

# Negligence in Implementing Child Custody Decisions: A Threat to Child Protection in Indonesia

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## Negligence in Implementing Child Custody Decisions: A Threat to Child Protection in Indonesia

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### Abstract

*The main objective of marriage is not only to form a family or to obtain offspring or children, but also to raise, nurture and educate children until adulthood. The children still have the right to care and education even if their parents' marriages are broken through a divorce. This study examines this issues of negligence in implementing the child custody decisions passed lawfully after a divorce or dissolution of marriage. This study adopted a legal research design with a normative juridical approach. The data for the current study was derived from primary and secondary legal material. The research procedure involved reviewing all the available data from legal documentation and library archives. The findings revealed that there is a non-compliance of the decisions of the court concerning the custody of children. The study recommends the need to guarantee the creation of the administration of justice to uphold a just law and improve the culture of law in the life of society and the nation. The Indonesian government should also draft statutory regulations that safeguards children who are the victims of negligent parenting due to divorce.*

Keywords: Child Custody, Divorce, Child Protection, Family Law, Contempt of Court, Legal Protection.

### Introduction

Marriage is a legal relationships in a society that is an inner bond between a man and a woman as husband and wife to form a family (household), happy and eternal based on the Almighty God (Tobing, 2018). Marriage is valid when performed according to the laws of religion and belief and recorded; there is no longer a variety of laws in determining the legality of a marriage. Marriage is essential in human life,

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both for individuals and groups (Haeri, 2014). Mixing married life is built in an atmosphere of serenity, peace and happiness, and the love between husband and wife and their children (Herawati, 2016). Marriage aims to form a happy, lasting, prosperous family (Randles, 2016). Marriage in Islam aims to fulfil the desire to create a happy family based on love and affection and obtain legitimate offspring in society by following the provisions of Shari'ah—forming a family and having children or descendants as the purpose of marriage. The legitimate child will carry on the lineage and develop the tribes of the human race.

A man with a woman as husband and wife bound by marriage has various legal consequences, namely the emergence of rights and obligations among those who belong to the family environment, namely the husband's marital power. The husband is the head of the family and is responsible for his wife and children. For the children they give birth to, parents are obliged to nurture and educate their children as best they can until the child marries or can stand on his own. Children who have not reached the age of 18 and have never been married are under the authority of their parents. Parents must nurture and educate their children as best they can until they marry or stand on their own (Steinberg, 2001). In particular, parental authority is obligated to educate and nurture their children. Parents are responsible for nurturing and educating their children as best they can (Goldstein et al., 1996). Every parent's responsibility is to care for, maintain and educate so that a child can grow and prosper. Parents whose marriages break up due to divorce are obliged to nurture and educate their children. In a divorce, both mother and father remain obliged to maintain and educate their children solely based on the child's interests. Each child has the right to be cared for by his or her parents.

Marriages sometimes have to break up because of divorce (Flowerdew & Al-Hamad, 2004; Rheinstein, 1955). Divorce should be the last action after taking the path for peace efforts and repair (Gottman et al., 1995; Johnston & Campbell, 1999). There is no way and for the sake of happiness that can be expected after the divorce. In the event of a divorce, the severance of the marital relationship between husband and wife, there are legal consequences on the child's status, maintenance, education, and financing (Mashhour, 2005). The relationship between husband and wife is severed with the dissolution of marriage due to divorce, but the relationship between parents and children remains unchanged. The father and mother still bear obligations for the cost of education and maintenance of the child (Cohen, 1987). The obligation of parents to nurture and educate their children as best they can until the child is married or able to stand on his own does not end with his parent's divorce. A man and a woman who caused the child's birth must be responsible for the child's survival, growth, and development. The right to child custody is a human right that must be protected (Nowak, 2005).

It is common knowledge that after divorce or parents' separation, there is a battle for the child's custody, which often results in heated arguments between both parents, putting the child in the middle of the conflict (Bruch, 2006). Continued exposure to overt and covert forms of parental conflict is the strongest predictor of whether or not children can successfully accept the breakdown of their family, even though most children do so and accept their parent's divorce. Most children living in high-conflict families continue to be subjected to their parents' anger, hostility, and

contempt for the other parent. These negative emotions frequently remain amid additional strains brought on by adjustments in children's day-to-day life (i.e., changes at home, changes at school, economic factors). The conflict between parents can also serve as a moderating factor in parenting because it can divert parents' attention away from the requirements of their children (Cao et al., 2022).

There are still many questions to be answered and misconceptions to dispel regarding the parents who fight custody battles for their children (Tymchuk & Feldman, 1991). Even though significant resources in the form of social services are provided to these families, the conflict continues for many of them. In order to have a complete understanding of the factors that influence child protection investigations in cases involving disputes over child custody, it is necessary to have a comprehensive understanding of the variables. Better informed data on these responses can promote changes in structure and the delivery of services, which will ultimately reduce the burden of suffering placed on children and the children of families caught up in these disputes (Forslund et al., 2022). The aspects of child protection after parental divorce are: Children have the right to maintenance from both parents even if divorced (Eldar-Avidan et al., 2009). Child care aims to protect children from harmful things to themselves and their future from the environment (Daniel et al., 2011). The cost of maintaining and educating the child becomes the father's responsibility (Seltzer, 1998). Hadjon (1987) states that legal protection is the protection of dignity and worth and the recognition of the human rights of the subject of law based on the legal provisions of arbitrariness.

