

Reconstruction of *Hadanah* With The Concept of Shared Parenting in Religious Courts

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Abstract

This study aims to introduce the concept of shared parenting as a solution to child custody disputes in religious courts. This study is qualitative and normative legal research, analyzing the decision of Tarempa Religious Court Number 27/Pdt.G/2023/PA.Trp, the decision of Tarakan Religious Court Number 408/Pdt.G/2019/PA. Tar, and decision of Syar'iyah Kuala Simpang Court Number 50/Pdt.G/2021/MS.Ksg. The results of this study show that the concept of shared parenting is one of the right choices to resolve child custody cases; this pattern is taken to break up situations when both parents fight each other for the right to hadanah. With this concept of co-parenting, the relationship between parents and children will continue to be excellent and harmonious after divorce. The implementation of the idea of shared parenting in disputes in religious courts can be found in two products, namely rulings and peace deeds. The peace deed is also in the form of a verdict, but more specifically related to the legitimacy of the peace agreement that occurs in the mediation process, both within and outside the court.

Keywords: *hadanah; the concept of shared parenting; religious courts*

Rekonstruksi *Hadanah* dengan Konsep Pengasuhan Bersama di Pengadilan Agama

Abstrak

Penelitian ini bertujuan untuk memperkenalkan konsep pengasuhan bersama sebagai solusi sengketa hak asuh anak di pengadilan agama. Penelitian ini merupakan penelitian kualitatif dan hukum normatif, menganalisis putusan Pengadilan Agama Tarempa Nomor 27/Pdt.G/2023/PA.Trp, Putusan Pengadilan Agama Tarakan Nomor 408/Pdt.G/2019/PA. Tar, dan putusan Mahkamah Syar'iyah Kuala Simpang Nomor 50/Pdt.G/2021/MS.Ksg. Hasil penelitian ini menunjukkan bahwa konsep pengasuhan bersama merupakan salah satu pilihan yang tepat untuk menyelesaikan kasus hak asuh anak; Pola ini diambil untuk meleraikan situasi, kedua orang tua saling berebut hak mengasuh. Dengan konsep co-parenting ini, hubungan orang tua dan anak akan tetap terjalin baik dan harmonis pasca perceraian. Implementasi gagasan pola asuh bersama dalam perselisihan di pengadilan agama terdapat dalam dua produk, yaitu putusan dan akta perdamaian. Perjanjian damai juga berbentuk putusan, namun lebih khusus lagi berkaitan dengan sah tidaknya perjanjian damai yang terjadi dalam proses mediasi, baik di dalam maupun di luar pengadilan.

Kata kunci: *hadanah; konsep pengasuhan Bersama; Pengadilan Agama*

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Available online at <http://journal.iaingorontalo.ac.id/index.php/au/index>

A. Introduction

Divorce cases are generally accompanied by disputes about child care, with each parent fighting for the right to take care of the child. Each is considered the most entitled to take care of children, even though minors need care from both.¹ In 2007, the public was shocked by the case of a child struggle that occurred between Tamara Bleszynski and Teuku Rafli. They fought in court to get custody of their only child puppet Teuku Rassya. The case ended after the Supreme Court determined Teuku Rafli as the holder of custody of their child. In 2008, the public was shocked again when there was a drama over child custody between musician couple Ahmad Dhani and his wife Maia Estianty, each of them felt entitled to custody of their three children Al, El, and Dul, even though the South Jakarta Religious Court even reached the cassation stage in the Supreme Court at that time decided the custody of their three children to Maia Estianty, but Ahmad Dhani did not flinch still unwilling to hand over his children to Maia Estianty. The latest that went viral and stole a lot of attention from the Indonesian people was the case that happened to the couple Tsania Marwa and Atalarik Syach in 2021. After the divorce, Tsania Marwa found it very difficult to meet her two children, even though she had been determined as the holder of custody of her two children, but until the execution attempt was carried out by the Cibinong Religious Court, Atalarik Syach insisted on not giving children to Tsania Marwa. Many other similar things emerged to the public, such as the couple Marshanda and Ben Kasyafani and the couple Risty Tagor and Stuart Collin.²

The series of parenting disputes that shocked the public above shows how complicated and complicated the issue of childcare is. The dispute arises because of who is more entitled to the right to take care of children later. So, usually, the Court will give a decision either through mediation or trial. It also shows that in resolving child custody

¹ Dhiauddin; Mhd. Yadi Harahap; 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* 09, no. 01 (2021), <https://doi.org/http://dx.doi.org/10.30868/am.v9i02.2060>.

