



The Transition of Child Custody Due to Apostasy: An Approach Based on Children's Rights and the Objectives of Shariah

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Abstract : Ketentuan hukum Islam menetapkan hak pengasuhan anak yang belum mumayyiz kepada ibu kandung. Namun, dalam Putusan Pengadilan Agama Tanjung Karang Nomor 948/Pdt.G/2023/PA.Tnk, hak asuh anak diberikan kepada ayah. Ayah kandung tidak terima atas pembaptisan tersebut dan menggugat ke pengadilan untuk mengambil hak asuh anak tersebut. Pengadilan memutuskan hak asuh anak diberikan kepada ayah kandung. Tulisan ini mengkaji bagaimana pandangan hak asasi anak dan maqashid syariah terhadap putusan tersebut. Penelitian ini merupakan penelitian Pustaka, sumber data utama berupa putusan pengadilan. Hasil penelitian menunjukkan bahwa Putusan Pengadilan Agama Tanjung Karang Nomor 948/Pdt.G/2023/PA.Tnk menegaskan bahwa meskipun hak asuh anak yang belum mumayyiz biasanya jatuh kepada ibu, pengecualian berlaku dalam kasus murtadnya ibu. Keputusan ini menunjukkan fleksibilitas hukum Islam dalam menanggapi kebutuhan sosial dan kepentingan terbaik anak. Putusan ini menciptakan preseden penting dalam konflik pengasuhan terkait perbedaan keyakinan, serta melindungi hak anak sambil mempertahankan nilai kemanusiaan dan keadilan sosial. Dalam konteks maqashid syariah, keputusan ini berfokus pada pemeliharaan agama dan kesejahteraan anak, dengan orientasi pada kemaslahatan umat.

Kata Kunci : Hak asuh anak; Murtad; Mumayyiz; Maqashid Syariah

Abstract : Islam stipulates the right to custody of children to the mother in a divorce situation or after the death of the husband. However, in the Decision of the Tanjung Karang Religious Court Number 948/Pdt.G/2023/PA.Tnk, custody of the child is given to the father. This case began with a conflict between an ex-husband and wife, where the ex-wife remarried and baptized their child without the consent of her ex-husband. This raises ethical and legal questions, especially regarding the custody of children who are not yet mumayyiz, who cannot yet determine what is good and bad. In the legal context, the judge's decision refers to Article 105 of the Compilation of Islamic Law, which states that the maintenance of children who are not yet mumayyiz is generally given to the mother. However, the decision of the Supreme Court of the Republic of Indonesia Number 210/K/AG/1996 emphasizes that religion is an important requirement in the right to custody. In this case, the ex-wife who apostatized lost her custody rights. This shows that the



judge's decision is not only based on legal norms, but also considers the social and moral values contained in the Maqashid sharia. The analysis of Maqashid sharia in this context shows that childcare is a very important aspect of life. In the view of Maqashid, maintaining the child's religion and ensuring that they are raised in an environment that is in accordance with religious teachings is a top priority. Therefore, the decision to grant custody to the father, who is of the same religion as the child, is considered a step that prioritizes the best interests and welfare of the child.

Key Word : Child custody; Apostasy; Mumayyiz; Maqasid al-Sharia

Introduction

The custody of children who have not yet reached the age of discernment, according to the provisions of the compilation of Islamic law, falls to the biological mother. This stipulation serves as a reaffirmation of the custody rights of mothers regarding children who have not yet attained the capacity to make independent decisions.¹ However, in certain cases, custody of a child who has not yet reached the age of discernment may be granted to the biological father.² One of the rulings by the Religious Court that transferred child custody is Decision Number 948/Pdt.G/2023/PA.Tnk. In this ruling, the judge transferred the custody of the child, which was previously held by the biological mother. The custody transfer was based on a petition filed by the biological father of the child. This petition for child custody was submitted after a previous decision had finalised the divorce between the Petitioner and the Respondent. On 6 January 2022, the Kalianda Religious Court officially issued Decision Number 1640/Pdt.G/2021/PA.Kla. In this decision, following the divorce, the Petitioner granted permission to the Respondent to care for their child, considering that no issues had arisen regarding child custody.³

However, on 2nd August 2022, the Defendant intends to remarry and register the marriage under Christian faith. The child from the first marriage the text has been baptised and

¹ Dhiauddin Tanjung, Mhd Yadi Harahap, and Fadlan Fuadi, "Penyelesaian Sengketa Hak Asuh Anak Melalui Putusan Pengadilan Agama Medan (Studi Analisis Terhadap Kompilasi Hukum Islam)," *Al-Mashlahah: Jurnal Hukum Islam Dan Pranata Sosial Islam* 105 (2019): 581–600, <https://doi.org/10.30868/am.v9i02.2060>.

² Fawzia Hidayatul Ulya, Fashi Hatul Lisaniyah, and Mu'amaroh Mu'amaroh, "Penguasaan Hak Asuh Anak Di Bawah Umur Kepada Bapak," *The Indonesian Journal of Islamic Law and Civil Law* 2, no. 1 (2021): 101–17, <https://doi.org/10.51675/jaksya.v2i1.176>; Yogie Alwaton Alwaton, "Jurnalisme Advokasi Pada Project Multatuli Dalam Isu Ibu Kota Negara (IKN) Nusantara," *Jurnal Spektrum Komunikasi* 11, no. 2 (2023), <https://doi.org/10.37826/spektrum.v11i2.509>; Irfan Islami, "Legalitas Penguasaan Hak Asuh Anak Dibawah Umur (Hadhanah) Kepada Bapak Pasca Perceraian," *Jurnal Al-Qadaw: Peradilan Dan Hukum Keluarga Islam* 6, no. 2 (2019): 181–94, <https://doi.org/10.24252/al-qadaw.v6i2.10715>; Agus Mahfudin and Fitrotunnisa, "Hak Asuh Anak Jatuh Kepada Bapak Perspektif Hukum Islam Dan Hukum Positif," *Jurnal Hukum Keluarga Islam* 4, no. 2 (2019): 129-130file:///C:/Users/HP14s/Downloads/23-DasSoll.

