



Analysis of the Best Interest Principle for Children in Custody Disputes Between Biological Mothers and Foster Mothers

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Abstract

Custody disputes between biological and adoptive mothers often pose legal dilemmas as they involve both biological and social aspects, particularly in determining who has the stronger claim to raise the child. This study aims to examine and analyse the judges' reasoning at the first instance, appellate, and cassation levels, with reference to the application of the principle of the best interests of the child. Using a normative juridical method and a case study approach, the findings reveal that at the first instance and cassation levels, the principle of the best interests of the child was not comprehensively applied. The panel of judges focused primarily on formal provisions set out in the legislation, thereby neglecting the factual circumstances relating to the child's well-being. In contrast, at the appellate level, the Aceh Sharia Court adopted a different approach by prioritising the best interests of the child, reflecting a more holistic and child-centred perspective. These findings conclude that the application of the best interests of the child principle greatly depends on the interpretation of judges at each level of the judiciary. Therefore, a deep understanding of this principle is essential to ensure that legal decisions not only fulfil formal legal aspects but also have a positive impact on the child's future.

Keywords: Custody Dispute, Best Interests of the child, Biological Mother, Foster Mother

Introduction

Children's rights are part of human rights as stated in Article 28 B paragraph (2) and the United Nations Convention on the Rights of the Child.

According to Law 23 of 2002 on Child Protection as stipulated in Article 1, "A child is someone who is not yet 18 years old, including children still in the womb".¹Children are the next generation of the nation who have great responsibility for the achievement of the ideals of the nation, so that every child has the right to survivaltherefore the welfare of children needs to be considered for their survival. Child welfare is considered achieved if children grow and develop properly.²

Parents have a very crucial role in the welfare of children, if parents are unable to ensure the welfare of the child then the child is entitled to protection from the state, agency or person, one of which is through the transfer of custody to adoptive parents. The rights and obligations of foster parents are regulated in Article 11 of Government Regulation Number 44 of 2017 concerning the Implementation of Childcare which reads "The obligations and responsibilities of Foster Parents are: nurture, maintain, educate, and protect children in accordance with human dignity, develop children optimally in accordance with their abilities, talents, and interests; prevent child marriage, and provide character education and instil ethical values in children".³ The policy can be implemented after a legally valid child adoption process.

Child adoption according to the law is the transfer of children to adoptive parents from biological parents as a whole and is carried out according to local rules to be valid in the eyes of the law.⁴ In the Compilation of Islamic Law Article 171 Letter (h) explains that "an adopted child is a child to be used as one's own child, or in general means appointing a person in a certain position which causes a relationship to arise as if it were based on blood relationship factors."⁵ For child recognition to be valid, it must fulfil the requirements that refer to

¹ Law No 23 Year 2002 on Child Protection (State Gazette of the Republic of Indonesia Year 2002 Number 109).

² Hanni Ananda Endria, 'Kajian Yuridis Terhadap Praktik Pengalihan Hak Asuh Anak Kepada Orangtua Asuh di Pati Jawa Tengah', Jurnal Hukum, Politik Dan Kekuasaan 3, no. 1 (2022): 95.

³ 'Government Regulation No. 44/2017 on the Implementation of Childcare (State Gazette of the Republic of Indonesia 2017 No. 220)'.

⁴ Soekanto Soejono, Intisari Hukum Keluarga (Bandung: Citra Aditya Bakti, 1989).

⁵ Abdurrahman, Kompilasi Hukum Islam Di Indonesia (Jakarta: Akademika Pressindo, 2007) pp. 25.

positive legal regulations, namely Government Regulation No. 54 of 2007 concerning the Implementation of Child Adoption Articles 12 and 13. However, the reality in its application is that people in Indonesia are still adopting children through an illegal process.

The conception of childcare in Islam is actually an expanded *hadhanah* law and in no way changes the legal, nasab and mahram relationships between the adopted child and his parents and family of origin. ⁶The fiqh scholars define *hadhanah* as taking care of children who are still young, both male and female, or who have grown up but are not yet mumayyiz, providing something that makes it good, keeping it from something that hurts and damages it, educating physically, spiritually and intellectually, so that it is able to stand alone to face life and assume responsibility.⁷

Child custody is an important aspect of family law that often leads to disputes.⁸ The law of *hadhanah* is only implemented when a husband and wife divorce and have a child who is not old enough to separate from the mother. This causes the child to still need care, nurturing and education that is carried out for the benefit of the child. In the Indonesian legal context, custody disputes often occur between husband and wife, but in certain situations, disputes can also occur between biological parents and foster parents. This kind of case creates complexity in the application of the law because it involves two parties with strong emotional ties to the child. In Decision No. 74/Pdt.G/2023/MS.Aceh, the judge determined that the child custody dispute was in the care of the foster mother. This decision raises questions about the legal considerations used, as well as how the principle of *the best interest of the child* was considered in making the decision. This principle is also recognised in international law through the Convention on the Rights of the Child, which requires that any decision involving a child must prioritise the best interests of the child.