² Kumparan.com, "5 Artis Yang Berseteru Soal Hak Asuh Anak" <https://Kumparan.Com/Kumparanhits/5-Artis-Yang-Berseteru-Soal-Hak-Asuh-Anak-1552885386213657311/Full> (Diakses Pada 20 Agustus 2023, Pukul 06.39 WIB)., n.d.

disputes, the role of the Court is very strategic in determining the best interests of child care.³

The development of events and changes in the social conditions of a very dynamic community have given rise to various forms of cases of hadanah disputes that are very varied. The problem is that legal instruments such as laws and others sometimes barely contain the rules, the readiness of the rules to overcome the storm of problems that are present one after another is almost nil, while legal events must be handled immediately so as not to cause turmoil in society. The settlement solution taken by the court to resolve the dispute according to the highest principle currently held is about who is most worthy to realize the best interest of the child and it is still centered on a pattern called sole parenting or split custody. Parenting in this pattern places childcare separately to either the father's or mother's parents.

Meanwhile, there is a new pattern or concept that has recently been practiced in religious courts and this concept has not been accommodated at all in the existing legal norms, namely the concept called shared parenting or joint custody. There are two general concepts of co-parenting that are currently practiced, namely first, the concept of co-parenting in accordance with the division of living time and residence of children with each parent (shared physical parenting). The two concepts of shared responsibility focus on children's lives such as education, health, and others (shared responsibility parenting).⁴

Mediation is the right choice to apply the concept of co-parenting rather than through trial, because the parties will be more free to submit peace plans and proposals⁵, besides that flexible and more free time allows the emergence of initiative of the parties that can be expressed at any time, so that the opportunity for peace is wide open. This advantage is not possessed by the court trial system which tends to be rigid and formalistic. The institutionalization of mediation carried out by the Supreme Court in an effort to simplify the settlement of cases was marked by the issuance of Supreme Court Circular Number 1 of 2002 concerning the Empowerment of First Instance Courts to Implement Peaceful

³ H.M. Jati Muharramsyah, *Kontekstualisasi Hukum Perdata Islam Sinergitas Teks-Konteks* (Yogyakarta: Phoenix Publisher, 2018), h. 6-7.

⁴ H.M. Jati Muharramsyah, *Kontekstualisasi Hukum Perdata Islam Sinergitas Teks-Konteks* (Yogyakarta: Phoenix Publisher, 2018), h. 30.

⁵ Iman Jauhari, "Penetapan Teori Tahkim Dalam Penyelesaian Sengketa Hak Anak (Hadlanah) Di Luar Pengadilan Menurut Hukum Islam," *Asy-Syir'ah Jurnal Ilmu Syari'ah Dan Hukum* 45, no. 2 (2011), <https://doi.org/https://doi.org/10.14421/ajish.v45i2.20>.

Institutions. Next is Supreme Court Regulation Number 2 of 2003 concerning Mediation Procedures in Court. This provision after seeing the lack and lack of maximum dispute resolution through mediation, then in 2008, the Supreme Court issued a new regulation, namely Supreme Court Regulation Number 1 of 2016.⁶

The implementation of the concept of shared parenting in religious courts, both through mediation and through trial, is a new thing that does not have a legal umbrella as the basis for its enforcement, in contrast to the usual pattern that has been clearly recorded in state regulations.⁷ Of course, this is an important problem to find a solution immediately, even though the judges in the court have the right to make a new law (judge made law), but what we must not forget is that the civil law legal system adopted by Indonesia requires that every decision handed down by the court is based on the principle of legality, where the law is the main legal reference. The next issue that is no less important to discuss is whether the concept of co-parenting is in accordance with the norms of Islamic law regarding hadanah that have been in such a way applied or vice versa are contradictory. Based on the description of the problem, researchers consider that this is important for a more in-depth analysis and study of hadanah reconstruction with the concept of shared parenting in the Religious Court.

B. Research Method

This research is a normative legal research, which discusses Mediation in the Religious Court ruling related to the issue of the concept of shared parenting. The approach used is the statute approach and conceptual approach, including the study of arguments and rules born in legal science so that it becomes the basis for constructing a legal view when overcoming the legal problems studied. The legal material used is the decision of Tarempa Religious Court Number 27/Pdt.G/2023/PA.Trp, the decision of Tarakan Religious Court Number 408/Pdt.G/2019/PA.Tar, and decision of Syar'iyah Kuala Simpang Court Number 50/Pdt.G/2021/MS.Ksg. These decisions are peace deeds that are confirmed through court decisions. From the six rulings, researchers collected material related to the concept of shared parenting through mediation in *hadanah* cases in religious

⁶ Aco; Sugiri Permana Nur, *Mediasi Di Pengadilan Dalam Dimensi Komunikasi Psikologi* (Surabaya: Pustaka Saga, 2022), h. 3-4.

