
ADJUDICATING JOINT PROPERTY DISPUTE IN ISLAMIC JURISPRUDENCE: BALANCING THE BEST INTERESTS OF THE CHILD WITH A FOCUS ON RESIDENCY

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Abstrak: Anak mempunyai peranan yang sangat penting dalam pembangunan suatu negara. Namun, anak-anak pada umumnya rentan; Adakalanya anak berada diposisi yang rentan sehingga perlindungan dan jaminan terhadap hak anak harus selaku ditegakkan. Salah satu contoh kondisi rentan yang membahayakan hak-hak anak adalah ketika tempat tinggal anak menjadi objek gugatan harta bersama. Dalam hal ini, asas kepentingan terbaik bagi anak perlu menjadi pertimbangan utama dalam segala pengambilan keputusan. Penelitian ini bertujuan untuk mengetahui ciri-ciri asas kepentingan terbaik anak dalam hukum Islam, menganalisis rumusan putusan hakim mengenai kedudukan tempat tinggal anak yang menjadi objek gugatan harta bersama. Penelitian ini merupakan penelitian hukum normatif, dengan menggunakan bahan hukum primer dan sekunder. Hasil penelitian menunjukkan bahwa asas kepentingan terbaik bagi anak yang digagas dalam Konvensi Hak Anak telah menjadi pertimbangan penting dalam berbagai peraturan perundang-undangan di Indonesia, termasuk Kompilasi Hukum Islam hingga Surat Edaran Mahkamah Agung (SEMA). Sebagai asas yang penting untuk diterapkan dalam gugatan harta bersama, penelitian ini memberikan tiga pandangan terhadap rumusan putusan hakim, yaitu: 1) Gugatan tersebut dapat diterima karena tidak ada norma yang tegas; 2) Tidak dapat diterima karena menunggu anak memasuki usia dewasa; dan 3) Diperbolehkan; Namun, pembagiannya ditunda hingga anak tersebut memasuki usia dewasa. Melalui penelitian ini, Penulis sepakat bahwa gugatan tersebut dapat diterima dengan menunda pembagian sampai anak tersebut memasuki usia dewasa. Namun perlu ada penyempurnaan mengenai posisi SEMA dan kejelasan usia dewasa.

Kata kunci: kepentingan terbaik bagi anak, gugatan harta bersama, perlindungan anak.

Abstract: Children hold a very important role in the development of a country. However, children are generally vulnerable; hence, protecting and ensuring children's rights must be a priority. One example of a condition where children's rights are put at risk is when a child's residence becomes an object of a joint property lawsuit. In this case, the principle of the best interests of the child needs to be the main consideration in all matters of decision. This study aims to determine the characteristics of the best interests of the child principle in Islamic law to analyze the formulation of the judge's decision regarding the position of the child's residence, which is the object of a joint property lawsuit. This research is normative legal research, using primary and secondary legal materials. The result of this research shows that the principle of the best interests of the child initiated at the Convention on the Rights of the Child has become an important consideration in various laws and regulations in Indonesia, including the Compilation of Islamic Law to the Supreme Court Circular Letter (*Surat Edaran Mahkamah Agung*, SEMA). As an important principle to be applied in the joint property lawsuit, this study provides three views of the judge's decision formulation, namely: 1) The lawsuit is admissible as there is no explicit norm; 2) It is inadmissible as it is waiting for the child to enter adult age; and 3) It is admissible; however, the distribution is postponed till the child enters adult age. Through this study, the Author agreed that the lawsuit is admissible by postponing the distribution until the child enters adult age. However, there needs to be some refinement regarding the position of SEMA and the clarity of adult age.

Key words: the best interests of the child, joint property lawsuit, child protection.



INTRODUCTION

Children are a mandate and gift from God Almighty that must always be taken care of as they possess dignity and rights as human beings that must be upheld.¹ However, every born child must be protected by law and have a defined legal status.² Children is the most important element in a country and even in human civilization, as children will be continuing the country's development. However, children who hold this important role are vulnerable, ranging from being exposed to diseases, being victims of criminal acts, having disorders, and child trafficking.³ Hence, children need to be treated with care and effort to ensure their physical, mental, and social development is completed and balanced.⁴ The participation of the State and the society is necessary to ensure the fulfillment of children's rights because a child is not able to protect himself.⁵ This condition is what underlies the existence of various international rules that provide child protection, such as:

- a. The Geneva Declaration of the Rights of the Child, which stipulates, among others: "A child must be given the means necessary for his normal development both materially and spiritually."
- b. Article 25 of the Universal Declaration of Human Rights, which provides: "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."
- c. Principal 1 of the 1959 United Nations General Assembly Declaration of the Rights of the Child, which provides: "Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination."
- d. Article 23 of the International Covenant on Civil and Rights of the Child of 1966, which provides: "States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."
- e. Article 10 of the United Nations Convention on the Rights of the Child of 1966 provides: "The widest possible protection and assistance should be provided to the family especially for the care and education of the child."

The international community's significant attention to children is evident through the establishment of several international instruments relating to child protection.⁶ One of these instruments is the Convention on the Rights of the Child (CRC), which the

¹ Hafsah, "Kajian Perlindungan Hak Pendidikan Dan Perlindungan Agama Anak Dalam Keluarga Muslim Di Kota Medan," *AHKAM: Jurnal Ilmu Syariah* 16, no. 2 (2016): 171–80, doi:10.15408/ajis.v16i2.4447.

² Amal Fathullah and Muhammad Abduh, "The Relationship of Children and Their Biological Father (Comparative Study of Positive Law of Indonesia, Thailand, and Jordan)," *Syariah: Jurnal Hukum Dan Pemikiran* 22, no. 2 (2022): 213–30, doi:10.18592/sjhp.v22i2.4953.

³ Nurwahidah, "Usia Anak Dan Remaja Dalam Pembuatan Perdata Dan Pidana Menurut Hukum Islam Dan Hukum Positif," *Syariah: Jurnal Ilmu Hukum dan Pemikiran* 17, no. 2 (2018): 203-219, DOI: <https://doi.org/10.18592/sy.v17i2.1326>

⁴ Rifdah Alifiyah and Isa Anshori, "Legal Protection for Children in Cases of Domestic Violence in the Indonesian Households," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 2 (2023): 348–61.

⁵ Harvin and Liza Priandhini, "Pengaturan Hukum Pemberian Nafkah Anak Setelah Perceraian Orangtua Dalam Undang-Undang Perkawinan," *Kertha Semaya* 9, no. 12 (2021): 2466–78.

⁶ Ibid.

United Nations General Assembly ratified on November 20, 1989.⁷ The CRC is an international treaty that governs human rights, including civil, political, economic, and cultural rights.⁸ The Convention has formulated universal principles and legal norms regarding the position of the child. The CRC regulates four principles of child protection, namely: 1) Non-discrimination principle, in treating children for specific reasons, 2) The best interests of the child principle, 3) The right to life, live a life, and child development principle, and 4) Respect for the child's opinion principle.⁹ One of the interesting principle to discuss is the best interests of the child principle, which is articulated in Article 3 (three) of the CRC.¹⁰ This article states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration".

Indonesia recognizes the importance of the best interests of the child principle under the CRC and ratified it through Presidential Decree of the Republic of Indonesia Number 36 of 1990. This ratification means that any child-related policies taken by social welfare agencies, whether state-owned or private, courts, legislatures, or administrative bodies must consider the best interests of the child. This obligation is confirmed in Article 4 of the CRC, which mandates participating countries to take appropriate administrative policies, legislation, and other actions to ensure children's rights under the CRC. To further strengthen the ratification, child protection efforts in Indonesia are carried out through the Law Number 23 of 2002 on Child Protection ("**Child Protection Law**"), which serves as a guide and legal protection for every child protection activity.