Furthermore, there can be two forms of legal protection for the people based on their means: preventive and repressive protection (Hadjon, 1987). In the UK, various terms are used such as "guardianship", "custody", "care", and "control". Then the "legal custody", "physical custody", "actual custody", and "joint custody". Various terms are confused by their terminology, which implies that they overlap. Custody means the care, treatment, "care", monitoring, treatment, care; "control" means monitoring and control; "guardianship" means the authority or duty of a guardian (Folberg & Graham, 1979; White, 1980). Further, "legal custody" is defined as: "so many obligations and powers (rights) of the parents concerning the person of a child (including as to the place and manner in which he will spend his time)" (DiFonzo, 2014). Then, "actual custody" (care and control) is defined as the Parent's right to have the child explicitly, including its obligations. Then "joint legal custody" means that both parents have the same right to decide on the child; no one has a superior right over the other (Seltzer, 1991). "Physical custody" means the right and obligation of a parent to provide "a home" for the child and to make day-to-day decisions while the child is with them (Fox & Blanton, 1994; Singer & Reynolds, 1987).

Even though this is a matter of more significance than determining who will have custody of the children following a divorce, none of the past studies has investigated the issue of negligence on the part of those who are awarded a child's custody. This ultimately creates a protracted situation for violations of children's rights, even though there are typical regulations that govern the transfer of a child's custody. However, having to go through these legal remedies is not uncommon. When it comes to marriage and divorce, children's rights cannot be denied for any reason, regardless of the gender of the custody holder or who has more rights. However, a child's rights,

including how he or she can thrive to their full potential and obtain what they want, should take precedence over all of these other considerations.

This paper identifies the factors that best predict joint custody, which is useful for parents, attorneys, and prosecutors. Parents should be aware of these findings before venturing into the courtroom. Divorce has consequences for the custody of children whose implementation is hindered. Several cases show that a court decision granting custody of a child to one of the parents was not implemented. This paper examines the protection of child custody after the dissolution of the marriage of both parents due to divorce. So the purpose of this paper was to cover a child's custody after divorce. In the implementation of a child's custody after divorce, there are defaults and obstacles in the implementation of the child custody decisions after divorce, which requires improvement in the fulfilment of a child's custody to achieve protection of rights foster care after the divorce of both parents is discussed in this study.

### Literature Review

- *The meaning of a child's custody*

The Indonesian Law mandates that the husband and wife are equally responsible for their children's care and upbringing, including their physical health, spiritual development, and academic progress. In the Indonesian legal system governing a child's custody, the term "custody" refers to the arrangement known as *mumayyiz*. In addition, it is also known as "child care" or *hadhanah* meant to provide emotional support, physical care, and educational opportunities for children until they became adults or can care for. In addition, *hadhanah* is the act of caring for a child who is unable to live independently and who cannot protect himself from everything that can cause him harm and put him in danger.

*Mumayyiz* is the act of caring for a child who can be independent and protect himself. There are a variety of different opinions regarding the age limit. The age limit under *mumayyiz* as defined in legal documents is 12 years (Zur Raffar et al., 2021); therefore, a child who is not yet eligible for *mumayyiz* is a child under the age of 12 years and whose custody rights are extended to the child's mother. Even though during the time when the child is in the care of the mother, it does not mean that the father is absolved of all responsibility. The responsibility here refers to providing financial responsibility to the child. After the child reaches the age of 12, the child can choose by which parent he will be raised next, and this is where the law renders the father's initial obligation null and void. When the child is in the mother's care, the father is obligated to fulfil only the financial rights of the child. However, after the child reaches the age of 12, this obligation is null and void. Regarding the laws and regulations in Indonesia, this situation prevails concerning the custody of children and the protection of children's rights

The principle of *hadhanah* also means to take care of children who are still young, whether they are male or female, or who are grown but not yet *tamyiz*, or the ones who can protect themselves from something that can hurt and destroy them; or the ones who can educate themselves physically and spiritually; who can stand independently to face life's challenges and assume responsibility. In addition, the term *hadhanah* within the Indonesian legal system, has become a permanent term used for the position

of a child whose management is "disputed" in court as a result of a live divorce between the husband and the wife (mother and father) (Firdausia, 2020).

The responsibility of maintenance, which includes supervision and service in addition to the provision of a living, is sustainable until the child reaches the legal age limit as a *mumayyiz* who can stand on his own. This responsibility includes the provision of a living. The Compilation of Islamic Law, Article 105 (a) stated that the age limit for a child to be considered a *mumayyiz* is 12 years old. In the meantime, Law Number 1 of 1974 concerning Marriage, states that a child is considered to be *mumayyiz* until he or she gets married or reaches the age of 18 years old (Ilyas, 2019). Additionally, it is also the obligation of parents to provide education and instruction that allows the child to become a human being, to acquire the abilities and skills and to develop innate talent, which will help him in the rest of his life.

- *Previous studies*

There is no dearth of research on child protection and decisions regarding a child's custody. A study by Joan B. Kelly entitled "The Determination of Child Custody" briefly reviewed the history of a child's custody decisions and describes the current custodial arrangements in the United States. It examined how parents and courts decided custody and access and the changing visitation patterns in recent decades. The author discussed the impact of legal reform and the implementation of newer dispute resolution and educational interventions and then made recommendations for policy and practice (Kelly, 1994). In another study, Greenberg et al. (2004) underscored the need for judges and lawyers to understand the ethical and professional standards underlying competent mental health practice in forensic cases. The practices of mental health professionals who provided court-related services may substantially impact the validity of their professional opinions, the effectiveness of services provided to children and families, and the development and adjustment. The authors suggested that core ethical and clinical issues be considered by all psychologists working in the context of custody disputes. These professional practice recommendations were also expected to be useful for lawyers and judicial officers in assessing the quality of the opinions of mental health professionals.