⁶ Muhammad Rais, 'Kedudukan Anak Angkat Dalam Perspektif Hukum Islam, Hukum Adat Dan Hukum Perdata (Analisis Komparatif)', Jurnal Diktum 14, no. 2 (2016): 184.

⁷ Hikmatullah, Fiqh Munakahat Dalam Islam (Jakarta Timur: Edu Pustaka, 2021). 86.

⁸ Abdulah Pakarti et al., 'Perlindungan Hak Anak Dalam Perceraian Menurut Hukum Keluarga Islam', Usroh: Jurnal Hukum Keluarga Islam 7, no. 2 (2023): 15.

This case was filed at the Banda Aceh Shari'iyah Court with case decision No 147/Pdt.G/2023/MS.Bna. This case occurred because the plaintiff gave birth to an unmarried child and handed over the child to the defendant in a state of panic and embarrassment, especially since the plaintiff's family did not know about the plaintiff's pregnancy. However, over time, the plaintiff's family learnt of the plaintiff's pregnancy and then married her off to the man who impregnated her. Based on family discussions, the child was asked to be taken from the care of the respondent to be cared for by the plaintiff with the support of her family. Initially the respondent was willing to return the child but the respondent changed his mind and started to make it difficult for the plaintiff to see her child. Based on the events that occurred during *the* trial, the judges of the Banda Aceh Shari'iyah Court decided to place the child under the care of the plaintiff.

The decision issued by the panel of judges of the Banda Aceh Shari'iyah Court was not accepted by the respondent, so the respondent filed an appeal against the decision of the Banda Aceh Shari'iyah Court Number: 147/Pdt.G/2023/MS.Bna, dated 27 June to be examined on appeal. The decision issued by the panel of judges of the Aceh Shari'iyah Court is to cancel the decision of the Banda Aceh Shari'iyah Court and determine the foster mother as the custody holder of the child *a quo*.

Child custody disputes between biological and foster mothers are interesting to study because they involve two basic rights: the child's human right to be cared for by his or her biological parents, and the child's right to receive care and affection from those who have been caring for him or her. This research is important because of the increasing number of similar cases in Indonesia, especially in areas that apply Islamic law such as Aceh. In this context, the analysis of the judge's decision will provide an overview of how positive law and Islamic law go hand in hand in protecting children's rights. This research aims to deeply analyse the judge's decision in this case, focusing on the legal arguments used and *the best interest of the child*. This research is expected to contribute to the development of family law in Indonesia,

especially in the aspect of child custody and how the best interest of the child principle is applied in making legal decisions.

Methods

The research used is the juridical-normative method, this approach is carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this research. This research aims to describe and analyse the application of the best interests of the child principle in custody disputes between biological mothers and foster mothers. This approach is also known as the literature approach.⁹ This research is conducted through the analysis of judges' decisions related to child custody disputes at the first, appeal and cassation levels. This method uses legal sources of court decisions, laws, judges' *code of conduct*, legal theory, and legal interpretation. This research also uses secondary data in the literature. The research approach used is a *case approach*, which aims to understand how legal norms are applied in practical cases. This approach is carried out by examining court decisions that are related to the issue and have permanent legal force (*inkracht*). The analysis used is inductive analysis. The research begins by examining judge decisions in child custody disputes that are *evidence-based*. This model is used to understand how the principle of the best interests of the child is applied in specific cases, so as to draw a broader understanding of the principle in the context of family law.