⁷ Jamadi, "Sengketa Hak Asuh Anak (Hadanah) Di Indonesia Dan Mesir," *Varia Peradilan: Majalah Hukum Tahun 33* 33, no. 390 (2018).

courts. Then the researcher will analyze and present it as a reconstruction related to the case of the Hadanah din Religious Court.

C. Result and Discussion

The concept of Hadonah in Law No. 1 of 1974 concerning Marriage and the Compilation of Islamic Law

In article 45 (1) and (2) of Law No. 1 of 1974 on Marriage it is stated that "both parents are obliged to maintain and educate their children as well as possible. The parental obligations referred to in paragraph (1) of this article apply until the child marries or can stand alone, which obligation continues even if the marriage between the two parents breaks up. Hadhanah linguistically, means to put something near the ribs or on the lap, because the mother when breastfeeding her child puts the child on her lap, as if the mother at that time protects and nurtures her child so that "Hadhanah" is used as a term that means⁸, Education and maintenance of children from birth to be able to stand alone, which is carried out by the child's relatives. The Ulama' Fiqh defines; Hadhanah as an act of caring for young children, whether male or female or who are old but not yet Mumayyiz, provides something that makes them good, guards them from something that hurts, educates them physically and spiritually, so that they can stand alone and can carry out responsibilities.⁹ In the KHI it is explained that child rearing or *hadhanah* is the activity of nurturing, nurturing, and educating children until adulthood or being able to stand alone.

The Marriage Law stipulates that parents are not allowed to transfer rights or mortgage permanent property owned by a child who is not 18 years old (eighteen years old) or has never entered into a marriage unless the interests of the child are in the interest of the child. The Marriage Law also indicates that the right to child maintenance refers more to the fulfillment of the child's external needs or the child's physical needs, namely in the form of meeting the needs of clothing, food, and shelter, while the right to get the right to

⁸Aco; Sugiri Permana Nur, *Mediasi Di Pengadilan Dalam Dimensi Komunikasi Psikologi* (Surabaya: Pustaka Saga, 2022), h. 216.

⁹ Sayyid Sabiq, *Fiqh Sunnah* (Bandung: Al-Ma'arif, 1980), h. 179-184.

education refers more to the child's spirituality. Meeting these needs can be in the form of providing education and teaching in science, religious education, and others.¹⁰

Article 105 of the IHL explains that "in the event of divorce, a. The maintenance of a child who is not yet mumayyiz or not yet 12 years of age is the right of the mother; b. The maintenance of the mumayyiz child is left to the child to choose between his father or mother as the holder of his maintenance rights; c. maintenance costs are borne by his father. Apart from the above obligations, other obligations are the responsibility of parents to their children, namely regarding property rights contained in Article 106 KHI that parents are obliged to care for and develop their children's property under their care, but are not allowed to transfer or mortgage it, and if there is negligence or fault the parents are responsible for the loss.¹¹ In article 105 paragraph (1) that the maintenance of children who are not yet mumayyiz or not yet 12 years old is the right of the mother. Then the KHI further clarifies in article 156 that the responsibility for the maintenance of children who have not been mumayyiz which was originally the right of the mother can be replaced when the mother has died. The replacing parties include: 1. Straight line women up from the mother, 2. Father, 3. Straight line women up from the father, 4. Sister of the child concerned, 5. The women of relatives according to the sideways line of the mother, 6. The women of relatives according to the sideways line of the father. Similar to article 105 of the KHI, article 156 also reaffirms that a child who has been mumayyiz has the right to choose to be in the care of his mother or father. However, if in reality the holder of the hadhanah cannot take good care of or cannot guarantee the physical and spiritual safety of the child, the right of maintenance can be transferred at the request of the relative concerned.

Settlement of Hadanah Cases with the concept of Shared Parenting through Mediation in Religious Courts

Case No. 66/Pdt.G/2022/PA. CN at the Cirebon Religious Court

Based on the decision of the Religious Court Source Number 5357/Pdt.G/2019/PA. Sbr, dated January 9, 2020 and Divorce Deed Number

¹⁰ F A Lubis, *Pertimbangan Hakim Pengadilan Agama Panyabungan Terhadap Hak Asuh Anak Di Bawah Umur 12 Tahun (Studi Kasus No: 306/Pdt. G/2018/PA. PYB)* (etd.uinsyahada.ac.id, 2019), <http://etd.uinsyahada.ac.id/1323/>.

¹¹ Muhamad Hasan Sebyar, *Bahan Ajar Hukum Perdata Islam Di Indonesia Bagian 1* (Solok: CV. Mitra Cendekia Media, 2022), h. 70.