³ "Putusan Pengadilan Agama Tanjung Karang Putusan Nomor 948/Pdt.G/2023/PA.Tnk," n.d.



Embracing Christianity has led to the biological father (the former husband) rejecting the baptism of his child. Citing his inability to accept his child being baptised into Christianity, the child's father filed a lawsuit with the Tanjung Karang Religious Court, seeking custody rights for himself. Ultimately, the Tanjung Karang Religious Court issued a ruling under Number 948/Pdt.G/2023/PA.Tnk, which determined that the custody of the child, who has not yet reached the age of discernment (*mumayyiz*), should be granted to the biological father. The provisions of the compilation of Islamic law state that when a child has not yet reached the age of discernment, custody rights fall to the mother. Thus far, research discussing the transfer of child custody rights due to the mother's apostasy has been divided into several focal points. The first focus is the transfer of custody rights due to the mother's apostasy from the perspective of *maqasid syariah*, as articulated by Sirajuddin.⁴ The second study examines the ruling on child custody rights following the apostasy of a wife, focusing on the conditions for the transfer of custody rights, authored by Rofiq⁵ and Holid⁶. The third aspect addresses the transfer of child custody due to the mother's apostasy, where the execution process is postponed until the child reaches the age of discernment, written by Zulfan⁷. The fourth discusses the transfer of child custody due to the mother's apostasy from the perspectives of Islamic law and positive law, authored by Nur Sudrajat⁸. Thus, this paper complements existing writings to analyse the judge's decision in cases of child custody transfer due to a wife's apostasy, viewed through the lens of children's rights and *maqasid al-shariah*. This study focuses on examining ruling number 948/Pdt.G/2023/PA.Tnk, employing an approach based on children's rights and *maqasid al-shariah*. This is crucial for assessing the beneficial values of the ruling.

⁴ Sirajuddin, Iim Fahimah, and Aziyaty Fadila, "Analisis Putusan Nomor 833/Pdt.G/2022/Pa.Bn Tentang Hak Asuh Anak Yang Belum *Mumayyiz* Karena Ibu Murtad Perspektif *Maqashid Syariah*," *QIYAS : JURNAL HUKUM ISLAM DAN PERADILAN* 8, no. 2 (2022): 371–80.

⁵ Muhammad Khoirur Rofiq, "Pemberian Hak Asuh Anak Dalam Perceraian Karena Peralihan Agama (Murtad)," *Journal of Islamic Studies and Humanities* 6, no. 2 (2021): 97–110, <https://doi.org/10.21580/jish.v6i2.8171>.

⁶ Muhammad Holid, "Hak Asuh Anak Pasca Perceraian : Studi Kasus Kasus Murtadnya Seorang Ibu Di Lombok Timur Bondowoso," *Jurnal Kajian Hukum Keluarga Islam* 6, no. 2 (2024): 12–29.

⁷ Zulfan Efendi, "Pelaksanaan Eksekusi Hak Asuh Anak (Hadhanah) Terhadap Isteri Yang Murtad Dalam Perkara Nomor: 398/P.Dt.G/2013/PA.Pbr Di Pengadilan Agama Pekanbaru," *Teraju* 2, no. 01 (2020): 1–34, <https://doi.org/10.35961/teraju.v2i01.62>.

⁸ Nur Sudrajat, "Perspektif Hukum Islam Dan Hukum Positif Tentang Peralihan Hak Asuh Anak Dibawah Umur Dengan Alasan Ibunya Murtad (Studi Di Desa Gisting Bawah Kecamatan Gisting Kabupaten Tanggamus Provinsi Lampung)," *Skripsi Ilmu Administrasi Negara*, 2019.



Research Method

This research is an in-depth literature study, with its primary focus being the examination of the religious court decision Number 948/Pdt.G/2023/PA.Tnk. The aim of this study is to analyse the legal aspects contained within the decision, as well as its implications for legal practice in Indonesia. In this context, the sources of data utilised are crucial to ensure the accuracy and depth of the analysis. This research employs secondary data sources, which consist of both primary and secondary legal materials. Primary legal materials include official legal documents that possess binding authority, such as legislation, court decisions, and other official legal documents. Meanwhile, secondary legal materials encompass unofficial literature that provides additional perspectives, such as books, journals, and other research findings. The analysis is conducted using a normative approach.

In analysing the religious court decision Number 948/Pdt.G/2023/PA.Tnk, it is crucial to understand the legal context underpinning it. For instance, this ruling may relate to issues commonly encountered in family law, such as divorce, asset division, or child custody. By tracing the background of the case, we can identify the relevant legal norms and how the judge applied these norms in their ruling. For example, if the decision involves child custody, we can observe how the judge considered the best interests of the child in their determination, as well as how this aligns with the provisions in the Child Protection Law. Concrete illustrations from similar cases previously handled by the court can provide a clearer picture of the decision-making process and the legal considerations employed.

