

Child Custody Due to Divorce in a Mixed Marriage (Study of Decision Number 73/PDT.G/2019/PN BTL JO. Decision Number 96/PDT/ 2020/PT YYK)

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Article Info

Article history:

Received: 13 March 2025

Publish: 30 March 2025

Keywords:

Mixed Marriage;

Divorce;

Child Custody.

Abstract

Mixed marriage refers to a marriage involving couples with different nationalities, with one party being an Indonesian citizen. Such marriages frequently occur in various countries due to work activities or tourism. One of the issues arising from mixed marriages is divorce, which has implications for the children born from these marriages, especially regarding their custody, as they are often unable to choose whether to live with their mother or father following the divorce. Typically, both parents desire custody, resulting in legal disputes brought before the court. In such cases, the judge's considerations are crucial, as they must examine and decide the case by prioritizing the best interests of the child to ensure the fulfillment of their rights and development. This research explains the judge's considerations in determining child custody resulting from divorce in mixed marriages. This research is normative juridical research, utilizing secondary data derived from primary and secondary legal materials. Based on the analysis, it is concluded that in determining child custody due to divorce in mixed marriages, the judge may grant custody rights to both parents. In this case, the mother, an Indonesian citizen, was granted custody of the first child, who was nine years old, based on the panel of judges considering the child's preference, who felt more affectionate towards his mother and practiced Catholic prayers with her in daily life. Meanwhile, the father, a foreign national, was granted custody of the second child, who was five years old, because the child expressed affection towards his father and stepmother, Mama Lena, and practiced Islam in his daily prayers, following his father's religion. Therefore, the panel of judges based the determination of child custody on the child's preferences to ensure their best interests.

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1. INTRODUCTION

Marriage is a legal event considered a fundamental need and one of the most essential aspects of human life. As human beings, life becomes more complete when following human nature by forming a family.[1]

A family is established through marriage to create a harmonious, loving, and respectful household between a man and a woman. Marriage is also mentioned in the Qur'an, specifically in Surah An-Nur verse 32, which states, "And marry those among you who are single and the righteous among your male slaves and female slaves. If they are poor, Allah will enrich them out of His bounty. And Allah is All-Encompassing and All-Knowing."

Marriage is also regulated by Indonesian law as a source of legal legitimacy. According to Article 1 of Law No. 1 of 1974 concerning Marriage, marriage is defined as

"the physical and spiritual bond between a man and a woman as husband and wife, with the purpose of establishing a happy and eternal family based on the belief in the One and Only God."

The increasing mobility and technological advancements that facilitate interactions between countries and cultures have resulted in the phenomenon of mixed marriages between Indonesian citizens and foreign nationals. Over time, this phenomenon has significantly impacted various aspects of life, including relationships among individuals from different cultural, ethnic, and national backgrounds. Article 57 of Law No. 1 of 1974 on Marriage states that mixed marriage is a marriage between two people subject to different laws due to differences in nationality, with one party being an Indonesian citizen.

Marriage cannot be conducted without rules and legal recognition, as it is a legal act that has legal consequences for the involved legal subjects, including property rights and other effects resulting from the event.[2] People engaged in mixed marriages may obtain citizenship from either the husband or wife and may lose their original citizenship according to Law No. 12 of 2006 on Citizenship. Mixed marriages also result in legal consequences, particularly in civil relations, which include specific consequences due to the application of different legal systems to each party involved.

The phenomenon of mixed marriages reflects the Indonesian society's inclusive perspective on diversity, although it is not free from legal challenges and consequences. Every individual has the right to marry anyone from any country, as long as it complies with applicable religious and statutory regulations.

One of the primary objectives of marriage is to obtain legitimate offspring. According to Article 42 of Law No. 1 of 1974 concerning Marriage, a legitimate child is "a child born within or as a result of a legitimate marriage." Marriage is a form of agreement that establishes a legal bond, which can be terminated for several reasons, including divorce. Although divorce is legally recognized and permitted, it often presents challenges, particularly concerning the fulfillment of children's rights, especially in divorce cases involving parents of different nationalities.

