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### Protection of Children's Rights As Victims of Divorce in Religious Court Decisions: A Juridical And Sociological Analysis in Ternate City

*Perlindungan Hak Anak Korban Perceraian dalam Putusan Pengadilan Agama: Analisis Yuridis dan Sosiologis di Kota Ternate*

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#### Abstract

Children caught in the crossfire of parental divorce are among the most legally and socially vulnerable members of Indonesian society. This article examines how the Ternate Religious Court protects children's rights in divorce adjudication, integrating juridical analysis of relevant legislation and court decisions with a sociological assessment of post-divorce outcomes for children. Drawing on normative-juridical methodology and secondary sociological data, the study evaluates the extent to which Religious Court decisions in Ternate comply with the protection mandates of the Indonesian Child Protection Law No. 35 of 2014, Law No. 1 of 1974 on Marriage, and the Compilation of Islamic Law, as well as with the best-interest-of-the-child principle enshrined in the Convention on the Rights of the Child. Findings reveal significant gaps between the formal legal mandate to protect children and the lived realities of post-divorce child welfare, particularly regarding hadhanah (child custody), nafaqah (child maintenance), and children's rights to education, identity, and ongoing parental relationships. The article proposes institutional and juristic reforms to strengthen child protection within the Religious Court system.

**Keywords:** children's rights; divorce; Religious Court; hadhanah; child protection

#### Article History

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**Abstrak**

*Anak-anak yang terdampak perceraian orang tua termasuk dalam kelompok yang paling rentan secara hukum dan sosial di Indonesia. Artikel ini mengkaji bagaimana Pengadilan Agama Ternate melindungi hak-hak anak dalam proses adjudikasi perceraian, dengan mengintegrasikan analisis yuridis terhadap peraturan perundang-undangan dan putusan pengadilan serta penilaian sosiologis terhadap kondisi anak pascaperceraian. Menggunakan metodologi normatif-yuridis yang dilengkapi data sosiologis sekunder, penelitian ini mengevaluasi sejauh mana putusan Pengadilan Agama Ternate mematuhi mandat perlindungan yang diatur dalam Undang-Undang Perlindungan Anak No. 35 Tahun 2014, Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, dan Kompilasi Hukum Islam, serta prinsip kepentingan terbaik anak yang diamanatkan Konvensi Hak Anak PBB. Temuan mengungkap kesenjangan signifikan antara mandat hukum formal untuk melindungi anak dan realitas kesejahteraan anak pascaperceraian, khususnya mengenai hadhanah, nafaqah, serta hak atas pendidikan, identitas, dan hubungan dengan kedua orang tua. Artikel ini mengusulkan reformasi institusional dan yurisprudensial untuk memperkuat perlindungan anak dalam sistem Pengadilan Agama.*

**Kata Kunci:** *hak anak; perceraian; Pengadilan Agama; hadhanah; perlindungan anak*

**Introduction**

Divorce is among the most consequential legal events in any society, and its consequences fall with particular severity on children who have no agency in the decision but bear many of its most enduring effects. In Indonesia, where the divorce rate has risen consistently over the past two decades, the protection of children caught in the legal and social rupture of parental separation represents one of the most pressing challenges facing the family justice system. The Religious Courts (Pengadilan Agama), which exercise exclusive jurisdiction over marital disputes among Muslim citizens under Law No. 7 of 1989 as amended by Law No. 3 of 2006 and Law No. 50 of 2009, are the primary institutional actors responsible for adjudicating divorce-related children's rights in the roughly 87 percent of the Indonesian population that professes Islam. The quality and consistency of Religious Court decisions on children's issues therefore have an enormous social impact that warrants sustained scholarly attention.

The city of Ternate in North Maluku Province provides a particularly instructive case study for this inquiry. As the historical center of the Maluku Sultanate and a city in which Islamic legal institutions have deep historical roots, Ternate combines a strong tradition of Islamic jurisprudential authority with the social challenges characteristic of a mid-sized Indonesian city undergoing rapid urbanization, economic transition, and demographic change. Data from the Ternate Religious Court indicate a steady increase in divorce filings between 2018 and 2023, with court records showing that child custody (*hadhanah*), maintenance (*nafaqah*), and related children's rights issues were raised in a significant proportion of contested divorce proceedings during this period (Pengadilan Agama Ternate, 2023). The quality of protection afforded to children in these proceedings has not previously been subject to systematic academic analysis.

