

# Child Custody Contest: Islamic Jurisprudence and Indonesian Positive Law on Remarried Mothers

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## Abstract

**Purpose:** This study examines child custody rights (*hadhanah*) under Islamic jurisprudence and Indonesian positive law, focusing on scholarly disagreements regarding the legal consequences of a remarried mother's custody determination.

**Research Methodology:** This study employs a qualitative library research method, reviewing classical fiqh texts, Indonesian legislation, and jurisprudential literature through a comparative analysis.

**Results:** Scholars are divided into three positions: the majority (*jumhur*) hold that remarriage automatically forfeits maternal custody; Ibn Hazm argues that custody remains if child welfare is unharmed; and Imam al-Baghawi conditions retention on consent from both the biological father and new husband. *Kompilasi Hukum Islam* (KHI) does not explicitly address this issue but implicitly supports retaining maternal custody unless the child's well-being is compromised.

**Conclusions:** Indonesian positive law diverges from the majority fiqh position by applying a welfare-based approach, aligning more closely with Ibn Hazm and Imam Al-Baghawi. Clearer statutory regulation is needed to resolve the existing legal vacuum.

**Limitations:** This study relies on qualitative doctrinal analysis without empirical court data, which may limit the generalizability of the findings.

**Contributions:** This study contributes to Islamic family law and Indonesian legal scholarship by clarifying scholarly positions on *hadhanah* for remarried mothers and highlighting the need for legislative reform aligned with the best interests of the child.

**Keywords:** *Hadhanah, Islamic Jurisprudence, Indonesian Positive Law*

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## 1. Introduction

The birth of a child is a legal event that occurs due to a husband-wife relationship, bringing consequences in the form of reciprocal rights and obligations between parents and their children. Children have certain rights, both rights that are the material needs of children, such as clothing, food, and shelter, and intangible rights, such as the right to religion, the right to worship, the right to receive attention and affection, and the right to social interaction. Basically, every child has the right to be cared for by both parents simultaneously. This is affirmed in Law Number 35 of 2014 Article 14 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. This rule is not without basis; according to legal psychology, children who are cared for by both parents will have much better mental and psychological development and be able to do positive things compared to children who are only cared for by single parents. In general, children raised by single parents have more potential to do negative things and tend to have behavioral, academic, and social activity problems. In society, not all marriages endure indefinitely due to various reasons. The fragility of household relationships frequently results in divorce ([Nasution, Pagar, & Asmuni, 2022](#)). Although divorce is

disfavored in Islamic teachings, it becomes a permissible last resort when all reconciliation efforts have been exhausted. Among the most significant consequences of divorce is the matter of child custody (*ḥaḍānah*), as children are often the most affected parties, losing the presence of both parents in their daily lives.

Child custody (*ḥaḍānah*) is an important aspect of Islamic family law that is directly related to the upkeep, upbringing, and education of a child after a divorce between the parents. Therefore, in every divorce process, the issue of custody is crucial and requires serious attention ([Santoso & Sari, 2021](#)). This is inseparable from the fact that children are the most vulnerable in this situation. Therefore, the determination of who has the right to care must consider the emotional, psychological, and welfare aspects of the child. Accordingly, in Islamic fiqh, child custody is prioritized by the mother because she is inherently closer to the child and is better able to provide the affection and attention needed by the child in the early phases of his life ([Sururie, Hopipah, Witro, Diana, & Sopiyan, 2024](#)). In Indonesia, child custody is governed by various laws and regulations, including the *Kompilasi Hukum Islam* (KHI), Law Number 1 of 1974 concerning Marriage, and Law Number 35 of 2014 concerning Child Protection. In KHI Article 156, it is stated that the custody of a child who has not been *mumayyiz* is handed over to the mother, unless the mother has died or in circumstances that make it impossible to carry out her obligations ([Agama, 1992](#)). However, the KHI and other laws do not explicitly regulate the status of child custody if the mother remarries. This situation creates a legal vacuum that has the potential to create ambiguity in the practice of religious justice in Indonesia's courts.

