
Legal Protection Against The Fulfilment of Children's Rights Due to Parental Divorce

Monike Khasanah
Universitas Muhammadiyah Purwokerto

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ABSTRACT

Marriage is the beginning of the formation of a family, where the family becomes the main place filled with love and affection, and the fulfilment of the rights of a child is guaranteed. However, in marriage it does not go well, there are times when various problems arise which eventually get a resolution point but not a few also end in divorce. The party who is harmed by this divorce is the child, because of this condition the child loses his rights that he should get from his parents. Therefore, protection is needed so that children's rights can be fulfilled. The issues raised in this paper are how the practice of fulfilling children's rights after parental divorce. The purpose of this writing is to find out the practice of fulfilling children's rights by parents after divorce. The research method of this writing uses empirical juridical research. With interview collection tools and literature study. The results of the study show that in fact the regulations made by the state are sufficient to provide protection to children after parental divorce. So, even though it has been clearly enacted, the implementation of legal protection for children after divorce has not been implemented properly so that there are still a lot of children who do not get their full rights after a divorce between the parents. And this results in many new problems in children's lives that impact their growth and development both physically and psychologically.

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Corresponding Author

Monike Khasanah

Faculty of Law, Universitas Muhammadiyah Purwokerto

Jl. KH. Ahmad Dahlan, Kembaran, Banyumas, Jawa Tengah 53182, Indonesia

I. INTRODUCTION

According to Article 1 of Law No.1 of 1974 concerning marriage, marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the Almighty God. Marriage in Islam has the value of worship in living it. In a marriage relationship, sometimes there will indeed be a problem that does not go away and many ultimately end in divorce. There are many factors that cause a person to decide to divorce. It can be found from the divorce that occurs, children become the unfortunate party. In a divorce process the divorcing parties will mind their own business, because they are busy looking for justification for the decision they made to divorce.

Divorce is an emergency exit in a marriage that cannot be saved for the sake of mutual safety. The real heavy burden that will occur from a divorce is not only on the divorced party, the position of the child after the divorce will be very different from the situation before the divorce, especially in terms of fulfilling the rights of a child. Seeing the events that often occur in divorced couples, one of the parents does not fulfil his obligations as a parent to the rights of the child, so that the rights of the child will be neglected. Even though the rights of a child will still be obtained even though the parents are divorced, there is no change in the fulfilment of children's rights.

The rights of children are protected in the 1945 Constitution of the 4th Amendment as a constitutional basis has expressly regulated the importance of protecting human rights, including the rights of women and children, as stated in Article 28 B paragraph (2), which states: "Every child has the right to survival, growth and development and the right to protection from violence and discrimination".

II. RESEARCH PROBLEMS

1. How are the rights and obligations of parents towards children after divorce ?
2. How is the form of legal protection of children's rights obtained by a child after the divorce of his parents?

III. RESEARCH METHODS

The type of research used in this writing is a type of research that is included in normative legal writing. Writing that uses normative legal methods is carried out by examining primary legal materials and secondary legal materials. The method of data collection in this writing is by reading, studying, reviewing, making the necessary notes, regarding the rights of minors, books on the implementation of the fulfilment of children's rights after parental divorce. The author in processing and analysing data uses qualitative analysis or the data collected is descriptive in the form of words. This writing explains how the legal protection of children's rights after divorce and also how the fulfilment must be done by parents to children as a result of the divorce.

IV. RESULT AND DISCUSSION

1. Rights and Obligations of Both Parents

Families with offspring, Article 28b paragraph (2) states that, "the children are entitled to survival, growth and protection from the family where of course this can be realised by the father and mother with the real manifestation of both in the family".¹ However, when a divorce occurs, the child's right to continue living together with both parents cannot be fulfilled because they no longer live under the same roof. Even though they no longer live together, the responsibility of the father and mother towards their children never ends.

In the case of placing a child under the care of one of the parents, there are also legal consequences that are related to the child's civil rights such as the right to living expenses, health expenses and education expenses.² The rights and obligations of parents are listed in Article 45 of Law No.1 of 1974. Article 9 of Law No.4 of 1979 on child welfare states that "Parents are primarily responsible for the realisation of the child's physical, physical and social welfare". Parental responsibility for children's welfare means that parents are obliged to care for and provide education to children both formally and informally so that children will grow up to be virtuous individuals.

The Marriage Law regulates the rights and obligations between parents and children in a number of ways.

The first regulates the obligation of maintenance and education, that both parents are obliged to maintain and educate their children as well as possible. The obligation of parents referred to in Article 45 (1) of the Marriage Law applies until the children are married or can stand on their own, which obligation continues even though the marriage between the two parents is broken. This provision is regulated in Article 45 of the Marriage Law.