Children's rights are part of human rights inherently attached to every individual since conception. Therefore, children's rights must be fulfilled and guaranteed by families, communities, and the state, as mandated by Law No. 35 of 2014, which amends Law No. 23 of 2002 on Child Protection.[3] Even if parents are divorced, their children are still entitled to their rights according to their dignity. Article 41 of Law No. 1 of 1974 on Marriage states that parents who divorce remain obliged to educate and care for their children based on the children's best interests. If the father cannot fulfill his responsibility in providing for and educating the children, the mother shares that responsibility upon the court's determination.

In cases of divorce involving children, a legal consequence is the determination of child custody. Custody may be decided through mutual agreement, but in the case of disputes, it must be settled by a court ruling. For the best interests of the child, custody is often granted to the mother, particularly if she is an Indonesian citizen, as stipulated in the Supreme Court Jurisprudence No. 126 K/Pdt/2001 dated August 28, 2003, which states that "in case of divorce, custody of underage children should preferably be granted to the closest person emotionally attached to the child, which is usually the mother."

Both the father and the mother often seek custody, resulting in legal action. For instance, Decision No. 73/Pdt.G/2019/PN Btl Jo. Decision No. 96/PDT/2020/PT YYK involves a custody dispute where both parents claimed custody over their children. Based on this context, the research problem is formulated as follows: What are the judge's

considerations in deciding child custody as a result of divorce in mixed marriage, as stated in Decision No. 73/Pdt.G/2019/PN Btl Jo. Decision No. 96/PDT/2020/PT YYK?

2. RESEARCH METHOD

This study employs normative legal research. The research examines the application of prevailing norms or rules in positive law. Normative legal research treats law as a system of norms, encompassing principles, norms, rules, and doctrines. The data source used is secondary data, which includes primary, secondary, and tertiary legal materials related to the research object.

3. RESULTS AND DISCUSSION

3.1. Child Custody Lawsuit in Decision Number 73/Pdt.G/2019/PN Btl Jo. Decision Number 96/PDT/2020/PT YYK

This Child Custody case has been filed in the first-level court, namely the Bantul District Court, with Case Number 73/Pdt.G/2019/PN Btl. The Plaintiff and the Defendant have been legally and officially divorced with the Bantul District Court Decision No. 76/PDT.G/2016/PN Btl, as evidenced by Divorce Certificate No. 3402-CR-03042017-0001. The plaintiff is a husband and the defendant is his ex-wife. After the divorce, the Plaintiff always behaved well towards the Defendant by maintaining communication, keeping in touch with the Defendant, and not severing the bond between the Defendant and their two children. That after the divorce, the Plaintiff stated in his lawsuit that there was an agreement regarding the custody of their two children, which would be under the Plaintiff's care as the biological father of both children, taking into account the parenting patterns for the children. The Plaintiff also stated in his lawsuit that during the time the children were under his care, he never restricted the Defendant from communicating with the children. Even the Plaintiff allowed both children to vacation in Yogyakarta with the Defendant, with the facilities provided by the Plaintiff. The Plaintiff presented several fundamental reasons that later became the basis for the Plaintiff filing for Child Custody, which are because the Defendant lacks affection and attention towards both children, including in terms of education, health, and providing a good environment. Furthermore, the Plaintiff always grants the Defendant access to meet both children without ever intending to sever the Defendant's bond with them. The Plaintiff, as usual, granted the Defendant access during the holidays to take their child to Yogyakarta, but when the Plaintiff was about to take their child back after the school holidays ended, the Defendant only returned their second child named Lorenzo Satriyo Huet and gave the Plaintiff the choice to take their second child Lorenzo Satriyo Huet or not at all. The Plaintiff argues that both of his children are siblings with a very close bond and should be united with the Plaintiff; if separated, it will have adverse effects in the future. The plaintiff stated that since being under her care, her two children have been given the rights they should receive, such as education, health, and a good environment. proven by the achievements of both of his children in the field of education. The plaintiff stated that their first child, since being under the defendant's supervision recorded from May 2019, has not been given access to meet without a clear reason, and since the end of June, the defendant has blocked the plaintiff and even did not respond to SMS inquiries about the child's well-being. And the defendant severed communication with both children, including the plaintiff's communication with the first child. And after that, the Defendant never asked about the news of their second child until now.