Meier et al. (2019) examined whether any empirical evidence suggested that parental alienation, or a parental alienation syndrome, was gender-biased in practice and outcomes. Second, this study sought to explore outcomes in detention/abuse litigation based on gender and different types of harassment. The study analyzed more than 2,000 court opinions and found that the Court was skeptical of the mother's claims of harassment by the father. This skepticism was most extraordinary when mothers claimed the child abuse. The findings also confirmed that cross-paternity claims of parental alienation increased (almost doubled) court rejection of maternal harassment claims and lost maternal custody of fathers accused of harassment. In comparing court responses when fathers accused mothers of harassment, significant gender differences were identified. Finally, this study relied only on electronically published opinions in the case of child custody. This resulted in an invaluable database that identifies ten years of published cases involving exile, harassment and custody while coding party claims and defense, outcomes, and other critical factors based on gender and parental status.

Mansari et al. (2018) aimed to determine the basis of the Judge's judgment in determining the childcare juridical review and legal consequences on the determination of child custody after divorce. This normative research used primary legal materials stated in Law No. 1 of 1974, secondary legal materials in Judge's decisions and tertiary legal materials in legal dictionaries and encyclopedias. Data presentation was done descriptively using qualitative data analysis methods. The results showed that the Judge's consideration to determine the child's caregiver after divorce was the existence of a demand from the plaintiff/defendant (petitioner/defendant), through the vertex decision, in the child's best interests. The designation of the mother or father as the child's caregiver was not contrary to the applicable laws and regulations as long as it guaranteed the best interests of the child and both the mother and the father have the right to care for the child even if the mother was more entitled to care for him. The Judge's verdict also included the suggestion that the babysitter should not only pay attention to the gender of the parents but must ensure the child's best interests. It was also recommended that policymakers should formulate more stringent policies and parents should not fight for custody of children if they cannot take care of them properly.

Waspada and Kharisma (2020) examined the regulations regarding a child's custody in divorce because of a divorce between a husband and wife where one party was an Indonesian Citizen, and the other party was a foreign citizen. This study was empirical based on legal research, descriptive with a qualitative approach. The data was collected through interviews with Sleman District Court Judges and triangulated through study documents and library material. The study concluded that the problems that arise in mixed divorce are where the divorce lawsuit involved two citizenships and the child's citizenship is to be determined. To resolve the issue of the child's custody in a mixed divorce, Indonesian judges apply the Indonesian national law, which gives children the right to choose which parent would adopt them. Children also acquire limited dual citizenship until they reach 18 (eighteen) years age or before their marriage. Children of 18 (eighteen) years age or married must choose one of their parents' nationalities.

In another research, (Ivana & Cahyaningsih, 2020) determined the basis of Judge's consideration of divorce decision by granting the child's custody to the father. Being a normative legal prescriptive research, the study used the case based approach. The study findings explained that the Judge's judgment was based on the principle of best interests for the child; the judge gave custody of the minor to the father; which was not in accordance with the applicable legislation because a minor child is in the mother's custody. Nevertheless, because of the mother's bad behavior known to the court, who had abandoned her child and forgotten her responsibilities as a mother. This had become the basis of the Judge's consideration in granting the custody of the minor child to the father.

Another research conducted by Soro and Serrano-Cinca (2021) focused on the provision of joint or single custody, seen as very important for the lives of children and parents. This paper first modeled the factors that explained the Court's decision to grant custody of the child and then tested the predictive capacity of the proposed model. The study used data from 1,884 court decisions by identifying and labelling factual elements, legal principles, and other relevant information. The study

developed a neural network model that included eight factual findings, such as the relationship between parents and their economic resources, children's opinions, and psychological reports on types of custody. The study also performed temporal validation using later cases compared with a training sample for prediction and obtained easy-to-apply decision rules with decision tree techniques.

### Research Methods

This study adopted a legal research design with a normative juridical approach. In the domain of law, a normative with a legal (juridical) approach is a different method, unlike other domains. A normative legal research method is also a systematic way of conducting empirical research to avoid getting caught up in the mistakes that generally occur in legal research. In social sciences, the normative research also helps to know and find the type of components required to carry out the research. Such an accuracy of research method significantly affects the process and results of legal research.

The data for the current study was derived from primary and secondary legal material. The primary legal material comprised various laws and regulations related to post-divorce custody and child protection while the secondary legal material used were journals, research results, books, and proceedings related to the research topic.

The research procedure involved reviewing all the available data from various sources, namely legal documentation. During the process, the data was reduced and summarized by selecting main components and arranging more systematically. The data analysis method involved qualitative analysis method which enabled the objective analyses of the situation faced by parents regarding a child's custody after divorce.

### Results

The number of divorce cases in Indonesia reached 447,743 in 2021, as stated in Figure 1. This represents a growth of 53.50 per cent in comparison to the number of divorce cases in 2020, which reached 291,677. Moreover, the number of divorce petitions filed by wives far exceeded those filed by husbands. As per record, a total of 337,343 or 75.34 per cent of all divorce cases decided by the court were filed by wives against husbands and a total of 110,440 instances or 24.66 per cent were the divorce cases in which the husband submitted the divorce petitions and the Court passed the verdict.