Furthermore, a thorough analysis of the secondary legal materials used in this research is also crucial. Secondary legal materials, such as journals and books, can provide additional insights into various legal interpretations, as well as expert opinions regarding the issues faced in the ruling. For instance, an author in a legal journal may express their views on how the decisions of religious courts reflect the development of law in Indonesia and the challenges faced by the judicial system. By relating these perspectives to the ruling under examination, we can draw conclusions about how this decision contributes to the establishment of legal precedents and the development of legal practices in the future. The transition between primary and secondary legal materials is essential for constructing a strong and integrated argument.



Results and Discussion

The matter at hand

The Plaintiff was married to the Defendant on Sunday, 5th December 2010, in accordance with Islamic law, and this marriage was recorded by the Marriage Registration Officer at the KUA Office of Sidomulyo District, South Lampung. Following their marriage, the Plaintiff and Defendant resided at the Plaintiff's parents' home in Sidomulyo District, South Lampung, for a period of one (1) month. Subsequently, they moved to a rented house in Panjang, Bandar Lampung, where they lived for approximately three (3) years before relocating to a house gifted by the Plaintiff's parents in Bandar Lampung City, after which they separated.⁹

The marriage between the Plaintiff and the Defendant has resulted in one son, aged 10, who was born in Bandar Lampung on 8th July 2013, with Birth Certificate Number 1871-LT-10122013-0070. According to the Statement of Claim dated 21st October 2021, the Plaintiff filed for divorce from the Defendant at the Kalianda Religious Court under Case Number 1640/Pdt.G/2021/PA.Kla. The ruling from the Kalianda Religious Court, Case Number 1640/Pdt.G/2021/PA.Kla, dated 6th January 2022, has become legally binding (*inkracht van gewijsde*). Furthermore, based on Divorce Decree Number 0033/AC/2022/PA.Kla dated 6th January 2022, issued by Hj. Tun Mukminah, S.H., M.H., as the Clerk of the Kalianda Religious Court, the Plaintiff and Defendant are officially divorced.¹⁰

The copy of the ruling from the Kalianda Religious Court, Number 1640/Pdt.G/2021/PA.Kla, dated 11 November 2021, has stated that the Respondent was duly summoned to appear in court but failed to attend. The court has granted the Petitioner's request by default (*verstek*) and has permitted the Petitioner (the Plaintiff) to pronounce a single revocable divorce (*talak satu raj'i*) against the Respondent (the Defendant) in front of the Kalianda Religious Court. In this ruling, the right of custody (*hadhanah*) over the biological child of the Plaintiff and the Defendant has not been determined by the panel of judges, hence neither the Plaintiff nor the Defendant holds the right of custody over the child due to the absence of a court ruling establishing this right. Following the divorce, the Plaintiff has allowed the child to reside with the

⁹ "Putusan Nomor 948/Pdt.G/2023/PA.Tnk,".

¹⁰ "Putusan Nomor 1640/Pdt.G/2021/PA.Kla,".



Defendant in the Plaintiff's house and continues to provide financial support for the child, including education expenses, in accordance with the Plaintiff's capabilities.¹¹

The Defendant subsequently remarried to another person of the Catholic faith and converted from Islam. The Plaintiff became aware of this based on the data from the Application for the Issuance of N1, N2, and N4 forms, which are requirements for marriage from the Panjang Sub-district, dated 2 August 2022. It is stated that the Defendant is of the Christian (Catholic) faith. Additionally, in the baptism document No. 8830, dated 19 April 2023, from the Ratu Damai Parish in Teluk Betung, it is recorded that XXXXX, the child of parents XXXXX and XXXXX, was baptised by XXXXX. This baptism was conducted without the consent or knowledge of the Plaintiff, who is the biological father of the child. Furthermore, the Defendant has also obstructed and expressed objections to the Plaintiff meeting with the biological child, despite the fact that the Plaintiff, as the biological parent, has the same rights and obligations as the Defendant.¹²

The Plaintiff has made efforts to seek assistance from the Department of Women's Empowerment and Child Protection) in Bandar Lampung City, requesting that the Defendant allow the Plaintiff to meet with their child, and that the Defendant refrain from obstructing the Plaintiff's communication, play, and caregiving with their biological child. However, these efforts have not been successful. Consequently, the Plaintiff sought the help of a lawyer to resolve the issues at hand. Nevertheless, the mediation efforts conducted outside of court by the Plaintiff's and Defendant's legal representatives have also proven fruitless. The peaceful resolution attempts have prioritised the interests of all parties involved in the dispute, ensuring that everyone feels satisfied and that no one feels wronged.¹³ The Plaintiff concludes that as the biological father, he has the right to petition the court to establish custody rights, which encompass the parental authority to care for, educate, nurture, develop, protect, and promote the child in accordance with the child's abilities, talents, and interests, as well as in line with the religion indicated on the child's identity card, which states that the child is of the Islamic faith, to the Plaintiff.

¹¹ "Putusan Nomor 1640/Pdt.G/2021/PA.Kla,".

¹² "Putusan Nomor 948/Pdt.G/2023/PA.Tnk,".

¹³ Agus Hermanto, Iman Nur Hidayat, and Syeh Sarip Hadaiyatullah, "Peran Dan Kedudukan Mediasi Di Pengadilan Agama," *As-Siyasi: Journal of Constitutional Law* 1, no. 2 (December 5, 2021): 34–59, <http://dx.doi.org/10.24042/as-siyasi.v1i2.11292>.