0673/AC/2020/PA. Sbr, January 24, 2020. That there has been a dispute between the Plaintiff and the Defendant in essence the Plaintiff filed a Child Control lawsuit against the Defendant. That the Plaintiff and Defendant have been blessed with 1 (one) child on the date of birth October 11, 2014, aged 7 years 3 months. After conducting the mediation process, the results of mutual agreement were obtained, then from the agreement the judge poured into the decision, that the pattern of joint parenting of children had been agreed, there were several points in the agreement, some of which had to do with shared parenting were as follows; (1) The first two weeks of each month, the Child resides and resides with the Plaintiff; (2) The second two weeks of each month, the Child is in and lives with the Defendant; (3) On the Child's school holiday, the Child's school holiday shall be divided half each for the Plaintiff and half for the Defendant; (4) If the Child is sick, the Child must remain with each party who is taking care of him until the Child recovers; (5) The Plaintiff and the Defendant shall each be responsible for taking care of all the child's school supplies and ensuring that the child's school affairs shall be the top priority while the child is in and resides with either party; (6) The child must be returned and delivered no later than 18.00 WIB every Sunday of the last week of the last party directly to the doorstep of the house where the parties are domiciled and will not leave the child until ensuring that the child has entered the house safely; (7) If the Plaintiff and the Defendant wish to differ from those stipulated above, it is permissible as long as the Plaintiff and the Defendant agree and are discussed in a family manner. 8) That all expenses for the Child that are the obligations of the Plaintiff as contained in Article 7 numbers (5) and (6) are obligations as a father to the child that must be paid as long as the Plaintiff is able, but if the opposite happens and it can be proven by evidence that the Plaintiff is incapacitated, then the Defendant as a mother is automatically obliged to meet all such costs. 9) That regarding the education of the Child, the Parties agree that the matter will be discussed by family deliberation or handed over to the Child to choose which school is appropriate according to the Child while still being guided and directed by the Parties as his parents. 10) That the Parties agree that each party is not allowed and prohibited from conveying negative information and impressions to the Child in order to make the Child hate or dislike one of the Plaintiff's or Defendant's parents.

(11) That the Parties agree that in the event of a dispute over the content and implementation of this Peace Agreement, the Parties shall give priority to its settlement by family deliberation. (12) That the Parties agree that if the Defendant violates the contents of this Peace Agreement, then the rights of the Defendant as contained in Article 5 are considered lost and void except for the right to meet and communicate. (13) That the Parties agree that if the Plaintiff violates the contents of this Peace Agreement, then the rights of the Plaintiff as contained in Article 5 shall be considered lost and void except for the right to meet and communicate. (14) That the Parties each agree to carry out all points as contained in Articles 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 mentioned above with full sincerity and responsibility and based on sincere intentions. (15) That the Parties each express their agreement and do not object to the Peace Agreement that has been successfully reached by the Parties as contained in the aforementioned articles.

Case No. 408/Pdt.G/2019/PA. Tar at Tarakan Religious Court

The Plaintiff and the Defendant are a married couple who are now divorced with proof of Divorce Deed Citation Number 0299/AC/2019/PA. Trk, July 25, 2019. Plaintiff and Defendant have one child, born on 09 November 2014, age 4 years. At the time of mediation, both parties agreed to reconcile and end the Child Custody dispute peacefully and familially. Both parties agree that the Plaintiff's and Defendant's Children will be cared for, cared for, and supervised by the Plaintiff and the Defendant, provided that from Monday to Friday attend the Islamic Kindergarten in Nunukan, together with the Defendant. On Saturday and Sunday, he will be escorted and joined the Plaintiff in Tarakan. Public holidays and other major holidays will be discussed in a family manner. The Plaintiff and the Defendant agreed to contact each other via face-to-face or video-call service, provided that on Monday, Wednesday, and Friday, the Defendant must contact Plaintiff after the Maghrib ba'da. On Tuesdays and Thursdays, Plaintiff will contact Defendant, when Plaintiff has the opportunity. Each party shall answer or accept such calls without exception. If there is something very urgent and important, each will contact outside of the aforementioned times.

If there are important matters that have not been recorded in this joint agreement, the next agreement will be made by taking into account the

principles of needs, interests, and benefits for the Plaintiff's Child and the Defendant, and does not rule out the possibility of involving third parties or mediators. The Peace Agreement is made by both parties based on their respective awareness and neither party coerces and intervenes.