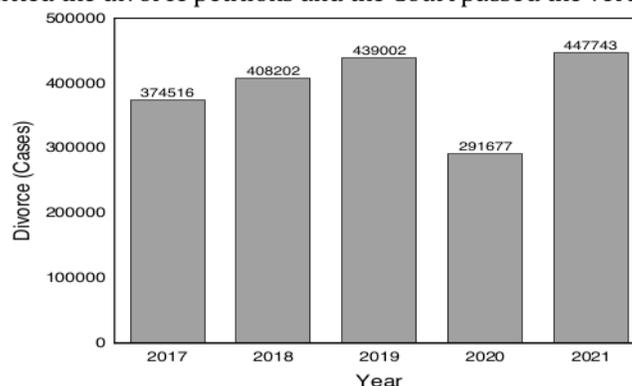


Figure 1: Number of Divorce cases in Indonesia, 2017-2021  
Source: Statistics Indonesia

West Java alone reported 98,088 divorce cases in 2021, making it the province with the most significant number of divorce cases. East Java and Central Java came at second and third places with 88,235 and 75,509 instances respectively. In 2021, disagreements and conflicts continued to be the leading cause of divorce, accounting for 279,205 instances. The majority of people who filed for divorce did so for financial reasons. However, there were a few cases filed due to domestic violence and polygamy. During the last five years, there had been a general trend toward fluctuations in the number of divorce cases throughout the country. However, the year 2021 saw the most significant number of people filing for divorce, while the year 2020 saw the fewest (Figure 1)

There are a significant number of women in Indonesia who marry at a young age for various reasons, including cultural norms, economic pressures, and other factors that are not ideal. Marriage is legal only if the man and the woman are 19 years old, as stipulated by Law Number 16 of 2019 concerning Marriage Amendments to Law Number 1 of 1974. This law was passed in response to Law Number 1 of 1974, which initially governed marriage. According to the results of the National Socio-Economic Survey (SUSENAS) Kor 2020, and as stated in Figure 2, a huge number of marriages of minors in Indonesia were reported. For instance, 8.19 per cent of Indonesian women tied the knot for the first time between the ages of 7 and 15. In South Kalimantan, the proportion of women who tied the knot for the first time at a younger age than the national average reached 12.52 per cent in 2020. Nevertheless, a 13.18 per cent drop can be seen when comparing this figure to the previous year's. West Java had 11.48 per cent of the country's total population of women who got married for the first time between the ages of 7 and 15, making it the province with the highest proportion of young brides. After that, East Java came in second with 10.85 per cent, West Sulawesi came in third with 10.05 per cent, and Central Kalimantan came in last with 9.855 residents The rate of underage marriage in Banten's female population was 9.11 per cent, followed by Bengkulu at 8.81 per cent, Central Java at 8.71 per cent, Jambi at 8.56 per cent, and South Sulawesi at 8.48 per cent (Figure 2).

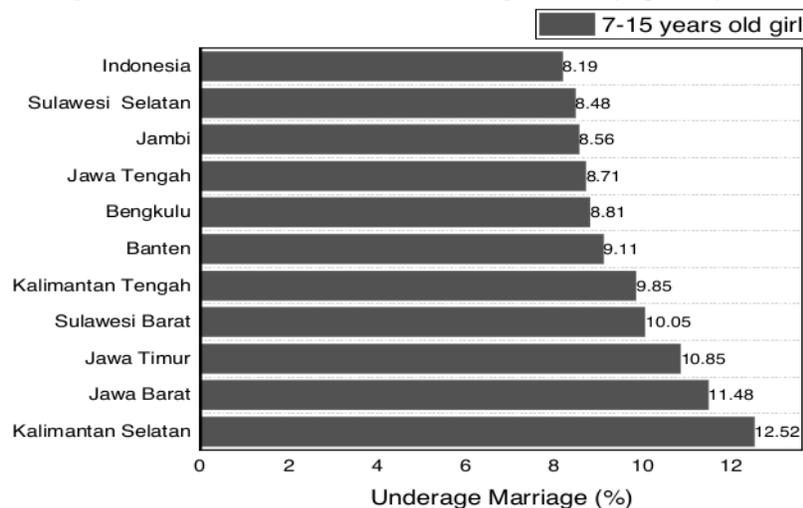


Figure 2 The percentage of Marriages of Minors in Indonesia

In 2020, the Ministry of Social Affairs of Indonesia reported that 67,368 children in Indonesia were neglected. It is the responsibility of the provincial as well as the district and city governments to ensure that every social agency can provide social rehabilitation for children who have been neglected. A child aged 0-12 is considered to be abandoned if he or she has suffered physical or emotional abuse at the hands of his or her parents or family or if the child has been removed from the care of his or her parents or family.

There is a correlation between marriages contracted by minors and increased divorce rates, and child abandonment due to the divorce. In the age range of 10 to 17 years, approximately 99.26 per cent of young women have not married, 0.70 per cent are married, and 0.04 per cent are divorced or divorced. However, 36.62 per cent of young women between the ages of 10 and 17 got married when they were 15 or younger. Marriages between people who were not yet adults or who had not reached puberty were typically considered to involve children. This was noted vide Article 7 of Law No. 1 of 1974.

In general, married life ought to be complete and harmonious, but things will not always go smoothly in practice. Divorce or death are two potential causes of separation in a couple's life. In situations where solely the biological father provides considerable care for the child, children who live with their biological mothers also experience an effect known as the loss of the child's motherhood. This is especially true for young girls and toddlers. The presence of a biological mother is essential for toddlers, particularly infants who are still required to consume breast milk. When a young woman approaches puberty, she has already begun to experience her monthly period and tends to become reluctant to talk or communicate with her father. This is because of the physiological changes that occur at this time.

The 2009-2018 MSBP Susenas show the percentage of children aged 0-17 years who were not yet married and live with their biological father. When it came to time, the fact that the father had a job meant that the children spent less time together. However, there were times when the father figure was needed, such as when children started school where other children were accompanied by their fathers. Only about 2% of children are currently living with their biological fathers. The percentage of boys who live with their biological fathers is 2.59 per cent, which is 2.59 per cent higher than the percentage of girls who lived in 2018, which was only 2.42 per cent. In the meantime, if you look at the location, you will notice that fewer children lived with their biological fathers in urban areas, which was 2.37 percent, as opposed to rural areas, where the percentage was 3.15 per cent (2.68 per cent).