Ten years after ratification, the principle of the best interests of children has not been optimally applied to child protection in Indonesia.¹¹ This is evident from the increasing complaints to the Indonesian Child Protection Commission.¹² One of the legal problems that arises is the rights of children in the division of joint property, where most divorced parents ignore the division of joint property.¹³ For example, this can be seen from existing data from the National Population and Family Planning Agency, that 57.91% (fifty seven point ninety one percent) of children in Indonesia live in inadequate housing. This shows that the CRC principle has not been implemented regarding adequate housing for children in the event of divorce

⁷ Richard C. Mitchell and Nabin Maharjan, "UN Convention on the Rights of the Child and Global Childhoods: Transdisciplinary Reflections from Nepal," *World Futures* 76, no. 1 (2020): 62-80, DOI: <https://doi.org/10.1080/02604027.2019.1698235>

⁸ Raissa Lestari, "Implementasi Konvensi Internasional Tentang Hak Anak (Convention on The Rights of The Child) Di Indonesia," *Journal of Chemical Information and Modeling* 4, no. 2 (2017): 1-10

⁹ Ziba Vaghri et al., *Monitoring State Compliance with the UN Convention on the Rights of Te Child: An Analysis of Attributes*, Springer (Gewerbestrasse, Switzerland: Springer, 2022), doi:10.2307/762171.

¹⁰ Ibid.

¹¹ M. Nur Syafiuddin, "Aksentuasi Kepentingan Terbaik Anak Dalam Putusan Nafkah Sebagai Upaya Penjaminan Hak Asasi Anak," *Jurnal HAM* 13, no. 2 (2022): 235, doi:10.30641/ham.2022.13.235-252.

¹² Muhammad Fachri Said, "Perlindungan Hukum Terhadap Anak Dalam Perspektif Hak Asasi Manusia," *JCH (Jurnal Cendekia Hukum)* 4, no. 1 (2018): 141, doi:10.33760/jch.v4i1.97.

¹³ Nursaidah, Adi Nur Rohman, and Panti Rahayu, "The Out of Court Divorce Model and Its Legal Implications: A Juridical Study in Babelan District Bekasi," *Syariah: Jurnal Hukum Dan Pemikiran* 20, no. 2 (2020): 159-74, doi:10.18592/sjhp.v20i2.3945.

It cannot be denied that in Indonesia there is no legal certainty regarding children's rights in the division of joint property after an annulment of marriage.¹⁴ A common uncertainty regarding the rights of children is the place of residence of the child who is the subject of the lawsuit. The problem that is often encountered is that the child's place of residence is the object of the lawsuit. According to Article 35, paragraph (1) of the Law No. 1 of 1974 on Marriage, as lastly amended by Law No. 16 of 2019 (“**Marriage Law**”), as amended by Law Number 16 of 2019, joint property refers to property obtained during the marriage. Similarly, Article 1 letter f of the Compilation of Islamic Law (“**KHI**”) defines joint property or *Syirkah* as “assets acquired either individually or jointly by husband and wife during the marriage bond, hereinafter referred to as joint property, without questioning whether it is registered in the name of anyone”. From the abovementioned regulations, the concept of joint property is known as property obtained during the marriage. In the event of a divorce, the couple may file a joint property lawsuit to the Religious Court, as stated in the elucidation of Article 49 *jo.* Article 66 *jis.* Article 86 of Law Number 7 of 1989 on Religious Court as amended by Law Number 3 of 2006 Law Number 50 of 2009 (“**Law on Religious Court**”).¹⁵ However, a legal problem arises when the joint property lawsuit involves the child's only residence.¹⁶ Under Article 97 of the KHI, each widower is entitled to half of the joint property as long as it is not specified in the prenuptial agreement, which means that the child could lose their home. Based on the provisions of Article 97 of the KHI, such a house can be directly divided. Consequently, the child loses his house or residence. In this case, the judge must consider the best interests of the child principle when deciding on the loss of the child's residence, which is included in the joint property.

The provisions of the legislation do not address the issue of the residence of children that qualify as joint property. Nevertheless, Letter C of the Circular Letter Number 1 of 2022 on the Enforcement of the Formulation of the Results of the 2022 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Duties for the Court (“**SEMA No. 1 of 2022**”) provides guidance on the implementation of the best interests of the child principle. It allows for the granting of a lawsuit for joint property, which includes a child's residential house. However, the division is only carried out after the child reaches the age of 21 or gets married. It is important to note that SEMA No. 1 of 2022 presents some legal problems. Firstly, SEMA's position is not regulated in Law Number 12 of 2011, which establishes laws and regulations. Therefore, it is considered a decision, not a statutory regulation. Secondly, there are differences in the age of adulthood in SEMA No. 1 of 2022 and the Marriage Law *jo.* Child Protection Law. In SEMA No. 1 of 2022, the adult age is 21, while the Marriage Law *jo.* Child Protection Law states it is 18. Finally, SEMA No. 1 of 2022 does not address the condition where a person is already married at the age of 16. According to the interpretation of *a contra rio*

¹⁴ Nurunnisa et al., “Implications of Annulment of Marriage on The Distribution of Joint Assets According to The Compilation of Islamic Law and National Law,” *Syariah: Jurnal Hukum Dan Pemikiran* 23, no. 1 (2022): 1–23, doi:10.18592/sjhp.v23i1.8611.

¹⁵ Adris Rafi Adji, “Pengaturan Hukum Harta Bersama Dalam Putusan Perceraian,” *Jurnal Kertha Semaya* 9, no. 12 (2021): 2292–2305.

¹⁶ Abd Rouf, Mufidah Ch, and Zaenul Mahmudi, “Joint Property Division in Indonesia: A Gender Equality Viewpoint,” *De Jure: Jurnal Hukum Dan Syar’iah* 15, no. 2 (2023): 230–50, doi:10.18860/j-fsh.v15i2.23050.

Article 47 of the Marriage Law, such a person is considered an adult, leading to uncertainty about whether the lawsuit can be granted or postponed.

To ensure legal certainty regarding the best interests of the child, it is necessary to formulate an appropriate approach regarding the child's residence as the object of a joint property lawsuit from the perspective of Islamic law. It is important to analyze the problems above to provide solutions that reflect justice, legal certainty, expediency, and in particular reflect the best legal interests of children in relation to forms of legal protection for children regarding the right to live in a decent place to live, when their parents' divorce. When this problem is allowed to continue, without any legal solution emerging, it will have an impact on the large number of children who cannot live in a decent place, because of their parents' divorce.¹⁷ Therefore, this article aims to analyze the following legal issues: *Firstly*, what are the characteristics of the best interests of the child principle in Islamic law? *Secondly*, how should a judge formulate a decision regarding the child's residence when it is the subject of a joint property lawsuit in Islamic law?

Several studies have previously been conducted on the principle of the best interests of the child as an optimization of child protection efforts post-divorce, so to make sure this article have a novelty, then several similar articles and their differences will be described. *First*, research by M. Nur Syafiuddin discusses the emphasis of the best interests of the child in child support decisions. According to the study, accentuating the best interests of the child in child support decisions must guarantee the child's welfare, including the presence of parents, the child's state (maturity and experience), and the environment in which the child lives. As a result, the judge must conduct an in-depth examination of the child's support case.¹⁸ *Secondly*, research by Angela Melani Widjaja, et al, analyze the judges' considerations in deciding child custody and the principle of the best interests of the child in determining child custody. The study highlights that judges in Indonesia may have different approaches to determine child custody for Muslim and non-Muslim couples. Determining child custody that reflects the principle of the best interest of a child does not necessarily prioritize the mother but must also consider the child's wishes and needs.¹⁹ From both of the article, there have not article that analyze about position of a child's residence as an object of joint property lawsuit in Islamic law which correlates with the best interest of child principle. Therefore, the novelty of this article is that it will analyze the position of a child's residence as an object of joint property lawsuit in Islamic law which correlates with the best interest of child principle.

¹⁷ Rahmat Hidayat et al., "Review of Maqāsid Al-Syarī'ah Concerning the Fulfillment of Child Rights Post-Divorce in Budi Aji Village, Simpang Pematang District, Mesuji Regency," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 22, no. 2 (2022): 213–28, doi:10.30631/alrisalah.v22i2.1254.

¹⁸ Syafiuddin, "Aksentuasi Kepentingan Terbaik Anak Dalam Putusan Nafkah Sebagai Upaya Penjaminan Hak Asasi Anak."

