



# LEGAL ANALYSIS OF JUDGES' CONSIDERATIONS IN DECIDING ON CURRICULUM RIGHTS OVER CHILDREN BY THE FORMER WIFE TO THE FORMER HUSBAND ACCORDING TO THE COMPILATION OF ISLAMIC LAW (Decision Study number 155/Pdt.G/2024/PA.Bji)

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Article Info	Abstract
<b>Article History</b> Received: 2025-05-05 Revised: 2025-05-06 Published: 2025-06-06  <b>Keywords:</b> <i>Judge's Considerations, Child Custody, Divorce</i>	Determination of custody of children under the age of 12 after divorce is usually guided by Article 105 of the Compilation of Islamic Law (KHI), which normatively mandates that child custody be granted to the mother. This research focuses on examining two main issues: the legal factors that influence the determination of child custody rights to the plaintiff, and how the court considers these legal factors in issuing a child custody decision. This research was conducted using a normative legal perspective using qualitative methods, based on an analysis of Decision No. 155/Pdt.G/2024/PA.Bji. The results show that the panel of judges did not adhere strictly to the literal meaning of Article 105 of the KHI, and preferred a more adaptive interpretation, adapting it to concrete conditions in the field. Although both parents are considered capable of caring for the children, the author argues that full custody should still be granted to the mother, considering that the children are still very young and emotionally closer to the mother in their daily lives.

## I. INTRODUCTION

Marriage is a form of bond carried out by individuals through legal procedures in accordance with religious provisions and state regulations, with the aim of forming a harmonious, happy and prosperous family based on the values of the Almighty God. (Beby Sendy et al., 2023) Legal regulations regarding marriage have been established through Law Number 1 of 1974 and are clarified in Article 2 of the Compilation of Islamic Law.

In reality, not every couple is able to maintain harmony in their marriage, so divorce is often the final solution. Divorce carries various legal consequences, one of which is the issue of child custody (hadhanah), which often becomes a primary focus after a divorce. Divorce not only impacts the integrity of the family structure but also has the potential to cause serious emotional distress in children. If not handled appropriately by parents or authorities, this condition can develop into profound psychological distress. (Gowasa et al., 2024)

The child custody case focused on in this study is a continuation of the divorce case between the Plaintiff and Defendant. As stated in Decision Number 171/Pdt.G/2023/PA.Bji, the

Defendant was found to have engaged in adultery, which should be a moral consideration in assessing a person's suitability and integrity to care for a child.

Article 41 paragraph (1) Law no. 1 of 1974 implies that the obligation lies with parents to care for and educate children even though they are divorced. According to Article 105 of the Compilation of Islamic Law, the care of children who are not old enough or not yet mumayyiz is in principle the responsibility of the mother. On the other hand, if the mother is deemed incapable of caring for her or has remarried, then custody can be transferred, then custody can be transferred to the father. Even though the child is in the mother's care, the responsibility for providing support remains the father's responsibility in accordance with applicable regulations.

These provisions are based on child protection principles that emphasize the importance of emotional stability and affection in supporting a child's growth and development. Children generally have a stronger emotional bond with their mothers, so child protection is seen as crucial to ensuring the continuity of national development, as children are the next generation. (Sujana, 2020) On the other hand, the

effectiveness of post-divorce legal protection depends heavily on parents' awareness of their responsibilities. Consistent implementation of this approach can minimize the psychological risks to children resulting from divorce. (Silvyanas et al., 2025)

Therefore, the provisions of Article 105 of the Compilation of Islamic Law (KHI) are not merely legal in nature, but also reflect humanitarian values and prioritize the principle of the best interests of the child. In situations where divorce is inevitable, the judge's role is crucial in determining custody, taking into account the emotional and psychological conditions and circumstances of each parent. The determination of custody must always prioritize the child's interests, ensuring that the party granted custody is capable of ensuring the child's well-being and social stability. (Rambe et al., 2024) In addition, the resolution of child custody cases should ideally be pursued through a peaceful approach and mutual agreement between parents, in order to avoid prolonged conflict that can have an impact on the child's psychology. (Umul Khair, 2020)

