



Indonesian Journal of Islamic Law, 07 (2), 2024: 30-42  
E-ISSN: 2615-7543  
DOI: <https://doi.org/10.35719/1xcbasch7>

# Protecting the Vulnerable: Child Custody Adjudication in Domestic Violence Cases in Banyuwangi Religious Court

**Putri Maja Mulia Anisa\***

*UIN Kiai Haji Achmad Siddiq Jember,  
Indonesia  
email: [pujaanisa09@gmail.com](mailto:pujaanisa09@gmail.com)*

**Badrut Tamam**

*UIN Kiai Haji Achmad Siddiq Jember,  
Indonesia  
email: [badrut.tamam@uinkhas.ac.id](mailto:badrut.tamam@uinkhas.ac.id)  
\*corresponding author*

**Ziyad Alrawasdeh**

*Istanbul University,  
Turkiye  
email: [ziyadalrawasdeh@istanbul.edu.tr](mailto:ziyadalrawasdeh@istanbul.edu.tr)*

**Article history:** Received: November 02, 2024, Revised: December 10, 2024; Accepted December 22, 2024;  
Published: December 26, 2024

## Abstract

Domestic Violence (KDRT), which also often causes child custody disputes between two parents, is one of the many factors in divorce. Judges must consider the value of justice for each party when they decide a case. Building clear standards in assessing justice and dealing with social problems in the legal realm is difficult, especially when problems continue to arise in society, especially regarding child custody after divorce due to domestic violence. The method used in this research is empirical legal research, using legislative, conceptual, and legal psychology approaches. The results of this research are that the judge uses legal interpretation and legal principles based on Law

Author correspondence email: [ijil.pascasarjana@uinkhas.ac.id](mailto:ijil.pascasarjana@uinkhas.ac.id)

Available online at: <https://ijil.uinkhas.ac.id/index.php/IJIL/Home>

Copyright (c) 2024 by the Indonesian Journal of Islamic Law



Number 23 of 2002 article 2 letter b concerning Child Protection where" the appropriate hadhanah must be based on the child's interests and by with the case being handled. If the father is at fault here then the judge must also refer to the provisions of KHI Article 105 where the custody of a child who has not yet mumayyiz will fall into the hands of the mother by using the civil law principle of proof (burden of proof), judges sometimes face external obstacles in the form of community participation in providing testimony regarding facts in the field, but if the facts and If the required evidence exists and all the interests of the child have been considered, the determination will be easier without any legal constraints or obstacles.

### **Keywords**

Judge's Considerations, Child Custody, Divorce, Domestic Violence.

### **Abstrak**

Kekerasan dalam Rumah Tangga (KDRT) sering menjadi salah satu penyebab sengketa hak asuh anak di antara orang tua. Saat hakim memutuskan kasus, penting untuk mempertimbangkan keadilan bagi kedua belah pihak. Membangun standar penilaian yang jelas dan menangani isu sosial dalam hukum adalah tantangan, terutama terkait hak asuh anak setelah perceraian akibat KDRT. Penelitian ini menggunakan metode empiris dengan pendekatan perundang-undangan, konseptual, dan psikologi hukum. Hasilnya menunjukkan bahwa hakim menginterpretasikan hukum dan prinsip berdasarkan Undang-Undang Perlindungan Anak, yang menekankan bahwa penentuan hak asuh harus berfokus pada kepentingan anak. Jika ayah terbukti bersalah, hakim merujuk pada ketentuan KHI yang menyatakan bahwa hak asuh anak yang belum mumayyiz umumnya jatuh ke ibu, dengan mempertimbangkan beban pembuktian dalam hukum perdata. Meskipun hakim kadang menghadapi kendala eksternal, seperti partisipasi masyarakat dalam memberikan kesaksian, penentuan hak asuh menjadi lebih mudah jika fakta dan bukti yang diperlukan sudah tersedia dan kepentingan anak diprioritaskan.

### **Kata Kunci**

Pertimbangan Hakim, Hak Asuh Anak, Perceraian, KDRT

## Introduction

Children are precious gifts that come from Allah SWT, which are entrusted to them as the love of their parents. Their responsibility is to properly fulfill the needs of children in all aspects. However, if there is a problem in the marriage relationship that ends in divorce, then the child feels the impact most significantly. The love from both parents that should be given to the child wholeheartedly will fade over time (Aulia, Afifah, and Putra 2021).