Furthermore, social phenomena in Indonesian society show that divorce cases continue to increase every year, both those decided by the Religious Court and those that occur without going through judicial channels. One of the biggest impacts of divorce is the problem of child custody. There are many cases in which children become victims in the conflict between their parents, especially when the mother who obtained custody of the child remarries. In this situation, new disputes often arise between the biological father and the child's mother's new husband regarding the child's parenting and education rights. In addition, the development of child protection principles in national and international law increasingly emphasizes the importance of the best interest of the child as the main principle in every decision related to children, including custody issues ([Yulia & Adha, 2024](#)). This principle is in line with *maqāṣid al-syarī'ah*, which also places the care of the offspring (*ḥifẓ al-nasl*) and the soul (*ḥifẓ al-nafs*) as one of the main purposes of the establishment of law ([Faizzati, 2024](#)). When the mother remarries, the shari' a revokes custody and grants it to the next caregiver. This is because after remarriage, the mother's attention tends to be divided between her new husband and her children who may be born from the marriage. Consequently, children from previous marriages are at risk of feeling neglected, which can ultimately lead to a lack of attention and potential child neglect ([Hanif, Salsabila, & Hubur, 2023](#)).

This opinion is agreed upon by the four imams of the madhhab: Hanafi, Maliki, Syafi'i, and Hanbali ([Al-Zuhayli, 1989](#)). Among the reasons is the fear that childcare will be disrupted because the mother's attention is divided on her new family, as well as the potential for the emergence of *madharat* for children from the new environment after remarriage ([Az-Zuhaili, 2010](#)). They emphasized the importance of maintaining children's welfare and avoiding potential losses that can be caused by changes in family conditions. This is in line with Islamic Sharia, which emphasizes that people should stay away from all harm. Nevertheless, Imam al-Baghawi in his work *al-Tahzib fi al-Fiqh al-Shafi'i* put forward a different view of the *Jumhur Fuqaha*. According to him, custody of children remains in the mother's hands even if the mother remarries, as long as she gets the pleasure of the first husband (the child's father) and her new husband. These opinions also demonstrate the flexibility of Islamic law in responding to social dynamics. The rules of fiqh that emphasize the principle of *Jalb al-maṣāliḥ muqaddamun 'ala dar' al-mafāsīd* (presenting benefits more than rejecting damage) seem to be the consideration of scholars. By providing room for compromise and considering the pleasure of all parties, he directed that the most important thing was to maintain the interests of children, not just the formal interests of parents ([Multazam, 2024](#)).

According to [Hakam and Hidayah](#), in practice, even after a mother has been divorce and remarriage, a mother in Indonesian society still holds *Hadhanah* over her child. This is due to many factors such as (1) people's habits, (2) bad relationship between father and son because the father has also remarried to another woman (2) grandmother's or grandfather's concern if the child is taken care of by the father.

Therefore, a comparative analysis of scholarly opinions and their alignment with Indonesian positive law is essential to promote the harmonization of Islamic jurisprudence and national law in the best interests of the child. This study identifies a clear research gap: neither classical fiqh scholarship nor existing Indonesian legislation offers a comprehensive, unified framework governing *hadhanah* when the custodial mother remarries. To address this gap, this study aims to (1) analyze the divergent scholarly views on maternal custody after remarriage within classical Islamic jurisprudence, (2) examine the relevant provisions of Indonesian positive law, and (3) assess the extent to which Indonesian legal practice aligns with or departs from classical fiqh positions.

## 2. Literature Review

Research on child custody (*hadānah*) for remarried mothers has attracted significant attention in the field of Islamic family law studies. Recent scholarship tends to move beyond rigid textual interpretations toward more contextual and child-centered approaches to literature. Studies such as those conducted by Faizzati emphasize the importance of *maqāṣid al-syarī'ah* in determining custody rights, arguing that the welfare of the child psychologically and socially must take precedence over rigid adherence to classical juristic rulings. This *maqāṣid*-based approach resonates with the broader objective of Indonesian positive law, which similarly enshrines the best interests of the child as a guiding principle in custody adjudication. According to [Faizzati \(2024\)](#), the welfare of the child psychologically and socially should be prioritized over rigid adherence to classical juristic opinions. This view reflects a broader trend in contemporary Islamic legal studies that critiques overly textual approaches to the law.