Legal Considerations

The purpose of the Plaintiff in bringing this lawsuit is to request that the Tanjung Karang Religious Court grant him custody of his child. This request is based on the reasons that can be inferred from the lawsuit and its rebuttal, which state that the custody claim is made due to the following:

1. The Plaintiff wishes to gain custody of their child due to the Defendant (the ex-wife) having converted to another faith and baptising the child without the Plaintiff's consent.
2. The plaintiff wishes to meet, care for, and nurture their child without interference from the defendant, who is the biological mother.

However, based on the facts presented during the trial, the following legal conclusions can be drawn:

1. The Plaintiff was previously married to the Defendant and they were blessed with one son. Subsequently, the Plaintiff and the Defendant separated, and the child is being raised by the Defendant as the biological mother.
2. The cause of the dispute between the Plaintiff and the Defendant arises from the Plaintiff being obstructed when attempting to meet, care for, and raise his child.
3. The Defendant, as the biological mother, has remarried and converted to Catholicism (apostasy) and has baptised the child without the Plaintiff's consent.¹⁴

Based on the facts revealed during the trial, the panel considered three frameworks of consideration, namely legal considerations, the Compilation of Islamic Law, and the best interests of the child;

The judicial consideration of the Judges' Council holds that the obligation to care for and educate children remains with the parents of those children. Each parent has equal rights and responsibilities towards the child, even if the parents have separated due to the dissolution of marriage, such as in the case of divorce. This is reflected in the provisions of Article 31 and Article 41 of Law Number 1 of 1974 concerning Marriage¹⁵. Based on the aforementioned provisions, it becomes clear that although the marriage has been dissolved, this does not result in the severance of the relationship between the parents (father/mother) and their children born from that marriage;

¹⁴ "Putusan Nomor 948/Pdt.G/2023/PA.Tnk,".

¹⁵ "Putusan Nomor 948/Pdt.G/2023/PA.Tnk,".



Islamic teachings prohibit the separation of a child from their parents, especially from their mother, as this is deemed unlawful. This can be seen from the warning given by the Prophet Muhammad (peace be upon him) in his hadith, which states:

"Whoever separates a mother from her child, Allah SWT will separate that person from those they love on the Day of Judgement." (Hadith narrated by Tirmidhi No. 1283)

The realm of positive law in Indonesia includes provisions that prohibit actions which may obstruct the fulfilment of these essential needs, as such actions could be deemed acts of violence and discrimination against children, potentially categorised as criminal offences. This is clearly illustrated in Article 4 of Law Number 23 of 2002 concerning Child Protection. Moreover, Article 7, paragraph 1 states, "Every child has the right to know their parents, to be raised, and to be cared for by their own parents." Additionally, Article 77 addresses the criminal elements involved.¹⁶

When two individuals separate, they can still engage in parenting and maintenance duties even if continuous direct caregiving cannot be realised. However, maintaining a conducive environment without conflicts regarding child maintenance is crucial, as it helps to ensure the child remains calm and comfortable despite the parents' separation. Should disputes arise concerning parenting issues, they may be submitted to the Religious Court in accordance with the provisions of Law Number 1 of 1974 concerning marriage.

According to Law Number 35 of 2014 concerning Child Protection, Article 14, paragraph (1) emphasises that every child has the right to be cared for by their own parents... Furthermore, Article 6 states that "every child has the right to worship according to their religion." The judges need to refer to the hadith of the Prophet Muhammad (peace be upon him), which recounts an incident where a mother complained to the Prophet that after her divorce, her ex-husband wished to separate her from her children.¹⁷ The Prophet Muhammad (peace be upon him) stated,

It means "You have more right to care for him as long as you have not remarried." (Hadith narrated by Ahmad and Abu Dawud).

Furthermore, the conditions for a guardian in custody (*Hadhanah*) are as follows:

1. sensible
2. mature

¹⁶ "Putusan Nomor 948/Pdt.G/2023/PA.Tnk,"

¹⁷ Ibid.



3. capable of providing education
4. Trustworthy and of good character
5. Muslim
6. The mother must not remarry another man, which would cause her custody rights to be forfeited¹⁸. The primary function of Islamic law in classifying actions is based on an absolute standard of good and evil that is determined rationally¹⁹.

The Defendant, as the biological mother, based on her own admission and the testimonies of witnesses, which are further corroborated by the testimony of the Plaintiff, has entered into a marriage with another individual on 2nd August 2022, adopting the Catholic faith. As such, the Court considers the Defendant's marriage as a significant factor in the forfeiture of her custody rights. Furthermore, the Defendant has baptised the child without the knowledge and consent of the Plaintiff.

Consideration from a normative perspective suggests that a mother should be granted custody rights over her child, as children tend to receive more affection from their mothers. The underlying philosophy is that children are better off with their mothers. However, the mother, as the Defendant, has misused the trust bestowed upon her by the Plaintiff to care for and educate the child appropriately and in accordance with Islamic law. The Defendant has infringed upon the child's right to choose their religion by coercing the child to adopt Catholicism. According to Islamic law, and the conditions under which a mother's right to custody (Hadhanah) may be forfeited, a non-Muslim mother no longer meets the criteria to retain custody of a child who has not yet reached the age of discernment (mumayyiz).²⁰

The Plaintiff has provided the Defendant with the opportunity to care for and raise their child from the time of the Plaintiff's and Defendant's divorce until the filing of this lawsuit. However, the trust (Amanah) placed in the Defendant by the Plaintiff has been misused, as the Defendant has conducted a baptism for the Plaintiff's and Defendant's child, who is not yet of discernment. Therefore, the Panel of Judges deems it appropriate that the custody and upbringing of the Plaintiff's and Defendant's child be

¹⁸ Wahbah Az-Zuhaili, *Fiqih Islam Wa Adillatuhu* (Jakarta: Gema Insani, 2011).

