



Judicial Discretion in Post-Divorce Child Custody Determinations Based on the Best Interests of the Child Principle: A Perspective of the Compilation of Islamic Law (KHI)

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Divorce in modern society gives rise to various complex legal implications, particularly regarding the protection, rights, and well-being of children. In Islamic family law, the concept of *hadhanab*, or the right of custody, occupies a central position. This study aims to analyse positive law and Islamic law texts regarding the existence of *hadith* and to evaluate the consistency of its application in Religious Courts to ensure legal certainty oriented toward child protection. The research method used is normative legal analysis, with a descriptive-analytical approach, based on library research. The results of the study indicate that although Article 105 of the Compilation of Islamic Law (KHI) grants the mother priority in the custody of a minor child (*mumayyiz*), in practice, judges in Religious Courts do not rigidly apply this rule. Judges exercise legal *ijtihad* and legal discovery by prioritising the child's best interests. Judges' considerations are multidimensional; therefore, *hadhanab* is viewed as a manifestation of parents' fundamental responsibility. Consequently, rulings by judges within the Religious Court system place greater emphasis on the party best able to ensure the child's holistic well-being and development rather than merely adhering to the literal text of the law.



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INTRODUCTION

Divorce is not merely the termination of a marital relationship but also a legal phenomenon that has become increasingly prevalent within the dynamics of contemporary society. This phenomenon generates a range of complex legal consequences, particularly concerning the protection of children's rights, legal standing, and future welfare, as they are among the parties most directly affected by the breakdown of the family institution.¹

¹ Titin Samsudin et al., "Legal Controversy Over Divorce Filed by Wives in Religious Courts in Indonesia," *Samarab: Jurnal Hukum Keluarga Dan Hukum Islam* 9, no. 3 (2025).

Within the framework of Islamic family law, the institution of *badhanah* (child custody) occupies a central and indispensable position. Its role is crucial as the primary mechanism for ensuring legal protection for children, guaranteeing that their fundamental rights, including financial support, parental care and affection, as well as education, remain adequately fulfilled despite the disintegration of their parents' marital relationship.²

As cited by Jumardin et al. from Adristi, the existence of *badhanah* disputes in the Religious Courts demonstrates that parental domestic conflicts often place children in a highly vulnerable position. Although Islamic family law, through the Compilation of Islamic Law (KHI), has established provisions regarding age limits and criteria for custody holders, in practice, disputes brought before the courts often drag on due to differing interpretations of the moral suitability and financial capability of the parties. Consequently, judges are required to play an active role in rendering decisions that best safeguard the welfare and interests of the child.

In adjudicating *badhanah* cases, judges in the Religious Courts are not solely confined to a textual or rigid application of the law based on the literal wording of statutory provisions. Rather, judges frequently engage in legal *ijtihad* and legal discovery (*rechtsvinding*) to uncover more substantive notions of justice, prioritizing the welfare of the child above mere formal legal rules through the application of the *Best Interests of the Child* principle.³

Furthermore, the development of the child protection paradigm within the Indonesian legal system has positioned children as legal subjects whose rights must be respected and protected.⁴ Child protection is no longer oriented solely toward parental rights over children; instead, it emphasises the fulfilment of children's physical, psychological, social, and educational needs.⁵ Consequently, in *badhanah* disputes, the question of who is legally entitled to custody should shift to determining which party is better able to ensure the child's optimal growth and development in accordance with the child's best interests.

On the other hand, Article 105 of the Compilation of Islamic Law (KHI), which grants custodial priority to the mother of a child who has not yet reached the age of *mumayyiz*, often encounters challenges in its implementation. In many instances, the mother, who is normatively entitled to custody, may be deemed less capable of fulfilling parental responsibilities due to factors such as economic conditions, social environment, health issues, or moral considerations.⁶ Conversely,

² Tarmizi Tarmizi, Yulia Pradiba, and Karmila Usman, "Post-Divorce Child Custody (*Hadhanah*) and Its Legal Consequences," *Journal Ilmu Hukum Pengayoman* 1, no. 1 (2023).

³ M Ridho Firdaus and Hendri Sayuti, "Prioritas Kemaslahatan Anak (Maslahah) Dalam Penyelesaian Sengketa Hadhanah Berdasarkan Tinjauan Kaidah Fiqiyah," *Journal Sains Student Research* 4, no. 1 (2026): 344–51.

