



Children's Protection in The Issue of Hadhanah Based on Islamic Law Perspective

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Abstract: Every year, the divorce rate in Indonesia continues to grow. Based on data released by the Central Bureau of Statistics (BPS) through the katadata database in early 2020, the divorce rate from 2015 has increased until 2019. In 2019 there were 408,202 cases of divorce. The high rate of divorce certainly has an impact on the lives of both partners, one of which is the issue of child custody or in Islam it is called hadhanah. A child who is still unable to take care of his life until adulthood must be cared for or given a decent life by their parents. Child custody is always an issue between the mother and father when they decide to divorce. Caring for and looking after children who are victims of divorce is obligatory for both parties. The research method used is qualitative normative. The result of this research is that the issue of hadhanah or child custody has been described in detail in the Compilation of Islamic Law in our country. If there is a dispute in this hadhanah issue, it can be resolved by arbitration.

Keywords: Hadhanah, Parental Right, Divorce.

INTRODUCTION

Marriage is an effort to continue the journey of human civilization which is formed by a small society where they get married because of love, affection, and responsibility and also a legal bond that will explain a person's sexual desires responsibly (Husein, 2001: 10).

Islam considers that marriage is a way for people to cultivate a sense of compassion and fulfillment of one's life instincts as a form of worship to Allah and also to implement or apply the sunnah of the Prophet Muhammad (Basyir, 2000: 13).

Based on Law Number 1 of 1974 concerning Marriage, it has been explained that the meaning of marriage, namely; Marriage is a physical and mental bond between a man and a woman with the aim of forming a happy and eternal family (household) based on the Allah SWT.

Meanwhile, in the Compilation of Islamic Law in verse 2 it is explained that; Marriage according to Islamic law is a very strong contract or "mitssaqon ghalidzan" to obey God's command and perform it is worship. (Article 2 Chapter II of Islamic Law Compikation)

Unlike the Islamic Law Compilation and also Law no. 1 of 1974

regarding the definition of marriage, civil law itself in Article 26 clearly states that the marriage that occurs between a man and a woman is only a civil relationship in the law. This means that from the author's opinion, this article emphasizes that marriage is a matter that is recognized or considered valid if it meets all the conditions of marriage that have been determined by the Civil Code.

Regarding marriage, in a book entitled *Hukum Islam* by R. Abdul Jamil it is explained that before marriage there are two things that must be known by the bride and groom, the first is to carry out Allah's orders to continue living together, and the second must be careful and careful. in choosing a life partner (Jamil, 2002: 81-83).

However, not always a marriage or its bond can last forever. There are always obstacles or trials in the relationship that is why when deciding to build a household, both wife and husband, must have a strong mentality and readiness to understand or face the differences between one another. The many things that happen in marriage, no doubt make some couples decide to end their household ark or in other words choose to divorce.

In Islam, divorce nomenclature is defined as a bond that breaks or ends a relationship (Nasohah, 2004, p. 2). Even though divorce is given a green line or

punishable is permissible, this is still something that Allah SWT doesn't like (Imron, 2016: 16).

Divorce in Islam is the ultimate solution when there are no other options and its nature is forced, the term if it is continued will only bring more suffering than happiness (Hifni, 2016, p. 51). In line with this, Sayyid Sabiq also expressed his opinion that the reason for carrying out a divorce was because there was something emergency in nature (Sabiq, tt: 106).

When divorced there will be many new problems that arise, one of which is about who has the right to care for a child, especially if the child is not yet 12 years old, then both parents are still obliged to provide education and also care for their child, even though they are divorced (Al-Munawwar, 2004: 189). Often divorce feels like a catastrophe in married life. It is not only felt by the wife and husband, but it is also a disaster for the child.

Divorce which is based on any reason still has a negative connotation in its implementation. Children are always victims of the breakdown of the relationship between a pair of parents even though we know that the love of parents who are still together is something a child really needs (Hifni, 2016: 51).

Every parent is obliged to know that a child's needs are not only material needs, but sincere feelings such as love are

what they really need to shape the development of a child (Yafie, 1997: 7).

Based on the explanation that has been mentioned, the author will dig deeper into how child custody (hadhanah) is in the compilation of Islamic law. Given that giving custody of children to the right person is very important to do because it involves the development of a child in the future.

METHOD

The research method used in this paper is normative qualitative legal research. The legal materials used in this research are primary and secondary legal materials. Primary legal materials as disclosed by Cohen & Olson are all regulations made by the State or statutory regulations, while secondary data is supporting data in this study (Diantha, 2017: 142).

RESULT AND DISCUSSION

The root word of hadhanah is hidnan which has the meaning of stomach, comes from a series of words hadhana ath-thairu baidahu which is literally interpreted as a woman who in this case is a mother who is squeezing her baby (Sabiq, 2007: 37). This means that a child is raised or cared for by his mother (Supriyadi, 2011: 164).