¹⁹ Angela Melani Widjaja et al., "The Application of the Best Interest of the Child Principle as a Basis for Determining Child Custody," *Unram Law Review* 4, no. 2 (2020): 163–73, doi:10.29303/ulrev.v4i2.126.

METHOD

This research is normative legal research. Normative legal research is a research that analyze the legal issue.²⁰ The approaches used in this normative research are the statute approach and the conceptual approach. A statute approach is used to answer existing legal issues, based on existing laws and regulations, such as the 1989 Convention on the Rights of the Child, Law Number 23 of 2002 concerning Child Protection as last amended by Law Number 35 of 2014, Law Number 1 of 1974 concerning Marriage as last amended by Law -Law Number 16 of 2019, and the Compilation of Islamic Law. The conceptual approach used is to use legal doctrines and concepts to answer existing legal problems, such as the best interest of child principle, the principle of the right to life, survival, and development of children, etc.

In this this article use primary and secondary materials for analysis. The primary and secondary legal materials selected are legal materials to answer legal issues related to the formulation of the judge's decision regarding the child's residence when it is the subject of a joint property lawsuit in Islamic law. The primary legal materials used are the 1989 Convention on the Rights of the Child, Law Number 23 of 2002 concerning Child Protection as last amended by Law Number 35 of 2014, Law Number 1 of 1974 concerning Marriage as last amended by Law -Law Number 16 of 2019, and the Compilation of Islamic Law. Meanwhile, the secondary legal materials used are research results or journals related to the discussion.

RESULTS AND DISCUSSIONS

A. Characteristics of the Principle of the Best Interests of the Child in Islamic Law

Children are the nation's most valuable asset and deserve protection for their dignity.²¹ To ensure their rights are safeguarded, special protections are necessary. In England and Wales, child protection regulations have shifted from emphasizing parental rights to parental obligations, whereas in Germany, the approach is more ambivalent, recognizing parental rights but linking them to parental obligations.²² These approaches reflect efforts to limit parental authority. The Convention on the Rights of the Child (“**CRC**”) explicitly recognizes the active rights of children. Almost all countries have committed to protecting children's rights by ratifying the CRC. The CRC is based on four principles that underpin child protection efforts, which are as follows:

1. **The Nondiscrimination Principle.** This principle is contained under Article 2, which essentially stipulates that all participating states are obliged to respect and guarantee the rights of each child within its jurisdiction as outlined in the Convention without discrimination. Upon Article 2, the participating States, for all efforts made, must ensure that children are protected against all forms of discrimination.

²⁰ Xavier Nugraha, Risdiana Izzaty, Annida Aqila Putri, “Reconstruction of Minimum Age for Marriage as a Form of Legal Protection for Women (Analysis of Constitutional Court Decision No. 22/PUU-XV/2017),” *Lex Scientia Law Review* 3, no. 1 (2019): 40-54, doi: <https://doi.org/10.15294/lesrev.v3i1.30727>.

²¹ Alfian Qodri Azizi, Ali Imron, and Bagas Heradhyaksa, “Fulfillment of Civil Rights of Extramarital Children and Its Effect on Social Dimensions,” *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 20, no. 2 (2020): 235–52, doi:10.18326/ijtihad.v20i2.235-252.

²² Soo Jee Lee, “A Child’s Voice vs A Parent’s Control: Resolving Tension Between The Convention on The Rights of The Child U.S. Law,” *Columbia Law Review* 117, no. 3 (2017): 687–727.

2. **The principle of the best interests of the child**, as contained in Article 3 of the CRC. It confirms that this principle is the primary consideration for all actions concerning children, whether carried out by government or private social welfare institutions, courts, governments, or legislative bodies.
3. **The principle of the right to life, survival, and development of children**, as stated in Article 6 of the CRC. It guarantees that the Participating States are obliged to recognize life as an inherent right of every child. Through Article 6, States Parties must ensure the child's survival to the maximum extent along with the child's development.
4. **The principle of respecting the child's opinion**, as stated in Article 12 of the CRC. It guarantees that the State Party gives freedom to the children for their views on all matters relating to themselves. Consequently, the Participating State shall provide an opportunity to hear, both in court and administration, all matters relating to the child by following the procedural provisions of national legislation.

Based on these four principles, the principle of the best interests of the child is an important topic for discussion as it aligns with the principle of non-discrimination, the principle of the right to life, and the principle of respect for the opinions of the child, all of which aim to ensure the best interests of the child. In other words, the principle of the best interests of the child is the primary consideration or foremost factor in making any decisions concerning the child.²³ This principle has been implicitly reflected by almost all countries that ratified the CRC, with the exception of the United States.²⁴ In the legal culture of the United States, the standard for the best interests of the child is applied to certain types of decisions involving children, such as in divorce cases, while in matters related to education, parental rights based on the Constitution of the United States and federal and state laws are emphasized.²⁵

Freeman views that the principle of the best interests of the child is often interpreted in a way that decisions regarding the child's future are still influenced by the parent who is deemed to understand children the most.²⁶ However, decision-making for children should not be based on adult measurements alone, there needs to be deliberation.²⁷ What adults consider good may not necessarily be what children need. Therefore, this principle should be at the epicenter of any policy related to the child and should prioritize the interests of the child over the interests of parents, families, communities, governments, or the state.²⁸

²³ Mashuril Anwar and M Ridho Wijaya, "Fungsionalisasi Dan Implikasi Asas Kepentingan Terbaik Bagi Anak Yang Berkonflik Dengan Hukum: Studi Putusan Pengadilan Tinggi Tanjung Karang," *Undang: Jurnal Hukum* 2, no. 2 (2020): 265–92, doi:10.22437/ujh.2.2.265-292.

²⁴ Jenny Krutzinna, "Who Is 'The Child'? Best Interests and Individuality of Children in Discretionary Decision-Making," *International Journal of Children's Rights* 30, no. 1 (2022): 120–45, doi:10.1163/15718182-30010005.

²⁵ RD Mawdsley et al., "The Best Interest of the Child: A United States and South African Perspective," *Journal for Juridical Science*, no. Special Issue (2010): 1–23.

²⁶ M. Freeman, *Article 3. The Best Interests of the Child*, ed. Andre Alen et al., *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden, Boston: Martinus Nijhoff, 2007).

²⁷ Akhmad Kamil Rizani and Ahmad Dakhoir, "Musyawarah Sebagai Alternatif Penyelesaian Sengketa Waris Beda Agama: Evidence Based Solution From Indonesia," *El-Mashlahab* 10, no. 2 (2020): 52–64, doi:10.23971/maslahab.v10i2.2063.

²⁸ Syafuiddin, "Aksentuasi Kepentingan Terbaik Anak Dalam Putusan Nafkah Sebagai Upaya Penjaminan Hak Asasi Anak."

The mandate of the principle of the best interests of the child in the CRC is outlined in several articles, including Article 3, Article 9, Article 18, Article 21, and Article 37, as shown in **Chart 1**. Article 3 serves as the primary basis and requires States Parties to ensure that action is taken in the best interests of the child by government or private social welfare institutions, courts, governments, or legislative bodies. Additionally, Article 9 guarantees that a child will not be separated from their parents, except when such separation is deemed necessary for the best interests of the child, such as in cases of parental abuse or neglect, or when determining child custody during parental separation. This article is closely related to Article 18, which places the responsibility of raising and nurturing children on parents to ensure that the best interests of the child remain their main priority.