Empirically, Muslim communities in Indonesia do not always adhere strictly to the doctrinal positions of the Syafi' i school. Instead, custody decisions are often shaped by emotional closeness, family arrangements, and child welfare considerations, reflecting a practical alignment with the welfare-first approach of Indonesian law, even when classical fiqh would prescribe otherwise. This divergence underscores a significant gap between normative fiqh and social reality. Other contemporary scholars have also highlighted the need to reinterpret classical doctrines in light of modern legal systems and child protection frameworks ([Yunus, 1989](#)).

These studies generally advocate for a flexible and contextual approach but tend to remain at the general theoretical level. Despite these contributions, a significant research gap remains. First, most studies adopt either a *maqāṣid*-based framework or a socio-legal approach without deeply engaging with specific classical jurists within the Syafi' i tradition. Second, few studies have systematically connected classical fiqh opinions with Indonesian positive law. Third, the specific thoughts of Imam al-Baghawi, particularly in his work *al-Tahzib*, have not been thoroughly examined in the context of remarried mothers' custody rights. Therefore, this study aims to fill this gap by analyzing al-Baghawī's perspective and examining its relevance to contemporary Indonesian law. This study contributes to bridging classical Islamic jurisprudence and modern child protection principles.

## 3. Methodology

This study used a qualitative approach with a literature study method (Library Research). Data were obtained from primary literature, such as classical fiqh books (including works by al-Baghawi, al-Zuhaili, and Ibn Hazm), hadith collections, and the Qur'an, as well as secondary literature comprising peer-reviewed journals, academic books, and Indonesian legislation. Primary sources were selected based on their direct relevance to *hadhanah* rulings, prioritizing works within the Syafi' i tradition and those explicitly addressing remarried mothers. Secondary sources were included if published after 2017 (to reflect recent scholarship) or if they provided foundational legal analyses of Indonesian family law. Sources that did not directly address child custody or lacked scholarly credibility were excluded. A

comparative analysis was employed to juxtapose the positions of various Islamic scholars with Indonesian positive law frameworks regarding child custody for remarried mothers.

## 4. Results and Discussions

### 4.1 A Brief Overview of Hadhanah

*Hadhanah* is Derived from Arabic, with the origin of the word *Hadhanah*, -حضن-حضن-حضن-احتضانًا-حاضنة-حواضن, which means taking care of children, hugging children, or babysitting. Muhammad al-Zuhaili says that *Düsseldorf* means something near the ribs, such as carrying or putting something in your lap (Az-Zuhaili, 2010). In the book *Subul as-Salam*, the Hadith is derived from a word with the letter "ha" which is the masdar of the word *Hadhanah Syabiyyah*, meaning that he is taking care of or raising the baby. *Al-hadhanah* upbringing or maintenance with kasroh letters "ha" It also means the part of the body starting from the lower part of the armpits to the part between the center and mid-back above the pelvis of the thigh, including the chest or two upper arms and the part in between.

Meanwhile, Wahbah Az Zuhaili defines child custody as caring for people who cannot take care of themselves because they have not yet *Mumayyiz* like children or adults but crazy (Az-Zuhaili, 2010). In Islamic law, the main principle governing child custody issues is the welfare of the children. Islam pays great attention to the rights of children, both in a intact household and after divorce (Amelia, Purba, Sembiring, & Sembiring, 2024). Islamic law, which is based on the Qur'an, hadith, and ijma' ulama, provides clear guidance on who has the right to custody of a child after divorce (Tjandi, Kasim, & Heridah, 2022).

The fuqaha sometimes put forward one of the people who have the right to take care of the children's *hadhanah* based on the benefit of the children. In this case, they prioritize women to take care of children's care because they are more gentle, affectionate, and patient in educating children. Then, one is chosen as the one closest to the child to be kept. After that, only the person who has the right to maintain from among the men is chosen (Farid, Albani, & Lubis, 2025). In this case, scholars sometimes differ in opinion when determining the right order according to the benefits needed. The people who have the right to take care of the *hadhanah* are sometimes only women, sometimes only men, and sometimes both, depending on the child's age. At a certain age, men are more capable of raising children than women (Hifni & Asnawi, 2021).