Every child deserves the attention of the father and mother, especially in terms of the maintenance of the child. Islamic law recognizes child custody as *hadhanah*, which means emphasizing efforts to care for children, from caring for them to protecting them from harm. At the age of children, of course, they still need the presence and attention of both parents, because, in the process of caring for children, cooperation between father and mother is very important (Fikri and Muchsin 2022).

In ensuring good child growth, of course good care is needed as well, in this case, the formation of a harmonious and peaceful home life in a marriage must also be considered. However, not a few household life will run smoothly according to the wishes of every human being, as for the ups and downs of the problems that each couple will face in married life and how each partner can react to it. The marriage relationship that has been formed may lead to divorce, if the problem cannot be overcome (Portrie and Hill 2005).

Many factors lead to domestic disputes leading to divorce, one of which is domestic violence which also results in child custody disputes between the parents. Domestic violence may not look at gender, but in fact, according to data presented by the Ministry of Women and Children's Empowerment (PPPA), women tend to experience more abuse in the household. Due to the prevalence of patriarchal culture that causes the husband to have power and authority in the household, this relationship is the beginning of the imbalance between husband and wife, so often the husband considers that after marriage the wife is his property, and his wife has no power over herself (Alimi and Nurwati 2021).

One of the common causes of divorce is violence, and divorce can hurt every child involved. As we know one of the rampant acts of

domestic violence is in the form of physical action, every child who witnesses firsthand how these acts of violence occur around him or happen to him can certainly experience trauma, and prolonged stress, even disturb the child's psychological condition (Nurfaizah 2023).

Based on the Banyuwangi Religious Court case recapitulation report, there were 4,964 divorce cases decided by the Banyuwangi Religious Court in 2023, 139 divorce cases were due to domestic violence, and 10 of them were child control / child custody cases. There are several cases of child custody disputes due to divorce due to domestic violence and two of these cases have been decided related to disputes and determination of child custody due to divorce due to domestic violence in 2023 with decision numbers 0322/Pdt.G/2023/PA.Bwi and 0998/Pdt.G/2023/PA.Bwi. The judge's consideration in deciding a case must pay attention to the value of justice for the parties. Obtaining a clear standard in assessing justice and overcoming social challenges in the realm of law is difficult, especially when problems continue to develop in society, especially related to child custody after divorce due to domestic violence (Sanjaya 2015). Not a few parents who experience divorce due to domestic violence, will have an impact on their children as victims of custody battles. Parents remain responsible for caring for their children until they are mature and independent, even after the breakup of the marriage.

The Hadith narrated by Abu Dawud explains that after a divorce the maintenance of the child should be left to the mother, especially if the mother has not married another man. However, the custody of the child will be under the authority of the mother, the father is also entitled to the care of his child after divorce if the mother does not meet the requirements to take care of her child, such as apostasy, bad behavior that can affect the child, insanity, and one of them as described in the hadith, namely not married to another man. Because in this case what needs to be considered first is the ability and sense of being able to provide good care and a sense of security for children victims of divorce (Hifni 2016).

The commitment of parents in taking care of their children after separation is also contained in Marriage Law Number 1 of 1974 where parents who have separated are still obliged to take care of their children until they grow up and can live alone. Likewise, contained in KHI article 105, that after the parents divorce the care of children who

are not yet *mummayiz* is the right of the mother, while children who are already *mummayiz* then have the right to choose for their maintenance to follow their mother or father, and the cost of maintaining the child will be borne by the father (Rohmah, Suyaman, and Mulyanti 2023).

The facts and evidence disclosed in the trial are very necessary to understand how parents care for their children during the marriage period (Stephens 2021). That it makes it easier for a judge to determine the decision to be issued and the need for legal interpretation from the judge who will decide the case of child control regarding the conception of child protection, considering that as explained in Law No. 23 of 2002 concerning child protection article 3 it is emphasized that:

*“Child protection aims to ensure the fulfillment of children's rights so that they can live, grow, develop, and participate optimally by the dignity and dignity of humanity, and receive protection from violence and discrimination, for the realization of quality, noble, and prosperous Indonesian children”.*

The Religious Courts as a government institution have an important role to play in protecting children's rights through judicial decisions. This can provide appropriate protection for children affected by their parent's divorce, given that the decision is applied with care and respect for children's rights. Religious courts must prioritize the interests of children who are involved as victims in their parents' disputes (Suadi 2022). The large number of claims related to child custody and maintenance that enter the Religious Courts is a particular concern that needs to be resolved, where the determination of *hadhanah* and the determination of the amount of child maintenance to be determined must ensure that all basic rights and main interests of children can be maximally channeled (Suadi 2018).