Judges' Legal Considerations in Decisions on Child Custody Disputes

Judges are state officials who are expected and required to provide justice, guarantee rights, and determine obligations for each litigant. Therefore, judges in carrying out the task of examining cases to making decisions must do so professionally and proportionally, in accordance with applicable legal provisions. This responsibility for a judge is a legal consequence and a form of professionalism of the judge in carrying out the function of

⁹ Zainuddin Ali, *Metode Penelitian Hukum* (Jakarta: Sinar Grafika, 2021). 76.

independent judicial power to uphold law and justice through the judiciary. This is regulated in Law No. 48 of 2009 on judicial power, as well as in Law No. 5 of 2004 on the Amendment to Law No. 14 of 1985 on the Supreme Court in conjunction with Law No. 3 of 2009 on the Second Amendment to Law No. 14 of 1985 on the Supreme Court.¹⁰

The Syar'iyah Court can be said to be an attempt to replace the role of the Religious Courts in exercising judicial power. The authority of the Syar'iyah Court was expanded after the enactment of Law No. 3/2006 on the Amendment to Law No. 7/1999 on Religious Courts. So that its authority includes: Marriage, inheritance, wills, grants, waqf, zakat, infaq, sadaqah, and shari'ah economy. Due to the case filed by the plaintiff regarding divorce, in accordance with the provisions of Article 49 paragraph (1) letter a of Law Number 7 of 1989 which has been amended for the second time with Law Number 50 of 2009, the Syar'iyah Court has the absolute competence to examine, hear and decide this case.¹¹

In the first instance decision, it can be presumed that the lawsuit filed by the biological mother, who acted as the plaintiff in this case, was a *hadhanah* lawsuit filed on 07 April 2023. The lawsuit was filed in an attempt to obtain custody of the child. As the party directly involved in the dispute, the foster mother who had been caring for the child was named as the defendant. This position reflects the conflict between the rights and responsibilities of childcare, where the biological mother filed based on blood relations, while the foster mother is considered to have formed a strong emotional bond with the child. This dispute demonstrates the complexity of child custody cases that not only involve formal legal aspects, but also review aspects of the best interests of the child which are at the core of this case.

Although the legal considerations put forward the principle of the *best interest of the child* as stipulated in the Convention on *the* Rights of the Child,

¹⁰ Andi Suherman, 'Implementasi Independensi Hakim Dalam Pelaksanaan Kekuasaan Kehakiman', SIGn Jurnal Hukum 1, no. 1 (September 2019): 46.

¹¹ Muhammad Basyir, 'Wewenang Mahkamah Syar'iyah Aceh Untuk Menggantikan Peran Peradilan Agama Dalam Menjalankan Kekuasaan Kehakiman', Ameena Journal 1, no. 2 (May 2023): 202.

the judges' decision-making process in some cases did not always apply this principle consistently. One example can be seen in decision No. 174 Pdt.G/2023/MS.Bna where the decision emphasises biological relationships as the main basis for determining child custody without comprehensively considering the emotional and psychological condition of the child.

In the legal considerations taken by the Panel of Judges, the subject matter of this case centred on the plaintiff's request to regain custody of her child who had previously been handed over to the defendant on 31 October 2022 based on a mutual agreement. The request is then based on legal considerations that refer to regulations related to children outside marriage as stipulated in Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning Marriage in Article 43: Children born outside marriage only have a civil relationship with their mother and their mother's family. Thus, the child does not have a legal relationship with his or her father, either with regard to inheritance or education. Therefore, the Panel of Judges ordered the respondent to hand *the* child back to the plaintiff based on this legal provision.

Furthermore, the position of the child is regulated in legal provisions that refer to the Child Protection Law Jo. Article 14 Paragraph (1) of Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection and Government Regulation Number 44 of 2017 amending the Regulation of the Minister of Social Affairs of the Republic of Indonesia Number 1 of 2020 concerning the implementation of Childcare which explicitly states that childcare is ideally still carried out by biological parents as parties directly responsible for the welfare, protection and development of children, unless there are certain conditions that make biological parents unable to carry out these responsibilities, which can then become the basis for legal considerations in this case.

The Panel of Judges was guided by general Jurisprudence that the trial did not prove the existence of a right that nullified the plaintiff to take care of his biological child with the legal basis of the Decision of the Supreme Court of the Republic of Indonesia Number. 102 K/Sip/1973 dated 24 April 1975, namely *"Based on Jurisprudence regarding guardianship of children, the benchmark is*

that the biological mother takes precedence, especially for young children because the interests of the child are the criterion, unless it is proven that the mother is not reasonable to maintain her child".

The panel of judges considered that the respondent did not fulfil the requirements to become a foster parent of the child because the respondent had not obtained official permission from the Social Services Office to become a foster parent, as stipulated in the provisions of Regulation of the Minister of Social Affairs No. 1 of 2020 on the Implementation of Childcare. In addition, considerations at trial, namely in the form of 9 (nine) written evidence and 5 (five) witnesses who gave supporting testimony, so that the Panel of Judges had sufficient legal confidence to determine the decision in this case.