The legal framework governing children's rights in divorce proceedings in Indonesia is multi-layered and sometimes internally inconsistent. At the constitutional level, Article 28B(2) of the 1945 Constitution guarantees every child 'the right to survival, growth, and development and the right to protection from violence and discrimination.' This constitutional commitment is elaborated in Law No. 23 of 2002 on Child Protection, subsequently amended by Law No. 35 of 2014, which establishes a comprehensive set of children's rights including the rights to identity, education, health, and protection from neglect and abandonment. In the domain of family law, the Marriage Law No. 1 of 1974 and the Compilation of Islamic Law provide specific rules on parental responsibility following divorce, including provisions on *hadhanah* (physical custody), the obligation of the father to pay child maintenance, and the rights of children to maintain relationships with both parents. The interaction between these frameworks in Religious Court practice has been a persistent source of jurisprudential uncertainty (Nugroho, 2021).

The principle of the best interests of the child (*kepentingan terbaik anak*), drawn from Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC), which Indonesia ratified through Presidential Decree No. 36 of 1990,

serves as the overarching normative standard against which child-related judicial decisions are evaluated in international and comparative family law. Freeman (2020) has argued that the best-interests principle functions both as a procedural standard—requiring courts to actively investigate and weigh children’s interests in every decision affecting them—and as a substantive standard that establishes minimum thresholds of protection below which no judicial decision regarding a child may fall. The application of this principle in the Indonesian Religious Court system has been uneven, with significant variation in the extent to which individual judges proactively consider children’s interests beyond the formal legal claims of the disputing parties (Rofiq, 2022).

Theoretically, this article draws upon two analytical frameworks. The first is a juridical framework centered on legal pluralism and rights-based approaches to child protection, following the analytical model developed by Merry (2020), who argues that the effectiveness of children’s rights protection in plural legal systems depends critically on the capacity of institutional actors—including judges, lawyers, and court-based social workers—to translate international and national rights norms into locally meaningful and practically enforceable outcomes. The second is a sociological framework drawn from the sociology of divorce and post-divorce family dynamics, following the work of Amato (2014), who has documented through longitudinal research that the long-term wellbeing of children of divorce is determined less by the fact of parental separation per se than by the quality of post-divorce parenting, the adequacy of economic support, the level of inter-parental conflict, and the stability of children’s living and educational arrangements.

The sociology of divorce in the Indonesian Muslim context has received growing scholarly attention. Nugroho (2021) has documented the phenomenon of ‘paper divorce’ (cerai kertas) in which formal Islamic court divorce is used instrumentally by one or both parties without genuine intent to dissolve the household unit, resulting in ambiguous post-divorce arrangements that leave children in legally and practically precarious positions. Rofiq (2022) has examined

the enforcement gap between Religious Court decisions awarding child maintenance and the actual payment behavior of non-custodial parents, finding that court-ordered nafaqah is frequently unpaid in the years following divorce, particularly where the non-custodial parent is economically marginal or has relocated outside the court's practical enforcement jurisdiction. These findings define the empirical landscape within which the present juridical and sociological analysis of child protection in the Ternate Religious Court is situated.

Existing scholarly literature on Religious Court adjudication of children's rights exhibits important gaps that this study seeks to address. First, the majority of existing studies focus on the formal legal content of Religious Court decisions without engaging substantively with the sociological evidence on post-divorce child welfare outcomes, thereby producing a juridical analysis that is disconnected from the social realities it is meant to evaluate. Second, studies focusing on the Ternate Religious Court specifically, as distinct from larger courts in Java or South Sulawesi, are largely absent from the literature, despite the distinct socio-religious and demographic characteristics of North Maluku that may produce distinctive patterns of judicial decision-making. Third, the institutional and procedural reforms necessary to strengthen child protection in Religious Court divorce proceedings have not been systematically developed with reference to the specific constraints and opportunities presented by the Indonesian Religious Court system.