Secondly, it regulates the opposite, namely the obligations of children towards their parents, namely: Children are obliged to respect their parents and obey their wishes properly. If the child has grown up, he/she is obliged to maintain according to his/her ability, the parents and the family in a straight line upwards, if they need his/her help (Article 46 of the Marriage Law).

Third, it regulates the obligation of children to be represented by their parents in all legal actions as regulated in Article 47, namely: Children who have not reached the age of 18 years (eighteen years). Or has never entered into marriage is under the authority of his/her parents as long as they are not deprived of their authority. Parents represent the child regarding all legal actions inside and outside the court.

Fourthly, Article 49 of the Marriage Law provides for the possibility of revocation of authority, namely: one or both parents may be deprived of authority over one or more children for a certain period of time at the request of the other parent, the child's family in a straight line upwards and adult siblings or authorised officials, by court decision in the following cases:

1. He/she is seriously neglecting his/her duty towards his/her children.
2. He/she has behaved badly.

Although parents are deprived of their powers, they are still obliged to provide maintenance to the child. Specifically in the Rights and Obligations between Parents and Children regulated in the Marriage Law.

2. Forms of Legal Protection of Children's Rights Due to Divorce of Parents

¹ Syaifuddin, Muhammad Sri Turatmiyah, dan Annalisa Yahanan. "Hukum Perceraian" Jakarta: Sinar Grafika (2013). Hlm. 373.

² Hidayana, Muhammad Irvan, Iman Jauhari, and Azhari Yahya. "Analisis Yuridis Terhadap Aspek Perlindungan Anak Pasca Perceraian Orangtua." *Jurnal IUS Kajian Hukum dan Keadilan* 8, no. 2 (2020): 302-311.

Article 41 of Law No. 1 of 1974 concerning Marriage states that "both father and mother remain obliged to maintain and educate their children, and the father is responsible for all the costs of maintaining the needs of the child's life but if the father is unable, the mother can assist the father in carrying out these responsibilities".³ In relation to the fulfilment of parental responsibilities towards children's rights, parents need to realise that their roles and responsibilities are indispensable in the lives of children. However, it is not uncommon for parents who are supposed to do their duties well to turn around and abandon their obligations. The father as the head of the family, who has the responsibility to provide a decent livelihood for his family, especially his children, turns around and does not fulfil his obligations. There are many factors that cause this to happen, such as problems in the family, a lack of understanding of his responsibilities, and even the existence of a new family life after a divorce with his previous wife.⁴ In terms of fulfilment, the responsibility that is most neglected by divorced parents is the fulfilment of the right to support children so that children live in deprivation and their needs are not properly met.

The forms of protection carried out by the Law in providing child protection are:

a. Preventive Legal Action

Namely an effort to prevent the occurrence of a form of violation. This preventive legal action is contained in legislation and aims for understanding, limitation and direction in performing an obligation. We can see this preventive action with the good faith of both divorced parents to jointly take care of the interests of children without neglecting their rights.

b. Repressive Legal Action

Namely a form of final legal action by the competent body as a result of an offence, in the form of sanctions, fines to imprisonment and additional penalties based on applicable laws. As mentioned above in the Law Article 4 to Article 18 of Law No. 23 of 2002 concerning Child Protection which discusses the rights of children, then in Article 41 of Law No. 1 of 1974 concerning Marriage, which contains parental obligations towards the fulfilment of children's rights. If these children's rights are not fulfilled properly, it can be said that parents are negligent which results in harm to the child. The consequence of a parent's negligence towards the care of the child can lead to the court filing an application for the determination of the child's custody rights. If the execution is approved by the judge, the most likely outcome is that the parent's rights to the child are revoked and the child is placed under the custody or guardianship of another person.

V. CONCLUSION

Divorce is a path chosen by a husband or wife for certain reasons stating that they cannot continue a marriage. When there has been a divorce, several problems will arise such as the division of property, disputes over rights and custody of children contested by the father or mother. With the occurrence of a divorce, the child is the most disadvantaged party.

Children basically have rights that must be fulfilled by their parents, which are clearly regulated in Law Number 23 of 2002 concerning Child Protection. These rights must be fulfilled by the parents as the legally responsible party in the child's life. Parents who are responsible for the growth and development of children are not only fathers or mothers, but both without exception, the law provides protection for children's rights, namely by enacting preventive efforts to prevent the implementation of parental obligations in fulfilling children's obligations and repressive actions to impose sanctions for negligence, which then if this continues will have legal consequences for parents, namely the revocation of parental rights and establish guardianship of children. However, this revocation does not mean that parental obligations also end, parental obligations still continue but not with the power to care for children. With the development of legal products in Indonesia, it is hoped that legal products can also be developed that fully protect child victims of divorce from parental negligence in carrying out their duties and responsibilities towards children. Also in practice, children are not only given material assistance but must also be assisted psychologically. Children with an unhappy family history usually tend to close themselves off and feel unloved by those around them, so it is hoped that children who are victims of parental divorce will receive more attention and moral support from their parents, neighbours and the state.