The judges in the court of first instance handed down a decision that placed the child under the care of the plaintiff and ordered the defendant to hand the child back to the plaintiff. Although the first instance decision was a *rechtsvinding* and could legally be considered a victory for the plaintiff, the case did not stop there. The defendant, who was not satisfied with the decision of the court of first instance, decided to file an appeal as the appellant (formerly the defendant) in this case. The appeal was lodged within the time limit set by law, so the case proceeded to the appellate level for re-examination of the considerations and decision of the court of first instance.

The Panel of Judges of the Acehhar'iyah Court gave legal consideration that the appellant had handed over the rights and responsibilities of the child *a quo* to the appellant, the handover of the child was understood as an act intended to make the child *a quo* as an adopted child. As the definition of an adopted child is a child whose care, education and fulfilment of his/her daily needs are transferred from the biological parents to the adoptive parents. Thus, the Panel of Judges considers that the act of surrender carries legal consequences that regulate the relationship of responsibility between the party who surrenders and the party who receives the child.

This is reinforced by written evidence in the form of a statement of child surrender dated 12 October 2022 signed by the appellant. The statement is evidence that the appellant voluntarily surrendered *the* child to the appellant

to be cared for as an adopted child. It should be noted that the provisions regarding the adoption of a child must be based on a court order or decision as stipulated in Article 1 Paragraph (9) of Law No. 35 of 2014 Concerning the Amendment to Law No. 23 of 2002 Concerning Child Protection and Article 171 Letter (I) of the Compilation of Islamic Law, in this case, the status of the child *a quo* is still in the transitional process of obtaining child adoption papers, which has not fully met the legal requirements because according to the provisions of Article 13 letter (I) of Government Regulation of the Republic of Indonesia Number 54 of 2007 concerning the Implementation of Child Adoption which reads "prospective adoptive parents must have cared for the prospective adoptive child for at least 6 (six) months since the parenting permit is granted". Thus, the child adoption process has not fully fulfilled the administrative and substantive requirements as stipulated in the laws and regulations.

Therefore, in order to apply for the adoption of a child, the above requirements must be met, namely that the prospective adoptive parents must care for the child within 6 months, whereas in this case, the appellant has only cared for the child for 5 (five) months and 7 (seven) days. Therefore, the Court's determination or decision on the adopted child cannot legally be fulfilled because it is still within the waiting period allowed to apply for the ratification of the adopted child in accordance with the Government Regulation.

Considering that since the child *a quo* is proven to have been handed over to the appellant as a handover to become an adopted child, then to cancel and withdraw the child from the appellant there must be a legal reason. Although Indonesia currently does not specifically regulate the cancellation of child adoption, considering that the purpose of child adoption is to promote the best interests of the child in order to realise child welfare and child protection. However, based on the lawsuit filed by the appellant, there is no legal reason to cancel the surrender of the child. The reason that the appellant is the biological mother of the child cannot be used as a juridical reason.

The Panel of Judges considered that the appellant was still an active student in semester VII, so she did not yet have a regular income that could support her and her child's needs. In addition, the respondent was known to

have been divorced from her husband, which further demonstrated her physical and mental instability in optimally caring for and raising the child. In contrast, the Panel of Judges found that the child *a quo* with the appellant was well cared for and received love and a decent life. Therefore, the Aceh Syar'iyah Court considered that it would be in the best interest of the child to be under the care of the appellant. Furthermore, the appellant must take care of all administrative matters as stipulated in the applicable law to ensure that the legal status of *the* child is legally recognised.

Therefore, the Panel of Judges of the Aceh Shari'iyah Court made a decision to award custody of the child to the appellant with the provision that although custody was awarded to the appellant, the lineage of the child as the child of the appellant should not be removed. This decision emphasises the importance of maintaining the identity and biological relationship of the child to his biological parents. In addition, the Panel of Judges also ruled that the relationship between the child and the appellant, as well as the appellant's family, must be maintained. The appellant was obliged to provide an opportunity for the appellant and the appellant's family to see the child at any time, so that the child could maintain an emotional bond with his biological parents.

However, this dispute was not resolved until the appeal level, although the appellant (who later became the appellant in cassation) still filed a cassation appeal on the grounds that the Aceh Syar'iyah Court as the *Judex Facti*, the Aceh Syar'iyah Court had misapplied the law in its deliberations. The appellant argued that the judges of the Aceh Syar'iyah Court erred in assessing and deciding on child custody, particularly in relation to the application of relevant legislation.

