

## Disparity in Child Custody Decisions from the Perspective of the Marriage Law and KHI

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Article	Abstract
<p><b>How to cite:</b> Ahdie Atid Dzikra, et al, 'Disparity in Child Custody Decisions from the Perspective of the Marriage Law and KHI' (2024) Vol. 5 No. 1 Rechtenstudent Journal Sharia Faculty of KH Achmad Siddiq Jember State Islamic University.</p> <p><b>DOI:</b> 10.35719/rch.v5i1.325</p> <p><b>Article History:</b> Submitted: 12/01/2024 Reviewed: 18/03/2024 Revised: 12/04/2024 Accepted: 20/04/2024</p> <p><b>ISSN:</b> 2723-0406 (printed) <b>E-ISSN:</b> 2775-5304 (online)</p>	<p>This research is a study that focuses on the disparity of decisions in child custody cases. The difference in decisions given by the Tangerang Religious Court in the same case. This study focuses on the factors in the granting of custody from the analysis and consideration of the panel of judges in case No. 967/Pdt.G/2014/PA.Tng and No. 2539/Pdt.G/2016/PA.Tng. The research method used is descriptive analysis. The factors that cause different decisions. In the first case the father as the defendant was unable to properly care for, educate and look after the child, and in the second case the mother as the respondent had left the applicant for more than two years and never returned. In the perspective of the law of marriage and the Compilation of Islamic Law (KHI) "the thing that must be considered is the interest of the child to provide security to children who are victims of divorce, in this case the Panel of Judges prioritizes how to provide protection and good for the child for the benefit and avoid things that are not desired by his parents.</p> <p><b>Keywords:</b> <i>Child Custody, Disparity, Religious Court.</i></p> <p><b>Abstrak</b> Penelitian ini merupakan penelitian yang mengfokuskan pada Disparitas putusan dalam kasus hak asuh anak. Perbedaan putusan yang diberikan Pengadilan Agama Tangerang terhadap satu kasus yang sama. Pengkajian ini berfokus pada faktor di berikannya hak asuh dari analisis dan pertimbangan majelis hakim terhadap perkara No 967/Pdt.G/2014/PA.Tng Dan No. 2539/Pdt.G/2016/PA.Tng. Metode penelitian yang digunakan yaitu analisis deskriptif. Adapun faktor faktor penyebab berbedanya putusan. Dalam kasus yang pertama ayah sebagai tergugat tidak dapat merawat, mendidik dan menjaga anak dengan baik, dan pada kasus yang ke dua ibu sebagai termohon telah meninggalkan pemohon selama lebih dari dua tahun dan tidak pernah kembali. Dalam prespektif undang undang perkawinan dan Kompilasi Hukum Islam (KHI)" hal yang harus diperhatikan adalah kepentingan anak tersebut untuk memberikan rasa aman kepada anak yang menjadi korban perceraian, dalam hal ini Majelis Hakim mengutamakan bagaimana memberi perlindungan dan kebaikan anak demi kemaslahatan dan terhindar dari hal-hal yang tidak diinginkan oleh orang tuanya.</p> <p><b>Kata Kunci:</b> <i>Hak Asuh Anak, Disparitas, Pengadilan Agama.</i></p>

## Introduction

The introduction is the first part which contains a general description of the problem or topic to be studied, as well as providing the context necessary for readers to understand the purpose, relevance and scope of the study. The introduction section must present the background of the problem, the importance of the research topic and the research objectives so that an adequate understanding of the context and relevance of the research being conducted can be found.<sup>1</sup>

Marriage for humans is a very sacred thing, because basically, God created humans in pairs between men and women who have legal force (Legal) and in accordance with Islamic law with the aim of forming a *sakinah, mawaddah warahmah* household.<sup>2</sup>

Marriage is also a way for humans to channel their sexual instincts to fulfil their desires so that their honour is maintained in a halal way according to sharia. The Prophet also said that marriage is a shield for ourselves from the prohibitions in religion.<sup>3</sup>

Abu Yahya Zakaria Al-Anshari gives an understanding that marriage is a contract that has legal force and makes it permissible to have sexual intercourse by saying the word *nikah* or saying words that have the same meaning. In Islam, marriage is a form of worship, because marriage is a very strong contract (*Mitsaqon golidza*) to obey the commands of Allah SWT. A bond that is so strong that it does not deserve to be taken lightly and tampered with. However, in the course of its marriage, which is expected to be full of harmony and happiness, sometimes there is a conflict that is not resolved and results in divorce. However, as much as possible to avoid divorce, which is allowed in Islam but hated by Allah Swt.<sup>4</sup>