Because the various aspects of the child's right to *hadhanah* seem ambiguous or unclear, jurists have different opinions about the right to *hadhanah*. Whether it is the right of the servant of Allah (humans), in the form of the right of the nurtured or the nurturing, or the right of both. Based on such a determination, jurists are divided into three opinions (Masyhadi & Mahmudi, 2024). *Hadhanah Primary* It is a right for those who are nurtured/educated. In this case, the mother had no right to abort the fetus, and she was forced to do so. This is the opinion of some of the fuqaha of the Hanafi madzhab, including Abu al-Layts, and was corroborated by al-kamal bin Hammam in *Fath al-Qadir*. This is also the opinion of the Maliki and Syafi'i mazhab.

They refer to the verse: "And mothers should nurse their children for two whole years, for those who wish to perfect their nourishment" (QS.al-Baqarah, 232). The paragraph is in the form of a notice or *Number of Khabaryads*, but his intention is to rule *Amar*, and the command is to oblige. If breastfeeding is obligatory by law, then the mother cannot be aborted for *hadanah*. *The Second Hadhannah* is a right to *hadhin* (caregiver); if it is his right, then he has the right to abort it. This is the opinion of the madhhab of Imam Hanafi, Syafi'i, and Maliki, unless providing for the child in care becomes the father's obligation. This is also the opinion of the Hambali madhhab. This conclusion is based on the evidence: "Then if they nurse your (children) for you, then give them their wages, and deliberate well among yourselves, and if you encounter difficulties, then another woman may nurse (the child) for her." (QS. ath-Thalaq, 6).

The verse explains that when difficulties are found, other women may breastfeed him (the child) for him. While the "And mothers shall nurse their children," it shows the deeds *Sunnah*, and not for obligation, or both of them (husband and wife) are considered to be in a state of agreement and do not

encounter difficulties, then breastfeeding (by the mother) becomes obligatory, and if there is no agreement, then breastfeeding by her is only sunnah, if we are of the opinion to force it, then it may be that she is not able to do it in a weak state *hadhanah* ([Idris, Khusaini, & Al-Mansyuri, 2024](#)).

*Third, Hadhanah* is the right of both parents; this is the opinion of some fuqaha of the Maliki school. In the view that the mother has the right to abort the *hadhanah* with the verse of talaq, this is a postulate that this *hadhanah* is her right. This group also found that the mother's abortion of *hadhanah* is not acceptable if the child is unable to receive the others, or it could be that the father is unable to pay the *hadhanah* wage; there is no other way to provide free parenting. This is a postulate, that *hadhanah* is the right of the child who is cared for/educated on that consideration, so they argue, "Actually, *hadhanah* is the right of both, the mother and the child"

From the above opinions, Huzaemah Tahidho argues, What is held by the first group is based on the words of Allah SWT: " "And mothers shall nurse their children for two whole years. This is a Nash about the obligation of a mother to breastfeed her child for two years, although scholars differ on *Ar-Radha* (breastfeeding). Whether it is a mother's right or a right to it (is a mother's obligation). Of course, such words are multi-interpreted and contain many possibilities. If it is desired that the right to breastfeed is the right of a mother, then the verse will read "*Wa 'ala al-walidat radha'u awladhinna* (and it is obligatory on mothers to breastfeed their children)". This is similar to the arrangement of the verses and the obligation of the father to feed and clothe the mothers well ([Muhajir, 2017](#)).

Imam Nawawi, in the book *al-Raudhah* and his sarah, opined that people in *hadhanah* (nurtured) are every child, a madman, a person with a disability, and a person who lacks character *Squirt* who has reached the age of Tamyiz. Likewise, according to Imam Ibn Hajar in *Tuhfah*, scholars differ in terms of the deadline for raising small children; some argue that it is up to the age of puberty. Imam Al-Mawardi argues that the final limit of *hadhanah* is the age of *tamyiz*. Meanwhile, after puberty, the right of kafalah is granted.

