

## LEGAL PROTECTION OF CHILDREN IN DIVORCE CLAIMS IN SIDOARJO RELIGIOUS COURT (STUDY OF DECISION NUMBER 2709/PDT.G/2022/PA.SDA)

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**Abstract**— Divorce in family that already have children often also has an impact on their children. Divorce lawsuits can not only be filed by husbands but can also be filed by wives (contested divorce) as in case decision Number 2709/Pdt.G/2022/PA.Sda. In the petitum of this decision, the wife asked the court to terminate her marriage with her husband and stipulate that custody of her three children be given to the wife as the mother. However, based on the decision uploaded on the official website of the Supreme Court's Directory of Decisions, there does not appear to be any consideration or decision regarding the custody rights. The absence of legal considerations and decisions regarding custody of the three children may occur due to 2 (two) factors, namely technical factors and administrative factors. Divorce does not eliminate parental obligations as a form of protection of children's rights, such as a father's obligation to support his child. So that when the father does not comply with the court's decision in providing for the child, the mother can use family or litigation methods. The research method used is normative legal research (normative juridical) or also called library law research.

**Keywords**— *Divorce Lawsuit, Children's Rights, Custody Rights, Child Support.*

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## I. INTRODUCTION

Marriage in human life is an important event that really requires legal regulations to regulate this, including through Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law (KHI). Marriage according to Article 1 paragraph [1] of Law Number 1 of 1974 concerning Marriage is "a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on Belief in the One Supreme God" . Whereas in Article 2 of the Compilation of Islamic Law (KHI) [2], "marriage according to Islamic law is a marriage, namely a very strong contract or *mitssaqan ghalidzan* (great agreement) to obey Allah's commands and carry out marriage is a worship". However, even though marriage is one of the sacred events because it is also related to God's commandments, it still cannot be a guarantee that the marriage will continue to be durable or lasting.

The cause of divorce can be caused by frequent conflicts in the household, ranging from continuous disputes, infidelity, gambling, and so on. Divorce lawsuits are not only the right of the husband (divorce *talak*), but the wife also has the same rights (divorce lawsuit). Based on data from the Sidoarjo Religious Court, it is known that divorce cases have dominated other cases filed in the last 5 (five) years. In later divorce cases it was also seen that there was a dominance of contested divorce cases when compared to divorce divorces.

The occurrence of divorce will not only have an impact on the husband and wife but will also have an impact on the children of the marriage, both mentally and legally. With the occurrence of divorce in which there are children often raises the issue of child custody. An example of a problem related to this is in the lawsuit for divorce decision No. 2709/Pdt.G/2022/PA.Sda. The decision on the divorce case is interesting to study because in the verdict the decision only decides on the Plaintiff's divorce lawsuit, while in the *posita* and *petitum* cases there is also a request for determination of child custody. In this decision it is known that the legal marriage between the Plaintiff and the Defendant was registered at the Sukodono District Office of Religious Affairs (KUA) on January 28 2005. From this marriage, the two of them were blessed with their first child (aged 16 years 8 months), second child, (aged 7 years 5 months), and a third child (5 years 6 months).

In his *posita*, the Plaintiff explained that the reason for filing the divorce suit was due to quarrels and disputes regarding the Defendant, who provided an inadequate living and often owed debts without being responsible for his debts. This conflict resulted in the

Defendant leaving the Plaintiff for 2 years and 2 months and until now his whereabouts are unknown. Due to these reasons, the Plaintiff in the petition of the lawsuit not only requested that the Sidoarjo Religious Court judge grant the divorce lawsuit between the Plaintiff and the Defendant, but also requested that the judge grant a stipulation of child custody (hadhanah) to be given to the Plaintiff.

Article 105 of the Compilation of Islamic Law (KHI) has explained that if a child is not yet 12 (twelve) years old, the custody will be given to the mother. Meanwhile, a child over the age of 12 years can choose the mother or father who will have custody of him. However, both of them still have to look after, protect, and love their child even though custody of the child falls into the hands of the mother. In addition, the father is also still obliged to provide a living or finance the needs of his child even though he does not obtain custody of the child.