In Islam, marriage is not an absolute obligation, nor does it facilitate divorce. Divorce can only be done if it is really in a very emergency condition, as a last resort in solving problems within the family.<sup>5</sup> Divorce is permissible if it is better than staying in a marriage bond but not achieving happiness and always being in suffering, as written by Sayyid Sabiq that the release of marital ties is strictly prohibited unless there are justified reasons for a very emergency.<sup>6</sup> Divorce is the termination of the marriage rope regulated in Islamic law. The breakdown of marriage can be done through a court decision that has permanent legal force. There will be many legal events that occur after divorce, one of which is child custody. Taking care of children in this case is taking care of children who cannot yet take care of themselves from danger and cannot yet support themselves.<sup>7</sup>

Divorce not only has an impact on the husband and wife as a couple. But it is also disastrous for the psychological and physical children of the couple. Regardless of the reason, divorce will have a very bad and negative impact on children. Children no longer get affection

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<sup>1</sup> C. E. Noviati, A. L. F. Choiriyah, E. L. Hakim, G. Iriyanto, G., & F. R. Tarigan, "Implementation the Indonesian Ulema Council Fatwa regarding the Sale and Purchase of Gold in Installments at Sharia Bank of Indonesia," *Rechtenstudent*, Vol 4, No (3), (2023): 248–259. <https://doi.org/10.35719/rch.v4i3.294>

<sup>2</sup> Article 3. Compilation of Islamic Law (KHI).

<sup>3</sup> S. A. Rosyida & B. Kurniawan, "Comparative Study of the General Election Commission (KPU) in the United States and South Korea", *Rechtenstudent*, Vol 4, No (3), (2023): 260–273. <https://doi.org/10.35719/rch.v4i3.292>

<sup>4</sup> Abu Yahya Zakariya Al-Anshary, *Fath Al-Wahab*, (Singapura: Sulaiman Mar'iy, t.t), 30.

<sup>5</sup> Rahmat Fauzi, "Dampak Perkawinan Campuran Terhadap Status Kewarganegaraan Anak Menurut Hukum Positif Indonesia", *Soumatara law riview*, Vol. 1 (2018): 56.

<sup>6</sup> Ahmad Hifni, "Hak Asuh Anak Pasca Perceraian Suami Istri Dalam Prespektif Hukum Islam", *Bil Dalil (Jurnal hukum keluarga)*, Vol 1, No 2, (2016), 51.

<sup>7</sup> R. A. Ardyansyah & S. Rizal, "Instrument for Protection and Enforcement of Human Rights in Indonesia", *Rechtenstudent*, Vol 4, No (3), (2023): 289–302. <https://doi.org/10.35719/rch.v4i3.304>

from both parents. Whereas during the growth period the child really needs affection for his physical and mental growth and development from both parents, and he cannot get it when his parents divorce.<sup>8</sup>

The fiqh experts argue that child custody (hadzonah) is caring for young children, both men and women who are still in their infancy and still need assistance from their parents. This is not applicable to children who have reached adulthood and are of sound mind. therefore children also have the right to know and be cared for by their own parents.<sup>9</sup> The care (hadhanah) of children by their parents has psychological advantages, because it has a deeper emotional connection than being cared for by other people.<sup>10</sup>

In this paper the author will discuss child custody after divorce, the author analyses the judge's decision on the case at the Tangerang Religious Court with No 967/Pdt.G/2014/PA.Tng. and No 2539/PdtG.2016/PA.Tng. there is a disparity in the decision of the panel of judges in the child custody decision which results in two different points of view in terms of the decision. This research is expected to provide benefits and useful information for readers and the public.

## **Research Method**

Research methodology is one of the most important components for the smooth running of a research to be carried out. This research includes descriptive analysis research, namely research by reading, examining and examining library materials and decisions. Data sources are taken from previous literature and also copies of decisions.<sup>11</sup>

This type of research uses research that aims to make a description or description of the facts, as well as an analysis of the judge's decision in making decisions related to child custody.