In this case, the Supreme Court then held that the legal considerations of the Banda Aceh Syar'iyah Court were correct and in accordance with the applicable law. The Supreme Court considered that the plaintiff (in this case the biological mother) was more entitled to care for her own biological child, without any legal impediment. In the sense that the Supreme Court was of the opinion that there was no legal reason strong enough to prevent the biological

mother from exercising custody of her child. Therefore, the Supreme Court affirmed that the decision of the Banda Aceh Syar'iyah Court to grant custody to the biological mother was valid and not contrary to the law.

Legal Facts	Legal Basis	Judge's Consideration
The child has been cared for by the foster mother since birth and the foster mother has even provided for the child since the womb.	<ul style="list-style-type: none"> - Article 41 of Law No 1 Year 1974 on Marriage. - Law No 35 Year 2014 on Child Protection 	The Panel of Judges of the Banda Acehyar'iyah Court considered the needs of the child, but decided on custody to the biological mother on the grounds of blood relationship and human rights of biological parents.
The biological mother filed a custody suit after the family learnt the facts of the child's existence.	<ul style="list-style-type: none"> - Article 14 of Law No 35 of 2014: Parents' obligation to protect children 	The judges of the Banda Aceh Shari'iyah Court considered that the biological mother had the primary right to the child, despite the lack of attention to the child's development while being cared for by the adoptive mother.
The economic condition of the adoptive mother is more secure and stable than that of the biological mother.	<ul style="list-style-type: none"> - <i>The Best Interest of the Child</i> Principle (Children's Rights Convention) 	The Panel of Judges of the Acehyar'iyah Court stated that the economic condition of the adoptive mother is not the main priority in determining custody but puts the interests or comfort of the child first.
The child has been emotionally adapted to the adoptive mother	<ul style="list-style-type: none"> - Article of Law No 35 Year 2014: The best interests of the child shall be 	The judges considered that the best interests of the child were the main basis for their decision without severing the

and her environment since birth.	the primary consideration in.	relationship with the biological mother.
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Analysis of the Best Interest of the Child Principle in Child Custody Dispute Decisions

Realising the legal protection and welfare of children, it is important to prioritise the principles contained in the Convention on the Rights of *the* Child, one of which is the principle of the best interests of *the child*, often known as the *best interest of the child*, which is stated in the provisions of Article 3 of the Convention on the Rights of the Child.¹² "...in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". This means that every action involving children, whether undertaken by the government, society, legislative bodies or judicial bodies, must make this principle the primary basis for every decision.¹³

As one of the most influential histories in human rights protection, the *Convention of the Rights of the Child* was ratified by the United Nations in 1989 and has a legal foundation at the international level.¹⁴ Article 25 of the Universal Declaration of Human Rights states that mothers and children are entitled to special care and protection without exception.¹⁵ Indonesia, as a

¹² Areta Edgina Apta Maharani, Agus Yudha Hernoko, and Erni Agustin, 'Prinsip Kepentingan Terbaik Bagi Anak Akibat Pembatalan Perkawinan Orang Tua Sedarah', *Media Iuris* 6, no. 1 (28 February 2023): 22.

¹³ Mary George and Noor Aziah Mohd Awal, 'The Best Interest Principle within Article 3(1) of the United Nations Convention on the Rights of the Child', *International Journal of Business, Economics and Law* 19, no. 4 (August 2019): 30.

¹⁴ Kunarso Kunarso and A Djoko Sumaryanto, 'Perlindungan Hak Anak Menurut Konvensi Hak Anak Tahun 1989 Krisis Global Covid-19', *Jurnal Ilmu Hukum* 1, no. 9 (30 November 2021): 911.

¹⁵ Widya Noventari and Anis Suryaningsih, 'Upaya Perlindungan Anak Terhadap Tindak Kekerasan (Bullying) Dalam Dunia Pendidikan Ditinjau Dari Aspek Hukum Dan Hak Asasi Manusia', *Maksigama* 13, no. 2 (November 2019): 157.

member of the international community, ratified the Convention on the Rights of the Child through Presidential Decree No.36 of 1990.¹⁶

In the provisions of *the Convention of the Rights of the Child*, there are 4 (four) basic principles related to the legal protection of children that underlie all efforts to protect children's law, namely in Article 2 of *the non-discrimination principle*, Article 3 of *the best interest of the child principle*, Article 6 of *the principles of the right to life, survival and development*, and Article 12 of *the principle of respecting children's opinions*. Based on the four principles above, the principle of the best interests of the child is the main foundation on which all matters related to children's rights are based.