Judges will use legal provisions as a basis for issuing their decisions. As well as, the Law, the Compilation of Islamic Law, and other reliable sources of law. As well as the need for legal interpretation and legal principles for each judge in dealing with each case submitted to him. However, creating a judge's decision based on laws and regulations or other sources of legal certainty, to realize the existence of justice and benefits for all litigants is not an easy thing, this is due to the difficulty of finding benchmarks for the concept of justice in a judge's decision. In this case, a judge is required to have a sharp understanding of the state of society, so that in his considerations he

does not always base his arguments on legal sources and materials alone. There will be several legal obstacles or obstacles that will be faced by judges when carrying out their duties in adjudicating, examining, and deciding a case, especially in cases of child custody disputes due to divorce due to domestic violence (Wantu 2014).

This research uses empirical legal research methods or Socio-legal research, which observes the law based on real actions that occur in society, as a manifestation of social phenomena experienced by individuals in group life. By using the first 3 approaches to legislation. Second conceptual approach. The third approach is legal psychology. The primary data sources used are interviews with sources or informants, namely judges of the Banyuwangi Religious Court, then secondary data from several library documents and legal materials available.

## **Methods**

The method used by researchers is empirical legal research or Socio-legal research, which observes the law based on real actions that occur in society, as a manifestation of social phenomena experienced by individuals in group life. By using the first 3 approaches legislation is a method that uses laws to be studied, as well as binding rules related to legal issues that are the subject of research (Muhaimin 2020). The second conceptual approach is the thinking that exists in legal science as the basis for this approach. Third, the legal psychology approach is an approach through analyzing the human psyche from a legal perspective (Muhaimin 2020).

This research took place at the Banyuwangi Religious Court class 1 A, the data sources used were primary and secondary. Primary data sources in the form of source interviews or informants here the author interviews Banyuwangi Religious Court judges, then secondary data by collecting some literature documents and legal materials available. The techniques used in data collection are interviews, observation, and documentation. The author uses several steps to analyze the data, namely data reduction, data presentation, and conclusion drawing.

## Result and Discussion

### *Legal interpretation used by judges at the Banyuwangi Religious Court in resolving child custody disputes in divorce cases due to domestic violence.*

The court has the right to decide which of the two parents has the right to take care of him (guardianship) for children who are not yet mature due to the divorce of their parents. This is explained in Article 229 of the Civil Code. Every judge in giving his consideration when deciding any case where in providing legal interpretation of case settlement related to child custody due to divorce due to domestic violence, is required to have the intellectual ability to provide his decision, which is balanced with morals and a high sense of integrity, to provide a fair and beneficial decision for the community.

A judge will always consider the rights and interests of the child above others, not the interests of the parents. Normally based on KHI article 105 a child under 12 years of age will be under the care of his mother, and he can choose between his father and mother when the child is *mumayyiz*. However, this rule cannot be used as a reference if the mother cannot fulfill the mandate in the care of her child, the judge will appoint her father as the custodian because he is considered capable of fulfilling his responsibilities in the care of the child. However, if both of them are not trustworthy, then the maintenance of the child can be transferred to the family on the mother's side. This has been based on Law No. 35 of 2014 Article 26 paragraph (2) of the amendment to Law No. 23 of 2002 concerning Child Protection.