In terminology, hadhanah in fact has the meaning of something that is

placed around the ribs, for example carrying or even holding (Zein, 2010: 166).

Fuqaha explains that hadhanah means to take care of a child who has not been able to distinguish between what is good and what is right, different when a child has reached puberty or in other words adult, then he can choose to be with whom when his parents separate, but still should do good to both parents (Al-Jamal, 1994:341).

From some of the definitions that have been displayed we can understand together that hadhanah is a right given to divorced parents to provide care and maintenance to their children who do not yet understand how to distinguish something between good or bad. It aims to make a child a good person and grow into someone who is far from bad and it is indeed the duty of every parent, no exception even if they are divorced.

Legal Standing of Hadhanah

In Islam, there are several rules of law that regulate the matter of hadhanah as follows. QS. At- Tahrim Verse 6, This verse has the following meaning. "O you who believe, protect yourself and your family from the fire of hell whose fuel is man and stone; His guardians are angels who are harsh, harsh, and do not disobey Allah in what He commands them and always do what He commands."

Based on this verse, Allah SWT commands parents to strive to nurture and maintain their families earnestly by staying away from what is forbidden and doing what He commands (Sahrani, 2011: 233). QS. Al-Baqarah verse 233, This verse has the following meaning.

"Mothers should breastfeed their children for two full years, that is for those who want to complete breastfeeding. And the obligation of the Father to feed and clothe the mothers in a "ma'ruf" way. A person is not burdened except according to his level of ability. Let not a Mother suffer for her child and a Father for her child, and even the heirs are obliged to do so. If both of them want to wean (before two years) with the consent of both of them and consultation, then there is no sin on both of them. And if you want your child to be breastfed by someone else, then there is no sin for you if you give payment accordingly. Fear Allah and know that Allah sees what you do. "

The father above emphasized the importance of the obligations of parents to their children. Allah SWT calls on all parents that they should not feel burdened by the presence of their children, and vice versa. Even though they have severed the marriage ties with each other between a husband and wife, this is not an excuse for them not providing support or being

responsible for their children (Asmayani, 2019: 379).

The Requirements to be Hadhin/ Hadhinah

Every parent should not neglect their child because it will lead a child to destruction. For every parent who is given hadhanah, they must meet some conditions to become a hadhinah or hadhin according to the book *Fiqh Sunnah* written by Sayyid Sabiq, namely; a) sane, b) independent, c) able to educate, d) mature, e) his mother is not married yet, f) trustworthy and virtuous, g) Islam (Sabiq, 2007: 181).

In addition, the jurists also provide explanations on other conditions that must be met by the babysitter (hadhinah) and also the babysitter (hadhin) as follows.

Conditions for hadhinah; (a) a hadhinah has divorced her husband and has not yet entered into a marriage bond. This is in line with a hadith, which means "from Abdullah bin Amru RA, he said, that a woman said," O Messenger of Allah, my stomach is indeed a container for my son, my breasts as a drink for him and the care I do as protection, but in fact His father has abused me and he wants to break it from me." Rasulullah SAW then said to him, "You are more entitled to him as long as you are not married." (HR. Ahmad, Abu Daud and judged authentic by the judge). (b) hadhinah is the mahram of a foster

child, (c) the maliki sect thinks that hadhinah should be a good babysitter, (d) a woman does not have the right to be a babysitter for a child who is still breastfeeding if she does not have breast or does not want to give her milk foster children, this opinion is expressed by madzhab syafi'i and hambali (Alam & Fauzan, 2007: 121).

Conditions for hadhin; a) stranger to the girl he is raising, b) if he is not a stranger to the girl he is raising, then hadhin must take care of the girl together with a woman (Alam & Fauzan, 2007: 124).

Post-Divorce Hadhanah on Islamic Compilation Law

On hadhanah has been arranged in the Compilation of Islamic Law in Chapter XIV on Child Care and also on Article 156 and Article 105 on hadhanah after divorce. Regarding child custody in Article 98 paragraph 2 it is said that either outside or in court, the parent is the representative of the child for the legal action they are taking. In paragraph 1 of the article is also given clarity about the age limit of a child, which is 21 years provided that the child has no mental or physical disability and is not bound by marital relations. Parents' responsibilities regarding the care of their children are also set out in Article 104 KHI: All breastfeeding costs are the

responsibility of the Father. If his father has died, then the cost of breastfeeding is charged to the person who is obliged to provide maintenance to his father or guardian. Compilation is done for a maximum of two years, and weaning can be done in less than two years with the consent of his father and mother. (See Islamic Law Compilation)

The KHI also explains the obligations of parents to care for the assets of their children as stated in Article 106; (1) Parents are obliged to care for and develop the assets of their children who are not yet mature or under pardon, and are not allowed to move or mortgage them except for an urgent need if the interest and safety of the child demands it or an unavoidable fact. (2) Parents are responsible for losses arising from errors and negligence of the obligations mentioned in paragraph (3) Meanwhile, regarding child custody in the event of divorce, this is regulated in Article 105 KHI which reads: (a) The care of a child who is not mumayyiz or not yet 12 years old is the right of his mother. (b) The care of the child who has mumayyiz is left to the child to choose between his father or mother as the holder of his custody rights. (3) Maintenance costs are borne by his father.

