several regulations in Indonesia specifically apply to the protection of children, especially children who are victims of divorce. Regarding child protection, several regulations in



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law are implemented in Indonesia (Solichin, 2020).

Hadhanah comes from Arabic, which means nurturing, educating, and meeting all the needs of children under 12 (not yet able to differentiate between good and bad). Hadhanah means placing something near the ribs or on the thigh because when a mother breastfeeds her baby, she places it on her lap, as if protecting and nurturing the baby, which is why the term "hadhanah" is used. "Education and upbringing of children's independence are also managed by the child's relatives" (Fahri, 2018).

The Scholars think that the hadhanah law is obligatory (Turnip, 2019) and is a joint obligation between the father and mother; the mother has greater custody rights. Maternal guardianship is valid until the age of seven, meaning that the child is supported; after that, he has a choice between his parents, so he has the right to be raised by the parents he chooses. Family is the smallest unit in human life (Fitriyana et al., 2022).

Marriage is a sacred bond (*mitsaqa qhalidzhon*) in managing household life and offspring. However, many people experience problems related to child custody, childcare costs, education, and so on. However, some people ignore this (Hamid & Fakhyadi, 2022).

In child custody, hadhanah does not always belong to the mother, and the father has the right to ask for custody if the mother does not fully comply with the rules that she considers sufficient to guarantee the child's well-being and interests. Therefore, a family life full of peace and piety is realized not only for married couples but also for the benefit of their offspring (Candra, 2022).

In decision Number 26/ Pdt.G /2023/ PTA.Pbr, the judge, decided to revoke child custody, the final decision of which was to grant the appeal and cancel the decision of the Pekanbaru Religious Court Number 2189/ Pdt.G /2022/ PA.Pbr, The object of the appeal is the return of custody of the appellant/defendant's child in the name of Fulan and ordering the appellant/plaintiff to pay the court costs according to the provisions that have been determined.

Even though in the decision of the Pekanbaru Religious Court Number 2189/ Pdt.G /2022/ PA.Pbr, the trial can be entirely accepted in the form of revocation of child custody, identifying the applicant as the person who holds custody of the child mentioned in the applicant's hadhanah; gave sanctions to the Defendant to give the child he was with to the Plaintiff.

The Panel of Judges took this after considering the reasons and evidence attached, the general contents of which are as follows: The defendant prohibited the child named Fulan from spending the night communicating, meeting, and eliminating the plaintiff's status as the father of their child.

Therefore, the Religious Court is one institution that has the right to hear cases and provide court decisions regarding cases of canceling hadhanah at the Pekanbaru Religious Court. As in Article 49 paragraph (1) of Law No. 1 of 1974 concerning Marriage, which has been changed to Law Number 16 of 2019, parents can revoke their rights over their children at the parents' request. Furthermore, the rules in the Circular Letter of the Supreme Court of the Republic of Indonesia No. 1 of 2017

concerning the Implementation of Construction Results of the 2017 Supreme Court Plenary Session can be used as a reference in carrying out the duties of the Court case letter C related to the legal development of religious rooms, in number 4 it is written "Decision in determining rights Child custody must include that the owner of child custody rights give the other party the right to meet even though they are not the guardian rights holder. The panel must also consider if rights are not granted to parties without custody rights; this can be used as a basis for taking legal action so that the hadhanah rights are revoked."

Based on this background, the author wants to analyze the decision titled "Revocation of Hadhanah at the Pekanbaru High Religious Court (Analysis of Decision Number 26/ Pdt.G /2023/ PTA.Pbr)".