⁴ Rifdah Alifiyah and Isa Anshori, "Legal Protection for Children in Cases of Domestic Violence in the Indonesian Households," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 2 (2023): 348–61.

⁵ Nadjma Yassari, Lena-Maria Möller, and Imen Gallala-Arndt, *Parental Care and the Best Interests of the Child in Muslim Countries* (Springer, 2017).

⁶ Nasaruddin Mera et al., "Child Custody Rights for Mothers of Different Religions: Maqāṣid Al-Sharī'ah Perspective on Islamic Family Law in Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 3 (2024): 1645–68.

the father, who is not normatively prioritised, may be considered more capable of ensuring the child's welfare and protection. Such circumstances demonstrate that the application of the law cannot be carried out mechanically; instead, it requires a careful assessment of the facts revealed during judicial proceedings.

These conditions highlight the crucial role of judges not only as law enforcers but also as guardians of substantive justice. In exercising their authority, judges are required to balance legal certainty, justice, and legal utility.⁷ Judicial decisions must not only conform to applicable legal norms but also provide effective protection for the rights of children as the most vulnerable parties in *badhanab* disputes. Therefore, an analysis of judicial reasoning in *badhanab* cases is essential to determine the extent to which the principle of the best interests of the child is genuinely implemented within the practice of Religious Court adjudication.

Given the complexity of these issues, a comprehensive juridical study on the existence and implementation of *badhanab* is highly necessary. Such a study aims not only to examine the provisions of positive law and Islamic law from a theoretical perspective but also to evaluate their consistency in judicial practice, ensuring legal certainty oriented toward the protection of children's fundamental rights.

METHOD

This study employs a normative juridical research method with a descriptive-analytical specification.⁸ The selection of this method is based on its focus on legal norms, particularly those relating to *badhanab*, judicial considerations, and the application of the *best interests of the child* principle in court decisions.⁹ A normative approach enables researchers to examine law as a set of norms embodied in statutory regulations, legal doctrines, and judicial decisions.

Operationally, the research was conducted through several stages. First, the researcher identified the legal issues that form the focus of the study: how judges apply the provisions of *badhanab* in divorce cases and the extent to which the *best interests of the child* principle is incorporated into judicial reasoning. Second, primary legal materials were collected in the form of final and binding Religious Court decisions (*inkracht*), particularly those concerning child custody disputes. At this stage, relevant decisions were selected based on their conformity with the research questions.

Third, secondary legal materials were gathered, including the Compilation of Islamic Law (KHI), the Marriage Law, the Child Protection Law, textbooks on

⁷ Muhamad Amin, Murdiono Murdiono, and Renat Sarimov, "Evolution of the Islamic Judicial System: Justice in the Governance of Caliph 'Umar Ibn Al-Khattāb," *Al-Abkam: Jurnal Ilmu Syari'ah Dan Hukum* 8, no. 2 (2023): 133–45.

⁸ John Roldan Torres, "Navigating Legal Knowledge: A Comparative Analysis of Quantitative, Qualitative, Applied, and Descriptive Research Methodologies in Law," *Qualitative, Applied, and Descriptive Research Methodologies in Law* (May 17, 2025), 2025.

⁹ Muhamad Isna Wahyudi, "Judges' Legal Reasoning on Child Protection: Analysis of Religious Courts' Decisions on the Case of Child Parentage," *Al-Jami'ab: Journal of Islamic Studies* 55, no. 1 (2017): 127–54.

Islamic family law, journal articles, and previous studies related to *hadhanah* and judicial discretion. These materials were used to construct the theoretical framework and to serve as the basis for interpreting the court decisions under analysis.

Fourth, content analysis of the selected court decisions examined the judges' legal reasoning (*ratio decidendi*). The analysis focused on the legal grounds relied upon by the judges, the factors considered in determining child custody, and the consistency of such considerations with Article 105 of the Compilation of Islamic Law and the *best interests of the child* principle.

Fifth, the findings from the analysis of judicial decisions were compared with the applicable positive law and relevant legal theories to determine whether judges merely applied legal norms textually or engaged in legal discovery (*rechtsvinding*) to realise the child's best interests. Subsequently, the researcher developed descriptions and interpretations of these findings to formulate the study's conclusions.

Accordingly, the operationalisation of this research method encompasses not only the collection of legal literature and court decisions but also the identification of legal issues, the selection of relevant cases, the analysis of judicial reasoning, the interpretation of legal norms, and the formulation of conclusions based on a qualitative approach.