The article is organized as follows. The methodology section describes the normative-juridical and secondary sociological data approach adopted. The results and discussion section examines three thematic areas: the juridical framework for child protection in Religious Court divorce adjudication; the sociological dimensions of child welfare following divorce as documented in the Ternate context, supported by comparative data; and the institutional and juristic reforms necessary to strengthen the alignment between formal legal protection and lived child welfare outcomes. The conclusion synthesizes the findings and offers targeted recommendations for the Ternate Religious Court, the Indonesian Supreme Court's Religious Chamber, and the national legislature.

## **Research Method**

This study employs a normative-juridical research methodology as defined by Marzuki (2017), which treats legal norms, principles, and judicial decisions as primary objects of analysis rather than merely as contextual background to social inquiry. The juridical component of the analysis examines the statutory, constitutional, and international legal framework governing children's rights in divorce proceedings; the provisions of the Compilation of Islamic Law (KHI) and classical Islamic jurisprudence on *hadhanah* and *nafaqah*; and a selection of published divorce decisions from the Ternate Religious Court covering the period 2018–2023, accessed through the Indonesian Supreme Court's publicly available judicial decision database (Direktori Putusan Mahkamah Agung). The selection of decisions was purposive, focusing on cases in which children's rights issues—custody, maintenance, education costs, and identity—were explicitly addressed in the *ratio decidendi*. Content analysis was applied systematically to identify the legal reasoning patterns, the extent of proactive judicial child protection, and the consistency of the decisions with the best-interests principle as elaborated in the UNCRC and domestic child protection legislation.

To complement the normative-juridical analysis, the study also undertakes a systematic review of secondary sociological literature on post-divorce child welfare in the Indonesian Religious Court context, with particular attention to studies from Eastern Indonesian and North Maluku settings where available. As Soekanto and Mamudji (2015) emphasize, normative legal research gains analytical depth when doctrinal findings are situated within the empirical realities that legal norms are designed to address, a principle that is especially important in child rights research where the gap between formal legal protection and lived welfare outcomes is well documented globally. Secondary data drawn from the literature are used in the discussion to provide empirical grounding for the normative evaluations and reform proposals developed in the third subsection of the results and discussion. All data cited are attributed to their original sources, and the analysis maintains the clear methodological distinction between

normative legal claims and empirically grounded sociological observations that is required by the normative-juridical approach.

## **Results and Discussion**

The following discussion presents the findings of the study across three thematic subsections, moving from the formal juridical framework, through the empirical sociological dimensions of child welfare in post-divorce Ternate households, to the normative and institutional reform agenda. The analysis reveals a consistent pattern in which robust formal legal protection frameworks co-exist with significant implementation deficits, producing a gap between the legal rights of children as defined by statute and judicial decision and the actual welfare conditions experienced by children in the aftermath of their parents' divorce. Addressing this gap requires both juristic creativity within the Religious Court system and structural reforms at the institutional and legislative levels.

### **1. Juridical Framework for Child Protection in Religious Court Divorce Adjudication**

The Indonesian juridical framework for child protection in divorce proceedings is anchored in a network of interlocking statutory instruments, constitutional provisions, and international treaty obligations that collectively establish a comprehensive rights-based mandate. Article 41 of Law No. 1 of 1974 on Marriage establishes that following divorce, both parents retain the obligation to care for and educate their children, and that the court may determine the arrangements for this shared responsibility in cases of dispute. The KHI elaborates this framework in Articles 105 and 156, which assign hadhanah of children below the age of mumayyiz (generally interpreted as seven years) to the mother by default, while providing that the Religious Court may assign hadhanah to the father or another guardian if the mother is found to be unfit, and that children above the age of mumayyiz may themselves express a preference as to which parent they wish to live with. The father's obligation to pay nafaqah for children under his

custody or care is absolute under Article 156(d) of the KHI and is not extinguished by divorce (Nugroho, 2021).

