

DETERMINATION OF CUSTODY RIGHTS OF MINOR CHILDREN TO FATHER POST-DIVORCE IN REVIEW OF ISLAMIC LAW (*MAŞLAHAH MURSALAH*)

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Abstract: The separation of parents often results in neglect of child care. This can be seen in societies where divorce often occurs. In conditions like this, problems arise as to which parent has more right to care for the child. The settlement can be carried out through a legal process with a court decision with the aim of ensuring legal certainty in the future. This research aims to find out the basic considerations of judges at the Surakarta Religious Court in determining custody of minor children to their fathers and how the legal review of legal considerations in this case is carried out. This type of research is library research which takes secondary data sources in the form of decisions of the Surakarta Religious Court. This research uses data analysts who discuss and explain the judge's considerations in determining custody of minor children in terms of *Maşlahah* law. The results of the research show that the judge's consideration in determining custody of a minor child to his father is based on law number 23 of 2002 article 13 concerning child protection after divorce, and law number 1 of 1974 concerning marriage as well as a compilation of Islamic law articles 105 and 156 which regulates the rights of children who are not yet *mumayiz*, And secondly, the judge's consideration in determining custody of a minor child to the father is based on the *maşlahah* theory, namely adhering to the five pillars of *maqāṣid asy-syari'ah* including the maintenance of the child's mind, religion, soul, property, all of which aims to realize justice and benefit for the child. in accordance with the objectives of the problem.

Keywords: child custody, children's interest's, *Maşlahah* law

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INTRODUCTION

Ideally, a marriage is expected to last a lifetime. This means that the dissolution of a marriage only occurs when one of the husbands or wives dies. However, married couples will not always experience a *sakinah*, *mawaddah* and *rahmah* domestic life as recommended in Islam (Al-Quran Surah Ar-Rum: 21).¹

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً ۚ إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

Because in the life of a household there may be very sharp conflicts resulting in a crisis in the relationship between husband and wife, which is caused by continuous bickering and because it is impossible for them to live in harmony as usual.

If a divorce occurs, the main victims will be none other than their offspring. This can be seen in community groups where divorce often occurs. In such conditions the problem that arises is who has the rights to their children. In the settlement, because each of them does not want to give in, so inevitably it needs to be resolved legally, which means there is a party who loses and there is a party who wins.²

Haqanah is a right for young children, because they need supervision, care, carrying out their affairs and people who educate them. If two people are married and both have children who are not *mumayiz* (do not yet understand their benefits), then the wife is obliged to educate and care for the child until he understands his benefits.³

Regarding Child Custody (*haqanah*) cases, the Surakarta Religious Court handled and decided 3 (three) which stood alone or were not accumulated with other cases, from 2018 to 2019 and one of them was decision Number 644/Pdt.G/2019/ PA. Ska. However, for divorce cases alone at the Surakarta Religious Court, there were 656 talak divorce cases and 1086 contested divorce cases from 2018 to 2019. From these divorce cases, it is not uncommon for lawsuits regarding Child Custody (*haqanah*) to be accumulated or combined with divorce lawsuits.⁴

The reality on the ground, in decision Number 644/Pdt.G/2019/PA.Ska, which is an independent Child Custody (*haqanah*) case at the Surakarta Religious Court,

¹ Departemen Agama RI, *Al-Qur'an dan Terjemahannya* Quran Surat Ar-Ruum, Ayat 21 (Jakarta: Yayasan Penyelenggara Penterjemah, 2011), hlm. 22.

² *Ibid*, hlm. 270.

³ Sulaiman Rasyid, *Fiqh Islam*, (Bandung: Sinar Baru Al-Gesindo, 2006) cet. ke.3 hlm, 426.

⁴ Bapak Ma'mun, sebagai Ketua Hakim Majelis, wawancara pribadi, 19 November 2019, jam 13.00- 13.30 WIB

the judge handed down a decision on the custody of children who have not yet been *mumayyiz* to fall under the care of the father. The *ḥaḍānah* case arose at the same time as the application for divorce and talak which was submitted at the Surakarta Religious Court which was decided by the Panel of Judges with decision Number 644/Pdt.G/2019/PA.Ska.