*"If the parents are absent, or their whereabouts are unknown, or for some reason cannot carry out their obligations and responsibilities, the obligations and responsibilities referred to in paragraph (1) may be transferred to the family, which shall be carried out by the provisions of laws and regulations."*

The legal interpretation given by the Banyuwangi Religious Court judge in resolving child custody disputes due to divorce due to domestic violence here is based on Law Number 23 of 2002 article 2 letter b concerning Child Protection where the determination of proper *hadhanah* must be based on the interests of the child. As well as based on existing case data, the Banyuwangi Religious Court judge also uses KHI Article 105 in his legal basis, because as a father who is proven to

have committed acts of domestic violence in the family, the judge will determine that the maintenance of the child will be given to the mother, if the mother is trustworthy and able to fulfill her duties, especially since the child is not yet *mumayyiz*, this is done because a judge prioritizes the welfare of the child, a child who witnesses or is a victim of domestic violence in his home will be at higher risk of experiencing physical and psychological health problems and it is feared that the violence will be experienced again, if he continues to live with the perpetrator of domestic violence (Tamam et al. 2023). However, the father still has the right to visit to provide affection and help educate his child as long as the child wants and does not interfere with all his activities.

It can be seen here that judges tend to use substantive justice in solving this problem where justice relates to how decisions or determinations made by judges in resolving cases are based on the principles of rationality, honesty, impartiality, without discrimination, and based on the judge's conviction, because basically justice does not only cover juridical issues, but is also based on public morality and human values, so as to provide satisfaction for the community (Syamsudin 2014).

### ***Legal principles used by judges at the Banyuwangi Religious Court in resolving child custody disputes in divorce cases due to domestic violence.***

Legal principles are fundamental truths that serve as guidelines for thought and action, forming the basis of a legal system. In the realm of civil law, several essential principles underpin its framework, reflecting fairness, responsibility, and societal welfare.

The principle of sovereignty of contract emphasizes the freedom of parties in formulating agreements, granting them autonomy to determine the terms of their contracts (Hasneziri 2023). This principle ensures that individuals or entities engaged in contractual relations can exercise their rights without undue interference. Complementing this is the principle of property rights protection, which guarantees the legal safeguarding of ownership, affirming the rights of individuals and organizations over their possessions (Mayasari et al. 2023).

Responsibility forms another cornerstone, articulated through the principle of legal responsibility (Foran 2022). This principle holds individuals and entities accountable for negligent actions that result in



harm to others (Foran 2022). In cases where harm or damage occurs, the principle of restitution comes into play, mandating the restoration or compensation for losses suffered due to legal violations by another party.

The legal system also recognizes the burden of proof principle, which places the onus of providing evidence on the party making a claim, ensuring that assertions are substantiated with credible proof (Khalid 2021). Balancing individual rights with societal needs, the principle of public interest allows for the regulation of private rights to promote the welfare of the broader community. Lastly, the principle of fair compensation ensures that individuals or entities who have suffered losses are equitably compensated, reflecting the importance of proportionality and justice in civil law.

These principles collectively underscore the ethical and functional foundation of civil law, ensuring a balance between individual autonomy, accountability, and the greater good of society (Rangkuti 2023).

Banyuwangi Religious Court judges apply the principle of passive judges, especially in resolving child custody cases due to divorce due to domestic violence, as explained in *Replacement of de Rechtsvodering (R.v)*, the principle of passive judges means that the scope of the case is decided by the parties. This means that the judge is limited to seeking the formal truth based on the arguments and truths presented by both parties during the trial. This principle also emphasizes that the judge only acts as a receiver and examiner of matters submitted by the plaintiff and defendant. This is based on Article 178 paragraph (3) HIR / 189 paragraph (3) Rbg, where "judges are obliged to hear the entire lawsuit and are prohibited from ruling on cases that are not prosecuted or granting more than what is demanded." (Junaidi and Merta 2020).

***Legal constraints or obstacles carried out by judges in the process of determining child custody in divorce cases due to domestic violence at the Banyuwangi Religious Court.***

As one of the law enforcers, judges have the task of determining a decision in a case involving disputing parties. When issuing a decision there will be obstacles or none at all, it depends on the case to be resolved. There are several difficulties faced by Banyuwangi

Religious Court judges when carrying out their responsibilities to examine and decide cases. It will depend on the case handled. External constraints in the form of community participation in the course of justice are certainly very necessary as well as being a witness to the facts that occur in the field, this is done in to realize a fair, useful judge's decision and create legal certainty (Wahab Aznul Hidayat 2023).