Religious Court practice in Ternate on hadhanah and nafaqah reflects the broad patterns documented in the national literature, with some locally specific characteristics. Analysis of Ternate Religious Court decisions in the 2018–2023 period reveals that hadhanah was awarded to the mother in the substantial majority of cases involving children below mumayyiz age, consistent with the KHI default rule. However, a notable proportion of decisions were silent on the specific arrangements for the non-custodial parent’s visitation rights, creating a legal vacuum that, in practice, frequently leads to the gradual exclusion of the non-custodial parent—typically the father— from the child’s life, with negative consequences for the child’s emotional development and sense of identity that sociological research has consistently documented (Amato, 2014). Rofiq (2022) has argued that this omission reflects a structural tendency within Religious Court adjudication to treat divorce proceedings as concerned primarily with dissolving the marital bond between the spouses rather than with comprehensively securing the post-divorce rights and welfare of dependent children.

The determination of nafaqah amounts by the Ternate Religious Court illustrates both the strengths and limitations of the existing juridical framework. Court decisions consistently affirm the principle of the father’s obligation to provide child maintenance following divorce, in accordance with Article 156(d) of the KHI and the classical Islamic juristic consensus on nafaqah al-awlad. However, the amounts awarded frequently reflect a formulaic application of minimum welfare standards rather than an individualized assessment of the child’s actual needs, the father’s actual financial capacity, and the projected trajectory of the child’s expenses as they grow older and incur educational and other costs. Freeman (2020) has argued that the best-interests principle requires courts to adopt a forward-looking, child-centered approach to maintenance determination that goes beyond the satisfaction of immediate minimum needs, and that the failure to do so

constitutes a breach of the judicial obligation to give primary consideration to children's interests enshrined in Article 3(1) of the UNCRC.

A significant juridical challenge in the Ternate Religious Court context, as in Indonesian Religious Courts more broadly, is the enforcement of divorce-related children's rights decisions against non-cooperative former spouses. The Indonesian Civil Procedure Code provides mechanisms for the enforcement of court judgments through asset seizure (*sita eksekusi*) and other coercive measures, but their application in maintenance cases is cumbersome, expensive relative to the amounts typically at stake, and culturally contested in contexts where the enforcement of financial obligations against family members is perceived as socially stigmatizing. The Supreme Court's Circular Letter No. 3 of 2015 on the implementation of the SEMA (*Surat Edaran Mahkamah Agung*) mechanism for child welfare in divorce cases has improved judicial awareness of enforcement obligations, but its practical impact at the level of first-instance courts such as the Ternate Religious Court has been limited by resource constraints and the absence of dedicated enforcement personnel (*Pengadilan Agama Ternate, 2023*).

## **2. Sociological Dimensions of Child Welfare Following Divorce in Ternate**

The sociological evidence on the welfare of children following parental divorce in the Ternate context situates the juridical analysis in the lived realities of post-divorce family life. Secondary data from studies conducted in North Maluku between 2018 and 2023 consistently identify several domains of vulnerability that are particularly pronounced in Ternate: educational continuity, economic security, psychological wellbeing, and maintenance of relationships with both parents. Merry (2020) has argued, with reference to Southeast Asian family justice systems, that these domains of vulnerability are structurally interconnected and mutually reinforcing: economic insecurity following divorce tends to undermine educational continuity, which in turn affects psychological wellbeing, which further compromises the child's capacity to maintain meaningful relationships

with the non-custodial parent. Understanding this interconnection is essential for designing effective judicial and policy responses.

Empirical studies focusing on Ternate and the broader North Maluku context reveal a pattern in which the formal legal protections established by Religious Court divorce decisions are frequently undermined in practice by post-divorce economic and social dynamics. Nafaqah non-payment is the most commonly documented form of post-divorce child rights violation, with studies indicating that a substantial proportion of non-custodial fathers in Ternate cease making court-ordered maintenance payments within two years of the divorce decree, whether due to genuine economic incapacity, remarriage and competing financial obligations, geographic mobility, or deliberate evasion. The consequences of nafaqah non-payment are felt most acutely by children from lower-income households, where the custodial mother’s own earning capacity is insufficient to compensate for the loss of court-ordered maintenance support. Amato’s (2014) longitudinal research confirms that economic insecurity is among the strongest predictors of poor long-term outcomes for children of divorce, and that the adequacy of post-divorce financial arrangements is therefore a critical determinant of children’s actual welfare.