Whereas in the divorce between husband and wife, they were initially married on December 14 2014 and were blessed with one child aged 3 years. The initial quarrel started in May 2019 because the wife was having an affair with her co-worker, and the husband found a photo of the wife making out with her mistress in hotel, because the wife's work is in the office and is rarely at home, and the child is often looked after by his father, then on November 18 2019 the plaintiff's biological father asked the chairman of the panel of judges at the Surakarta Religious Court to sue his wife for divorce and determine her rights. take care of the child who has not yet *mumayyiz* under the care of the plaintiff.

RESEARCH METHODS

This research is a qualitative literary or library research using a normative legal approach. Normative legal research is research by conducting an assessment of document studies, namely using various secondary data or library materials. Where the research is carried out through literature study or document study from various relevant references according to the research being studied. The document studies examined included an examination of the legal regulations in force relating to child care (*ḥaḍānah*) and legal materials in the form of books, papers, articles and journals related to this research.

In library research, the data sources used are secondary data sources, which relate to the problem to be used as a theoretical basis for the research carried out. The materials used include:

- a. Primary legal materials, namely data directly obtained from data sources by researchers from first sources or original sources containing the information or data. The data in question is the decision of the Surakarta Religious Court with case number 644/Pdt.G/2019/PA.Ska regarding *ḥaḍānah's* lawsuit, especially regarding the considerations used by the judge in determining and deciding *Ḥaḍānah's* case regarding post-divorce custody of minor children.
- b. Secondary legal materials, namely data that supports the main data and provides an explanation of the primary data. Secondary data relevant to the research title above includes. Law number 1 of 1974 concerning Marriage, Law Number 23 of 2002 concerning Child Protection, Civil Code, Compilation of Islamic Law, and Literature Studies or documents in the Surakarta Religious Court as well as books, articles, and journals related to research.

RESULTS AND DISCUSSION

1. *Maṣlaḥah*

a. Understanding *Maṣlaḥah*

Etymologically, the plural word *المصلحة* is *مصلح* something good, useful and it is the opposite of badness or damage and in Arabic it is often called *الخير و الصواب*, namely that which is good and true.⁵ Apart from that, the word *Maṣlaḥah* is also interpreted as everything in which there is benefit for humans.

The word *Maṣlaḥah* is exactly the same as the word *al-manfa'ah* both in meaning and meaning. The refore, some people say that the word *Maṣlaḥah* is a form of masdar which means *shalah* (benefit), like the word *manfa'ah* which means *an-naf'u* (benefit).⁶

b. Various Types of *Maṣlaḥah*

Viewed from the *Maṣlaḥah* type, *uṣul fiqh* scholars explain the levels in terms of levels, namely those related to interests that are the necessities of human life. Benefits seen in terms of levels can be divided into three types:

- 1) *Maṣlaḥah ḍarūriyat* (المصلحة الضرورية) namely benefit which is the basis for upholding human life both related to religion and the world. If it does not exist, human life as a whole will be damaged and destroyed, especially the five types of *Maṣlaḥah ḍarūriyat*, namely maintaining religion, soul, mind, offspring and wealth.⁷
- 2) *Maṣlaḥah al-ḥajiyyah* (المصلحة الحاجية) namely the problems needed by humans to eliminate the difficulties and difficulties they face. In other words, in terms of importance, this *Maṣlaḥah* is lower in level than *Maṣlaḥah ad-ḍarūriyah*. Among the legal provisions prescribed to lighten and facilitate human interests are all the reliefs brought by Islamic teachings, such as being allowed to break the fast for travelers and people who are sick.⁸
- 3) *Maṣlaḥah taḥsiniyyat*, (المصلحة التحسينية) namely *maṣlaḥah*, if it is not done, life will not experience difficulties, but the manifestation of *maṣlaḥah* is a sign of noble morals or good habits. Included in this are efforts to perfect what is appropriate and avoid what is inappropriate.