The Banyuwangi Religious Court judge will consider two elements related to determining child custody due to divorce due to domestic violence, first, a judge will look at the evidence and facts that exist during the trial process, such as during marriage whether it is proven that one of the parents has committed domestic violence, or other evidence that is tied to the case, because here the civil judge will be passive which later the decision issued will be based on evidence. Both panels of judges will prioritize all matters concerning children's rights, ranging from maintenance, fulfillment of nafkah, education, affection, and so on (Nasution, Triana, and Muchtar 2013).

If the two elements mentioned have been fulfilled, the determination of child custody due to divorce due to domestic violence will be easy to do and there will be no obstacles or legal obstacles, with whom the child has the right to be cared for and raised, basically a judge will see and consider the welfare and safety of the child (Dewi 2023). Also, the decision issued has gone through careful and good consideration by the judge, so that it will reflect justice, benefit and create legal certainty for the litigants.

## **Conclusion**

Legal interpretation and legal principles used by Banyuwangi Religious Court judges in resolving child custody disputes in divorce cases due to domestic violence based on Law Number 23 of 2002 Article 2 letter b concerning Child Protection where the determination of proper hadhanah must be based on the interests of the child, As well as by the case handled if the father is guilty here, the judge also refers to the provisions of KHI Article 105 where the custody of children who are not yet mumayyiz will fall into the hands of the mother by using the principles of civil law proof (burden of proof) against the parties to the case, so that based on the facts and evidence available the judge can determine between the two parents who are entitled to the maintenance of the child.

Regarding the obstacles or obstacles faced by Banyuwangi Religious Court judges in determining child custody due to divorce due to domestic violence, judges sometimes face external obstacles in the form of community participation in providing testimony related to facts in the field, but if the facts and evidence needed are available and all the interests of the child have been considered, the determination will be easier without any legal obstacles or obstacles. The judge will consider the welfare and safety of the child in determining who has the right to care for and raise them.

## Bibliography

- Alimi, Rosma, and Nunung Nurwati. 2021. "Faktor Penyebab Terjadinya Kekerasan Dalam Rumah Tangga Terhadap Perempuan." *Jurnal Penelitian Dan Pengabdian Kepada Masyarakat (JPPM)* 2 (2): 211. <https://doi.org/10.24198/jppm.v2i2.34543>.
- Aulia, Mohamad Faisal, Nur Afifah, and Gilang Rizki Aji Putra. 2021. "Hak Asuh Anak Dalam Keluarga Perspektif Keadilan Gender." *SALAM: Jurnal Sosial Dan Budaya Syar-I* 8 (1): 279-96. <https://doi.org/10.15408/sjsbs.v8i1.19388>.
- Dewi, A A Mas Adi Trinaya. 2023. "IMPLEMENTATION OF JUDGES'DECISIONS ON CHILDREN AFTER MARRIAGE DIVISION IN THE PURUSA SYSTEM." In *Proceedings of The International Conference on Multi-Disciplines Approaches for The Sustainable Development*, 331-38.
- Fikri, Fikri, and Agus Muchsin. 2022. "HAK-HAK ANAK DALAM HUKUM KELUARGA ISLAM Pendekatan Yurisprudensi Di Pengadilan Agama." IAIN Parepare Nusantara Press.
- Foran, Michael. 2022. "THE CORNERSTONE OF OUR LAW: EQUALITY, CONSISTENCY AND JUDICIAL REVIEW." *The Cambridge Law Journal* 81 (2): 249-72. <https://doi.org/10.1017/S000819732200023X>.
- Hasneziri, Luan. 2023. "The Principle of Autonomy of Contractual Will." *European Journal of Multidisciplinary Studies* 8 (1): 134-47.
- Hifni, Mohammad. 2016. "Hak Asuh Anak Pasca Perceraian Suami Istri Dalam Perspektif Hukum Islam." *Bil Dalil: Jurnal Hukum*