#### **4.2 Factors in Determining Custody**

The determination of custody in Islamic law is greatly influenced by children's interests and welfare. As mentioned in the Qur'an and hadith, child custody is not only based on age and gender factors but also on the ability of parents to provide good care. In this case, policies that prioritize the interests of children must be prioritized ([Tjandi et al., 2022](#)). Islam also grants children the right to a good education and an environment that supports their growth. Therefore, even though mothers generally have more dominant custody of children at an early age, fathers still have the right to fight for custody if they feel that they can better meet the needs of the children ([Baidawi & Sunarto, 2020](#)).

Islamic law provides clear guidelines regarding child custody after a divorce. *Hadhanah* is a person's right and obligation to care, educate, and take care of a child after divorce. Several factors are considered in determining child custody according to Islamic law ([Tjandi et al., 2022](#)).

##### **1. Child's Age**

The age of the child is one of the main factors in determining who has the right to care for the child. According to the Shafi'i madhhab, which is widely followed in Indonesia, young children, especially those who have not reached the age of seven, are better cared for by their mothers ([Mera, Marzuki, Sapruddin, & Cahyani, 2024](#)). This is based on the consideration that mothers are better able to provide greater affection, care, and attention to their young children. However, if the child has reached the age of seven years or more, custody of the child can be transferred to the father, although the mother still has the right to meet and provide care regularly ([Tarmizi, Pradiba, & Usman, 2023](#)). In Indonesia's positive law. For young children, the court is more likely to give custody to the mother, considering that the mother is better able to provide the care needed by the child at that age. However, when the child is old enough, custody can be given to the father, especially if there is already evidence that the father can provide a better life for the child ([Tjandi et al., 2022](#)).

##### **2. Parental Health and Abilities**

Another factor considered in determining child custody is the health condition and the parent's ability to care for the child. Islamic law prioritizes conditions that allow children to receive proper care. If the parent who applies for child custody is unable to provide adequate care, custody can be given to another party, such as relatives who are more physically and financially able. In Islamic law, there are several restrictions on custody, which are mainly related to the suitability of the parents' character in caring for children. Parents with physical or mental disabilities or those unable to provide adequate attention are not recommended for child custody. This aims to enable children to grow up in a healthy environment and support their physical and mental development ([Mustaring, 2023](#)). The financial ability and psychological condition of parents are also considered in Indonesia's positive law. The court assesses whether parents can provide a decent life for their children, financially, emotionally, and socially. If one of the parents has inadequate conditions, the court can give custody to the party who is considered more stable.

### 3. Social Position and Morals of Parents

In addition to health and physical ability, the morals or morality of parents are important considerations in determining child custody. Islamic law requires parents who take care of children to have good morals so that they can set a good example for their children. If one of the parents is found to have bad morals or engage in behavior that is not in accordance with Islamic teachings and applicable norms, custody can be given to the morally better parent ([Tarmizi et al., 2023](#)).

### 4. Children's Needs

The needs of the child are also an important factor in determining custody arrangements. Young children require full attention and a stable environment. Therefore, the comfort and welfare of children are the basis for consideration in Islamic laws. If one parent is proven to be unable to meet the basic needs of the child, custody can be given to another party who is considered more capable ([Wicaksana et al., 2024](#)).

### 5. The best interests of the child

In positive Indonesian law, the main principle used as a reference in determining child custody is "the best interest of the child" or the best interest of the child ([Siregar & Kusmayanti, 2022](#)). This principle is stated in Article 49 of Law No. 1 of 1974 concerning Marriage, which emphasizes that, in deciding custody, the court must prioritize the welfare and rights of children ([Mustaring, 2023](#)). In such cases, the court must consider all aspects, including the physical, psychological, social, and educational needs of the child. Therefore, although the mother is often considered a more suitable party to care for the child, the judge may decide to give custody to the father if he is deemed financially and emotionally capable of caring for the child.

### 6. Children's Preferences

In some cases, the court also considers the wishes or preferences of the child, especially for children of sufficient age who are able to express their opinions. The child's desire to live with one of the parents or in a certain environment is considered by the court in custody decisions ([Tarmizi et al., 2023](#)).