Case Number 50/Pdt.G/2021/MS.Ksg in the Syar'iyah Kuala Simpang Court

The Plaintiff and the Defendant are legal husband and wife but are currently divorced based on the Syar'iyah Kuala Simpang Court Decision Number 374/Pdt.G/2020/MS.Ksg, dated September 10, 2020 and Divorce Deed Number 0346/AC/2020/MS.Ksg, dated October 1, 2020. That there has been a dispute between the Plaintiff and the Defendant in essence the Plaintiff filed a Child Control lawsuit against the Defendant. The parties then mediated and managed to reach an agreement to reach child custody issues, both gave conditions to each party, and worked together to raise their children, while some of the agreements between the two parties are as follows; a) The Parties agree that each party shall not and shall not convey negative information to children in order for the child to hate or dislike one of the Plaintiff's or Defendant's parents. b) The Parties agree that in the event of a dispute over the content and implementation of this Peace Agreement, the Parties shall give priority to its settlement by family deliberation. c) The Parties each agree to carry out all agreements with full sincerity and responsibility and based on sincere intentions.

Analysis of Shared Parenting Judges' Decisions in Religious Courts

Talaq is the most hated halal act of Allah ¹², Because the implications are very strong and widespread, both for family life itself between father, mother and son, and for social life. Divorce has broken the very close bond of friendship between the family of the wife and husband. Divorce also gives birth to the next generation who are weak due to lack of affection as victims of husband and wife quarrels. Finally, the high divorce rate will be the cause of the fragility of a nation, the number of abandoned children increasing, the rise of prostitution by widows who can no

¹²Abu Daud Sulaiman bin al-Ash'ath al-Sijistani, *Sunan Abu Daud* (Beirut: Darul Fikri, 1994), h. 500.

longer afford to support themselves and the children they live with, juvenile delinquency and drugs and sexual abuse.¹³

Regarding who is most entitled to get hadanah, there are two categories of time for children related to hadanah, namely the period before mumayyiz and the period after mumayyiz.¹⁴ The period before mumayyiz is from birth to the age of seven or eight according to jurisprudence, before the age of 12 according to the Compilation of Islamic Law. At this time, a child cannot distinguish which ones bring good and which ones are harmful to him. Scholars conclude that mothers are more entitled to their children to perform hadanah after qualifying as caregivers (hadhin). While the period after mumayyiz is from the age of seven years until the age of puberty according to jurisprudence, after the age of 12 years according to the Compilation of Islamic Hukum. At this time a new child can distinguish which ones are harmful and which ones bring good to him. Therefore, he is considered to be able to make his own choice, he will follow his mother or follow his father.¹⁵

Regulations regarding hadanah in positive law in Indonesia are contained in Law Number 1 of 1974 concerning Marriage and Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law. Article 45 paragraph (1) of Law Number 1 of 1974 concerning Marriage states that both parents have the same obligation to maintain and educate their children as well as possible. The obligations of both parents under paragraph (2) shall continue even if the marriage between the two parents is broken.¹⁶ Hadanah after divorce is also affirmed in Article 41 letter (a) of Law Number 1 of 1974 which outlines that the result of the breakup of marriage due to divorce is that both father and mother are still obliged to maintain and educate their children, solely based on the interests of

¹³Zulkarnain Lubis, “Paradigma Makna Perceraian’, [https:// Badilag.Mahkamahagung.Go.Id/Artikel/Publikasi/Artikel/Paradigma-Makna-Perceraian-Oleh-Drs-Zulkarnain-Lubis-m-h-11-7](https://Badilag.Mahkamahagung.Go.Id/Artikel/Publikasi/Artikel/Paradigma-Makna-Perceraian-Oleh-Drs-Zulkarnain-Lubis-m-h-11-7), (Diakses Pada 12 Februari 2023, Pukul 16.33).,” n.d.

¹⁴Nurhadi, *Penyelesaian Sengketa Hak Asuh Anak Di Bawah Umur Pasca Perceraian* (Bandung: Mandar Maju, 2021), h. 4.

¹⁵Tati Nurhayati, “Pendidikan Anak Dalam Keluarga Muslim Kontemporer (Studi Kasus Pada Keluarga Dengan Ayah Dan Ibu Bekerja Di Perumahan Mega Nusa Endah Karyamulya Kota Cirebon),” *Jurnal Psikologi Pendidikan Islam* 03, no. 01 (2015).

¹⁶Kementerian Agama RI, *Bahan Penyuluh Agama* (Jakarta: Depag RI, 2001), h. 126.

the child, if there is a dispute regarding the control of the child, then the court gives its decision.¹⁷

The two articles explain that in principle both parents are obliged to take care of their children responsibly. Both parents are expected to work together in parenting for the best interests of the child. This principle implies that although custody of a child can be given to one party, the other party has the same obligation to take care of the child. The determination of child custody in no way eliminates the obligation of either party to take good and responsible care of the child.

