

**ANALYSIS OF LEGAL REASONING OF JUDGE'S DECISION NUMBER
1429/Pdt.G/2013/Pa.Tng ABOUT *HADHANAH* CHILD CUSTODY RIGHTS TO NON
MUSLIM HUSBANDS UNDER POSITIVE LAW AND COMPILATION OF
ISLAMIC LAW**

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ABSTRACT

The purpose of this research is to analyze the basis of legal reasoning for the judge's decision Number 1429/Pdt.G/2013/Pa.Tng regarding child custody of non-Muslim husbands discussed in positive law and the legal context of the Compilation of Islamic Law. The research method used is a literature analysis of the judge's decision and related laws and regulations with a normative approach that refers to relevant legal theories and legal doctrines. The results of the analysis show that the legal reasoning in the decision is strongly influenced by the provisions of the applicable positive law and also reflects the consideration of Islamic law in the codification of Islamic law. The findings provide a deeper understanding of how courts apply positive and Islamic law in resolving cases involving various aspects of family law, particularly cases concerning child custody in interfaith marriages. The implications of this analysis contribute to the development of more comprehensive legal thinking and judicial practice, particularly in the context of Indonesia's legal pluralism.

Keywords: Child Custody, Positive Law, Legal Reasoning

INTRODUCTION

In a marriage, the existence of children is something that is highly anticipated and expected. Children become the successor of offspring as well as the connector of love and affection from both parents. However, it is not uncommon for marriages to end in divorce which can result in problems related to child custody or hadhanah. In divorce cases, the determination of child custody becomes a very crucial issue and must be resolved fairly and wisely by considering various aspects, both positive law and Islamic law.

Judge Decision Number 1429/Pdt.G/2013/Pa.Tng is one of the interesting cases to be studied further. In the decision, the judge granted the application for child custody (*hadhanah*) to the non-Muslim father. This is controversial because in general, in Islamic law, child custody is given to the mother or a relative of the mother who is Muslim (1)¹.

This problem becomes even more complex when it intersects with positive law in Indonesia. The Compilation of Islamic Law (KHI) as a material legal guideline in the Religious Courts also has its own rules regarding child custody in divorce cases. Therefore, an in-depth analysis of the legal reasoning or legal considerations used by the judge in making the decision is needed (2)².

Based on the explanation in the decision, there are several factors that are taken into consideration by the judge in granting child custody to the non-Muslim husband in Decision Number 1429/Pdt.G/2013/PA.Tng, among others (3)³:

1. The wife's behavior is considered incapable of taking care of the child physically, mentally and financially based on the evidence presented at trial.
2. Non-Muslim fathers were considered more capable and worthy of taking care of the children as a whole than Muslim mothers.
3. During the divorce proceedings, the children were cared for by their biological father and grew up normally.
4. Decisions are based on the best interests and welfare of the child, emphasizing parental authority.
5. Judges make decisions according to the context of the case and the best interests of the child, despite differing views among scholars.
6. The fact that in Islamic law, there are differences of opinion among the imams of the madhhab on the conditions for granting child custody.

This research aims to examine the legal reasoning that formed the basis for the judge in handing down Decision Number 1429/Pdt.G/2013/Pa.Tng regarding child custody to non-Muslim husbands and the implications of the decision in the context of the development of Islamic family law in Indonesia. The scope of the research includes an analysis of the legal

¹ Suhada AW. (2017) *Hadhanah dalam perceraian akibat istri murtad: Studi analisis putusan No 1/Pdt. G/2013/PA. Blg.* Doctoral dissertation, Universitas Islam Negeri Maulana Malik Ibrahim;

² Syairopi A. (2016) *Pemberian hak asuh anak kepada suami yang non muslim (Analisis Putusan Nomor: 1429/Pdt. G/2013/PA. Tng.)*. Bachelor's thesis, Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta;

³ Hanifah M. (2019) *Perkawinan Beda Agama Ditinjau dari Undang-undang Nomor 1 Tahun 1974 Tentang Perkawinan*. *Soumatara Law Rev.* 2019;2(2):297–308.

bases used, both from positive law and the Compilation of Islamic Law, as well as a study of the methods of interpretation and legal construction applied by judges in interpreting legal provisions related to child custody in divorce cases.

RESEARCH METHOD

This research uses qualitative research methods by adopting some relevant ideas of qualitative methods (4)⁴. First, the case study approach was used to analyze Judge Decision No. 1429/Pdt.G/2013/Pa.Tng in depth, enabling detailed data collection related to the background of the case, legal considerations, and implications of the decision. Secondly, document analysis allowed the researcher to examine legal reasoning in documents such as judicial decisions, laws, and legal literature(5)⁵. Third, data triangulation is used to ensure the validity of data obtained from various sources(6)⁶.