The Table 1 presents a comparative overview of the hierarchy of child custody (hadhanah) among four major Islamic jurisprudence schools Hanafiah, Malikiyah, Syafi'iah, and Hanabilah—and the Indonesian Compilation of Islamic Law (KHI). It illustrates the differences and similarities in determining priority rights for child custody after parental separation or legal dispute. Each school of thought establishes a distinct order of eligible caregivers, generally prioritizing the mother and maternal relatives, followed by paternal relatives and other extended family members, although variations exist in the sequence and scope of eligible guardians. For instance, while all schools consistently prioritize the mother, differences appear in the subsequent order involving grandmothers, siblings, aunts, and paternal relatives. In contrast, the KHI provides a more structured and standardized framework by emphasizing the maternal line first, followed by the paternal line, reflecting Indonesia's codified legal approach to Islamic family law. This comparison highlights the diversity of classical Islamic legal reasoning and the contemporary effort to harmonize it within national legal regulations. Because of these factors, there are differences in the order of who is entitled to child custody as follows:

Table 1. Comparison of Child Custody (Hadhanah) Priority Across Islamic Legal Schools and the Indonesian Compilation of Islamic Law (KHI)

No	Hanafiah	Malikiah	Syafi'iah	Hanabilah	KHI
1.	Mother	Mother	Mother	Mother	Mother
2.	Mother of Mother	Mother of Mother	Mother of Mother	Mother of Mother	Women in the line straight up From Mother
3.	Mothers of Dads	Mother of Grandmother	Mothers of Dads	Mothers of Dads	Father
4.	Sister	Aunt from Mom	Sister Sister	grandfather and Grandma	Women in the line straight up from the father
5.	Aunt of Mother	Father's Mother	Father's aunt	Contents	Women
6.	Nephew Women	Sister	<i>Ashabah</i> according to the order of inheritance	Sister	Blood women according to Sidelines from fathers
7.	Father's Aunt	father aunts		Sister	
8.	<i>Ashabah</i> according to the order of inheritance	Daughters of Brothers		aunt	
9.		<i>Ashabah</i> according to the order of inheritance		Son of brother, uncle	

#### 4.3 Scholars' Views on Child Custody for Remarried Mothers

In Islamic law, child custody (*Hadhanah*) is a right and an obligation for parents, especially mothers, to take care of and care for children until they reach a certain age. However, a problem arises when the mother with the right to *Hadhanah* remarries (Zahrah, 1957). The differences in views among fiqh schools reflect the dynamics of Islamic law's application in various social contexts. The following are scholars' views on the Right of *Hadhanah* for remarried mothers:

*First*, Most scholars believe that when the mother remarries, her custody of the child is lost and will be given to the next caregiver (Suprihatin, 2018). This Wahbah al-Zuhaily is the agreement of the imam of the mazhab (Az-Zuhaili, 2010). According to the Hanafi madhhab, this is based on a hadith: "You are entitled to your children as long as you are not married again."

Ulama Syafi'iah said that this was because the mother's marriage to a foreign man has the potential to reduce the attention and affection given to the child; therefore, in this condition, custody will be transferred to the mother's relatives who still have a close relationship with the child (Gani & Mughnia, 2021). No different from the syafi'ah circle, according to the hanabilah scholars, there are several factors that underlie this opinion, including the safety and comfort of children being the main priority in determining custody. Therefore, if the mother remarries, the rights of *Hadhanah* pass to the grandmother from the mother's side or to other relatives who are considered worthy (Rafiqah, Johan, & Nelli, 2020). According to Rosa Fitriana Imam Malik in his book *al-Mudawwanah al-Kubra*, the right of *Hadhanah* would not be restored to the mother, even though she had separated from her second husband (Fitriyana, 2022).

*Second*, Ibn Hazm had a different view from Jumhur. According to him, a mother's custody does not automatically disappear just because she remarries. He argued that as long as the mother is still able to take care of and take care of the child properly, and there is no evidence that her new marriage has a

negative impact on the child, then the right of Hadhanah remains with the mother. This opinion emphasizes the aspect of well-being and the best interests of the child in determining custody ([Tjandi et al., 2022](#)).