In the study of childcare rights, the most important thing is to ensure the fulfillment and guarantee of children's basic rights, including those concerning children with disabilities. The majority of hadanah disputes submitted to the court are caused by a struggle between a married couple or between an ex-husband and his ex-wife, sometimes also caused by the fear of one spouse if one day the child will become a common feud after divorce so that one party takes the initiative to sue the court, there are also due to claims for population administration matters such as making family cards, passport and so on.¹⁸ However, whatever the variety of hadanah issues raised to court, always the court will be faced with the choice of claims /lawsuits about who will be appointed as the holder of child custody.

The basic rights of children according to Article 9 and Article 14 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection include, but are not limited to the following¹⁹:

- a. The right to be cared for by the parents themselves, unless there are valid reasons and/or legal rules showing that the separation is in the best interest of the child and is a final consideration;
- b. If a child is taken care of separately by his parents, the child has the right to meet

¹⁷Nurhadi, *Penyelesaian Sengketa Hak Asuh Anak Di Bawah Umur Pasca Perceraian* (Bandung: Mandar Maju, 2021), 4.

¹⁸M F Aulia and S Mufikoh, "Sengketa Hak Asuh (Hadanah) Anak Bagi Ibu Pasca Perceraian Kedua," *At-Tasyri': Jurnal Hukum Dan ...*, 2021, <http://jurnal.iain-ngabar.com/index.php/tasyri/article/view/217>.

¹⁹Abdul Manaf, "Putusan Badan Peradilan Di Indonesia Dalam Sengketa Perlindungan Anak (Kajian Dalam Perspektif Maqasid Al-Shari'ah Dan Hak Asasi Manusia)" (UIN Syarif Hidayatullah, 2017).

directly and have regular personal contact with both parents;

- c. The right to obtain living expenses from both parents;
- d. The right to education and instruction in the framework of his personal development and level of intelligence by his interests and talents.

Law Number 1 of 1974 concerning Marriage does not clearly describe how to resolve if a dispute arises or a dispute over child custody, who is the most entitled, father or mother. A detailed description of it is found in its main Compilation of Islamic Law (KHI) in Article 105 which governs matters, as follows:

- a. The right of custody (maintenance) of children who are not yet mumayyiz or not yet 12 years old rests with the mother;
- b. After the child is mumayyiz or twelve years old, the child has the right to choose or determine which of his father and mother is more entitled to hold custody rights over him;
- c. The cost of childcare or childcare is charged to the child's father.

The norms contained in Article 105 above show that child care is the right of their parents, so it is understood that the focus is "parenting rights", therefore expressed by M. Natsir Asnawi, the article places children more as "objects" of care, not as "subjects" of care. As a result, because the child is placed as an "object of care" rather than as a "subject of care", the process of resolving child custody disputes in court, the judge's judgment will focus on both parents, which parent is more entitled to take care of the child, not who is best able to meet the best interests of the child.²⁰

On the other hand, if the position of the child as a subject of care or legal subject is used as a central point, it carries legal implications for the attachment of human rights to children who are automatically entitled to protection from the state. Children as subjects of law, their rights and interests must be protected, so that in the context of this hadanah actually the main focus of judges in examining and considering judges in deciding disputes is how to ensure the rights and best

²⁰M. Natsir Asnawi, *Hukum Hak Asuh Anak Penerapan Hukum Dalam Upaya Melindungi Kepentingan Terbaik Anak* (Jakarta: Kencana, 2022), h. 4.

interests of children are fulfilled. This concept gives birth to a new perspective that child care is not the right of parents, but the obligation of parents to ensure the growth and development of their children properly and avoid children from the adverse effects of divorce that occur on both parents.

The concept of hadanah as a right from the mother as stated in Article 105 KHI above seems incompatible with the concept contained in Article 41 point a and Article 45 paragraph (1) of Law Number 1 of 1974 and Article 77 paragraph (3) of the KHI which states that hadanah is the obligation of parents or the rights of children. If the meaning of the concept of hadanah is the right of the mother, then according to Erfani, the mother can at any time give up her rights or just carelessly use her rights. It should be the child who is entitled to optimal care from his mother, thus meaning that hadanah is an obligation when viewed from the side of parents as hadanah holders.²¹

It is undeniable that due to the dynamics of facts and events in social reality, the norms of Article 105 KHI are not fully suitable and able to provide a fair solution, for example when the mother who should be the holder of child custody does not display the image of being a patient, loving and loving, too busy working, on the contrary, the image that should be in the mother instead appears in the father figure. On this fact, whether the mother still deserves the right to care for her child. It is certain that if the mother is still appointed to take care of the child, then what will happen is legal injustice. It is undeniable that due to the dynamics of facts and events in social reality, the norms of Article 105 KHI are not fully suitable and able to provide a fair solution, for example when the mother who should be the holder of child custody does not display the image of being a patient, loving and loving, too busy working, on the contrary, the image that should be in the mother instead appears in the father figure.²² On this fact, whether the mother still deserves the right to care for her child. It is certain that if the mother is still appointed to take care

²¹Erfani Aljan Abdullah, *Pembaruan Hukum Perdata Islam Praktik Dan Gagasan* (Yogyakarta: UII Press, 2017), h. 99.