## **Results and Discussion**

### **Definition of Child Custody**

The first sub-chapter contains the results of the analysis and discussion which is the answer to the first problem formulation. Regarding research results presented in the form of tables/figures, they must be accompanied by: Table Number, Table Title and Reference Sources used, as follows:

Hadhanah comes from the word Hidhan which means stomach, as the bird says flanking the eggs under its wings. Caring means caring for and educating children who cannot distinguish between good and bad (mumayyiz) who are not yet able to take care of themselves properly. Hadhanah comes from Arabic which means among others: the matter of maintaining, educating, managing, taking care of all the interests / affairs of children who are not yet mumayyiz.<sup>12</sup>

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<sup>8</sup> Achamd Muhajir, "Hadzanah Dalam Islam", Jurnal SAP, Vol 2, (2017): 170.

<sup>9</sup> Ahmad Nizam bin Abbas, "The Islamic Legal System in Singapore", Washington International Law Journal, Vol 21, (2017): 77.

<sup>10</sup> Ahmad Hasanudin Dardiri & Marzha Tweedo, Muhammad Irham Roihan. "Pernikahan Beda Agama ditinjau dari Perspektif Islam dan HAM", ILNS Student Scientific Writing Competition, Faculty of Law, University of Indonesia, (2012): 89.

<sup>11</sup> Soerjono Soekanto & Srimudji, *Penelitian Hukum Normatif*, (Jakarta: Rajawali, 1990), 35.

<sup>12</sup> M. Labib & Rumawi, "Legal Protection for Financial Technology Users Against Fraud and Illegal Acts", Rechtenstudent, Vol 4, No (3), (2023): 214-226.

According to Shaykh Kamil Muhammad Uwaidah, in the event of a divorce, the person most entitled to care for and maintain his children is the mother who is emotionally more patient than the father. However, in hadhanah, Islam provides conditions for caregivers, namely: Reasonable, baligh, have the ability and willingness to educate children who are cared for, can be trusted and must also be Muslim with the child.<sup>13</sup>

The Prophet said about this.

Meaning. 'And narrated from Abdullah bin Amr that a woman asked: 'O Messenger of Allah, I am the one who has conceived this child, I am the one who breastfed him and my lap is his refuge. Then his father divorced me and wanted to take him from me?' Then the Messenger of Allah (saw) said to her: 'You have more right to this child than your husband as long as you are not married.' (Reported by Ahmad, Abu Daud, Baihaqi and Hakim and authenticated by him).

Allah says in the Qur'an surah Al Baqarah about childcare.

﴿وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُتِمَّ الرَّضَاعَةَ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَارَّ وَالِدَةٌ بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَالِدَيْهِ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا وَإِنْ أَرَدْتُمْ أَنْ تَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُمْ بِالْمَعْرُوفِ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ ٢٣٣﴾

Meaning: "Mothers should breastfeed their children for two full years, that is, for those who want to perfect breastfeeding. And it is the father's obligation to feed and clothe the mothers in a virtuous manner. Someone not burdened but according to ability levels. Let not a mother suffer misery because of her child and a father because of his child, and the heirs are also obliged to do so. If both of them wish to wean (before two years) with their consent and deliberation, then there is no sin on either of them. And if you want your child to be breastfed by someone else, then there is no sin for you if you pay according to what is appropriate. Fear Allah and know that Allah is All-Seeing of what you do. (Q.S. Al Baqoroh: 233)

Wahbah Az-Zuhaili in the book *Fiqh Islam Waadillatuhu*, argues that hadhanah means the maintenance of children for people who have the right to maintain them. Or it can also mean maintaining or caring for people who are not yet able to take care of what they need themselves because they are not yet mumayyiz such as children, adults but crazy. Maintenance here includes secondary and premier affairs, such as clothing, food, shelter.<sup>14</sup>

According to H.Sulaiman Rasyd hadhanah means educating, educating here can be interpreted that maintaining, educating, leading, and managing in his life so that the child can manage himself according to the definition of hadhanah.<sup>15</sup> According to Amir Syarifuddin, the definition of hadhanah in fiqh terms uses two words but is shown for the same purpose, namely kafalah and Hadhanah.<sup>16</sup>

From some of the above definitions, a common thread can be drawn that child custody or Hadhonah is the right to custody or maintenance of boys and girls who are still young

<sup>13</sup> Syaikh Kamil Muhammad Uwaidah, *Fiqh Wanita*, (Jakarta: Pustaka Al-Kautsar, 1998), 435.