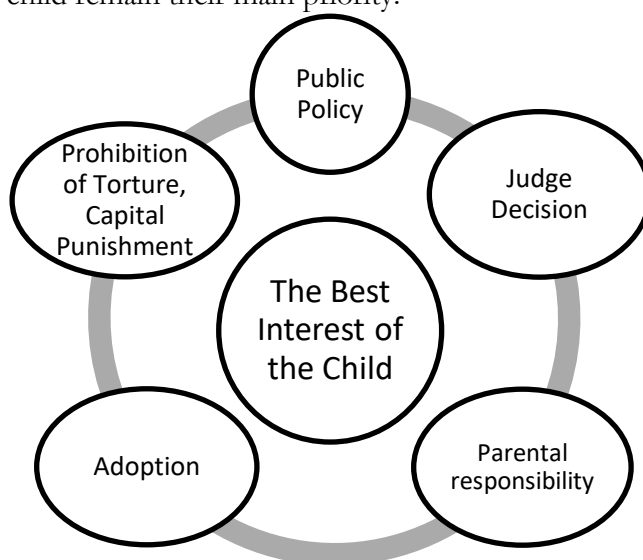


Chart 1. Reflection of the principle of the best interests of the child in the CRC

Source: Author's analysis

The principle of the best interests of the child (chart.1.), as stated in Article 21, implies that participating states have the right to establish an adoption system that prioritizes the child's best interests. However, this adoption system must adhere to the relevant procedures and regulations of the participating state. Additionally, Article 37 addresses the principle of best interests in situations where a child is deprived of their liberty. It mandates that a child should be separated from an adult unless such separation is deemed not to be in the child's best interests. Moreover, the child has the right to maintain relationships with their family.

Upon analyzing the implementation of the principle of the child's best interests, Zermatten argues that there are no specific provisions or special rules for its implementation. Zermatten then breaks down the understanding of the principle of best interests for children into three concepts, namely:²⁹ 1) The principle of best interests for children as a rule of procedure, which means that in making decisions

²⁹ Jean Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function," *International Journal of Children's Rights* 18, no. 4 (2010): 483–99, doi:10.1163/157181810X537391.

that will have an impact on a child or group of children, this principle must be considered since it will be inseparable from the impact given; 2) The principle of the best interest of the child as the foundation for a substantive right, that in order to provide guarantees that the child has the right to their best interests, the State Party should regulate proper mechanisms to translate the best interests of the child into a positive rule, for instance, a law that mandates judges to consider the rules of procedure that are appropriate for the best interests of the child in decision making; and 3) The principle of best interests for the child is a fundamental and interpretive legal principle, developed to limit the uncontrolled power of adults over children. This principle is based on the recognition that adults are only in a position to make decisions on behalf of the child due to the child's lack of experience and consideration.

The importance of child protection, as reflected by the principle of the best interests of the child, has prompted Indonesia to ratify the CRC. Indonesia has ratified the CRC through Presidential Decree No. 36 of 1990 concerning ratification of the Convention on the Rights of the Child dated August 25, 1990, voluntarily binding itself to the Convention's provisions. As a participating country, Indonesia has three obligations under Article 3 of the CRC, namely:³⁰ *First*, it must consistently apply the principle of the best protection for children in all actions taken by public institutions, including implementation, administrative affairs, and judicial processes appropriate for children. *Second*, it must prioritize the best interests of the child in all judicial and administrative decisions, existing policies, and legislation. *Third*, Indonesia must ensure that the private sector, including service providers and other private institutions that make impactful decisions for children, primarily considers the best interests of the child in their decisions and actions.

To consider the best interests of the child as the primary consideration gave rise to the Presidential Decree on the ratification of the CRC. The basis for the ratification of the CRC was driven by the realization that children are the foundation of national development and are potential human resources. Therefore, their development should start as early as possible to enable their optimal participation in the development of the nation and state. Additionally, the ratification of the CRC was motivated by the need to promote child welfare and provide opportunities to develop their rights. This responsibility is not solely that of parents, families, nations, and states, but also requires international cooperation. The ratification of the CRC can be the main foundation of global cooperation in child protection efforts.

Indonesia's commitment to child protection does not only rely on the ratification of the CRC but also includes the enactment of Law Number 23 of 2002 on Child Protection, amended by Law Number 35 of 2014 on Amendments to the Law Number 23 of 2002 on Child Protection (“**Child Protection Law**”). The protection of children's rights was previously guaranteed in the 1945 Constitution of the Republic of Indonesia and the Law Number 39 of 1999 on Human Rights

³⁰ UN Committee on the Rights of the Child (CRC), “General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)” (UN Committee on the Rights of the Child (CRC), May 2013).

(“**Human Rights Law**”). Article 28 paragraph (2) of the 1945 Constitution affirmed that every child is entitled to the right to survival, growth and development without discrimination or violence. This is in line with the elucidation of Article 52 paragraph (2) of the Human Rights Law which explains that a child’s right has been recognized and protected by law ever since they are still in the mother’s womb. With the affirmations provided in the 1945 Constitution and the Human Rights Law, a child’s rights are considered vital and forms the best interests of the child.

Child protection, as defined in Article 1 number 2 of Child Protection Law, refers to any activity that guarantees and protects children and their rights, enabling them to live, grow, develop, and participate optimally in accordance with human dignity, and aims to protect them from violence and discrimination. It is essential to note that parents, family, society, and the state have a crucial role in ensuring children’s protection. However, children are often faced with family disharmony and parental divorce, which can have a significant psychological impact on them.³¹ The parents’ divorce may cause a psychological impact on the child, especially followed by a joint property lawsuit which determines the child’s lives, causing a profound effect on their growth and development.³² Nonetheless, the principle of best interests of the child is very important to be upheld in all considerations for child protection. Regardless of the divorce, parents are obligated to maintain and educate their children, as mandated by Article 45 of the Marriage Law.

The principle of the best interests of the child is reflected in several articles concerning children’s rights in the Compilation of Islamic Law (KHI), even though the KHI was created before the ratification of the CRC. Articles 98-106 of Chapter XIV of the KHI regulate the maintenance of children. In the case of divorce, Article 105 of the KHI stipulates that a child who is not *mummayiz* or below 12 years old shall be under the mother’s supervision, and if they are *mummayiz*, the child can choose. Additionally, Article 149 of the KHI requires a former husband (father) to provide *badhanah* fees for his children who have not reached the age of 21 in the event of a talak, which is restated in Article 156 of the KHI as the father’s responsibility until the child is an adult who can take care of themselves. These articles indicate that the best interests of the child are the basis for consideration in the KHI arrangement.

The development of laws can be very complex, and it is possible for legal gaps to occur that require regulation under positive law. To ensure legal certainty and prevent ambiguity in the law, the Supreme Court has issued guidelines based on the principle of the best interests of the child in Islamic law. These guidelines are summarized in **Table 1**.

³¹ Muslim Zainuddin, Mansari, and Nadhilah Filzah, “Divorce Problems and Community Social Capital in Realizing Family Resilience in Aceh,” *Samarah* 6, no. 2 (2022): 914–33, doi:10.22373/sjkh.v6i2.15080.

³² Lisa Barron, “Divorce and Its Effects on the Development of Children,” *Graduate Research Papers* 132 (2010): 1–11, doi:10.1111/j.1746-1561.1979.tb07683.x.

No	Legal source	Description	Description (Implicit / Explicit)	Analysis
1	Supreme Court Circular Letter Number 3 of 2015 concerning the Enforcement of the Formulation of the Results of the 2015 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Duties for the Court.	The verdict regarding the imposition of child support shall be followed with an increase of 10% to 20% per annum from the stipulated amount, excluding the cost of education and health. (Religious Chamber Law Formulation No. 14)	Implicit	Considerations for increasing child support are based on the constant increase in the cost of living. Additionally, the current practice often relies on subjective terms such as "decent" and "fair" when calculating the amount of child support. With the stipulation of this provision, there will be legal certainty in calculating annual income.
2	Supreme Court Circular Letter Number 10 of 2020 concerning the Enforcement of the Formulation of the Results of the 2020 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Duties for the Court.	Parents or guardians of different religions with their Muslim children can apply for a marriage dispensation to the Religious Courts. (Legal Formulation of the Chamber of Religion Number 1 letter b)	Implicit	The Marriage Law does not prohibit requests for dispensation from parents or guardians with different religions from their children. The Marriage Law implicitly stipulates that the application for dispensation is made by parents or guardians who exercise parental authority. The existing regulation in SEMA is motivated by many requests for dispensation by parents who, in this case, have different beliefs from their children. The critical role of parents in the request for dispensation and based on consideration of the best interests of the child, this arrangement was made. The place of reference to request dispensation is based on the child's religion.
3	Supreme Court Circular Letter Number 5 of	In order to comply with the principle of best interest of the child and the	Explicit	The primary obligation to provide maintenance lies with the husband's responsibility. In the event of a divorce, the wife is often inseparable from