Philipus M. Hadjon considers legal protection to protect human dignity and dignity as a legal subject, including their human rights as sovereign human beings. In this case, children who are still under five or immature are also considered as legal subjects whose rights need to be protected. Children's rights based on Article 1 number 12 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection are "part of human rights that must be guaranteed, protected and fulfilled by parents, families, communities, state, government and local government"[3]. Based on these problems, the author chose the title "LEGAL PROTECTION OF CHILDREN IN DIVORCE SUIT DECISIONS IN SIDOARJO RELIGIOUS COURT (Study of Decision Number 2709/Pdt.G/2022/PA.Sda)".

## II. METHODS

The research method used is normative law (normative juridical) or also known as library research. Normative juridical research conducts studies on law as norms, rules, legal basis, legal principles, legal doctrine, legal theory and other literature to find answers to the legal issues studied [4]. In this research, several approaches will be needed, such as a statute approach, a case approach, and a conceptual approach.

In this study, the author uses qualitative data analysis with a deductive method which describes or describes the data that has been obtained through literature studies and interviews in the form of general sentences for later analysis in order to obtain specific conclusions that are easy to read and understand.

### III. RESULT AND DISCUSSION

#### 1. Reasons for the Judge Not Deciding on the Child Custody Application (Hadhanah) in the Divorce Decision Verdict Number 2909/Pdt.G/2022/PA/Sda

In deciding a case, the judge needs to formulate everything that becomes his consideration in every decision. The stage in which the panel of judges considers the facts obtained from the parties and witnesses during the trial process is known as "judge deliberation", which in the process requires the precision and accuracy of the panel of judges handling the case [5]. The considerations used to adjudicate a case must not only contain the reasons and basis for the decision, but must also include certain articles of the rules relating to the case or may also use unwritten sources of law as the basis for making a decision (Article 62). paragraph (1) Law Number 7 of 1989 concerning Religious Courts).

In the trial process, the judge must show a neutral and fair attitude by not being biased or taking sides with one of the litigants (*audi et alteram partem*) [6]. Also included in divorce cases, a judge should try to be able to realize or at least balance the principles of legal certainty (*rechsecherheit*), justice (*gerechtigheit*), and expediency (*zwachmatigheit*) which are set forth in the considerations of each decision he makes. Gustav Radbruch, a German philosopher, argued that these three principles are the basic elements of law which are also said to be the goals of law.

Through the petition of decision Number 2709/Pdt.G/2022/PA.Sda, it can be seen if the Plaintiff requests that the Panel of Judges:

1. Granted the Plaintiff's lawsuit;
2. Divorced one bain sughro of the Defendant against the Plaintiff;
3. Assign a named child:
  - Child I, date of birth October 30, 2005 (age 16 years 8 months);
  - Child II, date of birth February 16 2015 (age 7 years 5 months);
  - Child III, date of birth 20 December 2016 (age 5 years 6 months) under the care of the Plaintiff.
4. Charge the plaintiff with court fees;

However, in the legal considerations and verdicts uploaded on the website of the Supreme Court Decision Directory, the panel of judges only decided on the Plaintiff's divorce lawsuit against the Defendant. Based on the explanation of Drs. M. Shohih, S.H., M.H, as the

Chair of the Panel of Judges who decided on the case, the absence of a determination of child custody in the points of the decision may occur due to technical and administrative factors.

The absence of such determination does not mean to neglect the petitum in the Plaintiff's letter of action, but it is most likely due to technical factors. A technical factor occurs when the Plaintiff revokes the petitum points regarding the determination of custody of the three children, which usually occurs due to financial factors where the Plaintiff does not want or cannot pay more to present his child who is more than 12 years old in court. In addition, in the opinion of Mr. Heru Santoso, S.H.I., as Chair of the Information Technology Planning and Reporting Sub-Division of the Sidoarjo Religious Court, the revocation of the petitum points could also occur because the Plaintiff wanted to divorce the Defendant whose whereabouts were unknown as soon as possible.

