

CRITICAL ANALYSIS OF *MASLAHAH THEORY* PARENTAL CONFLICT WITH MENTAL DISORDERS (Analysis of the Four Madzhab and Compilation of Islamic Law)

Khusnul Khotimah¹, Nurhalimah², Nur Azizah³ Muna Fauziah Kiswan⁴
^{1,2} STAI Nurul Iman, ³ STAI Wali Sembilan Semarang, ⁴ STAI Nurul Iman Bogor
nurhalimah@stai-nuruliman.ac.id, khusnul@stai-nuruliman.ac.id
azizah.nr@gmail.com, muna@stai-nuruliman.ac.id

Abstract

Children are a trust that parents must take care of from the age of infant to adulthood, under certain conditions if in a household experiences a separation or problem, the obligation to care remains the responsibility of both parents, but what if certain conditions such as one of the parents have a mental disorder (People in mental disorders), how Islamic law sees and resolves this case. In the author's research using *descriptive, normative* and *comparative* methods by examining data sourced from *library research*, the findings of the study show that in the condition of people with mental disorders do not have the right to be *hadhanah*, article 109 states that religious courts can revoke a person's guardianship rights at the request of his relatives if the guardian is a drunkard, gambler, wasteful, insane and/or negligent or abusing his rights and authority as a guardian for the benefit of the person under his guardianship. The fourth opinion of the same madhhab requires reason as a part of being able to become *hadhan*. In madhhab As-Shafi'i *hadhan*, reason is the first condition. Where a crazy person does not have the right to take care of a child, unless the madness is not severe and not frequent. For example, once a year. Meanwhile, the hambali, maliki, and hanafi madhhabs absolutely require reason and there is no custody for the insane. This is in accordance with the concept of *maslahah theory* where the transfer of the right of *hadhanah* of parents with mental disorders to other relatives who are more perfect in their intellect can reduce *the* lack of bad influence on the child they will be cared for.

Keywords: *Maslahah, Hadhanah, Mental Disorders, Four Madzhab, and Compilation of Islamic Law.*

INTRODUCTION

Children are a trust from Allah given to a couple in a marriage, with complete family conditions can make a couple and a child psychologically happy but it will be a different story when a divorce occurs, whatever the reason is a disaster for the child. At that time, the child can no longer feel the affection at the same time from his parents. In fact, feeling affection at the same time from both parents is an important element for a child's mental growth. The breakup of the household of both parents often leads to neglect of childcare That is why divorce must be avoided as much as possible.¹

According to Arofik, Ulama agree that in maintaining and educating their children in law it is mandatory. If a husband and wife have children and then divorce,

¹ Dian Yudhantara Syahputra and Syaifuddin Zuhdi, "Comparison of the Legal Construction of Hadhanah Rights in Saudi Arabia, Turkey and Indonesia," *Journal of the Study of Islamic Law & Law "COURT"* 9, no. 1 (2024): 131–48, <https://doi.org/10.25217/JM V9IL.4753>.

then the right to care for the child between the two is required. Child custody is also called *kafālah*, which is the maintenance of young children after the breakdown of marriage due to divorce. The conditions for people who have the right to child custody are puberty, reasonableness, independence, Islam, trustworthiness, and virtue.²

In Islam, the husband has responsibilities towards his wife and children, including the obligation to provide for both birth and mind, guard and protect and so on. What if the husband as the head of the family does not provide and fulfill his wife even though he has more income, for example not providing mental sustenance, including the husband often does not come home, does not pay attention to his wife and children or has a healthy and strong body but is lazy to work to find his family's sustenance. Islam regulates the relationship and rights and obligations of a husband.³ However, it will be a rule in itself if the husband has a mental disorder, of course there will be a transfer of responsibility and *hadhanah* to relatives from the husband and wife's side.

Some of the studies that explain the right of *Hadhanah* include: Apriliani in her research explained that custody of an apostate mother is permissible according to several scholars such as Ibn Al Qasim, Madzhab hambali, some Hanafiah scholars and Imam M Abu Zahra on the condition that the child is not *mumayiz*, The statement if we look back at the KHI and the Marriage Law does not specifically mention the religion that will be the babysitter. In the Compilation of Islamic Law (KHI) article 105 as the basis for granting child custody in the Surakarta Religious Court has achieved the purpose of sharia, namely creating and seeking the benefit of children in line with *maslahah*.⁴

Irfan Islami in his research explained that the control of Child Custody for children under the age of 12 is given to the biological mother. However, sometimes in divorce cases, there are not a few disputes over the custody of minors given to the biological father.⁵ Arifin Abdullah in his research also explained that according to the study of fiqh and the Penang Islamic Family Enactment, there are similarities in determining things that can abort the rights of mothers as caregivers. According to fiqh studies, the things that can abort the mother's rights are if the mother deliberately goes to a distant place, if the mother has a dangerous disease, and if the mother is a wicked person or lacks religious knowledge and if the mother has remarried. And according to the Penang Islamic Family Enactment, there are five things that can abort the mother's right as *hadhanah*. First, if the mother is married to someone who is not the child's mahram. Second, if he behaves badly in an exaggerated and open manner. Third, if he changes his place of residence with the aim of preventing the father of the child from supervising him. Fourth, if he apostatizes. Fifth, if he does not care or mistreats the child. So these things can abort the mother's rights as *hadhinah* if the mother deliberately does these things. Therefore, it can be concluded that the