Post-divorce child protection depends heavily on the awareness and good faith of both parents. If this is done consistently, the potential negative impact on children can be minimized. In practice, the provisions of Article 105 of the Compilation of Islamic Law (KHI) often require contextual interpretation. The Binjai Religious Court Decision No. 155/Pdt.G/2024/PA.Bji is an example that legal provisions are not always applied rigidly, but rather consider the interests of the child. In this case, even though Article 105 of the KHI grants custody to the mother over children under the age of 18 (*mumayyiz*), in this case CHILD 3 is 8 years old and CHILD 4 is 3 years old, the Panel of Judges considered this provision not absolute. (Badriyah, 2020)

Normatively, according to Article 105 letter (a) of the Indonesian Islamic Law (KHI), children who are not yet of legal age or not yet *mumayyiz* should ideally be cared for by their mothers. In this case, the Plaintiff firmly demands custody of the 3rd and 4th children who are still minors based on this provision. Therefore, legal considerations should not only be based on the legal aspect alone, but also include the emotional and psychological dimensions of the child, considering that in general children have a more intense closeness with their mothers. However, the judge then chose to use a flexible approach based on the general welfare of the child.

The trial results showed that the two children were accustomed to living alternately at the Plaintiff's and Defendant's residences without any significant obstacles. Therefore, the Panel of Judges determined a shared parenting responsibility pattern with a two-week rotating system every month. This decision is in line with the principle of the best interests of the child as regulated in Article 4 paragraph (1) of Law No. 35 of 2014. In addition, this shows that Article 105 of the Compilation of Islamic Law can be interpreted contextually for the benefit of the child. This flexible and teleological approach is a form of legal discovery (*rechtvinding*) that reflects the adaptability of Islamic law to social dynamics, especially in child custody cases.

This research focuses on analyzing how the Panel of Judges interprets Article 105 of the KHI in the context of facts on the ground, and how these considerations reflect a progressive juridical approach in Islamic law.

## II. RESEARCH METHODS

This research uses a normative juridical method with a qualitative approach, which is carried out through an analysis of relevant laws and regulations and a case study review of Decision Number 155/Pdt.G/2024/PA.Bji. (Ali, 2012) Data were obtained through document and library studies covering legal literature, regulations, and court decisions. All data were analyzed descriptively and analytically to examine the legal considerations of the panel of judges in determining the pattern of shared parenting must consider the principle of the best interests of the child, as stipulated in Islamic law and the Indonesian national legal system. (Baharudin, 2019)

## III. RESULTS AND DISCUSSION

### A. Legal Factors Influencing the Determination of Custody Rights to the Plaintiff in Decision Number 155/Pdt.G/2024/PA.Bji

Decision Number 155/Pdt.G/2024/PA.Bji is a further legal consequence of the divorce between the Plaintiff and Defendant, which was previously decided through Decision Number 171/Pdt.G/2023/PA.Bji. In the previous case, the Defendant was found to have committed adultery, which should have been used as an indicator of moral eligibility in assessing child custody rights. (Gowasa et al., 2024)

In this case, the plaintiff (mother) filed a lawsuit for custody of two children aged 8 and 3 years. Normatively, Article 105 letter (a) KHI states that custody of children under the age of mumayyiz (12 years) is basically given to the mother. However, the Panel of Judges applied a more flexible approach by prioritizing the principle of the child's best interests as regulated in Article 4 paragraph (1) of Law no. 35 of 2014.(Herdinang, 2022) This consideration is based on the fact that both children have become accustomed to being cared for alternately by their parents after the divorce without experiencing significant psychological distress. (Maulana & Safitri, 2024)

The judge also stated that there was no evidence that either party was incapable of carrying out parenting duties.(Maulana, 2021) However, this consideration ignores moral facts that should have been taken into account, such as the Defendant's alleged affair, which emerged in a previous case. (Kamal, 2019)

In addition, the decision to establish a rotating parenting pattern (two weeks with the mother and two weeks with the father) does not consider the long-term impact on the emotional stability of very young children.(Mustaring, 2023) The ages of 3 and 8 are crucial for establishing stable emotional bonds. (Binjai Religious Court, 2023) Changing residences within a short period of time risks creating emotional confusion and uncertainty, which can hinder optimal child development. Therefore, even though both parents are formally deemed to have equal capabilities, from the perspective of child protection principles and Islamic legal norms, full custody should still be granted to the mother, unless there is strong evidence that the mother is unfit.