	<p>2021 concerning the Enforcement of the Formulation of the Results of the 2021 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Duties for the Court.</p>	<p>implementation of Supreme Court Regulation Number 3 of 2017 concerning Guidelines for Adjudicating Cases of Women Against the Law regarding the burden of child support, the wife may apply to the confiscation of the husband's property as collateral to fulfill the child's support and the object of the guarantee is described in detail in the <i>posita</i> and <i>petitum</i> of the lawsuit, either in the convention, reconvention or separate lawsuit.</p> <p>(Formulation of the Law of the Chamber of Religion Number 1 letter a)</p>		<p>fulfilling the child's living expenses. However, there are times when the wife has to deal with the law so that it is not within her ability to make a living. In this case, the wife can submit an application for confiscation of the husband's property to guarantee the fulfillment of the child's maintenance.</p>
4	<p>Supreme Court Circular Letter Number 1 of 2022 concerning the Enforcement of the Formulation of the Results of the 2022 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation</p>	<p>In order to secure the realization of the principle of the best interest of the child in the joint property where the object is proven to be the only place for the child to live, the claim may be granted. However, the distribution will be carried out after the child becomes an adult (21 years old) or married.</p>	Explicit	<p>The reason behind the postponement of the distribution of the object of joint property claims in the form of a house is that the house is a place that provides a sense of security and comfort for living and for the sake of the development of the child. Since children are considered vulnerable, they need a place of protection. Therefore, to consider the best interests of the child, the distribution of the house being a joint property must wait until the child enters adulthood.</p>

	on of Duties for the Court.	(Formulation of the Law of the Chamber of Religion Number 1 letter a)		
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Table 1. The consideration and application of the principle of best interests of the child in SEMA's Guidelines.

Source: Author's analysis

B. Formulation of Judges' Decisions regarding the Position of Children's Residences as Objects of Joint Property Lawsuits under Islamic Law

A child is a mandate from God Almighty that must be protected so that their growth and development as a continuation of the future of the nation can be achieved. Based on Islamic teachings, a child is the jewel and pleasure of life, as stated in QS. Ali Imran (3):14³³ :

"Beautified for people is the love of that which they desire - of women and sons, heaped-up sums of gold and silver, fine branded horses, and cattle and tilled land. That is the enjoyment of worldly life, but Allah has with Him the best return."

Children hold a special position in society and have rights that are distinct from those of adults.³⁴ In order to ensure their ability to contribute to the sustainability of the nation and state, every child needs ample opportunity to grow and develop physically, mentally, and socially. Therefore, it is necessary to conduct protection efforts that guarantee the fulfillment of children's best interests. It is the responsibility of the state and government to provide legal protection and human rights to children, as they are integral to the nation's future and the realization of Indonesia's ideals.³⁵

The ratification of the CRC through Presidential Decree and the enactment of laws related to child protection show that the state has made efforts to protect the human rights of children. Human rights, especially for children, are very important because they are inherent in every human being and must be protected by the state.³⁶ However, the current protection of children has not yet fully guaranteed that children receive the treatment and opportunities that meet their needs in various aspects of life, which is a legal issue.³⁷ Violations of children's rights in Indonesia remain a persistent problem, with the number of cases fluctuating every year. (**Figure 1**). Based on data from the Indonesian Child Protection Commission (*Komisi Perlindungan Anak Indonesia*, KPAI), from 2016 to 2022, there were 35,610 reported cases, which

³³ Karmawan Karmawan, "Respon Hukum Islam Terhadap Hak Perlindungan Anak Upaya Implementasi Sistem Perundang-Undangan Hukum Negara," *Kordinat: Jurnal Komunikasi Antar Perguruan Tinggi Agama Islam* 19, no. 1 (2020): 1–20, doi:10.15408/kordinat.v19i1.17170.

³⁴ Meilan Lestari, "Hak Anak Untuk Mendapatkan Perlindungan Berdasarkan Peraturan Perundang-Undangan," *UIR Law Review* 1, no. 02 (2017): 183–90.

³⁵ Hardianto Djanggih, "Konsepsi Perlindungan Hukum Bagi Anak Sebagai Korban Kejahatan Siber Melalui Pendekatan Penal Dan Non Penal," *Mimbar Hukum* 30, no. 2 (2018): 316, doi:10.22146/jmh.32017.

³⁶ Ulul Umami and Abdul Ghofur, "Human Rights in Maqāṣid Al-Sharī'ah Al-Āmmah: A Perspective of Ibn 'Āshūr," *Al-Ahkam* 32, no. 1 (2022): 87–108, doi:10.21580/ahkam.2022.32.1.9306.

³⁷ Rifki Septiawan Ibrahim, "Hak-Hak Keperdataan Anak Dalam Perspektif Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak," *Lex Privatum* VI, no. 2 (2018): 53–60.

is definitely not a small number. There are various factors underlying the reported cases to KPAI, such as social, family and parenting, religion and culture, civil rights, health and drugs, education, pornography and cybercrime, as well as the Children Facing the Law (*Anak Berhadapan Hukum*, ABH) factors.

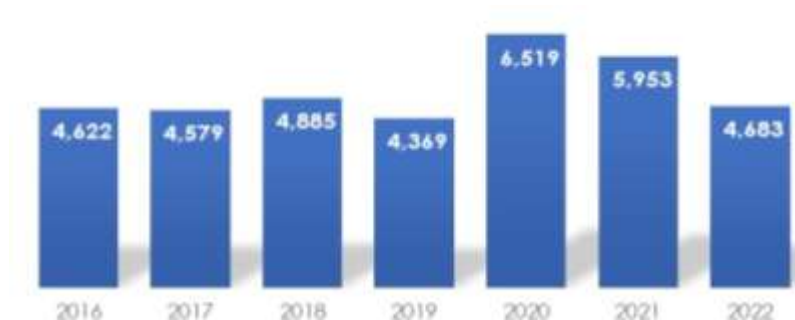


Figure 1. Child protection cases in Indonesia from 2016-2022.³⁸

Source: Indonesian Child Protection Commission (Komisi Perlindungan Anak Indonesia), 2022

Even though there are a lot of factors that cause reports to KPAI (figure 1), there are still few studies that discuss violations of children's welfare rights due to parents' divorce. In Indonesia, many children become victims of their parents' divorce.³⁹ In fact, the fulfillment of children's rights after divorce is considered very important because the presence of children in marriage will create a legal relationship between the children and their parents. This legal relationship creates rights and obligations between parents and children which will continue until the child reaches adulthood even though the parents' marriage has broken up.⁴⁰ The impact of divorce on their well-being can be both emotional and material.⁴¹ One material impact is when the house where the child resides becomes the subject of a joint property lawsuit in the divorce. The absence of a place to live can undoubtedly affect the child's sense of comfort and security. However, explicit arrangements regarding the mechanism for the distribution of the children's residence do not currently exist in Indonesia. Therefore, this article aims to provide a formulation of the judge's decision in addressing the position of the child's residence, which is the subject of a joint property lawsuit in Islamic law. This is also considering that one form of child protection is the realization of legal certainty for children.⁴²

³⁸ Komisi Perlindungan Anak Indonesia, "Data Kasus Perlindungan Anak 2016 – 2022," 2022, <https://bankdata.kpai.go.id/>.

³⁹ Ermi Suhasti Syafei and Siti Djazimah, "Mediation in the Settlement of Joint Marital Property Disputes: A Study at Tanjung Karang Religious Court, Lampung," *Samarah* 5, no. 2 (2021): 867–91, doi:10.22373/sjhc.v5i2.9039.

⁴⁰ Ismail Ramadan and Ummu Salamah, "Settlement Of Divorce Dispute Through The Forum Of Mediation In Judicial Institutions As An Effort Of Legal Protection For The Rights And Interests Of The Child Of Post-Divorce," *Syariah: Jurnal Hukum Dan Pemikiran* 21, no. 2 (2021): 213–26, doi:10.18592/sjhp.v21i2.4603.