² Slamet Arofik, "Child Parenting (*Hadhanah*) Perspective of Sayyid Sabiq and Wahbah Zuhaili", *Ukratuna Journal*, Vol. 2, No. 1, 2018. p. 11

³ Nurhalizah, Khusnul Khotimah, Fitri Mustafa, "The Phenomenon of Divorce Suing Public Figures Due to Nusyuz's Husband in the Study of Ulama Tafsir and Compilation of Islamic Law," *JIM-HKI-STAINI* Volume 1, no. 1 (2024): pp. 15–27.

⁴ Apriliani and Seno Aris Sasmito, "The Granting of Child Custody to an Apostate Mother", *Al Hakim Journal* Vol. 4.2022 ISSN 2685-2225 (P) ISSN) 2722-4317 (E)

⁵ Irfan Islami and Aini Sahara, "The Legality of Custody of Minors (*Hadhanah*) to Post-Divorce Fathers". *Al-Qadau Journal (Islamic Family Justice and Law)* Vol. 06 No. 92 December 2019.

provisions of this enactment follow the provisions of Islamic fiqh and the opinions of scholars of the madhhab.⁶

Of the several Islamic countries that also have special regulations related to *hadhanah*, the State of Turkey with moderate civil law regulations ensures the fulfillment of children's rights in divorce decisions by paying attention to the protection, upbringing and education of children. In addition, the State of Turkey is also considered more responsive to the changing times by integrating modern values to the protection of childcare rights. The state of Saudi Arabia with its legal system based on the hambali madzhab emphasizes more on the protection, education and custody of children supervised by Islamic authorities.⁷

A child at the beginning of his life until a certain age needs another person in his life, both in his physical arrangement and in the formation of his morals. A person who performs *the task of hadhanah* plays a very important role in this. Therefore, the issue of hadanah receives special attention in Islamic teachings. On the shoulders of his father and mother lies the obligation to carry out this task. If the father and mother are unable or unfit for the task due to insufficient conditions required according to the Islamic view, then a nanny who meets the conditions should be found.⁸ Following up from the youtube channel from Novi Pratiwi, one of the social activists who helps a lot of people who have a background in behavior and mental retardation, this case needs to be followed up and studied in depth how protection and *hadlanah* law in handling cases of parents who have mental retardation. So in this article, the author wants to explain how Islamic law in upholding the right *to hadhanah* of a child from mentally disturbed parents. In Islamic Law, there are no rules that specifically regulate parental authority in guardianship of children. However, there is a special term that regulates child care, namely in fiqh terms, commonly called *hadlanah*.

METHOD

In this article, to analyze the problem, the author uses *descriptive, normative, comparative* methods and includes *qualitative* research by examining data sourced from literature searches (books) and legal documents relevant to the subject matter. Peter Mahmud Marzuki called it the *statute aproach* method, which is legal research with a legal approach, he further explained that making primary law, namely laws and regulations, as the main source as well as Islamic law and fiqh (Madzhab opinion), as well as secondary legal sources about law, namely: textbooks and other legal products. This method is called normative legal methodology, where the object of research is legal norms, where normative legal material used as a reference is Islamic law such as fiqh, Marriage Law, and Compilation of Islamic Law (KHI).

RESULTS AND DISCUSSION

Child care in Arabic is called the term "*hadhanah*" *Hadhanah* according to the language "means to put something near the ribs or on the lap", because the mother when breastfeeding her child puts the child on her lap, as if the mother at that time

⁶ Arifin Abdullah Siti Nursyafiqah binti Ismail, "Factors of the Loss of Hadhanah Rights to Mothers (Analysis of Penang Islamic Family Enactment No. 5 of 2004 Reviewed According to Fiqh Study)". El-Usrah Journal: Family Law Journal <https://jurnal.ar-raniry.ac.id/index.php/usrah/index> Vol. 1 No. 1. January-June 2018 ISSN: 2549 – 3132 || E-ISSN: 2620-8083

⁷ Syahputra and Zuhdi, "Comparison of the Legal Construction of Hadhanah Rights in Saudi Arabia , Turkey and Indonesia ."