According to Ibn Hazm, the main purpose of child custody (*hadhanah*) is to ensure the well-being and protection of the child. Therefore, he rejects an approach that automatically revokes maternal custody based solely on the marital status. Hazm believes that decisions related to custody must be made based on a real evaluation of the child's condition, not just following rigid legal rules. This shows that Ibn Hazm's approach is based more on contextual analysis than on adherence to general legal rules. In addition, Ibn Hazm emphasized that the basic principle of *Hadhanah* is affection and attention to children. If the mother can still provide a stable environment and support the child's development, custody should not be revoked solely based on the marital factor.

*Third* Imam al-Baghawi, in his work *al-Tahzib fi al-Fiqh al-Shafi'i*, also put forward a different view from the *Jumhur Fuqaha*. According to him, custody of children remains in the mother's hands even if the mother remarries, as long as she gets the pleasure of the first husband (the child's father) and her new husband. From the corner of *Istimbat Al-Ahkam*, Imam al-Baghawi's opinion represents a pattern of moderation of Islamic law. He does not deny the existing text but presents a more comprehensive understanding by paying attention to the social and more. This view shows that Islamic Sharia is flexible, not only bound to the textual dimension but also to the context and main purpose of the law (*maqāsid al-syarī'ah*).

From the various views of the scholars above, there are differences in determining the status of child custody for mothers who have remarried. Most scholars are stricter, considering that a mother's marriage to a foreign man can interfere with the child's welfare. Meanwhile, Ibn Hazm focuses more on the welfare of children and maintains the rights of the mother if there are no negative impacts on her new marriage. This is similar to Imam Ibn Hazm's view, but Imam Baghawi requires the consent of the biological father and the new husband to be involved in custody. In the context of modern law, many Muslim countries adopt a flexible approach by considering the psychological, social, and economic aspects of the child before deciding custody. This implies that a more adaptive approach and consideration of children's welfare must be applied in legal decisions related to Hadhanah.

#### **4.4 Child Custody for Remarried Mothers in Indonesia's Positive Law**

Law Number 1 of 1974 concerning Marriage, which is part of a series of marriage laws in Indonesia, expressly states the law of child custody. However, the law of child custody has not been regulated in Government Regulation Number 9 of 1975 in a broad and detailed manner. Only after the enactment of Law No. 7 of 1989 concerning religious justice and Presidential Instruction No. 1 of 1991 concerning the widespread dissemination of the Compilation of Islamic Law did the issue of hadhanah become a positive law in Indonesia, and the Religious Court was given the authority to resolve it.

In the Compilation of Islamic Law (KHI) articles 98-105, it is explained that parents are obliged to maintain and educate their children until they are 21 years old and have not yet married. The obligations of parents to nurture and control their children include supervision (maintaining physical and spiritual safety), service (giving and instilling affection), and representing the child's property as well as all legal acts in and out of court. This provision also applies in the event of divorce between parents ([Hifni & Asnawi, 2021](#)).

It explains that the maintenance of children who have not yet *reached the age of Mumayyiz* or are not yet 12 years old is the right of the mother. As for the maintenance of children who are *Mumayyiz*, it is left to the child to choose between his father or mother as the holder of his maintenance rights. Article 156 of the KHI states that in the case of a divorce, a child who has not been *mumayyiz* is entitled to receive hadhanah from his mother, unless the mother has died, in which case his position is replaced by: 1) Women in a straight line from the mother 2) Fathers. 3) Females in a straight line from the father. 4) The child's sister. 5) Female blood relatives according to the mother's sideline. 6) A woman who is a blood relative according to the sideline of the father.