<sup>14</sup> Kadek Wiwik & Enny Ristanty, "Analalisis perkawinan Beda Agama di Berbagai Negara Sebagai Perlindungan Hukum Untuk Membentuk Keluarga", *Jurnal Cakrawala Hukum*, Vol, 11, No 1, (2020): 99.

<sup>15</sup> Sulaiman Rasyd, *Fiqh Munakahat*, (Bandung: CV. Sinar Baru, Cet. Ke-25, 1992), 426.

<sup>16</sup> Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, (Jakarta: Kencana. 2014), 327.

because they cannot yet establish which ones are good and which ones are bad. And provide his needs that make him good and keep him from danger that can damage and harm the child.

The scholars of fiqh are unanimous in stating that the law of caring for and educating children is obligatory, because if children who are still young, not yet mumayyiz, are not properly cared for and educated, it will have a bad effect on them, even leading to the loss of their lives. Therefore, they must be cared for, nurtured and educated properly.<sup>17</sup>

### **Conditions for Hadzanah**

A person who has custody of a child must be a person who is responsible for the interests of the child and must also have certain conditions. If a person does not fulfil one of the conditions, then his right to custody of the child is lost. The conditions are as follows: <sup>18</sup> 1) Baligh 2) Reasonable. 3) Have the ability to educate and care for. 4) Amanah. 5) Being Muslim. 6) A carer, especially a mother, is not married. 7) Independent.

From the description above, it can be concluded that the person most entitled to be a carer is the biological parent, either the father or the mother. If both of them meet the requirements to be carers then they are more entitled to the child. If the child is not yet mumayyiz then the mother is more entitled to the child. The reason is because children who are not yet mumayyiz still really need more love and attention, so the mother is the right person to take care of the child.<sup>19</sup>

### **Perspective of the Law**

The concept of child custody is determined through general legal rules, which must pay attention to the behavior of parents as caregivers. For example, the mother as a caregiver does not work until late at night, resulting in a lack of affection for the child, and tends not to be close, as well as many things related to the development of the child psychologically, materially, and non-materially.<sup>20</sup>

Law No. 1 of 1991 on marriage, articles 98-106, states that parents are obliged to maintain and educate their children until they reach the age of 21 and have not yet married. The obligation of parents to maintain and control children includes supervision (maintaining physical and spiritual safety), service (providing and instilling affection) and representing the child's property and regarding all legal actions in and out of court. This provision also applies in the event of divorce between parents.

According to Article 41 of the Marriage Law, the consequences of the breakdown of marriage due to divorce are:<sup>21</sup>

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<sup>17</sup> M. Labib & Rumawi, "Legal Protection for Financial Technology Users Against Fraud and Illegal Acts", *Rechtenstudent*, Vol 4, No (3), (2023): 214–226.

<sup>18</sup> Muhammad Nurul Azmi Khalid, "Penetapan Hak Asuh Anak Yang Belum Mumayyiz Kepada Ayah Prespektif Maqasid Syariah", *Unes Law Review*, Vol. 6, (2023): 4585.

<sup>19</sup> Arianty Anggraeny Mangarengi & Yuli Adha Hamzah, "The Position of The Marriage Law on Interfaith Marriages Abroad", *SIGn Jurnal Hukum*, Vol 3, Issue 1, (2021): 45.

<sup>20</sup> R. Sofiana, U. Maulidiyah, I. Mufidah, I., A. Hasanah, A., & D.P Rusadi. "Legal Provisions with Basic Principles in Labor Enforcement: Analysis of Effectiveness and Challenges", *Rechtenstudent*, Vol 4, No (3), (2023): 227–237. <https://doi.org/10.35719/rch.v4i3.297>

<sup>21</sup> R. Rizqon, "Analisis Perkawinan Beda Agama Perspektif KHI, HAM dan CLD-KHI. AL-MANHAIJ", *Jurnal Hukum dan Pranata Sosial Islam*, Vol. 4, No. 1, (2022): 44.

- 1) Parents remain obliged to maintain and educate their children, solely based on the interests of the child; when there is a dispute over the control of children, the court gives its decision.
- 2) The father shall be responsible for all costs of maintenance and education necessary for the child; if in reality the father is unable to fulfil this obligation, the court may determine that the mother shall share in the costs.
- 3) The court may oblige the ex-husband to provide subsistence costs and/or determine an obligation for the ex-wife.