RESULTS AND DISCUSSION

The Concept and Legal Framework of *Hadhanah* in Islamic Family Law

According to Ghozali, as cited in Fitrotun, Islamic jurists define *badhanah* as the continuous care and maintenance of children who are not yet legally competent to manage their own affairs. The scope of *badhanah* includes the provision of adequate living facilities, the protection of children from all forms of harm, and educational guidance encompassing physical, spiritual, and intellectual development. The essence of child custody lies not merely in protection but also in preparing a generation that is personally and socially resilient, capable of facing the challenges of life independently and assuming full responsibility for its actions in the future.¹⁰

Hadhanah aims to safeguard and promote the interests of children and constitutes a tangible manifestation of the legal commitment to ensuring that every child receives the best possible protection from his or her parents. This principle is consistent with statutory mandates recognizing that a child's right to life, survival, and optimal development represents a fundamental human right that must be protected by all elements of society. From a broader perspective, *badhanah* views the right to life not merely as a matter of positive law but as a natural right (*fitriah*) bestowed directly by Allah SWT. Therefore, any violation or neglect of custodial

¹⁰ Siti Fitrotun, "Perlindungan Anak Dalam UU Nomor 35 Tahun 2014 Dalam Perspektif Fikih Hadhanah," *Istidal: Jurnal Studi Hukum Islam* 9, no. 1 (2022): 83–97.

responsibilities is regarded not only as a moral failure but also as conduct carrying legal consequences and sanctions for the responsible party.¹¹ Allah SWT states:

“Indeed, those who kill their children foolishly without knowledge and forbid what Allah has provided for them, inventing lies against Allah, have certainly suffered loss. They have gone astray and are not rightly guided.” (Qur'an, Surah Al-An'am [6]: 140).

As a manifestation of Islamic legal certainty within Indonesia's positive legal system, *hadhanah* is regulated under Article 105 of the Compilation of Islamic Law (KHI), which provides:

“The care or custody of a child who has not yet reached the age of *mumayyiz* or who is under twelve years of age shall belong to the mother. The custody of a child who has reached the age of *mumayyiz* shall be determined according to the child's choice between the father and the mother as the custodian. The costs of maintenance shall be borne by the father.”¹²

Proper and effective parenting by a *hadhin* (custodian) constitutes a fundamental pillar of Islamic family law that harmonizes children's rights with parental obligations. Doctrinally, *hadhanah* encompasses both the authority and responsibility to care for, nurture, and educate children who have not yet reached the stage of *mumayyiz*, namely the age at which a child acquires sufficient maturity to distinguish between benefit and harm independently. Although the significance of this principle often becomes most apparent following divorce, the essence of *hadhanah* extends far beyond disputes over legal custody status in court. Rather, it encompasses the broader objective of ensuring holistic protection and continuous care in accordance with the best interests of the child.¹³

The Practice of Child Custody Determinations in Religious Courts

In the practice of Religious Courts, *hadhanah* disputes are among the most frequently litigated issues in divorce proceedings. This is largely due to conflicts of interest between parents, both of whom often believe that they possess the rights

¹¹ Niken Sylvia Puspitasari et al., “Tinjauan Yuridis Normatif Perlindungan Anak Dalam Perspektif Konsep Hadhanah Dan Undang-Undang Nomor 35 Tahun 2014: Normative Juridical Review of Child Protection in the Perspective of Hadhanah's Concept and Law Number 35 of 2014,” *Bustanul Fuqaha: Jurnal Bidang Hukum Islam* 5, no. 2 (2024): 309–21.

¹² Abdul Gani Abdullah, *Pengantar Kompilasi Hukum Islam Dalam Tata Hukum Indonesia* (Gema Insani, 1994).

¹³ Wardatul Jannah, “Implementasi Hadhanah Terhadap Anak Jalanan Perspektif Hukum Islam (Studi Kasus Yayasan Bina Matahari Bangsa): Wardatul Jannah,” *Jurnal Cerdas Hukum* 3, no. 2 (2025): 310–18.

and responsibilities associated with child custody.¹⁴ Normatively, judges refer to the Compilation of Islamic Law (KHI), particularly Article 105, which grants priority to the mother in the custody of children who have not yet reached the age of *mumayyiz*. Nevertheless, in practice, judges are not always bound rigidly by this provision and may take into account the principle of *ius contra legem* when necessary to achieve justice.¹⁵

In deciding *badhanab* cases, judges also consider the facts revealed during trial, including the child's psychological condition, the child's living environment, and the parents' ability to meet the child's needs. This demonstrates that law is understood not merely as a set of written norms but also as an instrument for achieving substantive justice.¹⁶ Although mothers are generally given priority in the custody of children who have not yet reached the age of *mumayyiz*, various judicial precedents indicate that custody rights (*badhanab*) may be awarded to the father. This legal phenomenon usually arises when judges, through an objective assessment of the evidence presented, determine that the mother no longer satisfies the qualifications required of a *badhin* (custodian). Such incapacity may be assessed based on moral deficiencies, severe economic instability, or psychological and physical conditions that could jeopardise the child's welfare, development, and future well-being.