¹⁹ Aziza Aziz Rahmaningsih and Retanisa Rizqi, "Agama Dan Moral Dalam Pembentukan Substansi Dan Struktur Hukum," *As-Siyasi: Journal of Constitutional Law* 2, no. 2 (December 20, 2022): 149–66, <http://dx.doi.org/10.24042/as-siyasi.v2i2.13884>.

²⁰ "Putusan Nomor 948/Pdt.G/2023/PA.Tnk."



entrusted to the Plaintiff as the father, given that the child is not yet capable of deciding whether to follow the Plaintiff or the Defendant.

Hadbanah essentially refers to the responsibility of caring for and educating a child who has not yet reached the age of discernment, from the moment of birth until they are able to look after themselves. It is important to note that *hadbanah* is not intended for the benefit of either the mother or the father. Therefore, when *hadbanah* becomes a point of contention between a mother and a father, the primary focus should be the welfare of the child and the preservation of their faith (*hifz al-din*).²¹ The priority that must be emphasised is outlined in the Explanation of Article 2 of Law Number 23 of 2002, as amended by Law Number 35 of 2014 and the second amendment of Government Regulation in Lieu of Law Number 1 of 2016 concerning Child Protection, in conjunction with Article 59, Paragraph (1) of Law Number 39 of 1999 concerning Human Rights. This is recognised as the principle of the best interests of the child, which asserts that in all actions concerning children taken by the government, society, including the judicial bodies involved, must uphold the best interests of the child and safeguard religion (*hifz al-din*) as the primary consideration. Based on the considerations above, the panel of judges determined that the Plaintiff's claims regarding child custody are substantiated and must be declared accepted.²²

After considering various factors and in light of all applicable laws and regulations, as well as the relevant provisions of Islamic law concerning this matter, the High Religious Court has reached the following decision:

1. The court grants the petition of the Plaintiff (Father).
2. The court designates the Plaintiff (Father) as the custodian of the child (*hadlonah*) named CHILD until the child reaches adulthood, with the stipulation that the Plaintiff must provide the Defendant access to meet and show affection to the child.
3. The court orders the Defendant (Mother) or anyone else in custody of the child named CHILD to surrender the child to the Plaintiff (Father).
4. The court imposes upon the Plaintiff the responsibility to pay the costs of this case in the amount of Rp175,000.00 (one hundred seventy-five thousand rupiah).²³

²¹M.Zaenal Arifin Muh. Anshori, *Fiqih Munakahat* (Yogyakarta: Pustaka Pelajar, 2019).

²² "Putusan Nomor 948/Pdt.G/2023/PA.Tnk."

²³ Ibid.



The judgment was delivered during a meeting of the Panel of Judges on Tuesday, 29 August 2023, corresponding to 12 Shafar 1445 in the Hijri calendar, by us, Drs. H. Sanusi, M.Sy., as the Chair of the Panel, and Drs. Aripin S.H., M.H., and Agusti Yelpi, S.H.I., M.H. as Associate Judges. The ruling was announced that same day in an open court session attended by the same Associate Judges, with assistance from Hj. Elok Diantina, S.H., M.H. as the Substitute Registrar. The Plaintiff and their legal representatives, as well as the Defendant and their legal representatives, were also present. The court has ordered the Respondent (Defendant) to pay the case costs amounting to IDR 175,000.00 (one hundred seventy-five thousand rupiah).²⁴

The Transition of Child Custody Due to Apostasy in Relation to Children's Rights

Based on the facts revealed in the court proceedings with decision number 948/pdt.g/2023/pa.tnk, it is known that the Plaintiff and the Defendant were married in accordance with Islamic law on Sunday, 5 December 2010, which was recorded by the Marriage Registration Officer at the KUA Office of Sidomulyo District, South Lampung. From this marriage, they were blessed with a son. Furthermore, it was revealed that prior to marrying the Plaintiff, the Defendant was of the Christian (Catholic) faith and had converted to Islam before the marriage to meet Islamic legal requirements. However, after the divorce, the Defendant remarried another man and reverted to her original faith, which is Christianity (Catholicism). The Defendant subsequently underwent a process of apostasy and baptised their child in accordance with Christian beliefs. Following her second marriage, the Defendant began to obstruct the Plaintiff's attempts to meet with their child. The Plaintiff has made efforts to seek assistance from various institutions and individuals to persuade the Defendant to allow him his rights to meet and fulfil his responsibilities as a father; however, these efforts have not yielded results.

In this case, it is clear that the Defendant has converted to another religion or has apostatised, based on the legal principles found in Surah al-Nisa' verse 141 and the decision of the Supreme Court of the Republic of Indonesia No. 210/K/AG/1996 dated 26 November 1996. Consequently, the Defendant's right to custody of a child should be forfeited. The panel of judges opines that the application of the legal principle stating that the custody rights of a mother who is not a Muslim over her child, who has not yet reached the age of discernment, becomes void if the mother has apostatised. In line with this, scholars

²⁴ Ibid.



of Islamic jurisprudence from the Shafi'i and Hanbali schools stipulate that anyone who wishes to exercise custody must be a Muslim. This implies that a mother who has apostatised has no authority and forfeits her responsibilities regarding custody.