Women who have to raise their children without the presence of a husband or a father figure, either as a result of separation or divorce from their husbands or because their husbands had passed away, were the ones who were most likely to be familiar with the term "single mother" or the role of a single mother. The mother, who also served as the community's pillar of support, took on an increasingly heavy responsibility, one that was not just financial but also social as well as emotional. The mother fulfilled all of her children's requirements, such as providing them with education, clothing, and food, and also took on the role of a father to safeguard her children. When it came to parenting, children who solely spent their time with their biological mother had a less balanced experience. One example was cited when the

child's biological mother was the only person who could care for him since his biological father could not do so because he was ill, worked outside the home, or had some other disability. Nevertheless, this position of the single mother also showed up in households where both the father and the mother were present.

Between 2009 and 2018, there was a general trend toward increasing the number of children living with their biological mothers. It was 5.61 percent in 2009 and continued to rise until it reached 8.34 percent in 2018. Children living with their biological mothers were more likely to be found in rural areas when compared to children living in urban areas. In 2009, the percentage of children living with their biological mothers in rural areas was 5.82 per cent. Since then, it increased to 6.77 per cent and expected to continue rising until it reached 8.38 per cent in 2018. This was because many parents in metropolitan regions were employed, particularly the mothers.

When assessed according to gender, more girls than boys lived with other families. The percentage of girls living with other families was 5.59 per cent in 2009 and 5.45 per cent in 2012, but it dropped to 4.69 per cent in 2015 before climbing up to 4.95 per cent in 2018. On the other side, some children did not live with either of their parents; the percentage of children who lived with other families in rural areas was significantly higher than that of children who lived with other families in urban areas (5.77 per cent). This was due to unavoidable circumstances, such as the difficulty in hiring a babysitter and the expensive cost of child care, as well as the various reasons for trusting grandparents to look after children or the large number of people who worked outside of the village, either in the city or abroad. It required extra care and distinct contact with children with these disorders so that these youngsters did not receive violence from their environment or associate with people who caused them to get into trouble.

Parenting was one factor that impacted a child's growth and development, particularly during crucial periods, which occurred between the ages of 0 and 8. Loss of good parenting due to causes such as divorce, loss of parents for either a temporary or permanent period, natural disasters, and several other traumatic situations significantly impacted their physical and mental health. According to Soro and Serrano-Cinca (2021), parenting was a relationship between parents and children that involved the expression of attitudes, values, interests, and beliefs held by the parents and the conduct exhibited by their children in parenting and training. Sociologically speaking, this encounter was a part of an indivisible group of occurrences that, whether it was done on purpose or not, helped youngsters get ready for the next phase of their lives. Therefore, the interpersonal and intrapersonal interactions of the people who were around the child gave the activity of parenting its unique color.

## **Discussion**

The findings of the study reveal that a child has a legal relationship with both his father and his mother, in the sense that both parents must care for and educate the child, and there is *the child's right to be cared for by both parents* (Amato, 1994). For children born in a legal marriage, the parents are primarily responsible for realizing the child's spiritual, physical and social well-being (Desai, 2010). Everyone who gets married, of course, expects the marriage to be intact forever. However, due to

unavoidable circumstances, the marriage can end in a divorce, that is, the dissolution of the marriage when the parties are still alive based on a bond that can be justified and determined by a court decision that affects the children.

Numerous studies report differences between boys and girls in the effects of parental divorce, although more recent studies do not appear to find such differences (Earp et al., 2012; Wallerstein & Lewis, 2004). With a divorce, the impact is not just momentary for both parents but a lifelong impact on their children. According to Fagan and Churchill (2012), divorce detrimentally impacts individuals and society in numerous other ways. For instance, in religious practices, divorce diminishes the frequency of worship of God and recourse to Him in prayer. In education, divorce diminishes children's learning capacity and educational attainment. In the marketplace, divorce reduces household income and deeply cuts individual earning capacity. In government, divorce significantly increases crime, abuse and neglect, drug use, and the costs of compensating government services. In health and well-being: divorce weakens children's health and longevity. It also increases behavioral, emotional, and psychiatric risks, including suicide.

The obligation of parents to nurture and educate their children as best they can until the child is married or able to stand on their own does not end with the parents' divorce. The relationship between husband and wife is severed with the dissolution of marriage due to divorce, but the relationship between parents and children remains unchanged. The father and mother still bear obligations for the cost of education maintenance. With the father and mother no longer bound in a marital relationship, or if both are divorced, then the party entitled to obtain *hadhanah* for the child, there are two periods: The period before *Mumayyiz*, namely from birth to age 12 (twelve) years, is the mother. At that time in most cases, a child is not yet *mumayyiz*, has not been able to distinguish between what is helpful and harmful for him. At this time, the mother is considered more entitled to the child. The mother better understands the child's needs at that time and is abler to show her love when the child is in dire need of the mother's love.

A child will not be separated from his parents against the child's wishes unless such separation is necessary for the child's best interests. The right of *hadhanah* of a child who has not been *mumayyiz* is the right of his mother; it is a regulatory rather than coercive provision. The core criterion as a measure is the realization of the best benefits for the child. For the custody of a child who has not been *mumayyiz*, the mother is more entitled to take care of him if the following requirements can be met, namely: who performs *hadhanah*, who must have reached puberty, who must be sane and does not have a disturbed memory; have the ability and willingness to care for and educate the child; can be trusted to hold *hadhanah* to ensure the child's care better; if the one who performs *hadhanah* is the biological mother, it is required that she does not marry another man. The *mumayyiz* period means the time duration until the child is able to distinguish between harmful and beneficial. Therefore, he is given the right to determine whether his attitude will follow the mother or the father. Children who are *mumayyiz* have the right to choose to get *hadhanah* from either their father or mother.