²²Neng Eri Sofiana, "Penyelesaian Sengketa Hak Asuh Anak Melalui Litigasi: Kajian Perkara No. 011/Pdt.G/2018/PTA.Plk," *Indonesian Journal of Shariah and Justice (IJSJ)* 02, no. 01 (2022), <https://doi.org/https://doi.org/10.46339/ijss.v2i1.29>.

of the child, then what will happen is legal injustice. It is undeniable that due to the dynamics of facts and events in social reality, the norms of Article 105 KHI are not fully suitable and able to provide a fair solution, for example when the mother who should be the holder of child custody does not display the image of being a patient, loving and loving, too busy working, on the contrary, the image that should be in the mother instead appears in the father figure.²³ On this fact, whether the mother still deserves the right to care for her child. It is certain that if the mother is still appointed to take care of the child, then what will happen is legal injustice.

That phenomenon in development and praxis in court has been adjusted. Currently, the norm of the article is not the only basis for deciding disputes submitted to the court. Courts that are mandated to apply the law and even make laws according to the jargon that has been firmly attached as judge made law have accommodated that mothers are not always the only ones who have the right to take care of children. In several court rulings in this regard, especially the Supreme Court, the Supreme Court has expressly created a new law that fathers are also entitled to the custody of children even if the child is not yet mumayyiz (under 12 years old).

From several decisions issued by the Supreme Court, there are interesting considerations that later became patrons for the courts below on how to solve problems regarding hadanah which previously judges were still confined and bound by existing norms. One of them can be observed in Decision Number 110 / K / AG / 2007, the Supreme Court upheld the South Jakarta Religious Court Decision which determined child custody to the Defendant as his biological father. The Supreme Court in its judgment distorted the provision (*contra legem*) outlined by Article 105 of the KHI which stipulates that a minor child is in the care of his mother by stating²⁴:

"That the care of the child is not merely seen from who is most entitled, but looks at the fact of who is more damaging to the child, in other words, what must be prioritized is the interests of the child, not who is the most entitled. The fact that has been revealed by the First Judge is that the child will suffer more if he has to follow his

²³Irfan Nurudin, "Prinsip As-Sulhu Dalam Penyelesaian Sengketa Dalam Islam," *EKSYAR: Jurnal Ekonomi Syari'ah* 03, no. 02 (2016): 186-95, <https://ejournal.staim-tulungagung.ac.id/index.php/eksyar/issue/view/18>.

²⁴H.M. Jati Muharramsyah, *Kontekstualisasi Hukum Perdata Islam Sinergitas Teks-Konteks* (Yogyakarta: Phoenix Publisher, 2018), h. 48.

mother because the child's mother often travels abroad and it is not clear who the child should be with, while the fact that now the child is calm and serene with his father (Cassation Petitioner). That even if the child named Kiara Andjani Rachman is designated under the badhanah of the Cassation Applicant/Defendant"

From the consideration of the Supreme Court, a legal rule was obtained that in determining who is more worthy to be the holder of the child's gift after divorce, the judge must consider aspects of the benefit and best interests of the child. Moving on from this decision, in the decision on the hadanah dispute, the judges now no longer only apply the norms of Article 105 KHI alone, but pay more attention to aspects of protection of the interests and benefits of children.

The decision of the Supreme Court should be so, positioning the best interests of children as the highest principle in determining the holder of child custody and it has been in line with the norms contained in Article 14 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection and in line with the norms of Article 41 letter (a) of Law Number 1 of 1974.

Reconstruction of Hadhanah with Shared Parenting Concept in Religious Courts

The concept of shared parenting is based on an effort to accommodate the needs of children who will be better if they are cared for with parents who are separated due to divorce. The choice to apply this pattern is taken to break up the situation when both parents are fighting each other for the right to hadanah, mutual claims as to who is the most worthy and most entitled to the child's care is inevitable, not infrequently the condition is increasingly pointed and complicated, even though the court has handed down a verdict. The party who is given the right by the court does not get the right because the other party who is sentenced to give up the child does not pay attention to what has been decided by the court. Even such an attitude is often accompanied by closing the access of the hadanah holder to meet and communicate with the child. As a result, there is not the slightest gap for the holder of the hadanah instead to give attention and pour out his affection towards the child.