⁸ Leone Hutsman, Parent With Mental Health Issue. (New Short Wales Government , 2008) h. 17-24.

would protect and care for her child, so that "*hadhanah*" is used as a term that means education and maintenance of children from birth so that they can stand alone to take care of themselves which is done by the child's relatives.⁹

Child care also means a parental responsibility to supervise, provide appropriate services and meet the life needs of a child by parents. Furthermore, the responsibility for maintenance in the form of supervision and service as well as the sufficiency of the child's maintenance is *continuous* until the child reaches the legal age limit as an adult who is able to stand on his own.¹⁰

The Concept of *Maslahah* Theory in the Case of *Hadhanah* of Mentally Disturbed Parents

Maslahah theory can be interpreted with the intention of bringing benefits and rejecting the mastermind in order to maintain the purpose and purpose of sharia'. There are five purposes of sharia that should be preserved and maintained, including preserving and maintaining religion, soul, intellect, lineage and property. When a person performs an action that is essentially to maintain the five points of the purpose of the shari'a above, then his action is said *to be mashlahah*. And it can be concluded that the so-called *mashlahah* is an action that is justified by the law because it contains goodness and benefits for all human beings or for themselves in terms of the body, intellect, soul, property and honor that they have with the aim of maintaining *the maqâshid of the shari'a*.¹¹

The concept *of mashlahah* is then used as the basis for the *jurists* to formulate the concept *of maqâshid shari'ah* which will be the basis for the determination of Islamic law. In contrast to the linguistic approach to the sources of Islamic law which focuses on deepening the linguistic rules to find a certain meaning of sacred texts, in the approach through *maqâshid shari'ah* the study is more focused on looking at values in the form of human benefits in every taklif revealed by Allah SWT. This approach is carried out on the basis of the consideration that the legal verses in the Qur'an are very limited in number, while the problems of society always arise. In dealing with these various problems that arise, it must be accompanied by progress in knowledge and understanding that covers the entirety of these problems.

In the rules of ushul fiqh it is explained that

دَرءُ المَفاسِدِ مَقْدَمٌ عَلَى جَلْبِ المَصَالِحِ

Resisting damage/danger must take precedence over taking advantage.

Regarding the conditions for raising *maslahah* as an argument, the Malikiyah and Hanabilah groups give three conditions to lay down a law based on *maslahah*, namely: 1. The *maslahat* must be clear and brightly lit. If the *maslahah* can clearly benefit humans or can clearly protect them from harm. 2. The benefits must be general in nature to cover the entire ummah or majority group, not individual benefits, or limited to the scope of certain communities in society. This is because a sharia, of course, is not intended for personal needs, but public needs which are the *implementation* of the public good. 3. A law formed on the basis of *maslahah* should

⁹ Zakiah Drajat, *Fiqh Science*, (Yogyakarta: Dana Bhakti Wakaf, 1995), p: 157

¹⁰ M Yahya Harahap, *National Marriage Law*, (Medan Zahir Trading 1975), p. 204

¹¹ Ali Mutakin, "The Theory Of Maqâshid Al Syari'ah And The Relation With Istinbath Method," *Kanun Jurnal Ilmu Hukum* 19, No. 3 (2017): 547–70, <https://doi.org/10.24054/kanun.v19i3.12345> | E-ISSN: 2527-8482.

not be contrary to a law based on the evidence of *nash* or *ijma'*. If there is a contradiction in it, it shows that the benefits it contains are in vain from the beginning it was determined because of the superiority of *the potential of the mafsadat* it contains. Therefore, the law has been null and void since it was enacted.¹² In the case of *the right of Hadhanah* from parents with mental disorders, the application and study of *the theory of maslahah* is very appropriate to be one of the references, this is the reason that in raising children it is not given to parents with emergency conditions.

Practical Problems of *Hadhanah* Cases of Mentally Disturbed Parents in Indonesia

Through the principles of Islamic family law, the influence of *hadhanah* greatly affects the emotional stability of children after divorce, where adequate emotional and psychological support from both parents shows a better level of mental health in addition to the importance of the role of parents in maintaining the holistic well-being of children after divorce.¹³

Overall, the scholars and mujtahids agree that if a husband and wife have mental retardation (mental disorders) then the right *to hadhanah* becomes lost, besides that the four madzhab also state that in an emergency where the parents experience mental disturbance the right to have to switch to other relatives, it is feared that the upbringing and upbringing of the mentally disturbed parents will bring negative things to the children they care for so that Her growth and development could not develop properly because both her parents as caregivers had mental retardation.¹⁴

Wahbah Az-Zuhaili in the book of Fiqh Imam Shafi'i who argues that the thing that cancels *hadhanah* is parents who do not meet the conditions such as reason, therefore people who have mental retardation should not take care of or take care of their children because the child is not guaranteed his safety.¹⁵ According to Madzhab As-Syafi'i itself, there are several criteria to become a caregiver, including: 1. Caregiver is reasonable. A crazy person has no right to take care of a child, unless the insanity is not severe and rare, for example, once a year. 2. One hundred independence. There is no custody for slaves. 3. The infidels take care of the children of the infidels and the Muslims take care of the children of the infidels. 4. Be able to take care of yourself. There is no custody for the wicked. 5. Trust. There is no custody of the traitor in religious affairs. 6. Move from the country of the child in care when the child has reached *the age of tamyiz*. 7. The child's mother is not married to anyone other than a mahram (mahram of the child who is being cared for). If the person concerned is married to a mahram, such as the child's uncle, custody does not fall if the husband allows her to take care of him.¹⁶

¹² Syaik Abdurrahman Al-Juzairi, *Fiqh Four Madzhab Volume 5*, (Jakarta: Pustaka Al-Kautsar, 2015), p.