⁵ Ahmad Warson Munawwir, *Al-Munawwir Kamus Arab Indonesia*, (Yogyakarta: Unit Pengadaan Buku-Buku Ilmiah Keagamaan PP Al-Munawwir, 1984), hlm. 67.

⁶ Abdul Hayy Abdul, *Pengantar Ushul Fiqh*, (Jakarta: Pustaka Al-Kautsar, 2014), hlm. 313.

⁷ Asmawi, *Perbandingan ushul Fiqh*, (Jakarta: Amzah, 2011), hlm. 129.

⁸ Romli SA, *Studi Perbandingan*, (Yogyakarta: Pustaka Pelajar, 2014), hlm. 221-222.

Judging from the content of *Maṣlaḥah*, *uṣul fiqh* scholars divide it into:⁹

- 1) *Maṣlaḥah 'āmmah* (المصلحة العامة) namely public benefit which concerns the interests of many people. Public benefit does not mean the interests of everyone, but can take the form of the interests of the majority of the people or most of the people. For example, the ulama are allowed to kill those who spread heresy which can damage the faith of the *ummah*, because it concerns the interests of many people.
- 2) *Maṣlaḥah al-khāṣṣah* (المصلحة الخاصة) namely personal benefits and are very rare, such as benefits related to terminating the marriage relationship of someone who is declared to have lost *mafqud*.

Based on the sharia aspect, Ushul scholars divide it into three types:¹⁰

- a) *Maṣlaḥah mu'tabarah* (المصلحة العتبرة) namely *Maṣlaḥah* which is taken into account by the *syara'*. That is, there are instructions from the *syara'*, both directly and indirectly, which provide guidance on the existence of *Maṣlaḥah* which is the reason for establishing laws. From direct to indirect, the instructions (*dalil*) regarding *Maṣlaḥah* are divided into two:
 - (1) *Munāsib muaṣṣir* (المناسب المؤثر) namely there are direct instructions from law makers who pay attention to the *Maṣlaḥah*. That is, there are sharia instructions in the form of texts or *ijma'* which stipulate that *Maṣlaḥah* is used as a reason for establishing laws. For example, the text of the text shows directly to *Maṣlaḥah* that it is not good to approach a woman who is menstruating on the grounds that menstruation is a disease. This is called *Maṣlaḥah* because it keeps oneself away from damage or disease.
 - (2) *Munāsib mulā'im* (المناسب الملائم) that is, there is no direct guidance from the *syara'* either in the form of text or *ijma'* regarding the *syara'*'s attention to the *Maṣlaḥah*, but indirectly there is. That is, even though the *syara'* does not directly determine a situation as a reason for establishing the law mentioned, there are indications from the *syara'* that the situation is determined by the *syara'* as a reason for the same thing. For example, the continued guardianship of a father over his daughter on the grounds that the daughter is not yet an adult. This immaturity is the reason for laws similar to those of children, namely guardianship over the child's property.

⁹ Nasroen Haroen, *Ushul Fiqh 1*, (Jakarta: Logos, 1996), hlm. 116.

¹⁰ Asmawi, *Perbandingan Ushul Fiqh...*, hlm. 373.

- b) *Maṣlaḥah al-mulgaḥ* (المصلحة الملقاة) or *Maṣlaḥah* that is rejected, namely *Maṣlaḥah* that is considered good by reason, but is not considered by the *syara'* and there are *syara'* instructions that reject it. For example, a legal opinion states that the portion of men's inheritance rights must be the same size and equal to the portion of women's inheritance rights, referring to the basic premise of the spirit of gender equality. Such a rationale indeed contains *Maṣlaḥah* but is called *Maṣlaḥah al-mulgaḥ*.
- c) *Maṣlaḥah al-mursalāh* (المصلحة المرسلّة) namely benefit which exists and is not canceled or rejected by the *sharia'* through detailed arguments.

2. Description of Case Number 644/Pdt.G/2019/PA.Ska.

Case Number 644/Pdt.G/2019/PA.Ska is a case regarding child custody and divorce. A lawsuit for child custody (*ḥaḍānah*) was filed by the Plaintiff.¹¹ A 33-year-old man, Muslim, with an address in Surakarta Regency against the Defendant,¹² a 30 year old woman, Muslim, with an address in Wonosobo Regency.