The unclear whereabouts of the Defendant also strengthened the Plaintiff's belief that the Defendant would not have a problem if their three children were raised by the Plaintiff as his mother. Regarding the revocation of the petitum points, this is also in accordance with Article 127 Rv which reads "The plaintiff has the right to change or reduce his claims until the case is decided, without changing the principal of his lawsuit", so that in this case the plaintiff is allowed and has the right to reduce his claims by revoking the petitum points regarding custody of their three children without changing the subject of the lawsuit regarding the divorce [7]. The reasons underlying this revocation can also be understood and accepted by the judge so that the request is accepted by the Panel of Judges handling the case. With the revocation of the application for the determination of child custody, the Panel of Judges handling the case can no longer decide on this matter and the three children are considered to be cared for by both parents together.

Meanwhile, the reason for the absence of legal considerations or a definite explanation regarding the cause of the revocation of the application for determination of child custody in decision Number 2709/Pdt.G/2022/PA.Sda which was uploaded on the website of the Directory of Decisions of the Supreme Court is due to administrative factors. Where there is a one day minutation and one day publish system as stated in the Letter of the Director General of the Religious Courts Number 1924.c/DjA/OT.01.3/VII/2018 [8]. This system is intended as an effort to improve the performance and services of the Religious Courts. One day request, namely the substitute clerk who minuates the case file on the same day as the reading of the decision, while one day publish, namely the decision that has been minuated must be published on the same day to the SIPP (Case Tracing Information System) and the Directory

of Decisions of the Supreme Court. The existence of this system causes the Sidoarjo Religious Court to work even faster, so the rush causes an error in the uploaded decision.

## **2. Efforts from the mother's side if the father does not fulfill the responsibility as a parent in terms of providing a living as a form of legal protection for children**

Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection stipulates the status of a child as a human being who must be guaranteed, protected and safeguarded by everyone, from the family to the state. Parents as the closest party to the child should think more about and try to be able to ensure the fulfillment of children's rights which are not only regulated under state law but also religious law. Divorce or separation of parents also should not cause the neglect of the rights of the child. In the event of a divorce between father and mother, both of them still have to work together to care for and raise children from the marriage so that their rights are not neglected or even disrupt their mental condition.

In the case of decision Number 2709/Pdt.G/2022/PA.Sda, to ensure good care for their three children, the Plaintiff requested the determination of child custody at the Sidoarjo Religious Court which was submitted in the petitum of the divorce suit. However, as the trial process progressed, the Plaintiff finally chose to revoke the petitum points regarding the child custody. So that if in the future the Plaintiff feels the need for a stipulation of child custody, he can file a new lawsuit specifically for child custody (hadhanah). In this new lawsuit, the mother can apply for a legal determination of child custody and ask for other rights for her three children from the father as the Defendant. These other rights include the right to a living, the child's right to meet his father, and so on.

In deciding the application for child custody, the judge will consider the interests of the child, the age of the child (Article 105 Compilation of Islamic Law), and the agreement with the parents (if any) [9]. In addition, the judge will also consider the facts obtained from the Plaintiff, Defendant, witnesses, children (if they are over 12 years old), and evidence submitted to the trial. These considerations will be explained by the judge on legal considerations as the basis for determining the outcome or decision to be made. In addition, the main principle or basis that needs to be emphasized in terms of child custody is that both parents basically have the obligation to care for and provide education for their children as stipulated in Article 41 a) Law Number 1 of 1974 concerning Marriage . So that to whomever the child custody is given it still does not eliminate the other party's obligations as a good and responsible parent.