⁴¹ Ismiati, "Perceraian Orangtua Dan Problem Psikologis Anak," *At-Taujih: Bimbingan Dan Konseling Islam* 1, no. 1 (2018): 1–16, doi:10.22373/taujih.v1i1.7188.

⁴² Said, "Perlindungan Hukum Terhadap Anak Dalam Perspektif Hak Asasi Manusia."

There are several perspectives in the formulation of the judge's ruling on the division of children's dwelling houses that are the object of a joint property lawsuit. **Firstly**, due to the absence of explicit rules on dividing a residential house as the object of a lawsuit, judges often overlook the child's housing needs. Consequently, judges still grant the suit for the division of joint property, as there are no statutory provisions governing whether the lawsuit is rejected, declared not accepted (*niet ontvankelijke verklaard*/NO), accepted, or postponed.⁴³ Judges who adhere to this view follow a positivistic rationale, identifying the law as an act or a statute, with the law being the sole means of interpretation in providing justice.⁴⁴ However, the law in Indonesia has a cultural dimension and humanism that needs to be considered. The idea of positivism, if analyzed in the Indonesian legal system, emphasizes that the law must not be narrowly understood; there are also psychological, spiritual, and physical realities that need to be considered.⁴⁵ Nonetheless, this positivist thinking cannot be absolutely applied in Indonesia because it cannot uphold justice in accordance with society's culture.⁴⁶ Regarding joint property lawsuits, some judges believe that selling the house can provide collateral for renting another house. However, this approach raises questions about whether the new house will provide a sense of security and comfort to the child and whether the money collateral from the sale will be directly used for renting another house.

Secondly, there is another perspective where the joint property lawsuit in the form of a dwelling house is declared not accepted by the judge (*niet ontvankelijke verklaard*/NO) and postponed until the child reaches adulthood. This approach was used in the Decision of the Supreme Court of the Republic of Indonesia Number 159 K / Ag / 2018 dated March 28, 2018. The reason for the non-acceptance of the joint property lawsuit by the Supreme Court judge was that both the Plaintiff's and the Defendant's children were still in the Plaintiff's care and were minors (*badhanah*) thus requiring a suitable living place. The judge concluded that if the permanent residence is the object of the lawsuit, the joint property becomes incomplete and not beneficial for the child's life. Therefore, it cannot be divided until both children of the Plaintiff and the Defendant reach adulthood. Initially, the Panel of Judges granted the joint property lawsuit, and the joint property in the form of residence had to be divided in half between the Plaintiff and the Defendant.

During the process, after the first phase, Defendant can file an appeal and cassation. The appeal was based on the objection that there was no request for residence as part of the lawsuit in the Plaintiff's claim, but the Panel of Judges in the first phase sentenced the Defendant to pay for the child's living expenses. The Panel of Judges at the court of appeal improved the first phase's judgment by handing down

⁴³ Ghansham Anand et.al., "Legal Implications on Cancellation of Agreements Made Prior to Custody for Good Faith Land Buyers", Muhammad Helmi, "Penemuan Hukum Oleh Hakim Berdasarkan Paradigma Konstruktivisme," *Kanun Jurnal Ilmu Hukum* 22, no. 1 (2020): 111–32, doi:10.24815/kanun.v22i1.14792..

⁴⁴ Faizal Kurniawan et. al., "The Principle of Balance Formulation as the Basis for Cancellation of Agreement in Indonesia", *Ibid*.

⁴⁵ *Ibid*.

⁴⁶ Islamiyati, "Kritik Filsafat Hukum Positivisme Sebagai Upaya Mewujudkan," *Law & Justice Journal* 1, no. 1 (2018): 87–90.

a decision that essentially corrected the court's judgment. Subsequently, the Defendant filed a cassation remedy, and the Panel of Judges at the court of cassation corrected the court of appeal's judgment related to the child's livelihood and joint property. The Panel of judges at the court of cassation made three considerations in deciding the cassation, including: 1) The two children of the Plaintiff and the Defendant were determined by the court to be under the care of the mother. Therefore, based on Article 41 point (b) of the Marriage Law jo. Article 156 point (d) of the KHI and legal norms contained in the Quran surah al-Baqarah verse 233, for the best interests of the children, the court may determine the children's living expenses to be paid by the father; 2) Since both children of the Plaintiff and Defendant are minors, the joint property, which is the object of the lawsuit, such as the permanent residence, cannot be divided until the two children reach adulthood due to the absence of benefits for the children's life interests; and 3) Since the joint property lawsuit's object is a permanent residence and cannot be divided due to the interests of the child, the Plaintiff's claim for joint property is determined not accepted (*niet ontvankelijke verklaard*/NO). The Panel of Judges at the court of cassation made their decision based on the principle of the best interests of the child.

Third, there is the perspective that joint property lawsuits can be granted, but the division of the joint property is deferred until the child reaches adulthood. The Supreme Court Circular Letter No. 1 of 2022 on the Enforcement of the Formulation of the Results of the 2022 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Duties for the Court (SEMA No. 1 of 2022), specifically point c of the Legal Formulation of the Religious Chamber Number 1, emphasizes that if the sole object of the joint property case is the residence where the child lives, then the lawsuit may be granted, but the division of the joint property is executed after the child becomes an adult to ensure the principle of the child's best interests. According to SEMA No. 1 of 2022, the legal age of adulthood is 21 years old or when the child is married. The implementation of SEMA No. 1 of 2022 is an integral guideline in handling cases in the Supreme Court, courts of appeal, and courts of the first phase to ensure consistency in decision-making and the unity of law enforcement.⁴⁷ In other words, the regulation of the division of the object of a joint property lawsuit, in this case, the child's residence, gives a 'breath of fresh air' to child protection efforts through legal certainty. This is because SEMA serves as a comprehensive guideline for handling cases in all levels of courts, from the Supreme Court to courts of first instance. By emphasizing legal certainty and the accommodation of the child's housing needs, SEMA offers a balanced approach that prioritizes both the husband and wife's property rights and the child's best interests. In this sense, SEMA can be viewed as a proportional justice solution.

It is important to note that there is a need for improvement in the recommendations regarding the ruling formulation for common property suits that

⁴⁷ Muhammad Farhan, Eficandra Eficandra, and Roni Efendi, "Implementasi Surat Edaran Mahkamah Agung Nomor 3 Tahun 2015 Pada Pengadilan Agama Sawahlunto," *JURIS (Jurnal Ilmiah Syariah)* 19, no. 2 (2020): 245, doi:10.31958/juris.v19i2.2234.

concern the child's interests. **Firstly**, the content of the arrangement regarding a joint property suit where the child's residence is involved should be regulated by a higher law so that it has binding legal force. This is because some assume that "Circular Letters" are categorized as policy rules or quasi-legislation, which function as policy regulations (*beleidsregel*).⁴⁸ As a policy rule, SEMA only regulates internally, i.e., judges, chief justices, clerks, and officials within the judiciary.⁴⁹ Law Number 12 of 2011 on Establishment of Laws and Regulations, as lastly amended by Law Number 13 of 2022 ("Law No. 12 of 2011"), should be considered in regulating this matter to ensure legal certainty for all parties involved. The Law No. 12 of 2011 does not regulate the position of SEMA in the hierarchy of laws and regulations in Indonesia.⁵⁰ This raises concerns about its less binding force of law, particularly if the above regulations invalidate the substance in the SEMA. To improve legal certainty in child protection efforts and prioritize the best interests of children, it would be beneficial to regulate the substance of the division of joint property related to the child's residence in higher laws and regulations that align with the hierarchy in Law No. 12 of 2011.