REFERENCES

Undang-Undang Dasar Republik Indonesia 1945

³ Sidi, Debora. "PERLINDUNGAN HUKUM HAK ANAK AKIBAT PERCERAIAN DALAM PERSPEKTIF HUKUM ADAT (STUDI KASUS BERDASARKAN HUKUM ADAT BATAK)." *LEX PRIVATUM* 9, no. 2 (2021). Hlm. 107.

⁴ Kurniawati, Mufidatul Ilmi. "UPAYA HUKUM PEMENUHAN HAK ANAK PASCA PUTUSAN PERCERAIAN." *Dinamika: Jurnal Ilmiah Ilmu Hukum* 25, no. 8 (2019): 234-242

- Undang-Undang No. 1 Tahun 1974 tentang Perkawinan
- Undang-Undang No. 23 Tahun 2002 tentang Perlindungan Anak
- Undang-Undang No. 39 Tahun 1999 tentang Hak Asasi Manusia
- Undang-Undang No. 9 Tahun 1979 tentang Kesejahteraan Anak
- Fuady, Munir. *Konsep Hukum Perdata*. Jakarta: Raja Grafindo Persada 2014.
- Hadi, Sutrisno, *Pedoman Teknik Wawancara*. Jakarta :Elips, 2001.
- Huraerah, Abu, *Kekerasan Terhadap Anak*, cet.4, Nuansa, 2006.
- John, Gray. *Children Are From Heaven*, cet I Jakarta: ramedia pustaka utama,2001.
- Maloko, M. Thahir, *Perceraian dan Akibat Hukum dalam Kehidupan*. cet.I 2014.
- Marzuki, Peter Mahmud, *Pengantar Ilmu Hukum*, Kencana,2008
- Moleong, Lexy J., *Metodologi Penelitian Kualitatif*, Bandung: Remaja Rosdakarya, 1996 Syaifuddin, Muhammad Sri Turatmiyah, dan Annalisa Yahanan. *Hukum Perceraian* Jakarta: Sinar Grafika 2013.
- Afriadi, A. I., and Sarmadan Juhaepa. "Catatan Keluarga Broken Home dan Dampaknya terhadap Mental Anak di Kabupaten Kolaka Timor." *Journal of Social Welfare* 1, no. 1 (2020)
- Amrunsyah, Amrunsyah. "TINDAK PIDANA PERLINDUNGAN ANAK." *Al- Qadha: Jurnal Hukum Islam dan Perundang-Undangan* 4, no. 1 (2017):
- Burhanudin, Achmad Asfi. "Kewajiban Orang Tua Atas Hak-hak Anak Pasca Perceraian." *Dalam Jurnal, E Journal Kopertais IV* (2015).
- Heranti, Amelin. "Dampak Perceraian di Luar Pengadilan terhadap Hak Anak", *KHULUQIYYA: Kajian Hukum dan Studi Islam*, Vol. 04. No.1. Januari 2022.
- Hifni, Mohommad. "Hak Asuh Pasca Perceraian Suami Istri dalam Perspektif Hukum Islam". *bil dalil*. Vol. 1 No. 2. Juli-Desember 2016.
- Isa, Muhammad. "Perceraian di Luar Pengadilan Agama Menurut Perspektif Undang- Undang Nomor 1Tahun 1974 dan Kompilasi Hukum Islam". *Jurnal Hukum Pascasarjana Universitas Syiah Kuala*, Vol. 2. No.1. Februari 2014.
- Kharlie, Ahmad Tholabi. *Hukum Keluarga Indonesia*. Jakarta: Sinar Grafika, 2013. *Kompilasi Hukum Islam (KHI)*
- Latupono, Barzah. "Pertanggungjawaban Hukum Ayah Terhadap Anak Setelah Terjadinya Perceraian." *Sasi* 26, no. 2 (2020).
- Tektona, Rahmadi Indra. "Kepastian hukum terhadap perlindungan hak anak korban perceraian." *MUWAZAH: Jurnal Kajian Gender* 4, no. 1 (2013).
- Tusan, Arimbawa, and Putu Sauca. "Perlindungan Hukum Terhadap Anak Akibat Perceraian Orang Tua." *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 6, no. 2 (2017).