The existence of legal regulations governing the father's obligation to finance or provide for his children, both while still in marriage and after a divorce, turns out to not be a guarantee. In fact, in society there are not a few children who are victims of their parents' divorce. Many fathers are actually able to provide a living for their children but are reluctant to provide a living after a divorce. Even so, there are still many mothers who decide to ask the Religious Courts for determination of child custody as well as child support [10]. The existence of a stipulation regarding child custody and maintenance for children, can better accommodate and protect the fulfillment of children's rights which should be considered by various parties, especially parents. The child's livelihood referred to here is the cost of maintaining or caring for children such as the cost of eating and drinking because these costs can be calculated clearly every day. While health and education costs are calculated outside of the cost of care because every day or every year there can be changes.

If the Defendant as the father does not fulfill the decision of the Sidoarjo Religious Court in providing a living for the child, then the Plaintiff as the mother can use the following methods:

#### 1. Family

The mother can communicate with her ex-husband as the father of her child, but in reality often the father does not want to compromise or cooperate with the mother. So another way is to communicate with family or close relatives from the ex-husband or father's side. If it is necessary to have a third party, then mediation can be carried out with the help of a mediator who is neutral (not taking sides with either one).

#### 2. Litigation (through court or legally)

In the case of child maintenance, if the Religious Court has determined the decision and has permanent legal force but is neglected by the father as the Defendant, the mother's side can ask for the execution of the ex-husband's property as the father of his child. The execution is carried out by submitting an application in advance to the Religious Court, in terms of fulfilling the child's maintenance, the execution in question is by carrying out the execution of the real assets owned by the father as the Defendant [11]. However, according to Drs. M. Shohih, S.H., M.H and Mr. Heru Santoso, S.H.I. This effort is considered quite complicated and not comparable, because to carry out the execution requires a lot of money, while it is not certain that the result of the execution on the father's property will be sufficient to cover living costs or even the costs incurred to carry out the execution.

## IV. CONCLUSION

### A. Conclusion

The Panel of Judges who decided on case Number 2709/Pdt.G/2022/PA.Sda could not decide on the points of the application regarding child custody (hadhanah) previously requested by the Plaintiff in their petition. The absence of legal considerations and a decision regarding custody of the three children of the Plaintiff may occur due to 2 (two) factors, namely technical factors or administrative factors.

Because there is no decision regarding child custody in the divorce ruling, the Plaintiff can file a special lawsuit for child custody (hadhanah) at a later date in which the petition can apply for the determination of child custody and child support. The panel of judges handling the case will consider the facts obtained from the parties, witnesses, children (if they are over 12 years old), and evidence submitted to the trial. The most important thing is to pay attention to the interests of the child because it will be related to the child's mentality and future. The father still has the obligation to provide for his child, even though the custody (hadhanah) of the child is in the hands of the mother. So that if the father still does not fulfill the child's maintenance even after a decision from the Sidoarjo Religious Court, the mother can use family methods or ask the Sidoarjo Religious Court to execute the real assets owned by the father.

### b) Suggestion

Judges as state officials who have the duty to examine and decide cases must be more careful, thorough, and alert when deciding a case that is being handled. In divorce cases involving children as well as in child custody cases (hadhanah), judges must fully consider the best interests of the child as a form of legal protection for children.

In uploading the decision to the website of the Supreme Court Directory, the substitute clerk should have been more thorough so that it would not cause confusion or misunderstanding to the general public who read the decision. Before signing the case file that has been minuted, the panel of judges must also check the completeness and correctness of the file.

The mother who wants to file for divorce should also ask for the determination of child custody and maintenance for the child to provide certainty that the child's rights will be fulfilled. Filing will also be more efficient than having to file a new lawsuit specifically for



child custody (hadhanah) in the future. If you have requested the determination of child custody and child maintenance in the petition of the lawsuit, it should be maintained until it is decided by the Panel of Judges handling the case so that there is still a decision that is binding on the parties and has permanent legal force.

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