Second, the refinement that needs to be considered is related to the criteria for determining when a person can be considered as an "adult". The diverse age limits for adulthood in Indonesian laws and regulations can cause confusion, including in the division of joint property.⁵¹ The Civil Code, Compilation of Islamic Law, and Law Number 4 of 1979 on Child Welfare state that a person is considered immature if he/she has not reached 21 years of age and is unmarried. On the other hand, Law Number 3 of 1997 on Children's Courts, Law Number 39 of 1999 on Human Rights, Child Protection Law, and Law Number 12 of 2006 on Citizenship, define a "child" as any human being under the age of 18. As such, there is still no uniformity in determining adulthood in Indonesian laws and regulations. Regarding this issue, it is suggested that the division of joint property should wait until the child reaches the age of 18, which is the age of majority according to Law Number 1 of 1974 concerning Marriage and Law Number 23 of 2002 concerning Child Protection. Furthermore, it is important to emphasize in SEMA No. 1 of 2022 that married children should be considered as adults if they meet certain criteria.

Suppose a person who is under the age of 18 years old is married. In that case, the person has been qualified as an adult, pursuant to the *a contra rio* interpretation of

⁴⁸ Eric and Wening Anggraita, "Perlindungan Hukum Atas Dikeluarkannya Peraturan Kebijakan (Beleidsregel)," *Jurnal Komunikasi Hukum (JKH)* 7, no. 1 (2021): 464–87, <https://doi.org/10.23887/jkh.v7i1.31820>..(Farhan, Eficandra, and Efendi 2020).Farhan, Eficandra, and Efendi, "Implementasi Surat Edaran Mahkamah Agung Nomor 3 Tahun 2015 Pada Pengadilan Agama Sawahlunto."

⁴⁹ Riki Yuniagara, "Penggunaan SEMA Nomor 7 Tahun 2014 Dalam Penolakan Peninjauan Kembali (Kajian Putusan Nomor 144 PK / Pid . Sus / 2016)," *Yudisial* 13, no. 2 (2020): 187–206, doi:10.29123/jy.v13i2.411.

⁵⁰ Ari Iswahyuni, "Kedudukan Ancama Pidana Minimal Dalam Undang-Undang Nomor 35 Tahun 2009 Tentang Narkotika Pasca Dikeluarkannya Surat Edara Mahkamah Agung Nomor 3 Tahun 2015," *Panorama Hukum* 3, no. 1 (2018): 19–32.

⁵¹ Agustinus Danan Suka Dharma, "Keberagaman Pengaturan Batas Usia Dewasa Seseorang Untuk Melakukan Perbuatan Hukum Dalam Peraturan Perundang-Undangan Di Indonesia," *Repertorium* II, no. 2 (2015): 168–76.

Article 47 of the Marriage Law. This affirmation certainly aims to equate with the criteria of being an “adult” under the prevailing legislations.

CONCLUSION

The state plays a crucial role in child protection as children are a vital element for the development of a country. The protection of children at the global level has been regulated in several rules ranging from the Universal Declaration of Human Rights of 1948 to the 1989 Convention on the Rights of the Child. There are four principles set out in the Convention on the Rights of the Child, namely: 1) Non-discrimination principle, 2) The best interests of the child principle, 3) The right to life, live a life, and child development principle, and 4) Respect for the child's opinion principle. Of the four principles, the principle of best interest of the child is considered to be the foundation for the other principles. The importance of this principle then inspired Indonesia to ratify the Convention on the Rights of the Child into Presidential Decree No. 36 of 1990 and the drafting of regulations related to the rights of children. Based on the analysis of laws and regulations relating to children's rights, the principle of best interest of the child has been reflected in several provisions of prevailing laws and regulations, including the KHI and several Supreme Court Circulars.

The efforts to protect children are inevitably linked to fluctuating legal issues. One such issue concerns the child's right to joint property that is subject to a lawsuit, specifically a residential house. The principle of best interests for the child is crucial in the judge's decision-making process in this matter. This study identifies three different views held by judges regarding the child's residence: 1) granting the lawsuit due to the absence of an explicit norm; 2) rejecting the lawsuit until the child reaches adulthood; and 3) granting the lawsuit while pending the child's adulthood. Based on proportional justice and prioritizing the legal certainty of the husband and wife's property status and the best interests of the child, the author agrees with the third view, i.e., granting the lawsuit but pending the child's adulthood.

By granting the lawsuit but waiting for the distribution of the child to become an adult, in terms of legal certainty, the parents' rights to joint property, in the form of rights to land and buildings (in casu: residential house) are still fulfilled. From the perspective of proportional justice, if the lawsuit is granted but the distribution waits for the child to become an adult, the parents' rights are still fulfilled (even if they have to wait some time) and also the child's fundamental right to obtain a decent place to live is still fulfilled, so that the interests of parents and children still fulfilled. In terms of the best interests of the child, when the lawsuit is granted, but the distribution waits for the child to become an adult, of course the child's right to obtain a decent place to live will be fulfilled.

Based on the description above, it can be understood that SEMA No. 1 of 2022 has not confirmed its clear position in existing laws and regulations and has not provided comprehensive regulations related to the concept of immature children in accordance with the Marriage Law. To improve SEMA No.1 of 2022, the author suggests two recommendations: 1) Regulate the substance of the division of common property in higher regulations and in accordance with the hierarchy of laws and regulations in

Indonesia, and 2) Set the adult age limit to be 18 years old based on the Marriage Law *jo.* Child Protection Law. This includes cases where a child under 18 years of age is married, which should be considered as an adult.

REFERENCE

- Adji, Adris Rafi. "Pengaturan Hukum Harta Bersama Dalam Putusan Perceraian." *Jurnal Kertha Semaya* 9, no. 12 (2021): 2292–2305.
- Alifiyah, Rifdah, and Isa Anshori. "Legal Protection for Children in Cases of Domestic Violence in the Indonesian Households." *El-Usrah: Jurnal Hukum Keluarga* 6, no. 2 (2023): 348–61.
- Anwar, Mashuril, and M Ridho Wijaya. "Fungsionalisasi Dan Implikasi Asas Kepentingan Terbaik Bagi Anak Yang Berkonflik Dengan Hukum: Studi Putusan Pengadilan Tinggi Tanjung Karang." *Undang: Jurnal Hukum* 2, no. 2 (2020): 265–92. doi:10.22437/ujh.2.2.265-292.
- Azizi, Alfian Qodri, Ali Imron, and Bagus Heradhyaksa. "Fulfillment of Civil Rights of Extramarital Children and Its Effect on Social Dimensions." *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 20, no. 2 (2020): 235–52. doi:10.18326/ijtihad.v20i2.235-252.
- Barron, Lisa. "Divorce and Its Effects on the Development of Children." *Graduate Research Papers* 132 (2010): 1–11. doi:10.1111/j.1746-1561.1979.tb07683.x.
- Dharma, Agustinus Danan Suka. "Keberagaman Pengaturan Batas Usia Dewasa Seseorang Untuk Melakukan Perbuatan Hukum Dalam Peraturan Perundang-Undangan Di Indonesia." *Repertorium II*, no. 2 (2015): 168–76.
- Djanggih, Hardianto. "Konsepsi Perlindungan Hukum Bagi Anak Sebagai Korban Kejahatan Siber Melalui Pendekatan Penal Dan Non Penal." *Mimbar Hukum* 30, no. 2 (2018): 316. doi:10.22146/jmh.32017.
- Farhan, Muhammad, Eficandra Eficandra, and Roni Efendi. "Implementasi Surat Edaran Mahkamah Agung Nomor 3 Tahun 2015 Pada Pengadilan Agama Sawahlunto." *JURIS (Jurnal Ilmiah Syariah)* 19, no. 2 (2020): 245. doi:10.31958/juris.v19i2.2234.
- Fathullah, Amal, and Muhammad Abduh. "The Relationship of Children and Their Biological Father (Comparative Study of Positive Law of Indonesia, Thailand, and Jordan)." *Syariah: Jurnal Hukum Dan Pemikiran* 22, no. 2 (2022): 213–30. doi:10.18592/sjhp.v22i2.4953.
- Hafsah. "Kajian Perlindungan Hak Pendidikan Dan Perlindungan Agama Anak Dalam Keluarga Muslim Di Kota Medan." *AHKAM: Jurnal Ilmu Syariah* 16, no. 2 (2016): 171–80. doi:10.15408/ajis.v16i2.4447.
- Harvin, and Liza Priandhini. "Pengaturan Hukum Pemberian Nafkah Anak Setelah Perceraian Orangtua Dalam Undang-Undang Perkawinan." *Kertha Semaya* 9, no. 12 (2021): 2466–78.