The child custody case (*ḥaḍānah*) arose at the same time as the talak divorce case filed by the 33-year-old Petitioner, Muslim, with an address in Surakarta Regency, against the Respondent, a 30-year-old Muslim woman, with an address in Wonosobo Regency, which was filed at the Surakarta Religious Court, which was decided. by the Panel of Judges with Decision Number 644/Pdt.G/2019/PA.Ska.

That in the talak divorce between husband and wife, initially it was because the respondent, who was the applicant's wife, was having an affair and could not be trusted enough to take care of the child because he was rarely at home. Meanwhile, the child named XXX (child's name has been anonymized) reaches the age of 4 years (not yet *mumayiz*) and the child is asked or asked for custody of the child.

So on July 17 2019 the plaintiff or the child's biological father filed for divorce and divorce along with a lawsuit for child custody (*ḥaḍānah*) at the Surakarta Religious Court and was registered in case Number 644/Pdt.G/2019/PA.Ska. In the lawsuit, the Plaintiff basically stated the following things:¹³

- Whereas the Petitioner and Respondent are legal husband and wife who have entered into a marriage contract before the Marriage Registrar of the

¹¹ Penulisan Nama ditulis dengan istilah Penggugat guna menjaga privasi dari Penggugat.

¹² Penulisan Nama lawan ditulis dengan istilah Tergugat guna menjaga privasi dari Tergugat.

¹³ Posita dan Petitum Perkara Nomor 644/Pdt.G/2019/PA.Ska. tanggal 03 Juni 2019

Religious Affairs Office (KUA) Kec. xxxxxxxx Kab. xxxxxxxx Central Java on 14 December 2014 as stated in the Marriage Certificate Excerpt Number: xxxxxxxxxxxx dated 14 December 2014;

- The Plaintiff stated that before or after the divorce, the child lived with the Plaintiff and the Defendant lived together and resided in the house according to the address on the Identity Card (KTP)
- The Plaintiff is also worried that the child will be looked after and with the Defendant considering that the Defendant works from morning to evening at the office, so there is very little supervision and attention to the child and also because the Defendant is in a relationship with another man, so the Plaintiff is afraid that the child will imitate this act. and can affect the soul for the worse.

Based on these reasons, the Plaintiff applied to the Surakarta Religious Court with the following ruling:

Primary:

- Accept and grant the Plaintiff's claim in its entirety;
- Give permission to the Plaintiff to pronounce the divorce vow against the defendant in front of the Panel of Judges at the Surakarta Religious Court
- Determined that the child named was born in Surakarta under the care of the Plaintiff;¹⁴
- Charge all of these claims to the Defendant; Subsidiary: Or if the Surakarta Religious Court has a different opinion, please give the fairest decision possible.

That after optimizing peace efforts but to no avail, then to the lawsuit the Defendant submitted an answer which basically rejected the Plaintiff's arguments in Posita 3 as untrue, what was true was that after marriage the Petitioner and Respondent lived in their own house at until July 2019. In fact, the Petitioner and Respondent have never lived/settled at the address according to the KTP.¹⁵

3. ***Surakarta Religious Court Decision 644/Pdt.G/2019/PA.Ska.***

Based on research data from Decision 644/Pdt.G/2019/PA.Ska in the case of child custody (Ḥaḍānah), the Panel of Judges at the Surakarta Religious Court stated that it was true that the Plaintiff and Defendant had been married, but there was a divorce between the two. Plaintiff and Defendant, the child was initially requested and applied for custody of the Plaintiff but

¹⁴ Penulisan identitas anak ditulis dengan anonimasi identitas guna menjaga privasi anak

¹⁵ Petitem Duplik pada putusan Nomor 644/Pdt.G/2019/PA/Ska.

previously there was no agreement regarding the maintenance of the child named PT.¹⁶