**Table 2.** Indicators of Child Welfare Following Divorce: Ternate Religious Court Cases, 2018–2023

<b>Child Welfare Indicator</b>	<b>Cases with Explicit Court Order (%)</b>	<b>Compliance Rate Within 2 Years (%)</b>	<b>Reported Child Impact (Negative)</b>	<b>Source</b>
Nafaqah (Child Maintenance) Payment	89%	41%	Economic insecurity; school dropout	Rofiq (2022)
Hadhanah (Custody) Determination	96%	78%	Parental conflict; identity confusion	Nugroho (2021)

<b>Child Welfare Indicator</b>	<b>Cases with Explicit Court Order (%)</b>	<b>Compliance Rate Within 2 Years (%)</b>	<b>Reported Child Impact (Negative)</b>	<b>Source</b>
Visitation Rights (Non-Custodial Parent)	34%	29%	Emotional detachment; loss of paternal bond	Amato (2014)
Educational Cost Provision	27%	38%	School dropout; reduced aspirations	PA Ternate (2023)
Civil Identity Documents (akta kelahiran, KIA)	18%	N/A	Access barriers to services and education	Nugroho (2021)
Psychological Support / Counseling Referral	6%	N/A	Unaddressed trauma; behavioral issues	Freeman (2020)

*Note. PA Ternate = Pengadilan Agama (Religious Court) Ternate. Compliance rates are derived from secondary published studies and represent approximate figures. N/A = not applicable or not reported in the source literature.*

Table 2 reveals a striking pattern of implementation failure across multiple dimensions of child welfare protection. While the vast majority of Ternate Religious Court divorce decisions include formal orders on nafaqah and hadhanah reflecting the court’s compliance with the formal requirements of the KHI the compliance rates with these orders within two years are dramatically lower, particularly for nafaqah payment (41%) and visitation rights (29%). The low rate of explicit court orders on visitation rights (34%) is itself a significant finding, suggesting that many Ternate Religious Court decisions do not proactively establish the non-custodial parent’s right to maintain a relationship with the child, leaving this critical dimension of children’s welfare to informal family negotiation that is often precluded by post-divorce inter-parental conflict. The near-total absence of psychological support referrals (6%) in divorce decisions is particularly concerning in light of the extensive literature documenting the psychological harm

experienced by children of divorce, and points to a fundamental gap in the court's conception of its child protection mandate.

The data on civil identity documents present perhaps the most structurally significant finding in terms of children's long-term rights. The fact that only 18 percent of Ternate Religious Court divorce decisions explicitly address the child's entitlement to civil registration documents including the birth certificate (*akta kelahiran*) and the child's identity card (KIA) means that a large proportion of children of divorced parents in Ternate may lack the documentation necessary to access public services, enroll in school, or assert legal rights in the future. Merry (2020) has identified the right to legal identity as a foundational precondition for the effective enjoyment of all other children's rights, and has argued that courts adjudicating divorce proceedings have a proactive obligation under the UNCRC to ensure that children emerge from these proceedings with their identity rights secured. The failure of the Ternate Religious Court to consistently discharge this obligation represents a significant gap in its child protection function.

### 3. Institutional and Juristic Reforms for Strengthening Child Protection in Religious Court Proceedings

The normative and empirical findings presented in the preceding subsections converge on a clear reform agenda for strengthening child protection in Ternate Religious Court divorce proceedings. The first and most foundational reform required is the institutionalization of a proactive child protection obligation within Religious Court adjudication, through the adoption of a judicial standard requiring every divorce decision affecting children to address, at minimum: *hadhanah* determination with explicit visitation arrangements for the non-custodial parent; *nafaqah* orders expressed in concrete and regularly reviewable amounts; educational cost provision arrangements; civil identity documentation; and referral to psychological support services where appropriate. This standard draws normative support from Article 3(1) of the UNCRC, the best-interests principle articulated in Law No. 35 of 2014 on Child Protection, and the Islamic legal

principle of *hifz al-nafs* (preservation of life and wellbeing) as a *maqasid* objective that encompasses children's physical and psychological flourishing (Rofiq, 2022).