¹³ Budi Santoso and Maya Sari, "The Psychological Impact of Divorce on Children and Parental Obligations in Islamic Family Law," *Indonesian Journal of Islamic Law*, 4 (2), 2021: 54-67 ISSN : 1907-591 4, No. 2 (2021): 54-67, <https://doi.org/DOI: https://doi.org/10.35719/ijil.v4i2>.

¹⁴ Priyanka P Nambiar, Kavita V Jangam, and Shekhar P Seshadri, "Psychosocial Perspectives on Child Mental Health in Custody Disputes: A Qualitative Study from Urban Bengaluru," *Indian Journal of Psychological Medicine* XX, no. X (2024): 1-10, <https://doi.org/10.1177/02537176241254515>.

¹⁵ Wahbah Az-Zuhaili, *Fiqh of Imam Shafi'i*, (Terj. Muhammad Afifi and Abdul Hafiz), (Jakarta: Al Mahira, 2010), cet, III, p. 69

¹⁶ Syaik Abdurrahman Al-Juzairi, *Fiqh Four Madzhab Volume 5*, (Jakarta: Pustaka Al-Kautsar, 2015), p. 1143.

According to Imam Malik as quoted by Ibn Rushd, "that rejection occurs because of four kinds of defects, namely madness, leprosy, leprosy, and venereal diseases that hinder jima'. These defects result in the existence of the khiyar right to refuse marriage or to keep holding the wife".¹⁷ The Maliki madhhab also has its own criteria in assessing the characteristics of caregivers, including: 1. Reasonable. There is no custody for the insane although they sometimes recover. Also for people who are weak in mind and stupid. 2. Able to do work related to children in care. There is no custody for weak people, such as women who have reached old age, or elderly men, unless both have people who can take care of children under their care, such as deaf, mute, stroke and others. 3. The person who takes care of the child of the girl who is in care of the girl who has reached orgasmic age. If the caregiver is in an unsafe place, custody is lost. 4. There is no custody of the wicked who drink khamar, known as adulterers, and other perpetrators of unlawful acts. 5. The caregiver does not have infectious diseases that are feared to be transmitted to the child in their care, such as leprosy, sopak, and others. 6. Caregivers are able to take care of themselves and property. There is no custody for a fool who wastes money, so that the money belonging to the child in care does not run out if he does have money. 7. Not to marry the man who has sexual intercourse with her, unless the mother is married to the mahram of the child in care, or the person who has custody knows that after that she is married and her husband is silent (does not discuss the matter of upbringing) for one year without a ruling, at which time her custody is lost. 8. The caregiver is not required to be a Muslim, both male and female. If the child in care is worried that he will be given to drink khamar or be fed pork, then the caregiver will be transferred to a place where Muslims are supervised, and the child will not be taken from him. In this case there is no difference between the *dzimmi* woman or *the majusi*. 9. If the caregiver is a man, it is required to have a woman who can take care of him, such as a wife, female slave, or maid. In addition, the mahram is not allowed to take care of a daughter who is already strongly intertwined, such as an uncle's son unless he marries his mother even though he feels safe.¹⁸

The criteria for Madzhab Hambali in choosing several criteria for caregivers include: 1. The caregiver is reasonable. There is no custody for the insane. 2. Not a hundred slaves. 3. Not having a disability such as blindness, because with this condition the purpose of parenting is not achieved if the person is visually impaired. 4. Not having any disease or leprosy, if he has these diseases, he loses custody. 5. Not marrying another man who is not the mahram of the little one, if he marries the mahram of the little one who is in his care, such as his grandfather and his relatives, then he has custody.¹⁹ Likewise, Imam Hanafi provides several criteria for conditions that must be met by caregivers (holders of *hadhanah rights*), including: 1. The caregiver must be Muslim. 2. Caregivers must be sensible and physically and mentally healthy. 3. Caregivers must have the ability to maintain and educate well. 4. Not married to a man who is not the mahram of the child. (especially for mothers).²⁰

¹⁷ Ibn Rushd, *Bidayatul Mujtabid*, Juz 2 (Terj.) Imam Ghozali Said and Ahmad Zaidun, (Jakarta: Pustaka Amani, 2007), p. 501

¹⁸ Shaykh Abdurrahman Al-Juzairi, *Fiqh of the Four Madzhab volume 5*, (Jakarta: Pustaka Al-Kautsar, 2015), p.1144-1145.