Hadhanab essentially refers to the responsibility of caring for, nurturing, or educating children who have not yet reached the age of discernment. This is outlined in Article 2 of Law Number 23 of 2002, which has been amended by Law Number 35 of 2014, and the second amendment of Government Regulation in Lieu of Law Number 1 of 2016 concerning Child Protection, in conjunction with Article 59 Paragraph (1) of Law Number 39 of 1999 regarding Human Rights. This is recognised as the principle of the best interests of the child, which asserts that in all actions concerning children undertaken by the government, society, legislative bodies, and judicial authorities, including courts, the best interests of the child must be upheld, with the safeguarding of religion (*hifz al-din*) being a primary consideration..

The Tanjung Karang Religious Court has decided to grant custody of the child, *Hadhanab*, who is still of an age to discern, to the Plaintiff (the biological father) as it has been observed that the Plaintiff adheres more closely to the established principles. In their considerations, the Panel of Judges also determined that the custody rights should be awarded to the father, who is a Muslim. This decision is based on Article 1, paragraph (2) of Law No. 23 of 2002 on Child Protection, which states, “*Child protection is all activities to ensure and protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with their dignity as human beings, as well as receiving protection from violence and discrimination.*” This article underscores that safeguarding children's rights is of utmost importance, even in the event of a divorce between their parents. Nevertheless, the Panel of Judges of the Tanjung Karang Religious Court expressed that in making this decision, the welfare of the child must be the primary consideration, taking into account not only their worldly wellbeing but also their spiritual welfare.

Furthermore, it has been clearly established in the court proceedings that the defendant (the mother) has currently converted to Christianity (*apostasy*), while the child was born and raised in the Islamic faith. Therefore, the panel of judges has reviewed and considered the matter from the perspective of Islamic Law regarding the right of custody (*Hadhanah*). In Islam, there is a principle that a child is a trust and a gift from Allah SWT to the husband and wife/parents. This aligns with Allah's command in Surah at-Tahrim, verse 6.:



﴿ يَا أَيُّهَا الَّذِينَ آمَنُوا قُوا أَنفُسَكُمْ وَأَهْلِيكُمْ نَارًا ﴾

“O you who have faith, protect yourselves and your families from the fire of Hell.”

(Q.S At-Tahrim 66:6)

Article 105 of the Compilation of Islamic Law states that the custody of a child who has not yet reached the age of discernment, or is under 12 years old, is the right of the mother. Article 105 outlines the custody of children in two scenarios. Firstly, when the child is still in a state of non-discernment (under 12 years old), custody is granted to the mother. Secondly, when the child reaches the age of discernment (12 years and older), the child is given the right to choose whether to be cared for by the father or the mother.

However, the Panel of Judges at the Tanjung Karang Religious Court explained that there is an exception: if the mother is proven to have apostatised and embraced a religion other than Islam, then her right to custody of the child is forfeited. This aligns with the Supreme Court Jurisprudence of the Republic of Indonesia No. 210/K/AG/1996, which contains the legal abstraction that although normatively the mother holds the right to *Hadhanah* for a minor, if she has apostatised, her right to *Hadhanah* for her child is nullified. This is because religion is a requirement for being the holder of custody rights over the care and upbringing (*Hadhanah*) of a child who has not yet reached the age of discernment.

The verse from the Qur'an, Surah An-Nisa (4:141), states:

﴿ مَوْلَىٰ يَجْعَلُ اللَّهُ لِلْكَافِرِينَ عَلَى الْمُؤْمِنِينَ سَبِيلًا ﴾

“...And Allah will not grant the disbelievers any way to dominate the believers....” (Q.S An-nisa 4:141)

According to Positive Law, one of the principles governing child protection is the principle of the best interests of the child. This means that in all actions concerning the child, their best interests must be the primary consideration. Additionally, there is a recognition of the child's right to express their views, which entails respecting their rights to participate and voice their opinions in decision-making, especially regarding matters that affect their lives.

Analysis of Custody Transition from the Perspective of Maqashid Shariah

In the ruling of the Tanjung Karang Religious Court, Number 948/Pdt.G/2023/PA.tnk, the court granted the plaintiff's request to assign custody of the child to the plaintiff. This decision was based on several considerations, one of which was



that the defendant had converted to another faith and baptised the child without the plaintiff's consent as the father. Islamic jurists from the Shafi'i and Hanbali schools stipulate that anyone who undertakes custody (*hadhanah*) must be a Muslim. This implies that a non-Muslim woman has no rights or authority over a Muslim child, as it could adversely affect the child's faith. Conversely, the Hanafi and Maliki schools assert that the right to custody belongs to the mother until she renounces that right. According to Muhyiddin al-Nawawi, as cited by Aris Bintania, custody should not be entrusted to a non-Muslim as it would prevent the child's well-being and could jeopardise their faith, which is considered a significant harm.

In the ruling of the Religious Court Number 948/pdt.G/2023/PA.Tnk, there is an intriguing case concerning the custody of a child who has not yet reached the age of discernment. In this situation, the panel of judges decided that custody of the child should be granted to the father, taking into account the fact that the child's mother has apostatised and converted to Christianity. This decision is not solely based on legal aspects but also involves profound moral and ethical considerations. In the context of Islamic law, this ruling reflects the principles of *maqashid al-shariah*, which aim to achieve welfare and benefit for the community.