Several judicial decisions also demonstrate interpretations that differ from the textual provisions of the Compilation of Islamic Law regarding child custody. One such example is Decision Number 183/Pdt.G/2021/PA.Mdo, as cited by Mustaring. In its ruling, the panel of judges designated the plaintiff (the biological father) as the lawful holder of *badhanab* rights over his two children based on a series of legal facts established during the proceedings. A crucial fact revealed that the children's biological mother had passed away in 2020. Following her death, the children had been under the de facto care of the defendant, namely their maternal grandmother, who was a non-Muslim. Although the Compilation of Islamic Law establishes a hierarchy of custodial priority, the judges adopted a progressive approach by determining that transferring custody to the father was necessary to ensure consistency between the children's religious identity and that of their custodian. The court further considered that such a decision would better safeguard the children's welfare and ensure they are raised in an environment offering greater spiritual and emotional stability.¹⁷

¹⁴ Irma Nawa Sari, "Analisis Yuridis Perbandingan Hak Asuh Anak Pasca Perceraian Dalam Sistem Hukum Keluarga Islam Indonesia," *Journal of Family and Sharia* 1, no. 1 (2025): 38–44.

¹⁵ Syamsul Darlis, "Hak Asuh Anak Di Bawah Umur Diberikan Kepada Ayah Pasca Perceraian Perspektif Undang-Undang Perkawinan Dan Kompilasi Hukum Islam," *QAIMUDDIN: Journal of Constitutional Law Review* 2, no. 1 (2022).

¹⁶ Rizki tara Ninditya and Yusup Hidayat, "Analisis Putusan Pengadilan Dalam Sengketa Hak Asuh Anak Berdasarkan Kepentingan Terbaik Anak (Studi Putusan Pengadilan Agama Kudus Nomor 000/Pdt. G/2023/Pa. Kds)," *Unes Journal Of Suara Justisia* 9, no. 4 (2026): 811–24.

¹⁷ Rokiah Binti Mustaring, "Analisis Putusan Hakim Terhadap Gugatan Hak Asuh Anak Di Pengadilan Agama Manado Perspektif Perlindungan Hak Anak," *I'tisam: Journal of Islamic Law and Economics* 2, no. 2 (2023).

Judicial Considerations in Deciding *Hadhanah* Cases

Judicial consideration constitutes the core element of every child custody decision. Judges should not merely act as the "mouthpiece of the law" by mechanically applying legal texts; rather, they must consider the realities and circumstances of each case. In child custody disputes, judges are required to prioritise the child's future welfare and well-being above all other interests.¹⁸ One of the most important principles guiding judicial decision-making is the *best interests of the child* principle.¹⁹ Through this principle, judges are obligated to place the child's welfare and future development at the forefront of their considerations. Accordingly, when parents contest custody rights, judges do not favour the party with greater financial resources or the party who claims a stronger entitlement to custody; instead, they determine which parent is better able to ensure the child's physical needs, emotional care, and psychological development.

In addition to considering the child's welfare, judges carefully examine each parent's conduct and moral character. This assessment is particularly important because parents serve as the primary role models for their children. If one parent is proven to have engaged in harmful conduct, such as domestic violence, substance abuse, or other detrimental behaviours, judges may deny or revoke that parent's custodial rights.²⁰ The objective is to protect the child from harmful environments and to ensure that the child is raised by an individual capable of providing security, guidance, and positive moral values.

Beyond moral considerations, economic capability is also an important factor in judicial decision-making. Parents with more stable financial conditions are better positioned to provide for a child's basic needs, including adequate nutrition, proper housing, education, and healthcare. Nevertheless, financial capacity is not an absolute determinant of custody rights. A parent with greater economic resources will not automatically be awarded custody if they lack sufficient time, commitment, or emotional involvement in the child's upbringing.²¹

¹⁸ Arif Jamaluddin Malik and Cecep Soleh Kurniawan, "Hadith as Legal Basis in Judicial Decisions: Examining The Application of Hadith in Child Custody Cases at The High Religious Court of Surabaya," in *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan*, vol. 25, 2025, 87–106.