The child can choose which of the two parents he will follow. However, if his mother dies she must be replaced by another woman from the maternal lineage, e.g.,

the grandmother. But if the grandmother has also died, and if no ancestors in the maternal line exists, the father of the child has the power to perform *hadhanah*. If the father has also died, he is replaced by a woman in the paternal line namely father's mother or father's grandmother. If they too have died, the *hadhanah* is performed by the child's sister concerned. The holders of *hadhanah* positions who will replace them are blood relatives according to the sideline from the mother or women who are blood relatives according to the sideline from the father. In the worst cases, if the *hadhanah* holder turns out to be unable to guarantee the physical and spiritual safety of the child, the *hadhanah* rights can be transferred to other relatives who have *hadhanah* rights.

Determining who is entitled to custody of the child should come first **is in the child's interest**, not who **is** most entitled. If **the** father as the holder of custody and care (*hadhanah*) of a minor child, the right of custody of a minor is the right of the mother. Mother is the holder of custody and care (*hadhanah*) for a minor child. At his age, the child's mental condition is compassionate and easily influenced by the surrounding behavior. However, if the mother has done an evil deed or indulged in immorality, which can affect the child's soul, and it is feared that it will have a more significant influence on the first child, for the sake of the child's mental development, the custody can be given to the father. Similarly, if the custody of a minor child is given to the mother, and the mother often travels abroad, or she is a celebrity/public figure who is very busy with her work, often going home in the morning and the afternoon, even until night, and as a result the child receives less attention and affection, the custody can be given to the father. The father should allow the mother to meet with the child and come with him on school holidays or agreed days. The mother has the right to visit/visit and help educate and pour her love as a mother into her child. In all such situations, the father must always be of good character and should never be involved in crime, and he should be able to perform his duty to support his children.

Regarding what is meant by child care in Indonesia, there is no explanation, nor is there any law or legal provision that regulates child care explicitly<sup>5</sup> (Hafsah, 2016; Ipanang, 2015). Custody of children in Islamic law in Indonesia **as stipulated in Article 105 Compilation of law** Islamicis also used the term *hadhanah*. Nevertheless, some think it is **the child's right to receive hadhanah**. **In the hadhanah, the rights of the father, the child, and the mother are included**. If the family is in harmony, the rights are held by all the three. Nevertheless, in a dispute, the child's rights are a top priority (Nasution et al., 2021; Rahim et al., 2020). *Hadhanah* is a part of the control (power) of parents, which consists of: first, *hadhanah*, taking care of the child (person) who is not an adult, which includes taking care of his body, providing shelter, providing education; and, second, *wilayat al-mal*, preserving the child's wealth and interests concerning that wealth. The father must do *wilayat al-mal*, and if he does not exist, the father is replaced by the mother. The power of the *al-mal* lasts until the child is said to be a *rasjid*, who could take care of his wealth on his own. By separating the two, it can be said that *hadhanah* is the primary right of the mother, and territory is the primary right of the father.

The main purpose is to provide welfare to the child from both parents. Separating the *hadhanah* from the territory (guardianship), thus ensuring the father remains

responsible for the child's welfare as long as the child is under the mother's care. The fact that the father remains the child's legal guardian means that he helps strengthen the mother in carrying out the child's maintenance. Maintenance means providing housing, food, clothing and care if the child is sick. Education means educating the child to become a social being. The central part of this parent's obligation is to send the child to school to work later (Epstein, 1987). The maintenance and education of a minor child by the father or mother who exercises parental authority must be done in the child's best interests. Fathers or mothers who exercise parental authority are not allowed to do as they please for their benefit. The cost must be commensurate with the parents' ability unless the child has his or her wealth and income. The child does not have the right to demand an education that his parents usually cannot bear (Goldstein et al., 1996; Greenberg et al., 2004; Ipendang, 2015).

Often after a divorce, both parents claim each other has neglected their obligations as parents, accusing not of caring for children, which continues concerning the transfer of children against the law (child abduction) by one of the parents—usually done by parents who do not obtain custody of the child but only obtain access rights. Such illegal transfer of control of a minor from his habitual residence to a place other than this can endanger the child physically as well as psychologically. The action of a parent who does not have the right to take his child away to the point of disregarding the rights that should be received by the child as regulated in Article 9 paragraph (1) and Article 11 of the Child Protection Law. If a child is taken away to a place of hiding, not schooled and positioned in the home constantly, the child's right to education and teaching is in the framework of his personal development and level by his interests and talents. The same regulation applies if the children are kept away from their social life, set aside the right to rest and use free time, associate with peers, play, recreation, and create according to their interests, talents and level of intelligence to develop themselves.