RESEARCH METHODS

The type of research used is normative legal research *using* normative case studies in the form of legal and behavioral products such as legal reviews. The point is that law is conceptualized as a norm or rule in society and as a norm of societal behavior. There are various approaches to normative legal research. In the approach taken by the author, he will obtain an explanation of several parts related to the problems that need to be answered. The approach used in this analysis is the statutory regulatory approach. The data sources for this research are statutory regulations such as Laws and Compilations of Islamic Law, which are primary legal materials. Meanwhile, secondary legal materials are explanatory materials regarding primary legal materials, which include several

kinds of literature, namely books and journals. Legal materials are processed in legal research by collecting data from various literature, then describing and connecting them from one legal material to other legal materials, especially the relationship between the factors mentioned in the research problem. Therefore, the writing is described systematically to provide answers to the problems in this research.

RESULTS AND DISCUSSION

1. The Concept of Hadanah in Law and the Compilation of Islamic Law

Law no. 1 of 1974 concerning Marriage and PP no. 9 of 1975 do not explicitly explain child custody. So, judges refer to the book of fiqh when deciding on hadhanah cases. These restrictions were included in statutory regulations after the issuance of Law No. 7 of 1989 and Presidential Decree No. 1 of 1991 concerning broadcasting the Compilation of Islamic Law. The authority to investigate and decide on hadhanah cases becomes the authority of the religious court after the enactment of this decree (Mursalin, 2020).

Legal provisions regarding child custody in Indonesian family law are regulated in Law Number 1 of 1974 concerning Marriage. Article 45, paragraph (1), Law Number (1) of 1974, explains that both fathers and mothers have equal obligations in the care and education of their children (Nailufar, 2017).

Custody rights between father and mother after divorce are regulated in Article 41 letter a of Law No. 1 of 1974, which explains that the consequences of

the breakdown of a marriage after separation are the obligation of the father and mother to support and direct their child solely based on the benefit of the child. If there is a problem regarding child custody, the court will decide. However, according to letter b, the responsibility for education costs lies with the father. If the father cannot bear this responsibility, the mother must bear the costs (Mahmudah et al., 2018).

Taking care of children is a parent's obligation. This obligation continues even though the marriage relationship has ended. Children must be cared for and protected from anything that could harm them until adulthood. The person who has custody of the child after a divorce is the mother. Child care (hadhanah) is an obligation of parents to look after and educate their children well (Islami & Sahara, 2019).

In the explanation above, the right to children after divorce is the mother's right because, in general, mothers are more intelligent, more patient, and love their children more, as in KHI Article 105, which regulates The right to custody of children under the age of 12 is the mother's right. However, this article does not mean eliminating or erasing the father's rights (Naslah et al., 2021).

This rule is similar to the hadhanah plan in Islamic law, which states that fathers and mothers must raise their children as best as possible (Shomad, 2012).

Article 98 of KHI states in the verse:

1. The age of a child who can live alone or is old enough is 21 years old if he is not physically and mentally deficient or has never been married;

2. Parents replace their children in all court proceedings or not;
3. The Religious Court can determine a close relative who can carry out the responsibility when both parents of the child cannot carry it out (Winanda, 2021).

In KHI Article 105 explains in more detail the issue of divorce, in particular (1) the care of children aged 12 years and under is the authority of the mother; (2) the care of a child who has reached puberty is entrusted to the child, whom he chooses from among his parents who has the right to care for him; (3) the costs of maintaining the child are the responsibility of the father (Mughnia, 2021).

On the other hand, child care by the provisions of Article 105 letter a does not always mean that the mother will automatically become the child's caretaker. Sometimes, the court may make a different decision based on specific considerations. Such a decision may arise when a judge sees that the father's behavior and other factors favor him being the child's caregiver rather than the mother. For example, even though the mother should have custody of the children because the children are still minors, the judge can decide otherwise, giving the father custody of his two daughters, taking into account various existing cases (Utami, 2019).

According to the favorable rules as stated in the KHI, custody by the father is the second choice by the judge after the mother is declared incapable or less qualified to provide custody for the better development of the child in the future. The transfer of hadhanah rights to the father is an alternative option. As soon as

the mother dies, according to article 156 KHI (c), the father can become the guardian of his child if the mother and women in a straight lineup have died. This can be linked to the fact that fathers also have the right to nurture and raise their children, even though these rights are very far from the rights of mothers (Islami & Sahara, 2019).