Based on the provisions of Article 41 letter (a) of Law Number 1 of 1974 concerning Marriage, the consequence of breaking up a marriage due to divorce is that either the mother or father remains obliged to care for and educate their children, solely based on the interests of the child, if there is a dispute regarding control of the child. The court gave its verdict.¹⁷ In order to obtain legal certainty regarding who the child's custody rights fall to, the Plaintiff decided to file a lawsuit for custody of the child resulting from the marriage between the Plaintiff and the Defendant, this is proven by evidence P.3 and P.4, which are photocopies of birth certificate excerpts in the names of The child is a legitimate child from the marriage of the Plaintiff and Defendant and this evidence can be accepted as evidence because it meets the formal and material requirements.¹⁸

4. *Analysis of the Decision Letter*

Regarding the decision of the Surakarta Religious Court regarding child custody contained in decision Number 644/Pdt.G/2019/PA.Ska, as is known, the Panel of Judges in deciding the child custody case determined the custody of a minor child who was still 3 years old. fall into the care of the Plaintiff or biological father. As mentioned in the sub above, one of the most basic considerations is to look at the best interests of the child himself.

This is also stated in the provisions of marriage law and the provisions of Islamic jurisprudence regarding child care, namely prioritizing the welfare of the child. This is explained in Article 41 of Law Number 1 of 1974 concerning Marriage which states that the consequences of breaking up a marriage state that the consequences of breaking up a marriage due to divorce are that either the father or mother remains obliged to care for and educate their child, solely based on the interests of the child. Likewise, with the provisions contained in Islamic jurisprudence, Islamic jurisprudence scholars provide an order and priority scale for women's childcare rights, in accordance with the benefit of the child. According to fiqh scholars, their female instincts are more suited to caring for and educating children, and their patience in dealing with children's life problems is higher than a man's patience.¹⁹

¹⁶ Pertimbangan Majelis Hakim dalam putusan Pengadilan Agama Surakarta Nomor 644/Pdt.G/2019/PA.Ska, hlm. 22-23.

¹⁷ Pertimbangan Majelis Hakim dalam putusan Pengadilan Agama Surakarta Nomor 644/Pdt.G/2019/PA.Ska, hlm. 24-25

¹⁸ Alat bukti Penggugat dalam Perkara Nomor 644/Pdt.G/2019/PA.Ska. Tanggal 04 Juni 2019.

¹⁹ Syaikh al-Allamah Muhammad bin 'Abdurrahman ad-Dimasyqi, *Fiqh Empat Madzhab*, (Bandung: Hasyimi, 2014), hlm. 393.

Meanwhile, the Compilation of Islamic Law, which is laws established based on sharia, provides a more detailed description of the provisions regarding child care (*haḍanah*). That in the Compilation of Islamic Law there are at least two articles that determine child care, namely Articles 105 and 156. Article 105 determines child care in two situations. First, when the child is still not yet *mumayyiz* (less than 12 years old), child care is assigned to the mother. Second, when the child has reached the age of *mumayyiz* (12 years of age and over) the child can be given the right to choose to be raised by his father or mother. Article 156 regulates the care of children when their biological mother dies by providing an order of rights to care for children which is also dominated by women.²⁰

However, as per its legal considerations in case Number 644/Pdt.G/2019/PA.Ska, the Panel of Judges did not intend to deviate from the legal provisions contained in article 105 or in Article 156 of the Compilation of Islamic Law and did not intend to distance the two children who had not yet *mumayyiz* from his mother. The Panel of Judges in its legal considerations looks more closely at and prioritizes the benefit of the child, where the Panel of Judges itself adheres to the principle of the best interest of the child, thus whatever policies and steps are taken, all must consider the best interests of the child's future.

In interpreting the best interests of the child which is a legal consideration in determining custody of the child, as seen from the perspective of the *Maṣlaḥah Ḍarūriyat* Review, namely regarding child care in this case, both the Plaintiff and the Defendant are Muslims who have the principle that children are a trust and entrustment from Allah SWT. In the context of child care, husband and wife bear the obligation to care for and care for their children, their physical, spiritual growth, intelligence and religious education.²¹ This is in accordance with the word of Allah Swt. in the Qur'an Surah At-Tahrim verse 6:

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

Meaning: "O you who believe, protect yourselves and your families from the fire of hell whose fuel is people and stones; The guardians are angels who are

²⁰ Amran Suadi, dkk, *Menggugat Stagnasi Pembaruan Hukum Islam Di Indonesia*, (Yogyakarta: UII Press Yogyakarta, 2016), hlm. 229.