RESULTS AND DISCUSSION

A. Definition of Child Custody and its Legal Basis after Divorce

Child custody (*hadhanah*) is the obligation of parents to maintain and look after their young children, both in terms of physical, spiritual, and moral. In Islam, *hadhanah* is an obligation imposed on parents to maintain and educate their children as well as possible (7). This is based on the words of Allah SWT in QS. At-Tahrim verse 6:

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

“O you who believe, protect yourselves and your families from the fire of Hell, whose fuel is man and stone; its guardians are angels who are harsh, hard, and do not disobey Allah in what He commands them and always do what is commanded.” (QS. At-Tahrim: 6)

In the Compilation of Islamic Law (KHI), child custody is regulated in Article 105

⁴ Farida Nugrahani, *Metodologi Penelitian Kualitatif* (Surakarta: LPPM Universitas Bantara, 2014), 3-4

⁵ Dimiyati K, Wardiono K. *Metode Penelitian Hukum*, Surakarta. Fak Huk Univ Muhammadiyah Surakarta. 2004;

⁶ Tan HT. Politik Hukum Putusan Pengadilan Agama Yang Menyimpangi Pasal 105 (A) KHI Tentang Hak Asuh Anak Yang Belum Mumayyiz Dalam Kasus Perceraian Marshanda Vs Ben Kasyafani. *Refleks Huk J Ilmu Huk.* 2015;9(2):219–28.

which states that the maintenance of children who are not yet *mumayyiz* or not yet 12 years old is the right of the mother. However, if the mother is unable to look after her child, Article 105 letter (a) allows the maintenance of the child to be transferred to relatives from the mother's side or relatives from the father's side who are capable. In addition, Article 156 of the Compilation of Islamic Law regulates the consequences of marriage breakdown due to divorce, where children who are not yet *mumayyiz* are entitled to *hadhanah* from their mother, unless the mother has died⁽⁸⁾⁷.

B. Child Custody in Fiqh Perspective

Child custody from a fiqh perspective is an important aspect of Islamic law that establishes the responsibilities of parents towards their children. According to fiqh, parents have the primary obligation to provide care, education and protection to their children. These child custody rights cover all aspects of a child's life, from material needs such as food, clothing, and shelter, to emotional needs such as affection, care, and moral guidance. ⁽⁹⁾⁸. In addition, fiqh also emphasizes the importance of providing religious education to children so that they grow up to be individuals who obey Allah SWT and have noble character. In the context of inheritance law, child custody also determines their right to receive inheritance from their parents. Therefore, from a fiqh perspective, child custody is a mandate that must be fulfilled with full responsibility by parents as a form of implementing Allah's commandments in nurturing the next generation of Muslims.

C. Child Custody in the Perspective of Indonesian Positive Law

In the Indonesian positive legal system, child custody, or often referred to as "parenting", is regulated in several laws and regulations. First, Law No. 1/1974 on Marriage mandates in Article 45 paragraphs (1) and (2) that both parents are obliged to maintain and educate their children as well as possible, including in cases of divorce. Secondly, in the Compilation of Islamic Law, specifically Article 105 and Article 156, mothers generally have priority to obtain custody of children who are not yet *mumayyiz*, but if the mother is unable, custody can be transferred to relatives from the mother's or father's side who are able.

⁷ Ahmad Syairopi, *Pemberian Hak Asuh Anak kepada Suami yang Non Muslim: Analisis Putusan Nomor 1429/Pdt. G/2013/PA. Tng.* (BS thesis, Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta, 2016).

⁸ Hidayat M, Rahmawati TL, Maulidan I. Hukum Hadhanah Anak Akibat Perceraian. *Ma'mal J Lab Syariah Dan Huk.* 2021;2(5):540–52.

Furthermore, Law Number 35 of 2014 on the Amendment to Law Number 23 of 2002 on Child Protection emphasizes in Article 26 paragraph (1) that parents are obliged to care for, maintain, educate and protect children, including in the context of divorce.

Settlement Of Child Custody Cases in Tangerang Religious Court

Tangerang Religious Court was established on January 18 in accordance with Provincial Law No. 152 of 1982 concerning the Establishment of Inquisition Courts in the Provinces of Java and Madura under the name *Raad Agama/Penhuku Landraad*. Detailed information about Tangerang Religious Court can be found on their official website, www.pa-tangerangkota.go.id, which is a valid source as it corresponds to the court's official history. Located on Jalan Perintis Kemerdekaan II, Cikokol, Tangerang City, this court is class IB 1 and is under the jurisdiction of the Banten Religious High Court. The 2020 square meter land on which the court is located has the status of usufruct rights in accordance with certificates number 28 and 29 issued by the Tangerang National Land Office on 21 September 1984, and its ownership was transferred to the Indonesian Government through the Indonesian Supreme Court. The court building has an area of approximately 1858 m², was built in 2009, and consists of two floors (10)⁹

The process of resolving child custody cases at the Tangerang Religious Court requires a lot of consideration and strict legal procedures. In this situation, the best interests of the child must be the top priority in the decisions made. Basically, the process of resolving a child custody case at the Tangerang Religious Court begins with the father or mother filing a lawsuit (11)¹⁰. This lawsuit can be filed as part of the divorce proceedings or separately. The party filing the lawsuit must provide compelling reasons why they are entitled to child custody.