In essence, the Plaintiff filed a lawsuit with the panel of judges to decide that the custody of the two children be placed under the Plaintiff as the biological father, based

on several grounds that have already been presented. Based on the above lawsuit description, the Plaintiff requests the Judge to Accept and grant the Plaintiff's lawsuit in its entirety and declare the custody of his two children named Raphael Satriyo Huet and Lorenzo Satriyo Huet to be given to the Plaintiff Romain Mathieu Regis Huet, as their biological father.

In this case, the judge then decided:

- 1) Declaring the custody of the second child, who is 5 years old, to the father, who is a French citizen, but as a father, he should not impose restrictions, and as the biological mother, she must be granted the right to visit, assist in education, and shower her love as a mother on the child.
- 2) Granting the partial lawsuit of the Counterclaimant/Defendant in the Counterclaim which states that the custody of the first child, who is 9 years old, is under the biological mother who is an Indonesian citizen and as the biological mother should not impose restrictions, and as the biological father should be given the right to visit, assist in education, and shower the child with affection as a mother, and ordering the biological father to provide monthly support of Rp. 10,000,000.00 until the child reaches the age of 21.

After the panel of judges made the decision as above, the biological father/plaintiff felt that the custody of his first child was not granted or given to him, so he filed an appeal. The legal appeal was submitted to the Yogyakarta High Court with Case Number 96/PDT/2020/PT YYK.

At the appellate level, the Judge decided to uphold the decision of the Bantul District Court dated September 2, 2020, Number 73/Pdt.G/2019/PN Btl, by deciding:

- 1) stating the custody rights of the child Lorenzo Satriyo Huet (the first child) born on March 1, 2014, under the custody of his father, while the biological mother should be granted the right to visit and help educate and shower her love as a mother to the child.
- 2) Declaring the custody of the child Raphael Satriyo Huet (the second child) born on July 1, 2011, to his biological mother, and in the event that the child is with his biological mother, the biological father must be granted the right to visit and help educate as well as shower his love as a father to the child.
- 3) Ordering the biological father to provide support to the second child who is under the custody of the biological mother, until the child reaches adulthood or is 21 (twenty-one) years old, in the amount of Rp10,000,000.00 (ten million rupiah) per month regularly, through the biological mother.

3.2. Judge's Consideration in Deciding Child Custody in Decision Number 73/Pdt.G/2019/PN Btl Jo. Decision Number 96/PDT/2020/PT YYK

In deciding a case in a court, it is a matter that requires legal consideration to ensure a fair legal judgment for both parties involved, taking into account the existing aspects[4]

3.2.1 Judge's Considerations in Decision No. 73/Pdt.G/2019/PN Btl

The process of determining child custody due to divorce in a mixed marriage requires the judges to first ensure whether the children are indeed the result of a mixed marriage. Regarding the divorce between the Plaintiff and the Defendant, where the Plaintiff is named Romain Mathieu Regis Huet and the Defendant is named Cicilia Irma Widiastutik, who have been legally and officially divorced as evidenced by Divorce Decree No. 3402-CR-03042 017-0001. In their marriage, the Plaintiff and the Defendant were blessed with two children named Raphael

Satriyo Huet and Lorenzo Satriyo Huet, who were both minors at the time of the divorce.

The legal consequence of divorce for children in a mixed marriage is that parental authority ends and becomes guardianship. The appointment of a guardian by the judge is made after hearing from the family of both the father and the mother to determine who among them will become the guardian, depending on who will later be considered most capable in managing the interests of their children. And this appointment of a guardian can also be reviewed by the judge upon the request of the father or mother based on changes in circumstances.

The panel of judges in their considerations used normative juridical reasoning in delivering the verdict in the civil case. In addition to using juridical considerations, judges can also use non-juridical considerations when making a ruling. Judicial consideration is the judge's consideration based on what happens in the trial and has been established by law to be included in the decision. Justice is a value that cannot be determined solely by legal considerations, but also by non-legal considerations such as psychological aspects, sociological aspects, and philosophical aspects.