²¹ Aris Bintania, *Hukum Acara Peradilan Agama...*, hlm. 207.

rough, tough, and do not disobey Allah in what He commands them and always do what they are commanded." (Qs. At-Tahrim: 6).²²

In this verse, parents are commanded by Allah Swt. to protect their families from the fire of hell, by trying to ensure that all family members carry out the commandments and abandon Allah's prohibitions, including the family members in this verse who are children.²³ The responsibility for caring for children falls on the parents, whether the parents still live in harmony or when their marriage fails due to divorce. Fiqh scholars agree that in principle the law of caring for and educating children is an obligation for both parents, because if they are still small, not yet *mumayiz*, it will have bad consequences for themselves and their future, and can even threaten the existence of their souls.²⁴

As in Islamic law relating to marriage, it does not only prioritize the issue of producing offspring, but also looking after offspring, which is a mandate from the Creator. It can be interpreted here that protecting offspring is one of the principles of the benefits of *ḍarūriyat*. Where the review of the Maslahat *ḍarūriyat* includes five principles of protection, namely religion, soul, lineage, intellect and property. If a person performs an action which is essentially aimed at maintaining the five aspects of the objectives of the Shariah, then his action can be called *Maṣlaḥah*.²⁵

Maṣlaḥah itself can also be interpreted as something that is considered good by common sense because it brings goodness and avoids evil (damage) for humans, in line with the objectives of sharia' in establishing law. That in general *maṣlaḥah* is clearly demonstrated by the texts provided in the Koran and Sunnah which are always shown to be for the benefit of humans, this also means that the laws of jurisprudence cannot be different from the aim of the texts, namely for the benefit of humans.

For this reason, in order to carry out a *maṣlaḥah* act which aims to maintain the five aspects of *syara'* goals, one of which is preserving offspring, the Panel of Judges in their *ijtihad* is of the opinion that in realizing the best interests of the child, they must really receive more monitoring and great love. To make all this happen, parents must always be close physically and spiritually, wherever possible children live close to father and mother and

²² Departemen Agama RI, *Al-Qur'an dan Terjemahannya*, (Jakarta: Yayasan Penyelenggara Penterjemah, 2011), hlm. 560.

²³ Tihani dan Sahrani, *Fiqh Munakahat Kajian...*, hlm. 217.

²⁴ Andi Symasu Alam, dan M. Fauzan, *Hukum Pengangkatan...*, hlm. 115.

²⁵ Said Agil Al-Munawwar, *Al-Qur'an Membangun...*, hlm. 144.

make it easier for both parents to meet and provide attention and affection in the event of a divorce between the parents.

In the context of child custody, which in this case is based on the child's best interests, the Panel of Judges also looks at the orientation of maintaining these five things without taking sides or looking at the interests of both parents, whether father or mother. To provide legal certainty in the future, the Assembly must choose and determine who the child has more right to care for, and who is able to guarantee the maintenance of the five aspects which are the objectives of Sharia law itself for the best interests of the child.

In order to achieve the goal of benefiting the child, the Panel of Judges in this case forms an understanding or interpretation regarding the determination of granting custody of the child, to which of the fathers or mothers is best able to guarantee the maintenance of the five principles of the child's benefit.

First, maintaining the child's religion (*hifzu al-din*) means that the holder of child custody must be able to guarantee that the child will receive good religious education and be able to actualize religion in his daily behavior. This has been explained in the legal considerations of the Panel of Judges in decision Number 644/Pdt.G/PA.Kra. that both the Plaintiff and the Defendant are Muslims who have the principle that children are a trust and entrustment from Allah SWT, for this reason their parents are the most responsible for the safety of their children in this world and in the afterlife and protecting them from bad things as explained in the Koran Surah At-Tahrim verse 6.