- Helmi, Muhammad. "Penemuan Hukum Oleh Hakim Berdasarkan Paradigma Konstruktivisme." *Kanun Jurnal Ilmu Hukum* 22, no. 1 (2020): 111–32. doi:10.24815/kanun.v22i1.14792.
- Hidayat, Rahmat, Jayusman Jayusman, Efrinaldi Efrinaldi, and Rita Sari. "Review of Maqāsid Al-Syarī'ah Concerning the Fulfillment of Child Rights Post-Divorce in Budi Aji Village, Simpang Pematang District, Mesuji Regency." *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 22, no. 2 (2022): 213–28. doi:10.30631/alrisalah.v22i2.1254.
- Ibrahim, Rifki Septiawan. "Hak-Hak Keperdataan Anak Dalam Perspektif Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak." *Lex Privatum* VI, no. 2 (2018): 53–60.
- Islamiyati. "Kritik Filsafat Hukum Positivisme Sebagai Upaya Mewujudkan." *Law & Justice Journal* 1, no. 1 (2018): 87–90.
- Ismiati. "Perceraian Orangtua Dan Problem Psikologis Anak." *At-Taujih : Bimbingan Dan Konseling Islam* 1, no. 1 (2018): 1–16. doi:10.22373/taujih.v1i1.7188.
- Iswahyuni, Ari. "Kedudukan Ancama Pidana Minimal Dalam Undang-Undang Nomor 35 Tahun 2009 Tentang Narkotika Pasca Dikeluarkannya Surat Edara Mahkamah Agung Nomor 3 Tahun 2015." *Panorama Hukum* 3, no. 1 (2018): 19–32.
- Karmawan, Karmawan. "Respon Hukum Islam Terhadap Hak Perlindungan Anak Upaya Implementasi Sistem Perundang-Undangan Hukum Negara." *Kordinat: Jurnal Komunikasi Antar Perguruan Tinggi Agama Islam* 19, no. 1 (2020): 1–20. doi:10.15408/kordinat.v19i1.17170.
- Komisi Perlindungan Anak Indonesia. "Data Kasus Perlindungan Anak 2016 – 2022," 2022. <https://bankdata.kpai.go.id/>.
- Krutzinna, Jenny. "Who Is 'The Child'? Best Interests and Individuality of Children in Discretionary Decision-Making." *International Journal of Children's Rights* 30, no. 1 (2022): 120–45. doi:10.1163/15718182-30010005.
- Lestari, Meilan. "Hak Anak Untuk Mendapatkan Perlindungan Berdasarkan Peraturan Perundang-Undangan." *UIR Law Review* 1, no. 02 (2017): 183–90.
- M. Freeman. *Article 3. The Best Interests of the Child*. Edited by Andre Alen, Johan Vande Lanotte, Eugene Verhellen, Fiona Ang, Eva Berghmans, and Mieke Verheyde. *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden, Boston: Martinus Nijhoff, 2007.
- Mawdsley, RD, JL Beckmann, E de Waal, and CJ Russo. "The Best Interest of the Child: A United States and South African Perspective." *Journal for Juridical Science*, no. Special Issue (2010): 1–23.
- Nursaidah, Adi Nur Rohman, and Panti Rahayu. "The Out of Court Divorce Model and Its Legal Implications: A Juridical Study in Babelan District Bekasi." *Syariah: Jurnal*

Hukum Dan Pemikiran 20, no. 2 (2020): 159–74. doi:10.18592/sjhp.v20i2.3945.

Nurunnisa, Rahmida Erliyani, Gilang Fitri Hermawan, and Yehia Mohamed Mostafa Abdelhadi. “Implications of Annulment of Marriage on The Distribution of Joint Assets According to The Compilation of Islamic Law and National Law.” *Syariah: Jurnal Hukum Dan Pemikiran* 23, no. 1 (2022): 1–23. doi:10.18592/sjhp.v23i1.8611.

Rizani, Akhmad Kamil, and Ahmad Dakhoir. “Musyawarah Sebagai Alternatif Penyelesaian Sengketa Waris Beda Agama: Evidence Based Solution From Indonesia.” *El-Mashlahab* 10, no. 2 (2020): 52–64. doi:10.23971/maslahah.v10i2.2063.

Rouf, Abd, Mufidah Ch, and Zaenul Mahmudi. “Joint Property Division in Indonesia: A Gender Equality Viewpoint.” *De Jure: Jurnal Hukum Dan Syar’iah* 15, no. 2 (2023): 230–50. doi:10.18860/j-fsh.v15i2.23050.

Rumadan, Ismail, and Ummu Salamah. “Settlement Of Divorce Dispute Through The Forum Of Mediation In Judicial Institutions As An Effort Of Legal Protection For The Rights And Interests Of The Child Of Post-Divorce.” *Syariah: Jurnal Hukum Dan Pemikiran* 21, no. 2 (2021): 213–26. doi:10.18592/sjhp.v21i2.4603.

Said, Muhammad Fachri. “Perlindungan Hukum Terhadap Anak Dalam Perspektif Hak Asasi Manusia.” *JCH (Jurnal Cendekia Hukum)* 4, no. 1 (2018): 141. doi:10.33760/jch.v4i1.97.

Soo Jee Lee. “A Child’s Voice vs A Parent’s Control: Resolving Tension Between The Convention on The Rights of The Child U.S. Law.” *Columbia Law Review* 117, no. 3 (2017): 687–727.

Syafei, Ermi Suhasti, and Siti Djazimah. “Mediation in the Settlement of Joint Marital Property Disputes: A Study at Tanjung Karang Religious Court, Lampung.” *Samarah* 5, no. 2 (2021): 867–91. doi:10.22373/sjhc.v5i2.9039.

Syafiuddin, M. Nur. “Aksentuasi Kepentingan Terbaik Anak Dalam Putusan Nafkah Sebagai Upaya Penjaminan Hak Asasi Anak.” *Jurnal HAM* 13, no. 2 (2022): 235. doi:10.30641/ham.2022.13.235-252.

Umami, Ulul, and Abdul Ghofur. “Human Rights in Maqāṣid Al-Sharī’ah Al-Āmmah: A Perspective of Ibn ‘Āshūr.” *Al-Ahkam* 32, no. 1 (2022): 87–108. doi:10.21580/ahkam.2022.32.1.9306.

UN Committee on the Rights of the Child (CRC). “General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1),” 1–21. UN Committee on the Rights of the Child (CRC), May 2013.

Vaghri, Ziba, Jean Zermatten, Gerison Lansdown, and Roberta Ruggiero. *Monitoring State Compliance with the UN Convention on the Rights of Te Child: An Analysis of Attributes*. Springer. Gewerbestrasse, Switzerland: Springer, 2022. doi:10.2307/762171.

Widjaja, Angela Melani, Ike Yeni Kartika Sari, Hasna Firaz Isza Fadhilah, and Devi Sukma

Ayuningtyas. "The Application of the Best Interest of the Child Principle as a Basis for Determining Child Custody." *Unram Law Review* 4, no. 2 (2020): 163–73. doi:10.29303/ulrev.v4i2.126.

Yuniagara, Riki. "Penggunaan SEMA Nomor 7 Tahun 2014 Dalam Penolakan Peninjauan Kembali (Kajian Putusan Nomor 144 PK / Pid . Sus / 2016)." *Yudisial* 13, no. 2 (2020): 187–206. doi:10.29123/jy.v13i2.411.

Zainuddin, Muslim, Mansari, and Nadhilah Filzah. "Divorce Problems and Community Social Capital in Realizing Family Resilience in Aceh." *Samarah* 6, no. 2 (2022): 914–33. doi:10.22373/sjkh.v6i2.15080.

Zermatten, Jean. "The Best Interests of the Child Principle: Literal Analysis and Function." *International Journal of Children's Rights* 18, no. 4 (2010): 483–99. doi:10.1163/157181810X537391.