#### **B. Judicial Considerations of the Panel of Judges in Determining Custody of Children Who Are Not Yet Mumayyiz in Case Number 155/Pdt.G/2024/PA.Bji**

In this case, the Plaintiff filed a lawsuit based on Article 105 letter (a) of the KHI, on the grounds that the third and fourth children were still at the age of not yet mumayyiz so that normatively they were in the care of the mother. (Khair, 2020) However, the Panel of Judges rejected the request for full custody and decided on a two-week rotating care pattern between the mother and father. This consideration was taken by referring to the main principle regarding the best interests of the child as regulated in Article 4 paragraph (1)

of Law Number 35 of 2014 concerning Child Protection. (Ministry of Religion of the Republic of Indonesia, 1991)

The panel assessed that both parents were still capable of carrying out their parenting roles effectively, and the children showed no psychological disorders. (Sudarsono, 2005) However, this approach raises legal issues because it ignores the primary norm in Article 105 of the Compilation of Islamic Law (KHI), which stipulates that the custody of children under the age of consent is the mother's right, unless there is a legitimate reason, such as the mother remarrying or being unfit to care for them. In this case, no such reason was found. (Mardani, 2011)

The fact that children are accustomed to alternating residences does not prove the system is ideal, as children aged 3 and 8 still greatly require emotional stability, which is better suited to full maternal care. In other words, the use of flexible principles should not necessarily eliminate the normative rights affirmed by the Compilation of Islamic Law (KHI). (Mertokusumo, 2007)

From the author's perspective, the Panel of Judges should continue to use Article 105 of the Compilation of Islamic Law (KHI) as the primary basis and not deviate from it without a truly compelling reason. (Rambe et al., 2024) The judge's decision in this case did consider the child's general well-being, but it appeared to ignore the child's natural instincts and neglect the emotional side that is more closely tied to the mother, as emphasized in Islamic hadhanah norms. Therefore, joint custody is inappropriate in this case. (Zahra & Hidayat, 2023)

#### **IV. CONCLUSIONS AND RECOMMENDATIONS**

Based on the results of the analysis of Decision Number 155/Pdt.G/2024/PA.Bji, it can be concluded that in this hadhanah case, the Panel of Judges provided a more flexible interpretation of Article 105 letter (a) of the KHI, by prioritizing the best interests of the child in accordance with those regulated in Law Number 35 of 2014 concerning Child Protection, although the provisions in the KHI stipulate that custody of children who are not yet mumayyiz is the responsibility of the mother, this interpretation is adjusted to concrete conditions in order to protect the interests of the child. The judge determined a rotating parenting pattern between the father and mother every two weeks.

However, this flexible approach lacks a sufficiently strong justification for deviating from these normative provisions. There is no evidence that the mother is unfit to care for the child, that she is not remarried, or that there are any circumstances that endanger the child under her care. Moreover, in a previous divorce case, the Defendant was found to have had an affair, which should have been a moral consideration in assessing the suitability of the child for care.

Thus, the author argues that the judge's legal considerations in this case failed to take into account the fundamental values of *hadhanah* in Islamic law. Full custody should remain with the mother, as there is no justification for transferring or sharing custody of children who are undergoing the initial stages of psychological emotional and personality development.

### **SUGGESTION**

1. For Religious Court Judges, it is advisable to continue to make Article 105 letter (a) KHI the main aspect in resolving custody disputes for children who have not reached *mumayyiz* age. Flexible interpretation should be carried out proportionally and only if there are truly legitimate circumstances to deviate from these norms.
2. For judicial institutions, there needs to be a clearer guideline to differentiate between legal custody and technical arrangements for care (physical custody), in order to avoid ambiguity in norms in shared care practices.
3. For future researchers, it is recommended to conduct further field or longitudinal studies regarding the psychological impact of rotating parenting on early childhood after divorce, in order to provide an empirical basis for supporting or rejecting this pattern.

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