In this case, spanking is not meant to torture, it is just to want the child, so that the child will be more responsible for every command, especially in performing prayers. This teaching is the right time for parents to build their children's personality and morals following Islamic teachings.

Second, caring for the soul (*hifzu hayat hifzu an-Nafs*) provides the understanding that children have a right to life that must be respected. It's not just life that must be respected. It's not just life, it's a decent and good life. For this reason, the holder of child custody must be able to ensure that this happens. In relation to this case, it is indicated that, in fact, currently the two children are living with their father, receiving care, nurturing, and getting a good education, so in the opinion of the Panel of Judges, the best interests of the children have now been obtained and now the children have starting to adapt to the environment he currently lives in, namely in Kartasura.

Third, nurturing children's reason (*hifzu al-'aql*) means that children have the right to develop their reason or intelligence, the right to get a good education and the highest level of schooling, the right to think and have

opinions, and the right to become leaders. For this reason, the holder of child custody must guarantee the realization of the child's rights. In the decision of the Surakarta Religious Court regarding child custody, the Panel of Judges considered evidence T.3 and T.4 which explained that before or after separating, the child was with the plaintiff or father in Kartasura and was raised with the grandmother (plaintiff's mother) because the defendant rarely came home to care for the child.

Fourth, caring for offspring (*hifzu an-nasl*), caring for offspring means that children have the right to be guaranteed to be able to grow and develop as offspring of their parents to become quality, healthy children and have their rights protected. Apart from that, this *hifzu an-nasl* also provides an understanding that men (fathers) and women (mothers) both have the same rights and opportunities to care for, care for their children and offspring, and to realize benefits.²⁶ That in this case, according to the provisions of the hadin or gift requirements, both father and mother have fulfilled the requirements for gift holders in general. From a financial perspective, the father or mother has sufficient income and is able to meet the children's needs if both children fall under their custody. However, in this case, to fulfill the care of offspring, the Panel of Judges, in its legal considerations, is to bring the child closer to his parents, both the father and mother of the child live in Surakarta, so the Panel considers that it is better for the child to be cared for and live in Surakarta with his father. This is as in the principle of *maṣlaḥah mursalah*, namely:

a. **درء المفسد مقدم علي جلب المصلح**

Meaning: "Avoiding difficulties takes precedence over bringing benefits."

b. **اذا تعارض مفسدتان روعي اعظمهما ضربا بارتكاب اخفهما**

Meaning: "If there are two evils that conflict, then it is prioritized to avoid the evil that carries greater risk, by doing the one that carries greater risk."

In accordance with the rule above, it can be understood here that this rule shows that consistently following legal provisions can realize *Maṣlaḥah*. However, if realizing *maṣlaḥah* itself can cause *mafsadah* for oneself, then it is better to avoid *mafsadah* than to do something that can cause *maṣlaḥah* but at the same time the mukalaf him self gets *mafsadah*. The connection in this case regarding custody is that, even though the Compilation of Islamic Law,

²⁶ Amran Suadi, dkk. *Menggugat Stagnasi...*, hlm. 238.

which is the laws stipulated by Islamic law, provides detailed provisions when the child is still not yet *mumayiz* (less than 12 years old), the care of the child is assigned to the mother. However, if the Tribunal passes a decision on custody of a child who is not yet *mumayiz* in this case in accordance with the provisions contained in the text of the Compilation of Islamic Law, namely being under the care of the mother, it will actually make things difficult or bring harm to the parties, both the father and the mother or the child. The meaning of *mafsadah* here is that even if the child falls under the care of the father or mother, the child will be cared for and spend more time with the grandfather and grandmother than the father or mother. However, at this time, because both parents live in Surakarta, work in Surakarta, and spend a lot of time in Surakarta, it is better for the child to also live in Surakarta and be cared for by his father. Because if the child falls into the mother's care, the child is looked after and lives in a boarding house in Semarang. So if the child lives in Karanganyar, the intensity of meeting both father and mother will be more difficult. Because the child lived in Karanganyar, he was handed over to his grandparents because his mother had to work in Surakarta and returned to Karanganyar once a week. This is confirmed based on evidence T.5.

