

P ISSN: 2528-2638

E ISSN: 2580-5460

JJIH

JUSTISI: JURNAL ILMU HUKUM

Volume 8 No.2 September 2023



PUBLISHED BY
FACULTY OF LAW
UNIVERSITY BUANA PERJUANGAN KARAWANG

DAFTAR ISI

JURIDICAL REVIEW OF UNILATERAL ENGAGEMENT ANNULMENT AS AN UNLAWFUL ACT IN CONNECTION WITH CODE OF CIVIL LAW (CASE STUDY OF DECISION NUMBER 45/Pdt.G/2019/PN.Sng) Yustya Laraswati, Yuniar Rahmatiar, Muhamad Abas..... 102-115

JURIDICAL REVIEW OF POLYGAMY PERFORMED BY CIVIL SERVANTS VIEWED FROM GOVERNMENT REGULATION NUMBER 45 OF 1990 (STUDY OF DECISION NUMBER 325/PDT.G/2019/PA.PWL) Windi Destriyanti, M. Gary Gagarin Akbar, Zarisnov Arafat 116-131

LEGAL PROTECTION OF CHILDREN AFTER DIVORCE DIVORCE RELATED TO ACT NUMBER 16 OF 2019 AMENDMENT TO ACT NUMBER 1 OF 1974 CONCERNING MARRIAGE (Decision Study Number 1145/pdt.g/2020/PA.Krw) Jihan Alfadia, Muhammad Abas, Zarisnov Arafat 132-144

CURRENT CONDITIONS FOR THE PROVIDENT OF CIVIL MEASURES CONTRA DROGS CONTRACTING CLASS I PARTIELLE ON THE BASIS OF LEGISLATION No. 35 OF 2009 ON DRUGS (Study of Judgment No. 446/Pid.Sus/2020/PN.Gpr) Jasa Sudjana, Deny Guntara, Yuniar Rahmatiar 145-162

LEGAL CONSEQUENCES OF DELAY REPORTING OF SHARE ACQUISITION BETWEEN PT. AGRO PRATAMA AND PT. DHARMA SATYA NUSANTARA BASED ON LAW NUMBER 5 OF 1999 CONCERNING PROHIBITION OF MONOPOLY PRACTICES AND UNFAIR BUSINESS COMPETITION (KPPU Case Study Number 29/KPPU-M/2019) Annisa Putri Azra, Anwar Hidayat, Yuniar Rahmatiar 163-181

OPTIMALIZATION OF THE ROLE AND FUNCTIONS OF THE LOCAL PROPERTY BOARD IN THE SUPERVISION OF THE USE OF LIMITED LANDS IN THE CABITATES OF THE NATIONS RELATED TO THE LAW NUMBER 17 OF 2014

(Case Study at the People's Representative Council of Karawang District)

Norma Indah Nur Fitrianingsih , M.Gary Gagarin Akbar , Sartika Dewi ...182-195

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

LEGAL PROTECTION OF CHILDREN AFTER DIVORCE DIVORCE RELATED TO ACT NUMBER 16 OF 2019 AMENDMENT TO ACT NUMBER 1 OF 1974 CONCERNING MARRIAGE

(Decision Study Number 1145/pdt.g/2020/PA.Krw)

Jihan Alfadia¹, Muhammad Abas², Zarisnov Arafat³

¹Faculty Of law, University Buana Perjuangan, Karawang.

²Faculty Of law, University Buana Perjuangan, Karawang.

³Faculty Of law, University Buana Perjuangan, Karawang.

* Correspondence email: hk19.jihanalfadia@mhs.ubpkarawang.ac.id

Abstract: Child protection is all activities to ensure and protect children and their rights so that they can live, grow, develop and participate optimally in accordance with human dignity and values, and receive protection from violence and discrimination. Divorce so far often creates problems inherent in children's rights, namely the right to education, health, maintenance costs and so on. In Law Number 1 of 1974 concerning Marriage, it mentions the rights and obligations between parents and children. It is stated in Law Number 1 of 1974 Article 45 Paragraph 1 namely: "Both parents are obliged to look after and educate their children as well as possible, while Paragraph 2 states that: The obligations of the parents referred to in Paragraph 1 apply until the child marries or can stand-alone. Which obligations continue even though the marriage between the two is broked, the obligation to provide maintenance for their child is not broken and the child still gets his rights as a child. The purpose of this research is to find out the legal protection of children after divorce and to find out the considerations of judges in deciding about legal protection of children after divorce.