The panel of judges holds the view that a situation in which a mother has converted to a different religion can have negative repercussions on the spiritual and moral development of the child. In this regard, the judges consider that the upbringing provided by a mother who has apostatised could result in greater harm to the child than any potential benefits that may arise. For instance, a child raised in an environment that does not align with the religious values upheld by their father risks losing important aspects of identity and moral values in life. This perspective aligns with the opinion of Al-Syatibi, who asserts that the legal burden in the context of custody must be oriented towards *maqashid*, which is to safeguard the interests and welfare of the child.

However, this decision also raises questions regarding a mother's right to express affection towards her child. From an Islamic perspective, a mother's love and attention are crucial for a child's development. Although the court has granted custody to the father, it is important to remember that the father should not restrict the interaction between the child and the mother. On the contrary, the father should support that relationship while upholding the religious values they adhere to. A concrete example of this can be seen in practices where the father allows the mother to meet and interact with the



child, provided that such interactions do not interfere with the child's spiritual and moral development.

In a deeper analysis, we must also consider the long-term impact of this decision on the child. A child who is separated from their mother, even in a legally sanctioned context, may experience significant emotional trauma. Research indicates that a strong bond between mother and child can contribute to the child's mental and emotional well-being in the future. Therefore, while the legal decision may seem fair from a legal standpoint, the psychological effects of this separation must be taken seriously. In this regard, the court could consider granting flexible visitation rights to the mother, ensuring that the child continues to receive affection from both parents without losing the identity and values imparted by the father.

The ruling of the Religious Court Number 948/pdt.G/2023/PA.Tnk highlights the complexities involved in determining child custody, particularly in the context of parental religious changes. Although the judges' decision to grant custody to the father was based on considerations of harm and benefit, it is crucial to maintain a balance between custody rights and the affectionate rights of a mother. In this context, Islamic law serves not only as a legal guideline but also as an ethical framework that must be adhered to in order to ensure the child's welfare. Therefore, collaboration between both parents, even in challenging circumstances, remains key to ensuring that the child can grow and develop in a nurturing and attentive environment.

According to Al-Syatibi, the objectives of Sharia (*Maqashid Syariah*) are divided into three core categories. Firstly, *Al-Dharuriyat* refers to the primary interests in life, which include the preservation of religion, the safeguarding of life, the protection of intellect, the maintenance of lineage, and the safeguarding of property. Secondly, *Al-Hajjiyat* pertains to secondary interests aimed at facilitating life and alleviating difficulties. Thirdly, *Al-Tahsiniyat* relates to supplementary interests in life, which, if unmet, do not result in hardship. Therefore, in this ruling, granting custody of a child to the biological father falls under the category of *Maqashid Dharuriyat*, as child-rearing is one of the most fundamental interests in life.

Al-Syatibi states that the fifth order of the *al-dharuriyat* is based on *ijtihad* rather than *naqly*, meaning it is constructed from the understanding of scholars regarding the texts derived through *istiqra'*. In arranging the five *al-Dharuriyat*, or what is also referred to as *al-kulliyat al-khamsah*, Al-Syatibi sometimes prioritises *aql* (intellect) and



at other times *nasl* (lineage), followed by *mal* (wealth), and lastly *aql* (intellect) again. However, in any arrangement, Al-Syatibi consistently begins with *din* (religion) and *nafs* (soul) first.

Concerns arise that if custody is granted to an apostate, the religious upbringing of the child may be adversely affected, leading the child to follow the beliefs of the apostate parent. From the perspective of the five essential objectives of Sharia, granting custody to the biological father falls under the principle of *Hifzun nafs*, or the preservation of life. *Hifzun nafs* entails protecting individuals from harmful influences and ensuring their well-being. Consequently, the court has ruled that the child of the Plaintiff and the Defendant shall remain under the custody of the Plaintiff, who is the father.

Islam establishes the right of child custody to the mother in the event of divorce or the death of a husband. However, within the complex legal and social context, there are often exceptions that need to be considered. In the ruling of the Tanjung Karang Religious Court Number 948/Pdt.G/2023/PA.Tnk, the custody of the child was granted to the father. This case reflects the dynamics commonly encountered in divorce proceedings, where child custody is determined not only by religious norms but also by the surrounding social and legal conditions. In this instance, the plaintiff, as the former husband, felt that his rights were violated when the defendant, his ex-wife, remarried a man of the Catholic faith and baptised their child without his consent. This situation raises profound questions regarding child custody, particularly for a child who has not yet reached the age of discernment, which is the age at which a child can distinguish between right and wrong.

In further analysis, it is essential to understand that the judge's decision is not solely based on the legal text but also takes into account the broader social context. In this instance, the judge assessed that the 10-year-old child did not possess adequate capacity to make a religious choice. Therefore, the defendant's action of baptising the child without the plaintiff's consent could be seen as an attempt that jeopardises the child's spiritual and emotional development. Moreover, the court must consider the aspect of *maslahat*, which pertains to the child's long-term welfare. Within the context of *maqashid syariah*, which focuses on the objectives and benefits of Islamic law, this court decision can be viewed as an effort to protect children's rights and ensure that they grow up in an environment consistent with the religious values upheld, particularly when one parent has converted to another faith.