Children's rights are human rights, therefore, for their benefit, children's rights must be recognised and protected by law even from the womb. Children's rights are contained in Article 2 of Law No. 4 of 1979 on Child Welfare, which states:¹⁷

- a) Children have the right to welfare, care, nurture and guidance based on love both in their families and in special care to grow and develop naturally.
- b) Children are entitled to services to develop their abilities and social life, in accordance with the culture and personality of the nation, to become good and useful citizens.
- c) Children are entitled to care and protection, both in the womb and after birth.

In practice, the principle of the best interests of the child is a universal concept and is the main element in making a decision in certain circumstances for a child or group of children including in cases of custody, adoption and child protection. This principle is regulated in Law No 35 of 2014 on the Amendment

¹⁶ Abdul Rahman, 'Respon Pemerintah Indonesia Terhadap Hak Asasi Anak Dalam Konvensi Internasional', Jurnal Politik Profetik 5, no. 1 (2015): 82.

¹⁷ M Freeman, *A Commentary on The United Nations Convention on the Rights of the Child Article 3: The Best Interest of the Child*, A Commentary on the United Nations Convention on the Rights of the Child (Martinus Nijhoff, 2007).

to Law No 23 of 2002 on Child Protection. The principle of the best interests of the child, as explained in Article 2.¹⁸

The principle of *the best interest of the child* has several important functions, including the protection of children's rights and being the main guideline in protecting children's rights, including the right to life, the right to develop, and the right to be protected from all forms of discrimination. In addition, this principle is the basis for decision-making by the government, legislative bodies, and judicial bodies, so that every decision made supports the welfare of children. The other function is as an effort to fulfil children's basic needs, such as education, health and a safe environment to support optimal child development.¹⁹

The application of the principle of the best interests of the child in court practice often involves complex considerations. Judges have to analyse various factors, including the child's emotional state, ties to biological or adoptive parents. Although this principle is subjective, the challenges in its application may vary depending on which aspect of the child's interests can benefit the child. This requires judges to balance between the child's right to be cared for by biological parents and the child's right to receive care and affection from foster parents. This principle should be considered in any regulation or policy involving children, and the drafting process should involve children to ensure that children's rights are guaranteed in accordance with the principle of the best interests of the child.²⁰

In this context, Islamic law also regulates the best interests of children, although it is not explicitly mentioned in KHI, but it is part of the best interests of children found in Article 156 Letter (c) KHI "Children who reach the age of 21 years or are not married, are fully under the authority of the parents, as long as that authority is not revoked based on a court decision". This provision

¹⁸ Law Number 4 of 1979 Concerning Child Welfare (Supplement to the State Gazette of the Republic of Indonesia Number 3143).

¹⁹ Mashuril Anwar and M Ridho Wijaya, 'Fungsionalisasi Dan Implikasi Asas Kepentingan Terbaik Bagi Anak Yang Berkonflik Dengan Hukum: Studi Putusan Pengadilan Tinggi Tanjung Karang', Undang: Jurnal Hukum 2, no. 2 (2020).

²⁰ Ahmad Muchlis, 'Penegakan Prinsip Kepentingan Terbaik Anak Pada Penerapan Diversi Dalam Sistem Peradilan Pidana Anak', Jurnal Hukum Progresif 12, no. 1 (2024).

shows that each parent is responsible for the physical and mental fulfilment of the child, which is part of the best interests of the child.²¹

Indonesian legislation does not detail the criteria for the principle of the best interests of the child.²² The principle of the best interests of the child is closely related to the concept of *maslahah mursalah*, which refers to benefits in accordance with the objectives of Islamic requirements, and there is no specific evidence that shows its rejection or recognition. can be interpreted as bringing good to reject harm.²³ Efforts to achieve kemashlahatan in line with the concept of *maqasid sharia*, Imam Syaitibi classifies the level of needs into 3 (three), namely: *Adh-daruriyyah*, *at-Tahsiniyat* and *al-Hajiyat*.²⁴

The benefit of children refers to the level of *ad-daruriyyah* needs, namely the protection of the soul (*hifz an-nafs*). *Al-Maslahah Adh- Daruriyyah* is the main benefit that must be maintained by every individual or group in the life of society, nation and state. If this need is not fulfilled, it will greatly affect life both in this world and in the hereafter.²⁵ *Hifz an-nafs* in this case includes protection of the right to live properly, healthy, safe, honourable and dignified. A child needs a caregiver because basically he is not yet able to live independently. Therefore, fulfilling basic needs, such as basic needs (primary) is the full responsibility of the party who holds the custody of the child.