Based on the aforementioned provisions, even though the marriage has dissolved, the father and mother are still obliged to maintain and educate their children, solely for the benefit of the child, even though in reality the implementation is only carried out by one of the parties. This means that one of the father or mother acts as guardian of the children, as long as the children have not reached the age of 18 years.

Based on the provisions of Article 41 of the Marriage Law, either the mother or father has an obligation to educate and care for the child as best as possible, for the benefit of the child to achieve the future, and if there is a dispute regarding custody, it will be determined by the court.<sup>22</sup>

It should be noted that the application for the power of custody of a child can be submitted at the same time as a divorce petition to the Religious Court for Muslims and the District Court for Christians. So in a divorce suit, in addition to requesting that the marriage be dissolved by divorce, one party can also request that custody of the children (who are still minors) born from the marriage be granted.

It should be underlined once again that in the case of a child custody battle, it must still be based on the interests and fulfilment of the child's needs. It must be understood that after a divorce, in general, children are entitled to:<sup>23</sup>

- 1) Affection, even though the parents are divorced, the child must still get affection and the child has the right to determine with whom he will live.
- 2) Education
- 3) Health care.
- 4) A proper place to live

The four basic elements above must be fulfilled by parents towards children, if they divorce. But it cannot be denied that there are parents who are divorced but one of the parties does not fulfil the rights of the child, so that the rights of the child are neglected. Article 105 of the Compilation of Islamic Law, determines that the maintenance of children who are not yet mature or not yet 12 years old is the right of the mother.

Supreme Court Decision No. 102 K/Sip/1973 dated 24 April 1975, namely: 'Based on jurisprudence regarding the care of children, the reference is that the biological mother takes precedence, specifically for children who are minors, her interests become the criterion'. Generally, the common factors for fathers to be given custody of minors is because the judge considers that the mother:

- a) Not trustworthy, the mother has no awareness or sincerity in educating the child;

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<sup>22</sup> R Sofiana, U. Maulidiyah, I. Mufidah, I. A. Hasanah, A., & D.P Rusadi. "Legal Provisions with Basic Principles in Labor Enforcement: Analysis of Effectiveness and Challenges", *Rechtenstudent*, Vol 4, No (3), (2023): 227–237. <https://doi.org/10.35719/rch.v4i3.297>

<sup>23</sup> Adib Bahari, *Tata Cara Gugatan Cerai, Pembagian Harta Gono-Gini dan Hak Asuh Anak*, (Yogyakarta: Pustaka Yustisia, Yogyakarta, 2016, 5.

- b) Irresponsible, the mother often neglects the child so as to threaten and endanger the safety of the child;
- c) Has a bad character in maintaining and educating children<sup>24</sup>

### **Perspective of the Compilation of Islamic Law**

Until now there has been no clear rule and task for Religious Court judges to decide who is entitled to custody of children in this divorce case, whether the father or the mother. So it is not surprising that there are many problems in cases of child custody battles, both in court and outside of court.<sup>25</sup> However, from the few existing rules, there is a reference for Religious Court judges in deciding child custody rights, namely in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law Article 105 which states:<sup>26</sup>

- a) The maintenance of children who are not yet mumayyiz or baligh (aged 12 years and under) is the right of the mother;
- b) The maintenance of children who have mumayyiz or baligh is left to the child to choose between the father or mother as the custodian.
- c) The cost of child maintenance shall be borne by the father<sup>27</sup>

### **First Case Number 967/Pdt.G/2014/PA.Tng**

On 30 April 2005, the parties entered into a marriage in accordance with marriage certificate number: 410/ 91/IV/2005 dated 02 May 2005 where two children were born as a result of the marriage. 1) The first child of the plaintiff and respondent was born on 31 October 2005 (female) 2) Second child of the plaintiff and respondent born 21 november 2010 (Male)

After the divorce (divorce certificate number: 0132/AC/2014/PA. Tgrs,) between the plaintiff and the respondent, initially the two children were cared for by the plaintiff as their mother, but since the last few months the second child, who is currently 4 years and 6 months old, has been under the care and custody of the respondent, while the first child continues to be cared for by the plaintiff because the plaintiff is still financially and temporally able to care for and support her children, The plaintiff currently has a good job and as the mother of the children the plaintiff often does not have the opportunity to play with the second child who is in the control of the defendant, for one reason or another the second child is not being cared for by the defendant but is being left at the home of the defendant's parents and is being cared for by her sister in Comal Pemalang, Central Java on a daily basis because the defendant has been unaware of the whereabouts of the second child since 2012.