- Junaidi, Junaidi, and M Martindo Merta. 2020. "Asas Hakim Pasif Dalam Reglement Op De Rechtsvordering (R.V) Dan Prinsip Hakim Aktif Dalam Herziene Indonesisch Reglement (Hir) Dalam Penyelesaian Perkara Perdata Di Pengadilan." *Qistie* 13 (1): 60. <https://doi.org/10.31942/jqi.v13i1.3426>.
- Khalid, Nasirullah. 2021. "Presumption of Innocence in the Islamic Law." *Addaiyan Journal of Arts, Humanities and Social Sciences*. <https://doi.org/10.36099/ajahss.3.1.2>.
- Mayasari, Lutfiana, Nur Triyono, Ulfa Wulan Agustina, and Beta Pujangga Mukti. 2023. "Inheritance Rights of Inactive Digital Accounts: Qiyās-Based Legal Protection." *AL-HUKAMA: The Indonesian Journal of Islamic Family Law* 13 (2): 253-75.
- Muhaimin. 2020. *Metode Penelitian Hukum*. Mataram: Mataram University Perss.
- Nasution, Hotnidah, Windy Triana, and Ahmad Rifqi Muchtar. 2013. "Ensuring Children's Rights after Divorce in Indonesia: Religious Court Decisions on Nafkah Madiyah." *Al-Ahwal: Jurnal Hukum Keluarga Islam* 17 (1). <https://doi.org/https://doi.org/10.14421/ahwal.2024.%25x>.
- Nurfaizah, Iva. 2023. "Dampak Kekerasan Dalam Rumah Tangga (KDRT) Terhadap Kesehatan Mental Anak." *Gunung Djati Conference Series* 19: 95-103.
- Portrie, Torey, and Nicole R. Hill. 2005. "Blended Families: A Critical Review of the Current Research." *The Family Journal*. <https://doi.org/10.1177/1066480705279014>.
- Rangkuti, Maksum. 2023. "Hukum Perdata Nasional: Pengertian, Prinsip, Aspek, Dan Undang-Undang." *Fahum.Umsu.Ac.Id*. 2023. <https://fahum.umsu.ac.id/hukum-perdata-nasional-pengertian-prinsip-aspek-dan-undang-undang/>.
- Rohmah, Asantia Puspita, Prahasti Suyaman, and Asti Sri Mulyanti. 2023. "Determination of Custody Rights (Hadhanah) for Children Who Are Not Yet Mumayiz to the Father." *Rechtsnormen Journal of Law* 1 (2): 48-57. <https://doi.org/10.55849/rjl.v1i2.307>.

Putri Maja Mulia Anisa, et al.

Sanjaya, Umar Haris. 2015. "Keadilan Hukum Pada Pertimbangan Hakim Dalam Memutus Hak Asuh Anak." *Yuridika* 30 (2): 356.

Stephens, Sharon. 2021. *Children and the Politics of Culture*. Princeton University Press.

Suadi, Amran. 2018. "Peranan Peradilan Agama Dalam Melindungi Hak Perempuan Dan Anak Melalui Putusan Yang Memihak Dan Dapat Dilaksanakan / the Role of Religious Court in Women and Children Rights Protection Through Partial and Executable Decision." *Jurnal Hukum Dan Peradilan* 7 (3): 353. <https://doi.org/10.25216/jhp.7.3.2018.353-374>.

— — —. 2022. "Protection of Women's And Children's Rights Based On System Interconnection: A New Paradigm of Execution of Women and Children's Rights after Divorce." *Jurnal Hukum Dan Peradilan* 11 (3): 499-522.

Syamsudin, M. 2014. "Keadilan Prosedural Dan Substantif Dalam Putusan Sengketa Tanah Magersari." *Jurnal Yudisial* 7 (1): 18-33.

Tamam, Badrut, Meka Dina Ramadhani, Nawawi Nawawi, Vais Vais, Ririn Sofiana, Farah Rofiqoh A, and Syafril Wicaksono. 2023. "The Social Acculturation of The Abhekalaghi Tradition in Tempurejo from The Perspective of Islamic Law and Constitution No. 16 Of 2019." *Fenomena* 22 (2 SE-Articles): 167-82. <https://doi.org/10.35719/fenomena.v22i2.148>.

Wahab Aznul Hidayat. 2023. "The Role of Witness and Victim Protection Agency for Imekko Tribe in Criminal Justice System in Sorong." *Law and Justice* 8 (2): 176-91. <https://doi.org/10.23917/laj.v8i2.2363>.

Wantu, Fence M. 2014. "KENDALA HAKIM DALAM MENCIPTAKAN KEPASTIAN HUKUM, KEADILAN, DAN KEMANFAATAN DI PERADILAN PERDATA." *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 25 (2): 205. <https://doi.org/10.22146/jmh.16092>.