The researcher found that although, in general, the custody of a child who has not reached the age of discernment typically falls to the mother, there are exceptions that can be applied in certain situations. For instance, if the mother has taken actions deemed detrimental to the child, such as changing the child's religion without the father's consent, custody rights may be transferred to the father. This indicates that Islamic law is not rigid; rather, it is flexible and responsive to the existing context. The researcher also noted that this decision not only impacts child custody rights but also reflects societal views on issues of religion, divorce, and custody. In a broader context, this ruling could set a precedent for similar cases in the future, where legal and social considerations must be balanced in determining child custody.

Through in-depth analysis, the researchers concluded that child custody cannot be separated from the social and religious context surrounding it. The judge's decision in the Tanjung Karang Religious Court Ruling Number 948/Pdt.G/2023/PA.Tnk reflects an effort to safeguard the welfare of the child, taking into account the benefits and potential harms that may arise from custody by a mother of a different faith. Thus, this decision can be viewed as a suitable step in protecting children's rights, while also reflecting the principles of *maqashid syariah* that prioritise welfare and justice in every aspect of life. In this context, it is crucial for all parties to understand that child custody is a responsibility determined not only by religious norms but also by broader values of humanity and social justice. From the perspective of *maqashid syariah*, this aims to uphold *dharuriyah al-khams*, which includes the preservation of religion, property, life, intellect, lineage, and also wealth. Furthermore, the ruling of the panel of judges aligns with one of the *fiqh* principles:

الضَّرُّ يُزَالُ

“Harm must be eliminated.”

Establishing that a child born into Islam should be raised by parents who are also Muslim, and penalising a Christian defendant for not handing over the child in their care to the plaintiff, is an effort to eliminate harm as outlined by the aforementioned principle.

In the context of family law in Indonesia, courts are often confronted with cases that involve a clash between religious values and applicable legal provisions. One particularly noteworthy example occurs when a mother who has converted away from Islam faces issues regarding child custody. In such situations, the court does not solely consider religious



aspects but also assesses the impact on the child's development. The decision to grant custody to the biological father is based on the belief that an environment consistent with the child's religious teachings is crucial for their growth. This reflects the view that consistent and stable religious education is vital in shaping a child's character and morals, especially in a country with a Muslim majority like Indonesia.

The court argued that by granting custody to the father, who shares the same faith as the child, the child is more likely to receive appropriate religious education. For instance, in the context of daily life, the child is more likely to participate in religious activities, such as study circles or the celebration of significant Islamic holidays, which can strengthen their spiritual foundation. However, this decision does not automatically negate the mother's right to be involved in her child's life. Despite the mother having renounced her faith, the court emphasised that the love and care provided by the mother remain vital for the child's emotional development. In this regard, the court established clear boundaries: the father does not have the right to prevent the mother from expressing her affection, indicating that despite differences in belief, the emotional bond between mother and child must still be preserved.

The ruling of the Tanjung Karang Religious Court, Number 948/Pdt.G/2023/PA.Tnk, provides a significant contribution as a precedent in addressing child custody conflicts in Indonesia, particularly in the context of parental belief differences. This case illustrates that although, generally, custody rights for children who have not yet reached the age of discernment typically rest with the mother, exceptions can be applied by considering specific situations, such as the apostasy of one parent and the implications of such actions on the child's development. As a precedent, this ruling affirms that Islamic law is not rigid but can adapt to existing social conditions. In this instance, the judge's decision to grant custody to the father reflects an effort to safeguard the child's best interests, which is one of the fundamental principles in the *maqasid al-shariah*. By considering the potential negative impacts of custody by a parent who has converted to another religion, the panel of judges demonstrates that the protection of the child's religious and moral upbringing is a priority that must be emphasised.

This ruling also helps to affirm that child custody conflicts cannot solely be resolved by referring to normative rules, but must also take into account the ethical and emotional aspects that involve all parties. For instance, in the ruling, although the father was



granted custody rights, the court still emphasised the importance of affection and interaction between the mother and child, which are crucial components for the child's healthy mental and emotional development. Through its analysis, the court has created a meeting point between legal provisions and the factual circumstances occurring in the field. This ruling could serve as a reference in the future for other judges handling similar cases, where differing beliefs may be an important element in decision-making regarding child custody. Thus, this ruling contributes to the development of jurisprudence that is more responsive to social dynamics, and demonstrates that Islamic law can be progressive, grounded in the principles of justice and the welfare of the child. The decision represents a significant step forward in recognising and protecting children's rights based on existing social contexts and beliefs, in line with the principles of Human Rights that uphold the best interests of the child.

Conclusion

The ruling of the Tanjung Karang Religious Court, Number 948/Pdt.G/2023/PA.Tnk, indicates that while custody of children who have not yet reached the age of discernment typically falls to the mother, exceptions can arise based on specific circumstances, such as the mother's apostasy. This decision underscores that Islamic law is dynamic and responsive to social conditions, prioritising the best interests of the child. Through this ruling, the court considered not only legal aspects but also the emotional and spiritual impact on the child, establishing an important precedent in addressing custody conflicts that involve differing parental beliefs. This reflects a commitment to protecting children's rights while upholding humanitarian values and social justice. Within the framework of *maqashid sharia*, this decision focuses on the preservation of religion (*hifz al-din*), life (*hifz al-nafs*), and the welfare of the child. It demonstrates that Islamic law is adaptable to social conditions and oriented towards the welfare of the community, particularly for future generations. As a precedent, this ruling emphasises the importance of considering humanitarian values and social justice in law enforcement, in order to safeguard children's rights in the face of custody disputes arising from differing parental beliefs.

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