¹⁹ Shaykh Abdurrahman Al-Juzairi, *Fiqh of the four Madzhab volume 5*, (Jakarta: Pustaka Al-Kautsar, 2015), p. 1143-1144

²⁰ Shaykh Abdurrahman Al-Juzairi, *Fiqh of the four Madzhab volume 5*, (Jakarta: Pustaka Al-Kautsar, 2015), p. 1143-1144

The four madhhabs also require reason as part of being able to be a caregiver. In madhhab As-Shafi'i, a sensible caregiver is the first requirement. Where a crazy person does not have the right to take care of a small child, unless the madness is not severe and rare. For example, once a year. Meanwhile, the Hambali madzhab absolutely requires reason and there is no custody for the insane. In addition, the Hambali madhhab also does not allow blind people, with the intention that nurturing is not achieved for people who are visually impaired. In the Maliki madzhab, it is also made common sense as a condition for obtaining custody. There is no custody for the insane even if they are cured sometimes, as well as for the weak and stupid.²¹ As for the duration of *hadhanah* itself, 4 madhhabs have requirements, namely: 1. For boys, the right of *hadhanah* lasts until the child reaches the age of 7 years, after which the child can choose to live with his father or mother. 2. For girls, the right to *hadhanah* lasts until the age of puberty, or until the child lives independently.

Hadhanah in civil law is commonly referred to as the term guardianship or guardianship. The right of guardianship or guardianship is the right of a child of the parents and is also the obligation of the parents to the child, article 45 paragraph (1) and paragraph (2) of the Marriage Law contains the *imperative* provision that both parents are obliged to maintain and educate their children as best as possible until the child marries or can stand alone.²²

In positive law in Indonesia itself, *Hadhanah* refers to the right and obligation to maintain, nurture, and educate children who are immature or unable to take care of themselves. This arrangement is recognized in the legal system that refers to Islamic law and is also regulated in national legislation such as: Law Number 1 of 1974 concerning Marriage Jo. Law No. 16 of 2019 and the Compilation of Islamic Law. In the Marriage Law itself (Law No. 16 of 2019) there is an article 41 which reads "*After divorce, child custody (hadhanah) becomes the obligation of both parents, but its implementation can be given to one party in accordance with the best interests of the child (benefit)*".²³ While article 45 reads, "*parents are obliged to maintain and educate their children until the child is an adult and can stand on his own*". And the Compilation of Islamic Law (KHI) regulates the Right of Hadhanah in article 105 which reads, "*1. Custody of children who have not been mumayyiz under the age of 12 years is with the mother, 2. Custody that has been mumayyiz is given to the child to choose with his mother or father. And article 3. The cost of child maintenance is the responsibility of the father*". And in article 156 which reads "*In the case of divorce, the hadhanah of children under the age of 12 years is generally given to the mother, unless there is a strong reason and can harm and harm the child who is cared for by the mother*".²⁴

Criteria For Parties Who Are Entitled To Hadhanah.

A child at the beginning of his life until a certain age needs someone else to help him in his life, such as eating, clothing, cleaning himself, and even waking and sleeping arrangements. Therefore, the person who takes care of it needs to have affection, patience, and have a desire for the child to grow up to be a good child in the

²¹ Shaykh Abdurrahman Al-Juzairi, *Fiqh of the four Madzhab volume 5*, (Jakarta: Pustaka Al-Kautsar, 2015), p. 1143-1144

²² Sri Budi Raharjo et al., "Legal Protection of Custody of Biological Children of Persons with Mental Disorders Progressive Legal Perspective," *INNOVATIVE: Journal Of Social Science Research* Page 9387-9394 E-ISSN 2807-4238 and P-ISSN 2807-4246 Website: <https://j-innovative.org/index.php/innovative> 4, no. c (2024): 9387-94.

²³ Law No. 01 of 1974 jo Law No. 16 of 2019 concerning Marriage

²⁴ Compilation of Islamic Law

future. In addition, you must have enough time to do the task. For this reason, it can be concluded that the party who has these conditions is a woman.

According to article 105 letter (a) of the Compilation of Islamic Law, it is stated that the custody of a child who is not *mumayyiz* (under the age of 12 years) is the right of his mother and article 156 letter (a) of the Compilation of Islamic Law also explains that the custody of a child who is under the age of 12 years is the right of his biological mother, and the position of the biological mother can be replaced if the mother has died. In this article, it is stated that the position of the mother can be replaced by the father if the mother has died and the woman in the upper line of the mother (grandmother or aunt) also no longer exists.²⁵

The principles and *conditions of hadhanah*, including those related to the maintenance or upbringing of children, apply between two elements that are harmonious in the law, namely.²⁶ *Hadhin* (foster parents) and *Madhun* (foster children). Both must meet the conditions specified for the mandatory and valid duty of parenting. During the period of the marriage bond, the mother and father are jointly obliged to raise the children from the result of the marriage. However, after the divorce occurs and the two have to separate, the mother and or father are obliged to take care of their children individually.