After a lawsuit is filed, the Tangerang Religious Court will first summon the parties involved to undergo a mediation process. In the mediation process, a qualified mediator will assist the parties to reach the best agreement regarding child custody. If the mediation is successful, then the child custody decision will be based on the agreement reached. However,

⁹ Zulfikar T, Fathinuddin M. Hak Dan Kewajiban Orang Tua Terhadap Anak Berdasarkan Pasal 45 Undang Undang Nomor 1 Tahun 1974 Tentang Perkawinan. *J Evid Law*. 2023;2(1):31–9.

¹⁰ Fithriyah NN. Urgensi penerapan dwangsom (uang paksa) dalam perkara hadhanah perspektif maqashid al-syari'ah (analisis putusan hakim nomor223/PDT. G/2019/PA. PDN DAN 67/PDT. G/2020/PTA.MDN. Bachelor's thesis, Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta; 2020.

if mediation fails, the process will continue with a trial. In the trial, the judge will listen to testimony from both parties, as well as evidence submitted. In addition, the judge may also request input from a Community Counselor (PK) or Child Psychology Expert to provide recommendations regarding the best interests of the child.

Explanation of Decision Number 1429/Pdt.G/2013/PA.Tng.

1. **Background to the Case** This is a child custody case brought by a non-Muslim father against a Muslim mother. The father sued to be granted custody of his minor children.
2. **Judge's Considerations** In deciding this case, the judge considered several important matters:
 - a. The fact that the mother was deemed physically, mentally and financially incapable of taking care of the children based on the evidence presented.
 - b. The non-Muslim father is considered more capable and suitable to take care of the children as a whole.
 - c. Although of different religions, the father must facilitate the children to carry out Islamic religious obligations.
 - d. Decisions are made with the best interests of the child as the top priority.
3. **Judgment** In his ruling, the judge decided to:
 - a. Granting the non-Muslim father's claim.
 - b. Granting custody of the child to the non-Muslim father.
 - c. Requiring the father to facilitate the children's observance of Islamic religious obligations.
4. **Special Considerations** This decision is quite unique because generally, in Islamic law, a Muslim mother has top priority for child custody, especially at an early age. However, in this case, the judge saw that the best interests of the child would be better served if custody was given to the non-Muslim father.
5. The implications of this decision show that judges can make decisions that differ from the general principles of Islamic law if there is strong evidence and special considerations that make the decision the best solution for the interests of the child. However, this decision cannot be generalized and must be viewed on a case-by-case basis.

Legal Reasoning of the Case Contained in Decision Number 1429/Pdt.G/2013/PA.Tng.

In Decision Number 1429/Pdt.G/2013/PA.Tng, the judge of Tangerang Religious Court used several legal reasoning in deciding the case of child custody to a non-Muslim father. The following are the legal reasoning used by the judge in the decision:

1. Interpretation of Islamic Law The judge interpreted the provisions of Islamic law related to child custody (*hadhanah*). Although in general Islamic law gives priority to Muslim mothers for child custody, in this case, the judge saw that the mother was unable to carry out her obligations as a good caregiver.
2. One of the main considerations in this decision is the principle of the best interests of the child (*mashlahah al-tholafah*). The judge saw that by giving custody to the non-Muslim father, the best interests of the child would be better guaranteed, both physically, mentally and financially.
3. The Judges also used the concept of benefit (*mashlahah*) in Islamic law. This decision is considered the best solution (*mashlahah*) to ensure the overall welfare and development of the children..
4. Consideration of Facts and Evidence The judge considers the facts and evidence presented at trial, such as testimony, reports from Community Supervisors, or Child Psychology Experts. This evidence shows that the non-Muslim father is more capable and suitable to care for the children than the Muslim mother.

CLOSING

Tangerang Religious Court Decision No. 1429/Pdt.G/2013/PA.Tng granted custody to a non-Muslim father of a child named Caroline, the result of a marriage between the petitioner and the respondent. This was based on the judge's consideration of the trial evidence and living law, with several factors supporting the decision. First, the wife's behavior involved infidelity, despite still being Muslim. Secondly, the difference of opinion among the imams of the *mahzab* about the conditions for granting child custody. Third, during the divorce process, the child is cared for by the biological father and grows normally. Fourth, the decision is based on the interests and welfare of the child himself, emphasizing parental authority. Despite differences in scholarly views, the judge made the decision according to the context and the best interests of the child.

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