If there is a dispute over child custody and both parties feel capable and worthy of being carers, then the judge uses *Maqasid al-Syariah* as a solution to the problem. By referring to *maqasid al-syariah*, the most entitled party can be found based on the ability to maintain the existence of *kulliyatul khams* (five

²¹ Compilation of Islamic Law (Presidential Instruction of the Republic of Indonesia Number 1 of 1991).

²² Yazid Nashrullah and Endah Hartati, 'Pengaruh Prinsip Best Interest of Child Dalam Penentuan Hak Asuh Anak Pada Kasus Perceraian Menurut Hukum Perdata (Analisis Terhadap Putusan-Putusan Pengadilan)', *Lex Patrimonium* 2, no. 2 (November 2023): 6.

²³ Ahmad Muhammad Mustain Nasoha et al., 'Analisis Maslahah Dalam Konsep Perwalian Pernikahan Anak Luar Nikah Berdasarkan Kompilasi Hukum Islam', *El-Faqih: Jurnal Pemikiran Dan Hukum Islam* 10, no. 1 (April 2024): 142.

²⁴ Muhammad Hafis and Johari, 'Maqasid Al-Syariah Sebagai Problem Solver Terhadap Penetapan Hak Asuh Anak Pasca Perceraian', *Jurnal Ilmiah Universitas Batanghari Jambi* 22, no. 3 (October 2022): 1522.

²⁵ Miskari and Hendra Gunawan, 'Pengalihan Hak Asuh Anak Kepada Ayah Sebab Perceraian Di Pengadilan Agama Mempawah; Studi Putusan Nomor 343/Pdt.G/PA MPW Dalam Perspektif Maslahah', *Jurnal El-Qanuniy* 7, no. 2 (June 2021): 267.

basic principles), namely maintaining religion, soul, mind, offspring, and property. Thus, this is commensurate with the principle of the best interests of the child.

In the decision of the Banda Aceh Syar'iyah Court Number 147 Pdt.G/2023/MS.Bna in its consideration, the Panel of Judges first stated Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage in article 43: Children born outside of marriage only have a civil relationship with their mother and their mother's family. According to the author, if reviewed in Islamic law, the consideration of the Panel of Judges is in line with the Compilation of Islamic Law Article 105 Paragraph (1) the maintenance of children who are not yet *mumayyiz* or not yet 12 years old is the right of the mother. In Islamic law, biological mothers are often given priority in terms of caring for children, especially young children. This is considered because biological mothers have a stronger emotional bond with the child and are able to fulfil the child's basic needs.²⁶

According to the author, if the Banda Aceh Judges awarded custody to the biological mother, the decision could be considered to reflect the principle of the best interests of the child, especially since the child was only 5 months old and needed intensive care, love and a mother's figure. In this context, the Panel of Judges may have considered that the biological mother was the most appropriate and could provide the care needed by the child, especially for a child who was not yet *mumayyiz*, considered a decision that could fulfil the basic rights of the child. The judges also prioritised the human right that biological mothers are more entitled to care due to blood relations. Thus, this decision reflects attention to the basic needs of children in accordance with Islamic law and Indonesian positive law.

However, in applying the principle of the best interests of the child, it is important to assess more than just the biological relationship. *The* Panel of Judges must consider the physical, psychological, and emotional condition of

²⁶ Dudung Maulana, 'Telaah Pasal 105 Kompilasi Hukum Islam Tentang Hadhanah', Posita: Jurnal Hukum Keluarga Islam 1, no. 1 (July 2023): 7.

the child, especially since the child has been cared for by the foster mother since the child was born. Judges need to evaluate whether the child needs the presence of the biological mother more at the phases of the child's growth and development? Whether the biological mother can provide proper care, a comfortable environment for the child's development. If the biological mother is proven to be unable to provide a conducive environment, then the decision can be reconsidered for the benefit of the child.

Therefore, the application of this principle requires a comprehensive approach, including considering the social, economic and psychological conditions of the caregivers to ensure that the child gets the maximum benefit from the decision. The principle of the best interests of the child is also a balancing act between religious values and practical realities in law. While the biological mother is given priority under Islamic law, the judge's judgement is based not only on religious texts, but also on an objective analysis of the child's needs.