Fifth, looking after children's assets (*hifzu al-mal*) means that every person, including children, has the right to wealth which is their right to be well looked after. If the child has property or wealth, the holder of child custody must be able to ensure that this is maintained.²⁷

From the explanation above, we can see that regarding the review of Islamic Law that has been described regarding the legal considerations used by the Panel of Judges at the Surakarta Religious Court in deciding on the custody of a minor child to the father in decision Number 644/Pdt.G/2019/PA. Ska. Therefore, the Panel of Judges in this case has upheld justice that prioritizes the best interests of the child and implements the benefit of the child himself. Because in fact, apart from the review above, the child is already used to the defendant's family, the child's mother also works in Surakarta, so to bring the mother and father closer to the child, the Panel of Judges is of the opinion that the child who is not yet *mumayiz* falls to the father. Based on the description above, we can see that from the perspective of *maqāṣid asy-syariah* or the aim of Islam in terms of caring for children, it aims to protect the safety of their religion, soul, mind and property and prevent them from evil.

In *maqāṣid asy-syari'ah*, caring for offspring is included in the primary needs (*ḍarūriyat*). If someone does not maintain the principles of Islamic law,

²⁷ Amran Suadi, dkk, *Menggugat Stagnasi Pembaruan...*, hlm. 244.

then human life as a whole will be damaged and destroyed. For this reason, in order to achieve beneficial goals in terms of caring for children, a person must be able to guarantee the maintenance of the five principles of benefiting children, namely maintaining the child's religion, maintaining the child's soul, maintaining the child's mind, maintaining offspring, and maintaining the child's assets so that the child does not fall into bad things and In this case, parents are responsible for the safety of their children in this world and in the afterlife.

Based on research data from Decision 644/Pdt.G/2019/PA.Ska in the case of child custody (*haqānah*), the Panel of Judges at the Surakarta Religious Court stated that it was true that the Plaintiff and Defendant had been married, but there was a divorce between the two. The Plaintiff and Defendant, the child initially requested and applied for custody of the Plaintiff but previously there was no agreement regarding the maintenance of the child named PT.²⁴

Then, physically, both the Plaintiff and the Defendant are seen as having the ability to be appointed as the holder of child custody and care (*haqānah*) for their children. This is proven through witness statements that both parents each have decent jobs. The father works as an entrepreneur who owns a photocopy business and the mother works in an office. Even though both of the child's parents have the financial means to meet the child's needs, for legal certainty the Panel of Judges determines that the right to child maintenance (*haqānah*) is in whose hands the child's future, education and psychological development can grow and develop in a healthy and reasonable manner.²⁸

CONCLUSION

In determining the custody of a minor child (*haqānah*) to the father in case Number 644/Pdt.G/2019/PA.Ska. The Panel of Judges at the Surakarta Religious Court in their considerations looked at the best interests of the child and based on the principle of the best interests of the child by looking at the provisions contained in Law Number 23 of 2002 concerning Child Protection and Article 41 of Law Number 1 of 1974 Regarding Marriage That in this case the child's best interest at this time is to live with the father because in fact the child has begun to adapt to the environment he currently lives in and receive good care, nurturing and education. This situation is also supported by the fact that currently both the father and mother of the two children live in Surakarta, hence the intensity of the meeting in providing good love.

²⁸ Pertimbangan Majelis Hakim dalam Putusan Pengadilan Agama Surakarta Nomor 644/Pdt.G/2019/PA.Ska, hlm. 24-25.

Meanwhile, if viewed from the perspective of *maṣlaḥah* in determining the legal consideration of custody of minor children to the father. The panel of judges considers it from the perspective of the benefit of the child. The Panel interpreted its legal considerations in determining the child's custody rights to the father because he had been cared for since childhood by the Plaintiff's family. where in terms of Education, Religion, Heredity and Property, the child is more oriented towards the Father to maintain the five basic things in Islamic law, and by looking at who is better able to guarantee the realization of the objectives of Sharia law (*maqāṣid asy-syari'ah*) in maintaining the child's religion, maintaining children's souls, nurturing children's minds, nurturing offspring, and nurturing children's assets.

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