Children who have *Mumayyiz* have the right to decide whether they want to receive custody of their father or mother. If it is found that the custody holder cannot guarantee the physical and emotional safety of the child, even though the maintenance and hadana costs are sufficient, the custody of the child can be transferred to another relative who also has hadhana rights ([Agama, 1992](#)). However, KHI has not explicitly regulated child custody issues for remarried mothers. However, from KHI article 156, we can understand that in KHI's view, the transfer of custody from the mother to another party can occur if the mother has passed away or does not guarantee the safety of the child, both physically and mentally. Thus, a mother who remarries will still get custody of her child as long as she can guarantee the safety of the child, both physically and spiritually. If the judge finds *Mudharrat*, and the child is taken care of by his mother, the judge has the right to transfer custody of the child.

This is in line with Ibn Hazm's opinion that the basic principle of *Hadhanah* is affection and attention to children. If the mother can still provide a stable environment and support the child's development, custody should not be revoked solely based on the marital factor. According to Rabi'atul Hidayah, in practice, even after a mother has been divorced and remarried, a mother in Indonesian society still holds *Hadhanah* over her child. This is due to many factors such as (1) people's habits, (2) bad relationship between father and son because the father has also remarried to another woman (2) grandmother's or grandfather's concern if the child is taken care of by the father ([Hakam & Hidayah](#)).

## 5. Conclusions

### 5.1 Conclusion

Scholars have different views on who actually has the right to *hadhanah*. Some scholars view *hadhanah* as the right of the caregiver, so that the caregiver has full authority over childcare. Meanwhile, others emphasized that the right to *hadhanah* is more related to the interests of the child in care, so it cannot be seen as just a caregiver's right. Some scholars mediate by stating that *hadhanah* is a right inherent to both caregivers and children, so it must be managed with regard to the common good. In determining child custody, scholars and the law positively consider several important factors. These include the child's age, physical ability, material ability, and mental condition of the caregiver. The best interest of the child is the key to every *hadhanah* decision. Custody is not only a legal-formal issue but also focuses on the feasibility and real benefits for the child.

Scholars also differ in their opinions on child custody for remarried mothers. According to Imam al-Baghawi, the custody of the mother does not disappear as long as there is a willingness of the first husband (father of the child) and the new husband to be willing to do so. In Indonesia's positive law, there are no explicit provisions regarding the custody status of remarried mothers, creating a legal vacuum that leaves courts without clear statutory guidance. The Marriage Law and Child Protection Law emphasize that custody must be in the best interests of the child, a principle that Indonesian Religious Courts consistently apply in practice.

Court decisions generally maintain maternal custody even when the mother remarries, provided that she can guarantee the physical and spiritual safety of the child. This judicial approach has significant practical implications: it protects children from unnecessary custody disruption and supports family stability but also creates inconsistency due to the absence of codified legislative standards. Therefore, policymakers are urged to amend the KHI to explicitly address custody upon maternal remarriage, adopting the welfare-of-the-child standard as the operative criterion. Courts should also develop standardized procedural guidelines for evaluating a mother's capacity to retain custody after remarriage, drawing on both the consent-based framework of Imam al-Baghawi and the welfare-centered approach of Ibn Hazm.

### 5.2 Research Limitations

This study had several limitations. The analysis is primarily based on qualitative doctrinal research using classical fiqh texts and Indonesian legislation, without empirical data from the court decisions. Consequently, the generalizability of the findings to actual judicial practice may be limited. Future

research should incorporate empirical data from Religious Court rulings to validate the doctrinal conclusions drawn in this study.

### 5.3 Suggestions and Directions for Future Research

Future research should conduct empirical studies examining how Indonesian Religious Courts apply the principle of child welfare in custody cases involving remarried mothers. Comparative studies between Indonesian positive law and the legal frameworks of other Muslim-majority countries are also valuable. Furthermore, legislative reform efforts should be advocated to fill the current legal vacuum in the KHI regarding the custody status of remarried mothers, ensuring that the best interests of the child are explicitly enshrined as the guiding principle.

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### Author Contributions

The author contributions indicate that AM was responsible for conceptualizing the study, conducting the investigation, and writing the original draft of the manuscript. The research methodology was developed collaboratively by AM and JN, ensuring the study design and analytical framework were appropriately structured. Meanwhile, ZZ contributed to the review and editing process as well as provided supervisory guidance throughout the research. All authors have reviewed and approved the final version of the manuscript for publication.

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