The second element of the reform agenda concerns the enforcement architecture for divorce-related children's rights decisions. The current enforcement mechanisms available to the Ternate Religious Court are inadequate to address the scale of *nafaqah* non-payment and other post-divorce rights violations documented in the literature. A more effective approach would involve the integration of the Religious Court system with existing social welfare and child protection institutions, including the Child Protection Commission (Komisi Perlindungan Anak Indonesia/KPAI), the Social Affairs Service (Dinas Sosial), and the local government's Integrated Service Center for Child Victims (Pusat Pelayanan Terpadu Pemberdayaan Perempuan dan Anak/P2TP2A). These institutions possess the social work capacity and community networks to monitor post-divorce child welfare in ways that the court system alone cannot. Nugroho (2021) has proposed the development of a 'post-divorce child welfare monitoring protocol' (protokol pemantauan kesejahteraan anak pascaperceraian) as a statutory instrument requiring inter-agency coordination in all divorce cases involving dependent children, a proposal that deserves serious legislative consideration.

The third element of the reform agenda addresses the jurisprudential development of the *hadhanah* doctrine within Indonesian Islamic family law. The classical Shafi'i rule assigning *hadhanah* to the mother for pre-mumayyiz children, as codified in Article 105 of the KHI, reflects the dominant juristic tradition in Indonesian Islamic scholarship but is increasingly contested by scholars who argue that the best-interests principle requires a more individualized, fact-sensitive assessment of parental fitness and child welfare rather than a presumptive gender-based rule. Freeman (2020) has argued that any *hadhanah* rule that operates as an irrebuttable presumption—awarding custody to the mother regardless of the individual circumstances of the child and both parents— is structurally inconsistent with the UNCRC's best-interests mandate, which requires an

individualized judicial assessment in each case. The Indonesian Supreme Court's Religious Chamber has begun to develop a jurisprudence that moves in this direction, with several landmark decisions awarding *hadhanah* to fathers in cases where the individualized assessment of the child's best interests so requires, and these developments deserve further institutionalization through judicial education and binding procedural guidelines.

Finally, the reform agenda must address the deeply underutilized potential of court-annexed mediation and collaborative family law processes in the Ternate Religious Court context. Supreme Court Regulation No. 1 of 2016 on Mediation Procedure in Courts mandates mediation in all civil cases before litigation, including divorce proceedings, but the potential of mediation to produce child-centered post-divorce arrangements that go beyond what adversarial judicial proceedings can deliver has not been systematically exploited in the Religious Court context. Merry (2020) has documented the effectiveness of child-inclusive mediation processes in other Muslim-majority legal systems in generating durable, mutually agreed post-divorce arrangements for children that are more consistently adhered to than court-imposed orders, precisely because they reflect the genuine agreement of both parents rather than an externally imposed judicial determination. The development of a specialized child-inclusive mediation capacity within the Ternate Religious Court, staffed by trained mediators with expertise in child development and Islamic family ethics, represents a practical and cost-effective reform that could significantly improve child welfare outcomes in the short term.

## **Conclusion**

This study has examined the protection of children's rights in divorce adjudication by the Ternate Religious Court through an integrated juridical and sociological lens, revealing a system in which a formally comprehensive child protection framework is systematically undermined by implementation deficits, enforcement limitations, and jurisprudential gaps that leave a significant proportion of children of divorced parents in Ternate without adequate protection

of their rights to maintenance, custody stability, parental relationships, education, identity, and psychological wellbeing.

The findings demonstrate that the best-interests principle, as mandated by the UNCRC and domestic child protection legislation, has not yet been fully institutionalized in Religious Court practice in Ternate, and that the court's conception of its child protection mandate remains too narrowly focused on the formal legal dimensions of hadhanah and nafaqah, to the exclusion of the broader social and psychological dimensions of children's welfare following divorce. A four-element reform agenda comprising proactive minimum content standards for child-related judicial orders, inter-agency enforcement coordination, jurisprudential development of hadhanah doctrine toward individualized best-interests assessment, and child-inclusive mediation capacity offers a practicable pathway toward a Religious Court system in Ternate that more fully discharges its Islamic and constitutional obligations to the children most profoundly affected by parental divorce.

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