The plaintiff is trying to win the favour of the defendant to be allowed to care for, educate and above all to be able to devote the love of the plaintiff to her children who really need it. The granting of the right to guardianship, care and maintenance of the children to the Plaintiff (the mother) will have a positive effect on the psychological development of the children and will also have a positive impact on the physical well-being of the children, so that they will not become sickly and will be able to become children who are devoted to their

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<sup>24</sup> Jaih Mubarak, *Peradilan Agama di Indonesia*, (Bandung: Pustaka Bani Quraisy, 2014), 204.

<sup>25</sup> Andre Eksa Setiyawan & Miftah Arifin, "The Fiqh Munakahat Perspective toward Ngalor-Ngulon Tradition in Choosing a Wife Candidate in Banyuwangi Regency", *Rechtenstudent Journal*, Vol. 4 No. 2 (2023): 57.

<sup>26</sup> Enrico Simanjuntak, "Peran Yurisprudensi Dalam Sistem Hukum di Indonesia", *Jurnal Konstitusi*, Vol. 1, (2019): 33.

<sup>27</sup> Jaih Mubarak, *Peradilan Agama di Indonesia*, (Bandung: Pustaka Bani Quraisy, 2014,), 203.

parents, religion and nation in the future. In this case, the panel of judges decided in their decision to grant the plaintiff's claim by *verstek* and gave custody of the child to the plaintiff as the mother of the child.<sup>28</sup>

### Second Case Number 2539/Pdt.G/2016/PA.Tng

On 30 March 2009 a marriage was solemnised in accordance with the marriage certificate number: 151/ 45/III/2009 where as a result of the marriage a male child aged 7 years was born, at first the marriage between the Applicant and the Respondent went well, living in harmony and happiness but over time there were disagreements and deep differences in principles so that frequent arguments occurred, the dispute was getting bigger every day and was irreconcilable which finally the applicant filed a divorce petition at the Tangerang City Religious Court. The two of them have been separated since January 2016 because the Respondent left the Applicant until now and has never returned and her address is unknown.<sup>29</sup>

The Applicant's family and neighbours have tried to advise and reconcile the two, but to no avail. The applicant in front of the court had stated that he no longer wanted to maintain his household and the applicant insisted that he wanted to divorce the respondent, maintaining such a marriage (household) is a futile act because it can result in negative accesses for all parties, and can even become a worldly hell for the parties concerned. In this case the panel of judges in their verdict granted the applicant's request by *verstek*, and gave custody of the child to the pemphon as the father of the child.<sup>30</sup>

### Disparity of Judgement (No. 967/Pdt.G/2014/PA.Tng and No. 2539/Pdt.G/2016/PA.Tng).

In this study, researchers found differences in the verdicts contained in No. 967/Pdt.G/2014/PA.Tng and No. 2539/Pdt.G/2016/PA.Tng. the verdict in the first case gave child custody to the mother. And in the second case giving child custody to the father. And the facts say that the child is still not *mummayyiz*. There are several considerations of the Judge which are the basis for the difference in the two verdicts in the case, including the following:

Number 967/Pdt.G/2014/PA.Tng.	Number 2539/Pdt.G/2016/PA.Tng
The Defendant was unable to care for the child properly, and instead entrusted the child to someone else, because he had a busy life outside, so the child did not receive full affection from the Defendant, and was considered negligent in caring for the child.	According to Article 1 of Law No.1 of 1974, marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and lasting family based on the Almighty God.
As referred to in the compilation of Islamic law (KHI) in 105 clearly states 'in the event of divorce: a. The maintenance of children who are not yet <i>mumayyiz</i> or not	The Respondent left the Applicant and never returned and her address is unknown. This is in accordance with Article 116 point b of the Compilation of Islamic Law which

<sup>28</sup> Copy of Decision Number 967/Pdt.G/2014/PA.Tng.

<sup>29</sup> Santoso, "Hakekat Perkawinan Menurut UU Perkawinan, Hukum Islam dan Hukum Adat", Jurnal Yudisia, Vol 7, No 2, (2016). 89.