Looking from the perspective of theory, principles, and also the judicial system that is practical and has two characteristics in judicial actions. Its characteristic is that the closure of the case is marked by the judge's decision, which signifies the end of the legal process, and the next characteristic is to support or facilitate the enforcement of the law related to the issue. In civil cases, this indicates that the nature of the judge's decision is to end the case (end vonnis) or to be the final decision. Referring to what has been described, it is evident that the nature of the judge's decision regarding the final verdict (end vonnis) is an action based on the law, which then enables the judge to resolve and conclude a case.[5]

The affirmation of custody rights for both parents after divorce is explained in the provisions of Article 41 Letter (a) of Law Number 1 of 1974, which emphasizes that the consequences of the dissolution of marriage due to divorce mean that either the father or the mother still has the obligation to care for and educate their children based on the best interests of the child. However, if there is a dispute in the custody process, the court will decide. Regarding child custody, this is stipulated in the Marriage Law, which states that both parents are responsible for caring for and educating their child properly until the child gets married or becomes independent, with equal rights and obligations.

Child custody in its determination must be based on existing regulations. The role of the judge in deciding custody significantly influences how the best interests of the child are considered. Regarding child custody, if a dispute arises, the court decides, so the judge has a strong basis for consideration used as a reason in determining child custody based on the best interests of the child as an authorized state official, which is then decided in court with the aim of ending or resolving the case between both parties.

Based on the evidence contained in Decision No. 73/Pdt.G/2019/PN Btl, legal facts were found where it is known that the plaintiff and the defendant officially divorced based on the Bantul District Court decision No. 76/PDT.G/PN Btl, and this was recorded in the divorce certificate No. 3402-CR-03042017-0001 on April 3, 2017.

Regarding child custody, the plaintiff and defendant were blessed with two children named Raphael Satriyo Huet and Lorenzo Satriyo Huet, both of whom are still minors. After the divorce, the child Lorenzo Satriyo Huet was taken care

of by the plaintiff, while the first child named Raphael Satriyo Huet was taken care of by the mother.

In her custody, the plaintiff stated that she did not restrict the defendant's access to meet, but the defendant claimed that he had difficulty accessing visits and communication because it had to go through the defendant's wife's permission. The plaintiff states that he provides adequate education and needs for the child. Based on the economic situation of both parties, the plaintiff is an expatriate with a high income, so economically he can provide for the child's needs, and the defendant is also economically capable of meeting the child's needs both financially and emotionally in daily life.

In their behavior, the father was proven to have had an unusual incident with the first child while he was at school, and the father pulled the child, causing the child to feel traumatized to meet and communicate with his father. The court has also attempted to mediate between the parties in this case as regulated by Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Court, but the effort was unsuccessful.

The Bantul District Court, as the adjudicator of this case, provided considerations after studying the case before delivering a verdict. In considering the custody of the child, the Panel of Judges at the Bantul District Court refers to the provisions of Article 41 letter (a) of Law Number 1 of 1974 concerning Marriage, which states that divorce does not eliminate the obligation of both the father and the mother to care for and educate their children. And in that article, it is stated that if there is a dispute regarding child custody, the court will make the decision.

In considering the verdict, the judge must base it on the facts and evidence revealed during the trial. This is done to assess the quality of parenting provided by the parents to their child, as well as the behavior of the father and mother. In determining child custody, the best interests of the child must be considered from psychological, material, and non-material aspects by providing the fairest decision without diminishing the child's rights.[6]

Based on the legal facts mentioned above, the judge's decision regarding child custody in ruling No. 73/Pdt.G/2019/PN Btl is based on the following considerations:

- 1) The belief or religion followed by the child is in accordance with that of their parents, this is so that the child in their mental development and spiritually, it is going well. The judges based this on the provisions of Article 1, paragraph 11 of Law Number 17 of 2016 concerning the stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 1 of 2016 concerning Child Protection, which states that "custody is the authority of parents to nurture, educate, maintain, foster, protect, and develop children according to their religion and their abilities, talents, and interests."
- 2) The panel of judges also considered the child's opinion in determining custody, where the child named Raphael Satriyo Huet expressed his opinion in court, explaining that he lives with his mother in Yogyakarta, he said that he loves his mother and compared to his father, he loves his father only a little because he once pulled Raphael. Meanwhile, Lorenzo Satriyo Huet, in his statement, explained that he lives in Malang with his father and stepmother (Mama Lena) and attends school at Bina Bangsa Malang. Lorenzo said that

he loves his father and Mama Lena and wants to live in Malang with his father and Mama Lena. Based on the provisions of Article 2 of Law Number 23 of 2002 concerning child protection, it states that "the implementation of child protection is based on Pancasila and grounded in the 1945 Constitution of the Republic of Indonesia as well as the basic principles of the Convention on the Rights of the Child, including:

- a. Non-discrimination
- b. The best interest of the child
- c. The right to life, survival, and development
- d. respect for children's opinions

The panel of judges opined that Raphael Satriyo Huet's child preferred his mother and Lorenzo Satriyo Huet's child preferred his father because they were already comfortable with their custody, and this was the consideration of the Bantul District Court judges in deciding Child Custody. This is based on Article 10 of Law Number 23 of 2003 on Child Protection, which states that "every child has the right to express and be heard, receive, seek, and provide information according to their level of intelligence and age for their development in accordance with moral and ethical values," meaning the child has the right to have their opinion heard in this custody matter.

- 3) The first child named Raphael said that when praying, he does it like his mother in the Catholic way, and Lorenzo prays every day in the Islamic way like his father.

Based on these considerations, the panel of judges followed the child's wishes by granting custody of the first child to the mother, as the child feels more affection for her and has been praying in the Catholic faith daily, following her mother's practice. Meanwhile, the father (a foreign national) was granted custody of the second child (5 years old), because the child feels affection for his father and Mama Lena, who is his stepmother, and prays daily according to his father's religion, which is Islam.

3.2.2 Judge's Considerations in Decision No. 96/PDT/2020/PT YYK.

The judge's considerations in the child custody case filed by Romain Mathieu Regis Huet as the Appellant, originally the plaintiff (father), are:

- 1) The appeal memorandum submitted by the appellant, who was originally the plaintiff, does not present anything new and merely repeats what has been previously stated. The first-instance judges have correctly considered it, so the judges have stated that it does not need to be considered again.
- 2) The Panel of Judges of the Yogyakarta High Court considers that the description and also the considerations of the First Instance Judges are correct, including the statements of the children who clearly stated in court that the child Raphael Satriyo Huet is happy and comfortable living in Yogyakarta with his mother, while the second child named Lorenzo Satriyo Huet is happy and comfortable living with his father in Malang. Therefore, the opinions and statements of both children must be respected, whether they prefer to be with their father or their mother.
- 3) That because the considerations of the First Instance Judges were correct and accurate, they were adopted and approved, and subsequently became the legal basis for the Appellate Judges in deciding the child custody case.

Therefore, based on the considerations outlined by the panel of judges above, the panel of judges deems that the decision of the Bantul District Court dated

September 2, 2020, in case number: 73/Pdt.G/2019/PN Btl, which was appealed by the appellant, originally the plaintiff, can be upheld and also strengthened. Thus, the judge upheld the decision of the Bantul District Court, which granted child custody to both the father and the mother. The mother, who is an Indonesian citizen, was granted custody of the first child who is 9 years old, while the father (a foreign national) was granted custody of the second child (5 years old).

In this case, the author has a different opinion regarding the separation of child custody after divorce, where the first child is raised by the mother and the second child is raised by the father. If the children are separated, it can affect the relationship between siblings, thereby eliminating supportive behaviors, comfort, and protection that the older sibling provides to the younger one. In emotional and social development, the relationship between siblings is very important in that development role. The interaction between siblings, whether in physical, verbal, or non-verbal forms such as knowledge, attitudes, beliefs, and feelings, occurs constantly. With the presence of siblings, they are considered as individuals who can be invited to play, debate, and negotiate. If the older sibling and younger sibling are not in the same upbringing, this situation can disrupt the sibling relationship, making it distant and potentially hindering one's development[6].

4. CONCLUSION

Based on the analysis of the research results, it can be concluded that the judge, in determining child custody rights due to divorce in a mixed marriage, granted both parents; both the father and the mother, the right to custody of their child. The mother, who is an Indonesian citizen, was granted custody of the first child, who is 9 years old, with the consideration that the judges followed the child's wish, as the child feels more affection for the mother and has been praying in accordance with the Catholic faith, following the mother's practice. Meanwhile, the father (a foreign national) was granted custody of the second child (5 years old) with the consideration that the child feels affection for his father and Mama Lena, who is his stepmother, and prays daily according to his father's religion, which is Islam. Thus, the panel of judges in determining child custody follows the child's wishes, so that the determination of child custody is in the best interest of the child.

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