Keywords: child protection, divorce, parental responsibility

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

1. Introduction

In line with Article 1 paragraph 2 of Law Number 23 of 2002, as revised by Law Number 35 of 2014. As a result, child protection may be defined as any activity that ensures and protects children and their rights so that they can live, grow, develop, and engage ideally in line with human dignity and values, and are protected from violence and prejudice. Child protection aims to ensure the fulfillment of children's rights in order for them to live, grow, develop, and participate optimally in accordance with human dignity and status, as well as to be protected from violence and discrimination, in order to realize a quality, noble, and prosperous Indonesian society. Implementation of child protection based on Pancasila and the Republic of Indonesia's 1945 Constitution, as well as the core principles of the Convention on the Rights of the Child.

Divorce is something that should be feared because of the impact it has not only on the husband and wife but also on the children and families of both parties, because the occurrence of a divorce will have legal consequences for the divorce, which can result in divorce. It is the parents' obligation after the divorce; the expense of living, education, and health will become a legal problem. This is evident from media attention and the growing number of divorce cases being handled through the courts.¹

As a result, both parents must be accountable for all child maintenance, and the kid must be safeguarded from the surroundings that might harm his life, either directly or indirectly, so that the child does not become a victim of societal

¹ Tan Kamello dan Syarofah lisa Andrianti, *Hukum Orang dan Keluarga*, USU Press, Medan, 2011, hlm. 70

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

intimidation. emotional, physical, and social consequences of others' passive or aggressive activities (private or government).

Because children cannot protect themselves, they require protection from both parents in order to avoid mental, physical, and social losses.² Furthermore, children have the right to receive assistance to help them develop their talents and social lives, as well as the right to be protected from environmental factors that might hurt or impair their development.³

It is established in Marriage Law Number 1 of 1974 regarding the rights and duties of parents and children. Mentioned in Article 45 of Law No. 1 of 1974, precisely:

"Both parents are obligated to care for and educate their children as best they can," according to Paragraph 2. Both are damaged".

Based on the background mentioned above, the authors are interested in conducting research with the title **LEGAL PROTECTION OF CHILDREN POST-DIVORCE CONNECTED FROM LAW NUMBER 16 OF 2019 AMENDMENT TO LAW NUMBER 1 OF 1974 REGARDING MARRIAGE (Study of decision number 1145/pdt. g/2020/PA.Krw).**

Based on this article, it is possible to conclude that even if both parents have separated in the sense of divorce, the obligation to provide for their child is not interrupted, and the child retains his rights as a child, as referred to in Article 45 paragraph 1. However, it is paradoxical that the many rights related to children are

² Maidin Gultom, 2012, *Perlindungan Hukum Terhadap Anak Dan Perempuan*, PT. Refika Aditama, Bandung, hlm. 69

³ Maulana Hassan Wadong, *Advokasi Dan Hukum Perlindungan Anak 2000*, PT. Grasindo, Jakarta, hlm. 18

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

insufficient to safeguard the rights of post-divorce children or children whose parents have split.

The issues presented in this study are as follows:

1. How is legal protection for children following divorce defined in Law No. 16 of 2019, an amendment to Law No. 1 of 1974 concerning Marriage?
2. What factors did the courts examine when deciding on legal protection for children following a talak divorce in decision case number 1145/pdt.g/2020/PA.Krw?

2. Method

The writers took a normative legal approach in their study. The author employs this strategy because the major data utilized is secondary data, data collected via literature research, while the supporting data is primary data, data obtained through field studies. The specifications in this study are analytical descriptive in nature. The reason for choosing this specification is that it aims to provide a detailed, systematic and comprehensive description by describing the applicable laws and regulations in relation to legal theories and the implementation of positive law concerning the above issues. The data that has been obtained is then analyzed qualitatively using the method of legal reasoning (axiomatic), namely by explaining what is the issue in this study and then describing it.

3. Analysis or Discussion

Legal protection is a theory that governs how the law can safeguard a person's or a group's rights against harmful activities. In this regard, the Marriage Law No. 1 of 1974 governs legal protection for children following divorce. The law states that

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

whomever is still legally linked to one of the parties because of marriage and performs an act that hurts a spouse or kid has the right to legal protection. Protection is shielding anything from damage, which might take the shape of interests, items, or goods. Protection also entails guarding someone who has been handed to someone who is weaker. Legal protection may be defined as all of the government's efforts to ensure legal certainty in order to safeguard its people's rights as citizens, and those who breach will face punishment in line with existing legislation.