<sup>30</sup> Copy of Decision Number 2539/Pdt.G/2016/PA.Tng

yet 12 years old is the right of the mother’.	states ‘One party leaves the other party for two consecutive years without the other party's permission and without valid reasons or for other reasons beyond his/her control’.
The Plaintiff should have had the right to care for the children as their mother, considering that the psychological development of minor children is largely determined by the love and caress of a mother, so that later they can be formed into children who do not lack the love of a mother.	Giving custody to the applicant as the father of the child so that the growth and development of the applicant's child psychologically and physically goes well. the decision of the Indonesian Supreme Court. No. 906/K/Sip/1973 states, that the interests of the child are the benchmark for determining who the parents are entrusted with the care of the child.

In this case there are different views due to various considerations. There is a disparity between the two decisions, namely in case number 967/Pdt.G/2014/PA.Tng, the custody of the child falls to the mother and case number 2539/Pdt.G/2016/PA.Tng, the custody of the child falls to the father, while in article 105 KHI children who are not yet mumayyiz their custody rights fall to the mother but in the decision number the custody of the child can fall to the father.<sup>31</sup>

In deciding the case, of course the panel of judges has a basis for making decisions, including by using: Article 1 of Law No. 1 of 1974 concerning marriage, Article 14 of Law No. 23 of 2002 concerning child protection, Article 19 letter F of Government Regulation No. 9 of 1975 Jo. Article 22 paragraph 2 of the Government Regulation, Article 41 of Law No 1 of 1974 concerning marriage, Article 116 point b of the Compilation of Islamic Law (KHI) which states: ‘One party leaves the other party for two consecutive years without the other party's permission and without valid reasons or for other reasons beyond his/her control’. KHI Presidential Instruction No 1 Year 1991 this legal basis is in accordance with the interests of children who are not yet mumayyiz.

In this case the author has seen that the consideration of the Panel of Judges is appropriate and relevant to the facts in the field and in accordance with applicable laws. In order to avoid such concerns, the right to maintenance and care of children should be determined and handed over to a person who meets the requirements of childcare in accordance with his abilities.

Not always hadhanah falls to the mother, even also falls to the mother's lineage and above. The father also has the same rights as the mother, but in Islam the mother and the mother's lineage are the priority in childcare with a note that the mother must meet the existing requirements. Because in this case of childcare, the first thing that must be considered is the interests of the child and has the ability and ability to provide security to children who are victims of divorce, in this case the Majelis Hakim prioritises how to provide protection and good for the child for the benefit and avoid things that are not desired by his parents.

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<sup>31</sup> M Irwan Zamroni Ali” Keterlibatan Mediator Non Hakim Dalam Menangkal Perceraian Di Pengadilan Agama Banyuwangi”, *Kertha Patrika*, Vol 45, No 3, (2023): 315-333. doi:10.24843/KP.2023.v45.i03.p04

## Conclusion

The disparity between the two decisions is that in case number 967/Pdt.G/2014/PA.Tng, the custody of the child falls to the mother and case number 2539/Pdt.G/2016/PA.Tng, the custody of the child falls to the father, while in article 105 KHI children who are not yet mumayyiz, their custody rights fall to the mother but in decision number 2539/Pdt.G/2016/PA.Tng. child custody can fall to the father. In deciding the case, of course the panel of judges has a basis for making decisions, including using: Article 1 of Law No. 1 of 1974 concerning marriage, Article 14 of Law No. 23 of 2002 concerning child protection, Article 19 letter F of Government Regulation No. 9 of 1975 Jo. Article 22 paragraph 2 of the Government Regulation, Article 41 of Law No 1 of 1974 concerning marriage, Article 116 point b of the Compilation of Islamic Law (KHI) which states: 'One party leaves the other party for two consecutive years without the other party's permission and without valid reasons or for other reasons beyond his/her control'. KHI Presidential Instruction No 1 Year 1991 this legal basis is in accordance with the interests of children who are not yet mumayyiz.

In addition to using the article as the basis for the considerations used by the Panel of Judges in dealing with the case, the Panel of Judges had also tried optimally to provide advice and suggestions to the plaintiff and the applicant so that they could resolve their problems by deliberation but were unsuccessful, and the Panel of Judges also considered by looking at the inner pleasure and the interests of growth and education, all of which were for the good of the child in the future.

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**Legislations:**

Compilation of Islamic Law

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