Hadhanah is also regulated in Chapter XVII on the Consequences of the Divorce of Marriage precisely in Article

156. This article explains that there are 6 points regarding the consequences of divorce due to divorce;

A child who has not mumayyiz is entitled to hadhanah from his mother, except when his mother has died, then his position is replaced by: (1) women in a straight line upwards from the mother, (2) father, (3) women in a straight line upwards from the father, (4) sister of the child concerned, (5) female relatives of blood according to the sidelines of the father.

Children who are already mumayyiz have the right to choose to get hadhanah from his father or mother: (a) If the holder of the hadhanah is unable to guarantee the physical and spiritual safety of the child, even though the cost of alimony and hadhanah has been sufficient, then at the request of the relative concerned the Religious Court can transfer the hadhanah right to other relatives who have hadhanah rights. (b) all the costs of hadhanah and child support are the responsibility of the father according to his ability, at least until the child is an adult can take care of himself (21 years). (c) in the event of a dispute over hadhanah and child support, the Religious Court reverses its decision based on letters.

The court can also consider the ability of the father to set the amount of

costs for the care and education of children who do not follow him.

From the explanation given above regarding hadhanah we can understand that this has been regulated in KHI. After the divorce, referring to the articles that discuss the problem of hadhanah, KHI prefers hadhanah to be given to the mother. Why is that? It has been shown in previous discussions that Islam is regulated about the obligation to take care of children. The mother comes first because the mother is the one who is pregnant with the child, especially if the child is still in breastfeeding. KHI is also same, in Article 156 part (a) and Article 150 paragraph 1 both explain that each child has the right to receive hadhanah from his mother in the event of a severance of marital relationship between his parents. This makes the mother's position stronger before the law to accept the custody of the child, unless the child has mumayyiz or in other words has grown up and is able to decide which to do and which not to do, then she can choose to live with whom. This is in line with Article 156 section (b). Mumayyiz in Article 105 is until the child is 12 years old.

The priority given to the Mother of Hadhanah is also supported by the Supreme Court Decision No. 102 K / Sip / 1973 dated 24 April 1975, namely;

"Based on the jurisprudence regarding child guardianship, the rule is that the biological mother takes precedence, especially for young children, is the criterion, unless the mother is not fair to look after the child. "

Clearly, the Supreme Court jurisprudence above does support the priority that a mother has on hadhanah, but this only applies if the mother is indeed able to take good care of her child. Although in KHI and some hadhanah decisions are always won by the mother, but it does not mean that the father can not get hadhanah for his son. One of the proofs is a Bekasi Religious Court Decision No. 354 / Pdt.G / 2007 / PA. Bks where the applicant or the child's father managed to get hadhanah for his son. This is because the mother is not trustworthy and also does not have the seriousness to take care of her child and this will certainly make the child uncomfortable.

Based on this decision, we can draw the conclusion that the Judiciary in giving hadhanah to one of the parents is not only based on the relevant articles, but also considers many things that concern the comfort and security of the child so that growth does not hinder because every child has a constitutional right to a decent education and livelihood.

In determining its decision on who has the right to adopt a child, they are

based on 9 things, namely the welfare of the child, the plaintiff's testimony and plaintiff, mutual agreement, economic factors, the child's or father's closeness to his mother, irresponsible mother, culture, and non-attendance His mother is a mother or a more deserving person (Mansari, 2016: 88-94).

resolution of the child custody dispute (hadhanah) can also be resolved with the theory of tahkim. According to Iman Jauhari, tahkim is arbitration in which the disputing/disputing party chooses one or more people to be the mediator as a problem solver in a peaceful way where the tahkim itself has a legal basis derived from the Qur'an (QS. An-Nisa: 35, QS. An-Nisa: 114, QS. An-Nisa: 128, QS. Al-Hujurat: 9). (Iman Jauhari, 2011: 1395).

So, both the wife and the husband provide each of their representatives to find a middle ground or red thread to resolve the child custody dispute. Both representatives must be people who can be trusted so that later the custody of the child can fall to the right person.

CONCLUSION

After understanding the above discussion, it can be concluded that the custody of the child (hadhanah) after divorce can be given to the mother or the party of the mother, father or party of the

father, based on the decision of the Religious Court and the jurisdiction of the Supreme Court supporting a child custody dispute case. In making a decision on this hadhanah matter, the Judiciary also focuses on the nine matters that have been explained previously. Although the law prioritizes the mother to get hadhanah, but this does not close the possibility that the father can get hadhanah from the judge's decision, as happened in the Bekasi Religious Court where the custody of the child falls to the Petitioner, in this case it is the father.

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