Furthermore, post-divorce rights of women and children are guaranteed by laws and regulations, such as Marriage Law No. 1 of 1974, article 41 letter c, which stipulates that the court may order the ex-husband to pay living costs and/or decide an obligation for the ex-wife. In addition, to improve the safety net in preserving women's rights before the law, the Supreme Court published Supreme Court Regulation Number 3 of 2017 about Guidelines for Trying Cases of Women Against the Law.

3.1. Legal Protection of Children After Divorce

The lives of the children after the divorce of the husband and wife is something that must be addressed. Problems that occur when a kid's parents divorce, namely the rights to education, a place to reside, affection, bodily and spiritual health, and child maintenance payments.

It is different if, in terms of providing a living for their children, it turns out that the child no longer requires the assets given by the father who is in arrears, then the obligation to provide for the father does not need to be carried out because the child is able to finance his life and complete the daily needs when the father is in arrears and the child. However, if the kid does not have his or her own costs to cover his or

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

her demands, then the obligation is also a burden to the father who cannot afford to pay for his child.⁴

Both parents, even after a divorce, continue to carry out their obligations to satisfy the cognitive (intellectual intelligence), emotional (emotional intelligence), and spiritual (spiritual intelligence) needs of their children. Parents must also be good role models in word and action, fair and do not discriminate against children based on age, gender, strengths and limitations, and recognize the potential of children by reflecting a kind and affectionate attitude. Both after carrying out a divorce, both parents are also still carrying out their responsibilities to meet the needs of children, cognitive (intellectual intelligence), emotional (emotional intelligence), and spiritual (spiritual intelligence). Parents must also be a good role model, one word and deed, fair and do not discriminate children in terms of age, gender, strengths and weaknesses and respect the potential of children by reflecting an attitude of love and affection.

The above-mentioned understanding, that even though the parents' marriage has been declared broken as a result of divorce, the obligation to educate and care for children has not been interrupted and must still be carried out by both father and mother, is solely based on the child's best interests. Although a woman is considered capable and after a divorce has child custody, this does not absolve the ex-husband of obligation for the children he had at the time of marriage. Even though his ex-wife is categorized as a person who can afford it, the father is nonetheless obligated to support, care for, and educate the child. Similarly, when a child is under the guardianship power of the parents, they will not break from their obligations to the child and are expected to remain in good faith. If the parents' obligations to the child

⁴ Satria Efendi, 2004, *Problematisasi Hukum Keluarga Islam Kontemporer*, cet-2 Kencana, Jakarta, Hal, 157.

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

are not fulfilled, the guardianship power can be revoked, but the parents must still finance the child's life to meet all of his needs.

So that the divorce between the two (husband and wife) does not interfere with the child's life, the basic things that parents must do to convince their children to adapt healthily to the divorce include staying involved; research has shown that children achieve the most when they have active contact with both parents. Avoid conflict in the presence of children, according to study, the degree of continuous conflict between the parents according to the divorce is an essential element that effects children's adjustment to a father-mother divorce, Particularly when the youngster is caught in the crossfire. Reduce the degree of conflict and make an active effort to protect children from being embroiled in conflict is a good strategy to support children after a divorce. Talking with children, talking honestly with them, listening to their concerns and anxieties, and teaching them how to deal with their experiences may all help them prepare. This is critical for all parents who are going through the divorce process.⁵ This has a significant impact on how children treat their parents. If divorced parents do not accomplish these things, their children's behavior toward their parents will suffer. Children will think and act poorly toward parents who do not show them care and affection.

3.2. Considerations of Judges in Deciding on Case Decision Number 1145/Pdt.G/2020/PA.Krw.

Each choice must take into account the issues. The judge's consideration is one of the important aspects in determining the value of a judge's decision that contains

⁵ Philip M.Stahl, 2004, *Menjadi Orang Tua Setelah Perceraian*, Jakarta, Grasindo, Hal, 19.

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

justice and legal certainty, as well as benefits for interested parties, so this judge's consideration must be addressed carefully, properly, and carefully.⁶

According to Article 62 paragraph (1) of Law No. 7 of 1989, "all decisions and decisions of the Court, apart from having to contain reasons and their grounds, must also contain certain articles of the relevant regulations or unwritten sources of law which serve as a basis for adjudication." Every judgment that is tried by a court must be backed with supporting factors.