Such facts occur in society, such as the case of public figure Maia Estianty with Ahmad Dhani and the case of Tsania Marwa with Atalarik Syach. That is why, the

Supreme Court in the Supreme Court Circular Number 1 of 2017 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber in 2017 as a Guideline for the Implementation of Duties for the Court in Letter C number 4 of the Formulation of the Law of the Religious Chamber, outlined that in the grammar the determination of child custody (hadanah) must include the obligation of the holder of hadanah rights to provide access to parents who do not hold hadanah rights to meet with their children. Still, in the same rule, it is also stipulated that the Panel of Judges must give consideration in this regard that not giving access to parents who do not hold hadanah rights can be used as a reason to file a lawsuit for revocation of hadanah rights.²⁵

This phenomenon illustrates that separate parenting that has been practiced does not guarantee that disputes will be resolved because it often gives the impression that such a pattern only prioritizes the right of parents to take care of children instead of emphasizing parental "obligations", and children tend to be used as "objects" of parenting. In fact, the best interests of children should be used as a reference for parents to be designated as hadanah holders without questioning whether they are cared for separately or jointly.

In some cases of hadanah disputes in religious courts, the application of a pattern of joint parenting has been more successful in creating peace agreements in the mediation process rather than imposing separate parenting patterns that tend to provoke mutual claims about the parties' rights to hold their children. This is because the concept of joint parenting pattern requires that after divorce, the relationship between parents and children continues to be good and harmonious. Shared parenting provides space and opportunities for children to still be able to use time together with both parents in a balanced manner.

The implementation of the concept of shared parenting in disputes in religious courts can be found in the product of the judgment, but although all are contained in the decision, the mechanism and process vary from one decision to another. There are at least two product models issued by the court, especially regarding cases

²⁵Indah Sari Megasari, *Rekonstruksi Hak Asuh Anak Belum Mumayyiz Yang Berbasis Nilai Keadilan* (Semarang: Unissula, 2018), h. 205.

containing disputes, namely rulings and the peace deed. The latter is also in the form of a ruling, but more specifically related to the legitimacy of the peace agreement that occurs in the mediation process, both within the court and outside the court.²⁶

The concept of co-parenting in religious courts is found in the two forms of the product in question. Disputes handed down in the form of judgments are usually the final result of the initial lawsuit filed by the parties, but can also contain a peace agreement partly as a result of efforts made in the mediation process that have been contained in the amendment of the lawsuit. The decision stated in the peace deed known in legal terms as *akta van dading* is usually an affirmation by the court so that the peace agreement that occurs between the parties is obeyed as the content of the agreement.

From some of the products of the Religious Court decisions shown above, it appears that although *hadanah* disputes are resolved by litigation in court, one crucial thing is that the role of mediation is very decisive in resolving *hadanah* disputes (court-based mediation). Without neglecting the role of procedural law procedures, mediation in court has long been used as an institution that is believed to be able to minimize and simplify a dispute that goes to court so as not to pass through a trial process that is known to be slow, expensive, and convoluted.

D. Conclusion

Both parents must nurture and educate their children as well as possible. The obligations of both parents continue even if the marriage between the two parents breaks up. Both father and mother are still obliged to maintain and educate their children, solely based on the interests of the child. In principle, both parents are obliged to take care of their children responsibly. Both parents are expected to work together in parenting for the best interests of the child. Although child custody can be given to one party, the other party has the same obligation to take care of the child. The determination of child custody in no way eliminates the obligation of either party to take good and responsible care of the child. In the most important

²⁶Riduan Syahrani, *Hukum Acara Perdata Di Lingkungan Peradilan Umum* (Jakarta: Pustaka Kartini, 1998), h. 40.

childcare effort is to ensure the fulfillment and guarantee of children's basic rights, including those concerning children with disabilities. Hadanah disputes submitted to the majority court are caused by a struggle between a married couple or between an ex-husband and his ex-wife. However, whatever the variety of hadanah issues raised to court, always the court will be faced with a choice of claims / lawsuits about who will be appointed as the holder of child custody. The concept of shared parenting is one of the right choices to resolve child custody cases, this pattern is taken to break up situations when both parents fight each other for the right to hadanah, mutual claims who is the most worthy and most entitled to the child's presence, not infrequently the condition is more pointed and complicated, even though the court has handed down a verdict. With this concept of co-parenting, it is hoped that after divorce, the relationship between parents and children will continue to be good and harmonious. Shared parenting provides space and opportunities for children to still be able to use time together with both parents in a balanced manner. I The implementation of the concept of shared parenting in disputes in religious courts can be found in two products, namely rulings and peace deeds. The peace deed is actually also in the form of a ruling, but more specifically related to the legitimacy of the peace agreement that occurs in the mediation process, both within the court and outside the court. From some of the products of the Religious Court decisions shown above, it appears that although hadanah disputes are resolved by litigation in court, one crucial thing is that the role of mediation is very decisive in resolving hadanah disputes (court-based mediation).

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