For people who want to carry out child maintenance or become *hadhin*, both men and women are set the following conditions:

a. Baligh

A small child or one who has not yet reached puberty should not be a *hadhin* for others, because he himself is not able to take care of his own needs

b. Sensible

Crazy people and idiots should not be *hadhin* because they also need someone else to take care of their needs. They are not able to take care of themselves, let alone take care of the needs of others.²⁷

c. Able to educate and manage

Based on this, custody cannot be given to a person who is unable to carry out custody. Regarding incapacitation, it is sometimes caused by old age or weak health. But sometimes the inability is caused by a malignant disease that makes a person helpless, so that he is unable to take care of himself or others. Sometimes, the inability is caused by work demands.²⁸

d. Trust

The person who takes care of the child must be able to protect him from everything that can damage his health, behavior, mental, or religion. So that people who cannot be trusted do not have the right to take care of children. Thus, if a wicked person (male or female) whose wickedness prevents him from taking care of a child, then he has no right to take care of him. Meanwhile, if his wickedness does not prevent him from taking care of a child, then he has the right to take care of him.²⁹

²⁵ Mary V Seeman, "Intervention to Prevent Child Custody Loss in Mothers with Schizophrenia," *Al Hukuma* 2012, no. 06 (2012): 1–6, <https://doi.org/10.1155/2012/796763>.

²⁶ Amir Syarifuddin, *Islamic Marriage Law in Indonesia*, p.328.

²⁷ Wahbah Az-Zuhaili, *Islamic Fiqh Wa adillatubu*, p. 66

²⁸ Abdul Majid Mahmud Mathlub, *Sakinah Family Law Guide* (terj. Harits Fadly and Ahmad Khotib), (Surakarta: Intermedia era, 2005), p. 590.

²⁹ Abdul Majid Mahmud Mathlub, *Sakinah Family Law Guide* (terj. Harits Fadly and Ahmad Khotib), (Surakarta: Intermediate era, 2005), p. 591.

e. Muslim

The infidels do not have the right to take care of *the hadhanah* of the children of Muslims because the infidels have no power over the Muslims.³⁰ This is an opinion held by many scholars, because the task of parenting includes the task of education that will direct the religion of the child in care. If he is taken care of by a non-Muslim, it is feared that the child he is taking care of will be far from his religion.³¹

f. Mother is not married to someone else

If the nanny is married to a foreigner for the child or to her relative who is not a stranger, then she is not entitled to the right of maintenance.³²

g. Independent

A slave was usually so busy with his master's affairs that he had no opportunity to take care of a child.³³

If both parents of the child are still complete and qualified, then the one who has the most right to perform *hadhanah* on the child is a mother. The reason is that mothers have more affection compared to fathers, while at a very young age it requires more affection. If the child is in the care of a mother, all the necessary expenses remain under the responsibility of the father. This is already an opinion agreed upon by scholars.³⁴

According to Sayyid Sabiq in *Fiqh Al-Sunnah III* explained that the clear provisions regarding the limit of the end of hadhanan are not explained in detail, it's just that the measure used is *tamyiz* and the ability to stand alone, if a child has been declared capable and distinguishes what to do and what to be left behind, does not need services and can meet his own needs, then Sayyid Sabiq states that the hadhanah period has expired and is over.³⁵

Islam has made it mandatory that the maintenance of its legal children is mandatory. As we already know, children are the responsibility of both parents. Therefore, children must be nurtured, cared for well and saved from everything that can damage them. The legal basis about *the hadhanah* of Allah SWT is stated in Q.S Al-Baqarah verse 233.

Mothers should breastfeed their children for two whole years, for those who wish to complete breastfeeding. It is the duty of fathers to cover their food and clothing in a proper manner. A person is not burdened, except according to his ability. Let not a mother suffer for her child, nor let her father suffer for her child. The heirs are like that too. If both of them want to wean (before two years) based on agreement and deliberation between them, there is no sin against them. If you want to breastfeed your child (to someone else), there is no sin for you if you pay in a proper way. Fear Allah and know that Allah is All-Seeing of what you do.

³⁰ Wahbah Az-Zuhaili, *Islamic fiqh*, p. 329.

³¹ Amir Syarifuddin, *Marriage Law*, p. 329

³² Abdul Majid Mahmud Mathlub, *Family Law Guide, Sakinah Family Law Guide* (ed. Harits Fadly and Ahmad Khotib), (Surakarta: Intermediate era, 2005), p. 593

³³ Amir Syarifuddin, *Marriage Law*, p. 329

³⁴ Disma Hariani et al., "Women's Resistance To Polygamy Gender Studies On Social Dynamics And Islamic Law," *Al Haiyy: Islamic of Law* 1, no. 1 (2025): 37–50, <https://doi.org/https://doi.org/10.64344/hry.v1i1>.

³⁵ Sayyid Sabiq, *Fiqh as Sunnah III*, (Terj. Nor Hasanuddin), Jakarta: Pena Pundi Aksara, 2006. h 246.

As the purpose of the Qur'an verse above is to explain the law of breastfeeding when talaq occurs. It is interpreted that family contains a meaning, namely a relationship that cannot be separated from the two parents (husband and wife) concerned. What is meant by inseparable is about the child that each parent, both siayah and the mother, has a role and must play a role in the child. If a husband and wife separate, as a parent, they must give a clear and detailed guarantee to the child. Under any circumstances, parents must still meet the needs of the child. Nurturing and caring for young children is obligatory by law, because if we neglect young children, they are in danger of destruction.