The article above explains the authority and obligations of fathers and mothers. In this case, fathers must be responsible for caring for their children, especially children who do not have property or other property (Utami, 2019).

In Islamic law, it is obligatory to care for children until they are independent without expecting help from others. Therefore, looking after small children is very important because ignoring children is the same as leaving them in danger, as written in Surah Al-Baqarah: 233, which orders mothers to breastfeed their children for two years. However, parents can also reduce how much time they breastfeed their child without reducing their basic needs. This is mandatory for parents who are still married or who have separated to give child rights to their children. Negligence in caring for children is unjust (Mahmudah et al., 2018).

Article 109 of the Compilation of Islamic Law states: The Religious Court can stop control of a person or foundation and transfer it to another person based on the recommendation of a relative if the person in charge is a person who likes to drink, gamble, have fun, is not of sound mind and neglects or misappropriates guardianship rights and authority for the benefit of the children under their care (Hidayat et al., 2021).

The rights of father and mother can be transferred if there is a basis for transfer according to the provisions of Article 49 of Law Number 1 of 1974 concerning Marriage:

- a. The rights of the father or mother or both can be transferred due to pressure from other parties, the child's immediate family, and adult biological relatives or the rightful authority, according to the court decision:
 1. Very negligent when carrying out responsibilities towards children;
 2. Very despicable behavior.
- b. Even if parents' rights are revoked, they still have to bear the costs of raising their children (Naslah et al., 2021).

According to Article 49 Paragraph 2 of Law No (1) of 1974 concerning Marriage. Childcare funding assistance remains valid forever, even though the child's rights have been relinquished (Nurdian, 2023).

The provisions of the Compilation of Islamic Law state that the father's obligation to the child cannot be abandoned even if he has divorced his wife or is married to another person. In addition, for children who have not matured, the mother becomes a priority to nurture her child. When the child is *mumayyiz*, he has the right to choose which parents he will follow. It depends on the child's choice. Suppose the father and mother are negligent in fulfilling their obligations to manage and expand their child's property. Their rights can be transferred if there is a basis for the transfer (Fakhrurazi, 2017).

Meanwhile, Article 156 (a) regulates child care when the biological mother has died by ordering those who have the right to care for children, namely women in a straight line from the mother, father, women in a straight line upwards from the father, sisters from the children in question, women who have blood relations from father or mother (Syahrain, 2017).

2. New Town Religious High Court Judges in Revocation of Hanah Limits (Analysis of Decision No.26/Pdt.G /2023 / PTA.Pbr)

The judge's considerations are the soul and essence of the decision. These considerations contain the essence of the decision. The considerations include analysis, reasoning, opinions, or conclusions of the judge who examined the case. In the presentation of considerations, analysis is presented to explain based on the law of evidence. In deciding a case, the judge is obliged to carry out justice to consider whether the facts and evidence actually happened or not. This evidence can be observed and classified (Khumairoh, 2019).

The theory used in this research is known to be that of justice and benefit. This theory is used to describe and analyze the judge's decision regarding the revocation of hadhanah rights in divorce cases based on the Compilation of Islamic Law and Law (Syarif Fadillah, 2021).

The most critical assessment by the panel of judges in determining the child's custody rights to the father is in the interests of the child and the realization of basic needs from the time the child is a minor until he is an adult. From a legal perspective, children under 12 years old and not yet *mumayyiz* are the mother's

right because they still need love from their mother, but if the mother does not carry out her duties well or is not responsible for her children. There is a chance that the judge will hand over custody to the father because he believes that the father is more responsible for the child (Damayanti, 2020).

When the judge decides whether a father has custody of his child, he not only decides but also takes actions to be considered by the panel of judges, and a number of considerations become obstacles to the mother's having rights to the child. Due to the mother's inability to carry out her duties properly and her efforts to eliminate the role of father for her child.