Children continue to waver in the struggles of their parents until, as a result, it becomes one of the causes of violence against children, including the abduction, abduction and abuse of children by their biological parents. It is not uncommon for one of the parents to complain to the authorities or the Police to be processed into a case of "Child abduction" committed by the mother or father. His dispute is eventually filed in Court as a criminal case. Law Enforcement: Police, prosecutors, and judges do not apply the provisions that have been in extended force to be used as a legal basis to resolve cases/ cases related to parental custody of children. Enforcement Law Needs to enforce that children meet directly and have regular personal contact with their parents, which is the child's right. Legal indicates that the decision is in the best interests of the child. The right of a child separated from one or both parents to maintain a personal and direct relationship permanently with both parents unless this is contrary to the best interests of the child concerned is a right that must be respected by

Law enforcement applies the provisions that have long been in force to be used as a legal basis to resolve cases/ cases related to parental custody of children. They are further accommodated in Government policy. For the Government as a policymaker, it is necessary to improve the Children's Rights Regulations, especially on the education of minors and guardianship and custody of children whose marriages are

broken. So that the child rights there are no longer obstacles in the fulfilment of his rights, especially to the fulfilment of the child's rights when the marriage of both parents is broken. In a divorce in general, either early, pre-divorce, or in the process or post-divorce, for couples who have already had children, each tends to "fight over their child," both the wife and the husband, which has a very negative impact against the child, against the child himself will experience trauma. The child becomes the "object" of disputes between mother and father, resulting in the child being a victim of violence and mistreatment by his biological parents. The effect on a child's attitude or acceptance of divorce depends on the child's age. The earlier a child is deprived of an average parent-child relationship, and the more likely abnormalities will occur in the child's psychic development. Solutions concern the child to behave and act as accurately as possible.

If the parents influence each other on the child, there can also be a "betrayed feeling". Suppose the process lasts long enough, then in experiencing domestic conflict. In that case, the impact of split loyalty (split loyalty) unfair children are faced with choices because the child does not expect separation between his parents. The child tends to blame himself (self-blaming). The child feels part of the cause of the divorce of both parents. His parents, on the other hand, the child is in a situation of great physical and psychological suffering as contested the parents. Hence, the children remain standing as the object of the victims due to domestic violence. Such a negligence will negatively affect child development, resulting in physical and psychological stress for the child. Therefore, the Government needs to focus on children in dispute with their parents regarding parental custody rights over children. together with the relevant agencies and institutions and all elements of society, the role is to synergize in providing protection and fair legal certainty for children who are victims of the implementation of Parental Custody Rights for Children.

The definition of protection in law is a form of service that must be provided by law enforcement or security officers to provide a sense of security, both physical and mental, to victims and sanctions from threats. Harassment, terror, and violence from any party provided at the investigation stage, prosecution, and upon examination in Court (Chinkin, 1994; Humphreys & Thiara, 2003; Zimmerman et al., 2011). Legal protection is to protect the human rights of others, and such protection is given to the public to enjoy all the rights provided by law. In other words, legal protection is a variety of legal efforts given by law enforcement officers to provide a sense of security, both mentally and physically, from interference and threats from any party (Cross, 1999; Howse & Mutua, 2000).

Hadjon (1987), in his book, mentions the means of legal protection there are two kinds, namely as follows: Means of Preventive Legal Protection. In this preventive legal protection, legal subjects can file objections or opinions before a government decision takes a definitive form. The purpose is to prevent disputes. Protection legal Preventive means a lot for government actions based on freedom of action. With the protection of preventive law, the Government is encouraged to be careful in deciding based on discretion. Not much is regulated about legal means of protection for the preventive people, but in this preventive legal protection, we can find preventive means in the form of objections (Inspraak). Means of Repressive Legal Protection

Repressive legal protection aims to resolve disputes. The handling of this repressive legal protection is done by the General Court and the Administrative Court. The principle of the legal protection of actions is Government based on and originates from the concept of recognition and protection of human rights. According to western history, the birth of concepts of recognition and protection of human rights is directed to restrictions and the imposition of public obligations. At the same time, the second principle underlying the legal protection of government actions is the principle of the rule of law. Associated with the recognition and protection of human rights, the recognition and protection of human rights takes a central place and can be linked to the purpose of the rule of law.

The Supreme Court of the Republic of Indonesia has granted Jurisprudence: The child's interests should be used as a benchmark to determine which of the parents is entrusted with the child's care. Article 1, number 2 of Law Number 23 of 2002 as amended by Law Number 35 of 2014 on Child Protection, it can be understood that child protection means to guarantee and protect children and their rights to live, grow, develop, and participate optimally by human dignity, and receive protection from violence and discrimination. In terms of the child, it is said that the child's interests are given priority in all cases. Provisions respect the right of a child separated from one parent or both parents to permanently maintain a personal and direct relationship with both parents. There is a basis for respecting the child's opinion. Respect for the child's right to participate and express his or her opinion in decision-making, especially concerning matters that affect their lives. The child's best interests will be a primary consideration in all actions—best for the child.

Child protection aims to ensure the fulfilment of children's rights to live, grow, develop, and participate optimally by the dignity and worth of humanity, and receive protection from violence and discrimination for the realization of quality, moral, and prosperous Indonesian children. The implementation of child protection is based on Pancasila and the Constitution of the Republic of Indonesia in 1945, as well as the basic principles of the Convention on the Rights of the Child. Considering some principles mentioned above, it can be understood that the implementation of legal protection given to children aims to ensure a good and decent child's livelihood to encourage the growth and development of children as expected. Included in this is protecting children who are victims due to parental divorce. Children who are victims of divorce from both parents retain legal protection and have a civil relationship.

The either parent can file a lawsuit to obtain custody of the child. The preparation of a lawsuit to obtain custody of children in the Religious Court can be done simultaneously with the divorce lawsuit when filing a divorce lawsuit, a request or demand for custody of the child (this method is called quantization). Both ways to file a lawsuit, the choice is up to the plaintiff himself. To simplify and speed up the process of completing the trial, it would be better if the divorce dispute and the custody dispute is not combined. Each parent (father and mother) still has the right of parental custody of the child (legal custody) as well as the right of custody, care and maintenance and education of the child (physical custody). However, if there is a dispute over the child's custody, the court gives a decision and can revoke the custody of the child. The Court gives the custody verdict in favor of either mother or father is solely in the child's interests.