In the case of child maintenance (*hadhanah*) the Prophet pointed to a mother who has the most right to take care of the child according to her words:

عَنْ عَبْدِ اللَّهِ بْنِ عَمْرٍو رَضِيَ اللَّهُ عَنْهُمَا; أَنَّ إِمْرَأَةً قَالَتْ: (يَا رَسُولَ اللَّهِ! إِنَّ ابْنِي هَذَا كَانَ بَطْنِي لَهُ وَعِجَاءٌ، وَتَدْيِي لَهُ سِقَاءٌ، وَجِجْرِي لَهُ حِوَاءٌ، وَإِنَّ أَبَاهُ طَلَّقَنِي، وَأَرَادَ أَنْ يَنْتَزِعَهُ مِنِّي فَقَالَ لَهَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَنْتِ أَحَقُّ بِهِ، مَا لَمْ تَنْكِحِي) رَوَاهُ أَحْمَدُ، وَأَبُو دَاوُدَ، وَصَحَّحَهُ الْحَاكِمُ

From Abdullah ibn Amr (RA), he said: *A woman said, 'O Messenger of Allah, 'O Messenger of Allah, this is indeed my son, it is my stomach that conceives him and my breast gives him drink, and my lap protects him, but his father who divorced me wants to take him away from me'*.³⁶

The content of the above hadith is that if there is a divorce between husband and wife and leaving a child, as long as the mother is not married again, then the mother has more right to take care of him.

Analysis of the Summary of Islamic Law on the Loss of Parental Rights for Mental Disorders

In the compilation of Islamic Law regarding child care, there is chapter XIV on child maintenance. Article 98 paragraph (3) states that the Religious Court can appoint one of the closest relatives who is able to fulfill the obligation if both parents are incapacitated. There is an article that regulates the revocation of guardianship rights in the Compilation of Islamic Law. In the Compilation of Islamic Law article 109 it is stated that:

The Religious Court revokes the guardianship rights of a person or legal entity to transfer it to another party at the request of his relatives if the guardian is a drunkard, gambler, wasteful, insane and/or negligent or abusive of his rights and authority as a guardian for the benefit of the person under his guardianship.

Regarding the obligations of the guardian, there is the next article, namely article 110. According to article 110 paragraph (1), the guardian is obliged to take care of himself and the property of the person under his guardianship as well as possible and is obliged to provide religious guidance, education and other skills for the future of the person under his guardianship. The general requirements to be able to become a caregiver (*hadhin*) are Muslim, have common sense, be an independent person, not have a husband and then live in the same place as the child being cared for. The three

³⁶ Ibn Hajar Al Asqalani, The Book of Bulughul Maram Hadith. No. 1597.

madhhabs agree that it requires reason as part of being able to be a caregiver and with different additional provisions.³⁷

The cause of the loss of the right *to hadhanah* is the upbringing for mothers who do not meet the conditions that have been described such as crazy, slave, infidel, wicked, untrustworthy and remarried to another man, unless the mother is married to a man who has the right to take care of the child. According to the Malikiyyah imam quoted by Wahbah Zuhaili in his book *Islamic fiqh*, there are four reasons for the loss of the right *to hadhanah*, including: 1. The departure of parents to distant places 2. Elderly People with dangerous diseases 3. If the parents are wicked or their religious knowledge is lacking, 4. When the parents remarry.³⁸

In the Shafi'i madzhab, a sensible caregiver (*hadhin*) is the first requirement. A crazy person does not have the right to take care of a small child, unless the madness is not severe and rare, for example once a year. Meanwhile, the Hambali madzhab absolutely requires reason and there is no custody for the insane. Apart from that, in the Hambali madzhab it is also not allowed for the blind, with the intention that nurturing is not achieved with the visually impaired. In madzhab, Maliki also added that being sensible is also a requirement for obtaining custody. There is no custody for the insane although they are sometimes cured, nor for the weak and stupid.³⁹ The provisions of madzhab As-Shafi'i are a bright spot for a person with a disorder of conscience that is relatively mild and does not endanger children. According to the provisions of madzhab As-Shafi'i, a person who is insane is classified as not severe or rare (for example, once a year) can still be a caregiver.⁴⁰

In line with the general requirement of being a caregiver by the madzhab, article 109 states that the religious court can revoke a person's guardianship rights at the request of his relatives if the guardian is a drunkard, gambler, wasteful, insane and/or negligent or abusive of his rights and authority as a guardian for the benefit of the person under his guardianship. In addition, the religious court will also appoint one of the closest relatives who is able to fulfill this obligation if both parents are unable to do so. This guardian is then obliged to take care of the children's assets under his guardianship as well as possible and is obliged to provide religious guidance, education and other skills for the future.⁴¹