¹⁹ Kukuh Pramono Budi et al., "Adjudicating Joint Property Dispute in Islamic Jurisprudence: Balancing the Best Interests of the Child with a Focus on Residency," *Syariah: Jurnal Hukum Dan Pemikiran* 23, no. 2 (2023): 245–66.

²⁰ Rohmawati Rohmawati and Syahril Siddik, "Legal Protection for Children Out of Wedlock: Ensuring the Best Interests of Children Through Judge Decisions," *Al-'Adalah* 19, no. 2 (2022): 315–38.

²¹ wulan Febriani, Lily Andayani, And R Ardini Rakhmania Ardan, "Tinjauan Yuridis Terhadap Penetapan Hak Asuh Anak Dengan Menggunakan Prinsip Kepentingan Terbaik Bagi Anak Dalam Perkara Perceraian," *Rechtswetenschap: Jurnal Mahasiswa Hukum* 2, no. 2 (2025).

Psychological considerations and the child's emotional condition likewise play a significant role in custody proceedings. Judges commonly assess the strength of the child's emotional bond with each parent. Such emotional attachment often becomes a decisive factor in determining the most suitable custodian. If a child feels more comfortable, secure, and emotionally connected to one parent, this may strongly influence the court's decision to safeguard the child's mental health and emotional stability following the divorce.²²

Accordingly, judicial considerations in *hadith* disputes are not singular but rather involve a multidimensional analysis. Judges do not merely apply legal norms textually; instead, they adopt a comprehensive approach encompassing several fundamental dimensions:

1. Juridical-Normative Aspect: Judges remain guided by the framework of positive law and Islamic law, particularly the Compilation of Islamic Law (KHI), to ensure legality and legal certainty regarding child custody status.
2. Sociological and Moral Aspect: The suitability of a parent (*as-sholahiyah*) is evaluated by assessing moral conduct, social reputation, and the parent's ability to serve as a positive role model and provide a safe environment for the child.
3. Economic and Welfare Aspect: Financial capability is considered a supporting factor in ensuring the fulfilment of the child's fundamental rights, including adequate nutrition, access to healthcare facilities, and quality education.
4. Psychological and Emotional Aspect: This constitutes a crucial dimension in which judges evaluate the child's emotional bond and psychological stability. The objective is to minimise the risk of psychological trauma following divorce and to ensure a stable transition in the child's life.

CONCLUSION

Hadhanah essentially represents the manifestation of parents' fundamental responsibility and obligation to nurture, protect, and ensure the holistic development of their children. In Indonesia, the legal framework governing child custody has been systematically accommodated through both classical Islamic legal sources and positive law, particularly the Compilation of Islamic Law (KHI). Normatively, Article 105 of the KHI grants priority to the mother in exercising custody rights, especially

²² Indana Zulfah and Idha Aprilyana Sembiring, "Kedudukan Hukum Hasil Tes Psikologi Anak Sebagai Alat Bukti Dalam Persidangan Perceraian Untuk Menetapkan Hak Asuh Anak (Studi Putusan Nomor 57/Pdt. G/2022/Pta. Mdn)," *Unes Journal of Suara Justisia* 9, no. 1 (2025): 86–92.

for children who have not yet reached the age of *mumayyiz* and are therefore incapable of making independent choices regarding their care. However, in practice, the application of this provision is not rigid. Judges within the Religious Court system possess discretionary authority to engage in legal discovery (*rechtsvinding*) that extends beyond the literal text of statutory provisions. Such discretion is exercised to ensure that judicial decisions are not based solely on formal legal procedures but are firmly grounded in the *best interests of the child* principle as the primary consideration.

Judicial decisions in *hadhanah* disputes are the result of a synthesis of various complex factors. The primary focus is no longer merely determining which parent has the stronger legal claim to custody, but rather identifying the parent best able to ensure the child's welfare, safety, emotional stability, educational development, and overall well-being. Consequently, judges adopt a multidimensional approach by considering juridical, sociological, moral, economic, and psychological factors to ensure that custody arrangements genuinely serve the child's best interests. In this regard, *hadhanah* is understood not merely as a legal right, but as a continuing responsibility aimed at safeguarding the child's present welfare and future development.

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