Implementation by Religious Court Judges so that it can run smoothly and effectively, Religious Court Judges must complete several stages when adjudicating and deciding child custody disputes: a. legal interpretation of child care laws, b. background to legal provisions on child custody, c. prioritize the child's best needs, d. investigate the parents' history, and e. carry out local research (Syahrain, 2017).

In the analysis of the decision of the Pekanbaru High Religious Court in Decision Number 26/ Pdt.G /2023/ PTA.Pbr **RS bint S**, formerly defendant, now appellant, against **IAI bin SDI**, formerly plaintiff, now appellee. Then, cancel the results of the decision of the first level Religious Court in the decision of the Pekanbaru High Religious Court. Regarding this case, there were a number of reasons or circumstances in the trial which were taken into consideration by the Pekanbaru Religious High Court

judge to cancel the decision of the Religious Court.

These reasons are as follows: first, they cannot prove that the defendant/applicant neglected their obligations towards the child and cannot prove that the defendant/applicant committed disgraceful acts, whether gambling, drinking, or being a wasteful mother. Second, that the plaintiff/appellant's argument that the defendant/ appellee denied the plaintiff/appellee's right to see the child is not proven.

On April 12, 2023, the Pekanbaru Religious High Court issued a decision canceling the decision of the Pekanbaru Religious Court No.2189/ Pdt.G /2022/ PA.Pbr.

Legal Considerations of the Panel of Judges in Case Number 26/ Pdt.G /2023/ PTA.Pbr. The Panel of Judges obtained the legal facts of the trial, namely:

1. That after examining the evidence submitted by the Plaintiff and Defendant, the Pekanbaru Religious Court considered that the plaintiff had been able to prove the arguments for his claim so that in the decision, the Pekanbaru Religious Court had granted the Plaintiff's claim. However, the Pekanbaru High Religious Court disagrees with the considerations of the Pekanbaru Religious Court, so that it will reconsider at the appeal level.
2. In the Compilation of Islamic Law, it is stipulated that the care of children who are not yet mumyiz or who are not yet 12 years old is their mother's right.
3. In the order establishing the custody of the child, the obligation of the holder of hadhanah rights to give

access to parents who do not hold hadhanah rights to meet with their child must be included. In legal consideration, not giving access to parents who do not hold hadhanah rights can be used as a reason to file a lawsuit for revocation of hadhanah rights.

4. Based on these facts, the Pekanbaru Religious High Court is of the opinion that there is not sufficient reason to revoke custody of the child from the Defendant/Appellant. Therefore, the Plaintiff/ Appellee's lawsuit must be rejected.

As explained above, based on decision Number 26/ Pdt.G /2023/ PTA.Pbr which has considered and ordered the Appellee to carry out what has been determined by the Panel of Judges at the Pekanbaru High Religious Court, namely accepting the applicant's appeal request to cancel the decision of the Pekanbaru Religious Court related to child custody rights regarding the child of both parties, and the Appellant was designated as the person who was given the right to care for the child.

CONCLUSION

Based on the results of the analysis of "Revocation of Hadhanah at the Pekanbaru High Religious Court Number 26/ Pdt.G /2023/ PTA.Pbr ". So it can be concluded as follows:

1. In the Compilation of Islamic Law, child care, as stated in Article 105 letter a, namely, the care of children aged 12 years and under, is the authority of the mother. However, in other cases, the mother is not always the holder of custody of the child. Furthermore, in Article 109, the

Court can revoke the guardianship of a person or legal entity at the request of other relatives if the guardian is a drunkard, gambler, and so on.

2. Based on the results of the decision of the Pekanbaru High Religious Court No.26/ Pdt.G /2023/ PTA.Pbr in the case of revocation of child custody rights, based on the facts that have been described, the judge accepted the applicant's appeal with the fairest possible decision and canceled the decision of the Religious Court because it considered the defendant/applicant is capable of caring for the child.

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