The compilation of Islamic law states that the main *right of hadhanah* falls into the hands of the mother having consideration that the mother has a stronger inner bond to the child, the mother who has more affection than the father, and the mother also has more time to nurture and care for the child. Parenting or *hadhanah* (in Islamic terms) is the obligation of parents to nurture and educate their children as well as possible. This maintenance includes economic problems, education and everything that is the basic needs of the child.⁴² Viewed in terms of children's needs, especially for children who are still young and not yet independent, *hadhanah* is an act that must be carried out by their parents, because without *hadhanah* it will result in children being abandoned and wasted in their lives. Marriage Law No. 1 of 1974 does not specifically regulate child care in a broad and detailed manner, even in its implementing

³⁷ Rahmad Lubis et al., "The Dilemma Of Modernity: Conflict Of Values In The Application Of Customary Criminal Law In A Multicultural Society," *Al Haiyy: Islamic of Law, Vol. 1 No. 1, April 2025 E-ISSN : 000-000 DILEMA* 1, no. 1 (2025): 1–10, <https://doi.org/10.18196/ijcl.v4i2.19300>.

³⁸ Wahbah Az-Zuhaili, *Islamic fiqh*, p. 70-71

³⁹ Shaykh Abdurrahman Al-Juzairi, *Fiqh of the four madhhabs* volume 5, p. 1143-1144.

⁴⁰ Shaykh Abdurrahman Al-Juzairi, *Fiqh of the four madhhabs* volume 5, h 1143.

⁴¹ Compilation of Islamic Law Article 98 paragraph (3) and Article 110 paragraph (1).

⁴² Amir Nuruddin, *Islamic Civil Law in Indonesia*, (Jakarta: Kencana, 2004). p.293

regulations, even though Government Regulation No. 9 of 1975 does not regulate it. After the enactment of Law No. 7 of 1989 concerning Religious Courts and Presidential Instruction No. 1 of 1991 concerning the widespread dissemination of the Compilation of Islamic Law, there was a regulation regulating the control of child custody for minors, namely the issue of *hadhanah*.

In the Marriage Law articles 42 to 54 it is explained that parents are obliged to maintain and educate their children who have not reached the age of 18 in a good way until the child marries or can stand on his own. The parent's power also includes representing the child regarding all of the child's legal actions in and out of court. As for child support, if in the condition of both parents it is not possible, then the maintenance costs are borne by the family from the father's side. In article 105 of the KHI, it is explained that the custody of children under the age of 12 years old is the right of the mother. However, child care also means the responsibility of parents to supervise, provide proper services and meet the needs of a child's life by parents. Furthermore, the responsibility for maintenance in the form of supervision and service as well as the sufficiency of the child's maintenance is continuous until the child reaches the legal age limit as an adult who is able to stand on his own. And the transfer of responsibility for child maintenance costs or child support is to the father even though the custody of the child is with the mother.⁴³

CONCLUSION

From the discussion of this article, it is explained that childcare or *hadhanah* (in Islamic terms) is the obligation of parents to maintain and educate their children as well as possible. This maintenance includes economic problems, education and everything that is the basic needs of the child. In article 105 of the KHI, it is explained that the custody of children under the age of 12 is the right of the mother

However, parents in the condition of mental disorder do not have the right to be *hadhanah*, article 109 states that the religious court can revoke a person's guardianship rights at the request of his relatives if the guardian is a drunkard, gambler, wasteful, crazy and or negligent or abusive of his rights and authority as a guardian for the benefit of the person under his guardianship. The fourth opinion of the same madzhab requires reason as part of being able to be a caregiver. In madhhab *As-Shafi'i*, a sensible caregiver is the first requirement. Where a crazy person does not have the right to take care of a small child, unless the madness is not severe and rare. For example, once a year. Meanwhile, the hambali, maliki, and hanafi madhhabs absolutely require reason and there is no custody for the insane.

According to the Compilation of Islamic Law (KHI) regarding the custody of children by parents who have mental retardation, they should not get custody, because they do not meet the requirements of *the hadhanah* holder, to get *the right of hadhanah* must meet the applicable conditions and provisions and those that have

⁴³1. KHI by paying attention to the situation and conditions of the needs of Muslims, and is enforced in Indonesia. 2. As a guide for PA and PTA judges in the sense of guidelines and sources of law-making in examining, adjudicating and deciding cases. 3. As an applied law (material law) used in the Religious court environment in the case settlement process in the PA and PTA, there are differences in terms of the use of KHI. Some use it explicitly, others do not. The purpose of KHI is to complement, support, support and reaffirm and further elaborate on Law No. 1/1974 along with Government Regulation No. 9/1975, Government Regulation No. 28/1977 and Law No. 7 of 1989, where this nuanced and Islamic-breathing elaboration can be used as a guideline, foundation and handle for justice seekers and legal practitioners, especially judges of religious courts.

been stipulated in the Quran, one of the conditions is common sense, if the *hadhanah* holder Not having common sense cannot guarantee the physical and spiritual safety of the child and if a *hadhanah* holder is not sensible, then the *right to hadhanah* is lost due to mental retardation.

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