The Karawang Supreme Court Panel of Judges' reasoning in judgment Number 1145/Pdt.G/2020/PA.Krw, awarded custody of a 6-year-old kid to the Petitioner (father) rather than the Respondent (mother), are as follows:

Unresolved child custody disputes Child custody if Article 105 KHI Jo is referred to. Article 156 KHI expressly controls child custody, so the mother has a greater right to care for children under the age of 12. However, these laws are merely regulatory in nature; those having custodial rights can terminate their rights without facing any consequences. The Supreme Court of the Republic of Indonesia jurisprudence Number 102/K/Sip 1973 dated 24 April 1975 stated the same thing regarding child custody that the criterion was "the biological mother takes precedence, especially for young children, because the child's interests are the criteria, unless it is proven that the mother is unnatural to look after the child".

The mother has the greatest right to custody, and she is allowed to exercise or relinquish her rights under the law. Mothers can gain or lose their rights. According to Mochtar Kusumaatmadja, "rights" are generally specific legal topics or all legal

⁶ Mukti Arto, *Praktek Perkara Perdata Pada Pengadilan agama*, Yogyakarta; Pustaka Pelajar, 2004, hlm, 140.

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

subjects that are unhindered or interfered with by any party, and these freedoms have a legal foundation (recognized or given by law).⁷

According to the rules of Articles 105 and 156 of the KHI, the mother is more entitled to custody of a child who has not been mumayyiz in the case of a divorce. If the mother dies, another person, such as a lady in the mother's lineage or higher, can take her place; however, if the mother and mother (grandmother from the mother's lineage) are not present, custody of the child is given to the father.⁸

According to Solahudin Pugung, the provisions of Article 105 KHI letter (a) KHI and Article 156 letter (a) KHI are not a requirement and are absolute, but rather rights that are limited by the provisions of Article 156 letter (c) KHI, which states, "If the custody turns out to be unable to guarantee the physical and spiritual safety of the child, even though the custody fee has been sufficient, the Religious Court can transfer the custody".⁹

The requirements of Article 105 KHI provide mothers the ability to care for their children, however they cannot be punished if they do not use their rights. Abortion is legal if the mother does not exercise her rights. The authority granted by law to legal subjects is known as a right.¹⁰ As a result, even if the Panel of Judges of the Banda Aceh Syar'iyah Court did not create the rules in Article 105 KHI, it is extremely acceptable for the Panel of Judges to conclude that child custody is in the care of the Petitioner (the father).

⁷ Mochtar Kusumaatmadja dan B. Arief Sidharta, Pengantar Ilmu Hukum; Suatu Pengenalan Pertama Ruang Lingkup Berlakunya Ilmu Hukum, Bandung; Alumni, 2018, hlm90

⁸ Mansari, Pertimbangan Hakim Memberikan Hak Asuh Anak Kepada Ayah; Suatu Kajian Empiris Di Mahkamah Syar'iyah Banda Aceh, Banda Aceh; Fakultas Syariah dan Hukum Universitas Negeri Ar-raniry Banda Aceh, Volume 1 Jurnal Hukum, 2018, hal 88-89

⁹ Shohaludin Pugung, Mendapatkan Hak Asuh Anak dan Harta Bersama, Jakarta Karya Gemilang, 2017, hlm, 39.

¹⁰ HasanudinAF, Pengantar Ilmu Hukum, Jakarta; Pustaka, 2018, hlm86.

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

3.3. Father's Proximity With Children.

The relationship between the Petitioner (father) and the kid The Panel of Judges heard in court that a 6-year-old boy called Anak has been nurtured by his father (Petitioner) since they parted from their households. This fact is substantiated by the evidence of witnesses who testified that the kid has been cared for by the Petitioner since the Petitioner and Respondent's residences were separated. The Petitioner is capable of caring for the kid and faces no difficulties. The closeness of a kid to his or her father or mother is an essential factor for the court to examine before making a decision in a case. If the mother is closer to the kid, the child is handed to her, and vice versa for the father, if the father is closer to the child and meets the standards, the judge may grant him child custody.