In the decision of the Aceh Syar'iyah Court Number 74/Pdt.G/2023/MS.Alceh, it was determined that foster rights were in the care of the foster mother. According to the author, the decision of the Panel of Judges can be considered relevant to the principle of the best interests of the child because it is based on several factors considered by the Panel of Judges. One of the reasons *the* Panel of Judges determined that the child was under the care of the foster mother was the comfort felt by the child when with the foster mother. The bonding that had been established between the child and the foster mother was a determining factor, indicating that the emotional relationship between the two had developed significantly. This was different when *the* child was with the biological mother, where the child showed a sense of unfamiliarity and frequent tantrums, indicating a lack of comfort.

Feeling comfortable is a very important element in shaping a child's personality and development. Children who feel comfortable with their caregivers are likely to develop optimally, both emotionally and

psychologically.²⁷ Therefore, the determination of custody to the adoptive mother in this case can be considered to reflect the efforts of the Panel of Judges to ensure that the child grows up in an environment that supports her basic needs. Such comfort becomes the main foundation in applying the principle of the best interests of the child, which does not only focus on biological relationships, but also looks at aspects of the child's welfare holistically. Taking into account the emotional state and bonds that have been formed, foster care by adoptive mothers is seen as more likely to ensure stability and security for the child. This is in line with the goal of child protection-orientated law, which is to ensure that every decision made aims to provide the greatest benefit to the child, both in the short and long term. The decision is not only based on legal norms, but also on the reality of the child's life, which is prioritised for the sake of their welfare.

The main factor considered by the Panel of Judges in assigning custody of the child to the foster mother was the proper love given by the foster mother. This was reflected in the actions of the foster mother who organised a festive aqiqahan event in her home village in Java, which demonstrated her concern and commitment to the welfare of the child. This event made a positive impression on the Panel of Judges, who considered that by being under the care of the foster mother, the child would receive better care and be able to develop optimally. As such, this decision reflects attention to the emotional and physical needs of the child, which are prioritised in determining custody.

In addition, the Panel of Judges also considered the condition of the biological mother who is still an active student. This may indicate that the biological mother is not yet socially, emotionally, or mentally stable. Such instability may affect her ability to provide maximum care for the child. Therefore, the Panel of Judges prioritised the stability and welfare of the child, by considering these factors in determining custody. This decision shows that the Aceh Syar'iyah Court focuses on the best interests of the child by assessing

²⁷ Amita Diananda, 'Kelekatan Anak Pada Orang Tua Dalam Meningkatkan Perkembangan Kognitif Dan Harga Diri', *Istighna* 3, no. 2 (July 2020): 143.

the conditions that are more favourable for the child's future development and survival.

In Supreme Court Decision No. 1321 K/Ag/2023 the panel of judges awarded custody to the biological mother. This cassation decision strengthens the decision of the Banda Aceh Syar'iyah Court. In the author's view, both the decisions at first instance and cassation level did not apply the principle of the best interests of the child as a whole. The judges tended to make decisions in their considerations based solely on formal laws and regulations. This approach tends to ignore aspects of substantial justice related to the emotional and psychological needs of children who should be the subject of every legal decision. As a result, the resulting decision may fulfil the rules of law procedurally, but is less able to answer the needs of justice felt by the litigants. Especially in the context of disputes involving child custody, if the approach only focuses on procedural legal rules, it can ignore the deeper elements of justice. A legal decision that is based solely on the text of the regulation without considering the factual conditions in the child's life may risk not reflecting the best interests of the child. The decision may fulfil the rule of law from a formal perspective, but it may not address the real needs of the child or the parties involved in the case.

Conclusion

The application of the principle of the best interests of the child in custody disputes between biological and foster mothers places the interests of the child as the main priority, which states that the best interests of the child should be seen as the "*oparamount of importance*" in any decision concerning the child. Basically, the Panel of Judges had diverse views of judgement and used different legal bases when determining which party was entitled to gain control of the child's custody. The judges' consideration in the decision of the Banda Aceh Syar'iyah Court number 147/Pdt.G/2023/MS.Bna in conjunction with the decision of the Supreme Court of the Republic of Indonesia number 1321 K/Alg/2023 only assessed the order of parenting according to the law (procedural justice) and ignored the substantive justice based on the values

born from the sources of law that live in the community. The Panel of Judges of the Aceh Syar'iyah Court in its consideration of Decision No. 74/Pdt.G/2023/MS.Aceh prioritised factual conditions such as parenting stability, children's emotional and psychological relationships. The principle of the best interest of the child has a major impact on the child's future. It aims to ensure that the decision taken is not only in accordance with the law but also has a positive impact on the child's future

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