Regarding the Court's decision on child custody, there may be objections and obstacles to implementation. Sometimes, one of the parties may not be willing to implement the court's decision and the child's right to stay in touch with both parents may not be observed by parents concerned and vice versa. After a court decision with permanent legal force, the party who does not obtain custody but controls the child does not want to hand over the child. These are obstacles in execution and no sanctions are allowed for those who do not implement the court decision. Execution of the Court's decision is the right of custody of a child which is deliberately not complied with. The child however becomes an "object" that must be executed though children are not in the form of goods but human beings as a whole. Executing children as human beings cannot be carried out by force; it requires a persuasive and wise attitude from the executors. In principle, the execution of handing over a child to another parent is not allowed to be carried out by force. It is expected that execution should be carried out adequately based on humanity and justice in the child's best interests.

Each parent is expected not to violate the court decision. In order to ensure the creation of the best environment for the administration of justice and to uphold law and justice based on Pancasila, it is necessary to make a law that regulates the action of acts, behavior, attitudes and speech that can degrade and undermine the dignity and the honor of the judiciary. Some argue that there is a contempt of court by the losing defendants, not wanting to carry out the judge's orders that have been considered. If those who get Parental Custody Rights (Legal Custody or Physical Custody) do not comply with the Court's decision which has permanent legal force by prohibiting or not allowing their child to meet and stay in touch with their parents (father or biological mother), then the parent who does not comply with the Court's decision, has ignored the Court's Decision, has committed an act of humiliation, has undermined the authority, the dignity of honor, and amount to contempt of court. It insults the judiciary's authority, dignity, and honor. In such a state of non-compliance of the court's verdict, there is a need to have a law concerning the contempt of Court, which regulates action against actions, behavior, attitudes and disobedience, or words that can demean and undermine the authority, dignity and honor of the Judicial Body so that non-compliance with court decisions on child custody is termed as a contempt of court. It will take a long time to enact a law concerning the contempt of the Court; therefore, it is proposed that the Supreme Court of the Republic of Indonesia be willing to pre-regulate it in a Supreme Court Regulation.

### Conclusion

The presence of a child is invaluable in a household, both for the child's parents and other members of society. A man and a woman bound in marriage as husband and wife want their marriage to be happy and lasting and to have children. Obtaining offspring is legitimate among the purposes of marriage. Children born in lawful marriage are the next generation of their parents. Children as God's deposit are future assets and the successor of the relay of generations for future civilizations whose rights need to be protected in personal development and accordance with the level of interests and talents.

However, in the event of a marriage dissolution or a divorce, the term for taking the custody of a child is defined as *hadhanah*, an activity of nurturing and educating

children until they are adults or able to stand on their own. It refers to the power of parents to nurture, act, nurture, build, protect, and develop and develop children by their religion and abilities, talents, and interests is called the Parent's Authority. *Hadhanah's* primary purpose is to nurture and care for minors by both parents. The bond of cooperation between the two can only be realized if both parents are still bound in the marital relationship. In such an atmosphere, although the task of *hadhanah* will be done more by the mother, the role of a father cannot be ignored, both in meeting all the needs that facilitate the task of *hadhanah*, and in creating a peaceful atmosphere in the household where children are raised (Afriyani, 2021; Ahmad, 2014; Annisa et al., 2019).

While giving the verdict of divorce cases, the court determines the parental custody of the child. Parties who do not obtain custody, but control the child, do not give the child the opportunity to meet with his parents. The right to meet with one of the parents who is not the holder of custody of the child as a right to visit (access rights) is a fundamental right for the child and the parent to meet and legally communicate with his child. Parents who obtain physical custody must provide an opportunity for the parents of the father or mother of his children to meet and stay in touch with their children, and vice versa, the right of children to stay in touch with both parents. A parent who has been given parental custody to his child must have been considered by the Judge as a good and wise parent to be given physical custody. If it turns out that the Parent does not comply with the order contained in the court order, which has permanent legal force and has been requested to be executed by the Court, then the Parent who obtained the Physical Custody can be revoked. revocation of parental custody rights over children can be implemented immediately to carry out the decision, even if there is a match or appeal. Parents are given to others (father or mother) but are still required to give their children the opportunity to meet and socialize with Parents who have been deprived of custody.

Court decisions are carried out about humanitarian values and the values of justice. However, the execution of the court's decision on legal custody or physical custody is not complied with voluntarily. The decision of the Court that has the force of law remains on the parental custody authority for many children who are unexecutable is not implemented. parties who other than do not have/do not obtain physical custody rights do not comply with the decision of the court by not wanting to hand over the child. Similarly, the party who obtained the physical custody rights willfully fails to comply with the decision of the court. The mechanism for implementing custody rights for children is in the best interests of children who need to get the broadest possible physical, mental and social opportunity by providing guarantees on the fulfilment of their rights.

The study recommends the need to guarantee the creation of the administration of justice to uphold a just law and improve the culture of law in the life of society and the nation. To execute the custody decision, if deemed necessary, the Judge may order the Ministry of Social Affairs to conduct a "Social Research" to find out the life background of the Executor (Father, Mother) and family and children to be handed over to the Execution applicant. It is anticipated that the Indonesian government will work to draft a statutory regulation that safeguards children who are the victims of negligent parenting due to divorce. It is anticipated that further researchers will continue this

research, particularly those whose primary focus is on protecting children from the adverse effects of divorce-related neglect in parenting. We are aware that this research has limitations, most of which are associated with the selected research technique, which is normative juridical, which only investigates in the context of the study of laws. This deficiency will reflect those individuals who use a more comprehensive research strategy, mainly while producing a study on the same subject

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