The Karawang Supreme Court Panel of Judges grants custody to the father since the youngster is closer to the father. This is done to avoid psychological interference and to ensure the child's benefit. The judge's considerations for child custody are centered on the kid's best interests and advantages. Even while laws, rules, and practices favor giving custody to the mother, especially if the kid is underage or still mumayyiz, these provisions or customs are not often followed. Child custody can be given to the father if the mother has a bad temperament, morals, or behavior, such as a mother who abuses her child, a mother who cheats on her or has another ideal man (PIL), which causes the husband to file for divorce, or a mother who intentionally abandons and neglects her children so that they are not cared for.

3.4. Economic Factors.

Economic Elements Economic considerations are one of the reasons judges grant custody. This issue is significant since early children requires proper education in

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

order to complete their own education. Although the Karawang Supreme Court Panel of Judges did not formulate economic elements in their conclusion, the author believes that this might be a factor for the Panel of Judges in determining their verdict. In terms of economics, the Petitioner (father) has a job and can maintain his kid.

4. Conclusion

Based on the discussion above in this study, the conclusions can be obtained as follows:

1. A divorce in a household relationship does not result in the loss or abolition of parental obligations regarding the rights that their children should have obtained; the parents' obligations towards children owned at the time of marriage remain the same and have not changed in the least; as parents, they still have to carry out their obligations in matters of providing education, providing proper housing, providing affection, providing attention, and other parental obligations. The obligation of parents to their children following a divorce has not been completely realized. The problem is the parents' lack of self-awareness of their responsibility for the lives of their children after the divorce. One of the parents who is released from responsibility for the child they have can be processed and followed up in court according to the domicile where he lives. There was a dispute regarding responsibility for children after the divorce, the court gave its decision. The first thing that needs to be done is to file a lawsuit with the court regarding the issue of parental obligations to children. Following the filing of a claim, the case will be handled until a decision is made about the parents' continued responsibility for the kid. If the outcome of the trial does not satisfy the respondent, the petitioner may request execution. Furthermore, the judge removed the respondent's power of attorney since he was no longer liable for the kid following the divorce.

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

2. When a divorce occurs, those who are entitled to child custody for those who are not yet mumayyiz or underage are the wife (mother), who has more rights to educate and care for the child until she understands her own benefit, because mothers are more capable of taking care of and educating it. Based on Article 105 KHI and Rasulullah SAW's hadith on child care. Babysitting is the ex-wife's (mother's) right as long as the wife (mother) still meets the qualifications, specifically not having a new spouse. Even though the mother is more entitled to child custody, the father can obtain custody under certain conditions as long as the mother does not meet the requirements stipulated in Article 156 point c KHI that it is feared that children cared for by people with bad characteristics will have a negative impact on the child in her care. While children are state assets that require more care, parents must ensure and defend their children's rights so that they can grow and develop optimally in accordance with their abilities and interests.

References

Book:

- Abu Huraerah, Child Abuse (*Kekerasan Terhadap Anak*), Nuansa, Bandung, 2007
- Ahmad fadil sumad, hukum dan keadilan sosial, materi perkuliahan program doktor ilmu hukum universitas islam sultan agung, tanpa penerbit, jakarta, 2012.
- Carl joachim friedrich, filsafat hukum perpekstif historis, bandung: nuansa dan nusamedia, 2004.
- Maulana Hassan Wadong, *Advokasi Dan Hukum Perlindungan Anak 2000*, PT. Grasindo, Jakarta, 2019.
- Maidin Gultom, *Perlindungan Hukum Terhadap Anak Dan Perempuan*, PT. Refika Aditama, Bandung, 2012.

Universitas Buana Perjuangan Karawang

Vol.8 No.2 (2023)

Submit: 6-Jul-2023

Revised: 17-Jul-2023

Published: 3-Sep-2023

Subekti, R dan Titrosudibio, kitab undang-undang hukum perdata(Burgelijk wetboek)dengan tambahan undang-undang agraria dan undang-undang perkawinan,pradnyaparamita,jakarta.2001.

Tan Kamello dan Syarofah lisa Andrianti, *Hukum Orang dan Keluarga*, USU Press, Medan, 2011.

Theo huijebres, *filsafat hukum dalam lintasan sejarah*, cet VIII, Yogyakarta: kanisius 1995.

Yusuf Thalib, *Pengaturan Hak Anak dalam hukum positif*, BPHN, Jakarta, 2019.

Legislation:

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

Kompilasi Hukum Islam 105

Undang-Undang No 1 Tahun 1974 Tentang Perkawinan

Undang-Undang nomor 35 tahun 2014 Tentang Perlindungan Anak