

## LEGAL PROTECTION OF CUSTODY OF DUAL CITIZENSHIP CHILDREN AFTER THE BREAKDOWN OF MARRIAGE

Agus Arief Wicaksana<sup>1\*</sup>, Sri Astutik<sup>2</sup>, Wahyu Prawesthi<sup>3</sup>, Hartoyo<sup>4</sup>  
<sup>1,2,3,4</sup>Fakultas Hukum Universitas Dr. Soetomo, Surabaya, Indonesia  
agusarief8@gmail.com<sup>1\*</sup>, sri.astutik@unitomo.ac.id<sup>2</sup>,  
wahyu.prawesthi@unitomo.ac.id<sup>3</sup>, hartoyo@unitomo.ac.id<sup>4</sup>

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### Abstract

The purpose of this research is first to determine the legal consequences of the breakup of mixed marriage on the custody of dual citizenship children and second, to understand the judge's considerations in handing down a decision as legal protection of child custody after the breakup of mixed marriage normative legal research methods. In the era of growing globalization, population mobility between countries has become increasingly common. This often causes mixed marriages between Indonesian citizens and foreigners to occur. Obstacles for people carrying out marriages of different nationalities, both within and outside the country, are regarding legal protection for children if in a marriage in Indonesia, for example, there is a divorce which has an impact on the division of assets, child custody, and so on. The most prominent impact of this kind of marriage is the birth of children with dual citizenship or dual citizenship. These children are citizens of more than one country at birth, and this presents unique challenges regarding their custody when parents divorce. An issue that is vulnerable and often arises in mixed marriages is the issue of the child's citizenship. Even though there are several legal regulations governing child custody, disputes over child custody often become disputes in court that require fair handling by judges. In this research, the judge decided that custody of a dual-citizen child would be given to the biological mother by applying the principle of the best interests of the child.

**Keywords:** Child Custody, Dual Citizenship, Divorce

## INTRODUCTION

Marriage is a fundamental need for all human beings, from ancient times to the present. Marriage is an issue that is relevant to discuss within and outside legal regulations. From marriage arises a legal relationship between husband and wife, and subsequently, with the birth of children, it creates legal relationships between parents and their children. (Martiman Prodjohamidjojo, 2011). Based on Article 2 of the Compilation of Islamic Law (Kompilasi Hukum Islam), states, "Marriage in Islamic law is a marriage contract, which is a very strong covenant (Akad) or mitssaqan ghalidzan, to obey the command of Allah and to carry it out is an act of worship.

Marriage can be between individuals of the same nationality or between individuals of different nationalities, which is known as mixed marriage. According to Article 57 of Law Number 1 of 1974 concerning Marriage, a mixed marriage refers to a marriage between two individuals in Indonesia subject to different laws due to differences in nationality, with one party being a foreign national and the other party being an Indonesian national. Rulita Angraini, a member of the Supervisory Board of the Indonesian Mixed Marriage Community, Central Indonesia, states that international marriages are increasing and becoming a trend not only in Indonesia but worldwide (Suhayati, 2020). This is due to the increasing number of communication and transportation facilities every year. The Indonesian Mixed Marriage Community records that 1,200 members of the community are involved in mixed-family marriages (Megiani, Kasim, & Mustika, 2023). Law Number 12 of 2006 concerning citizenship, Article 5 paragraph 1 states that a child of an Indonesian citizen born outside of a legal marriage, who is under 18 (eighteen) years old or unmarried, recognized by their foreign national father, is still recognized as an Indonesian citizen.

The vulnerable and frequently emerging issue in mixed marriages is the matter of children's citizenship (Marsella, 2015). The old citizenship laws adhered to the principle of single citizenship, so children born from mixed marriages only had one citizenship, determined by the father's citizenship according to the law. This regulation creates issues when the parent's marriage breaks down later on, as the mother would face difficulties in obtaining custody of her child who is a foreign citizen (Melani Wuwungun 2009).

In the increasingly globalized era, population mobility between countries has become more common. This often leads to cross-border marriages, where couples from different countries marry and establish families. The most prominent impact of such marriages is the birth of children with dual or multiple citizenship. In this context, complex questions arise regarding child custody when parent's with different citizenship divorce. Divorce is an emotionally challenging event for the involved couples, and even more so when children are part of the situation. One of the most critical aspects is how the custody of children with dual citizenship should be handled, especially concerning immigration. The role of immigration in this process is crucial, as they are responsible for the rules and regulations governing residence permits and citizenship (Hamidi, J., & Charles, C, 2021).

Globalization has opened doors for increased population mobility worldwide. People travel for various reasons, including work, study, marriage, or humanitarian reasons. As a result, couples from different countries often marry and form families in a third country. The birth of children in such marriages can result in children with dual or even triple citizenship.

Children are an inseparable part of human survival and the continuity of a nation and state. To ensure that every child can bear the responsibility for the continuity of the nation and state, they need the broadest possible opportunity to grow and develop optimally, both physically, mentally, and socially. As a country that upholds human rights, the Government of the Republic of Indonesia guarantees the protection and fulfillment of children's rights as regulated in several laws, such as the 1945 Constitution, national and international regulations, as well as the ratification of the International Convention on the Rights of the Child implemented in Law Number 23 of 2002 concerning Child Protection.

Article 4 of Law Number 12 of 2006 concerning the Citizenship of the Republic of Indonesia does not recognize dual citizenship (bipatriide) or statelessness (apatride). Dual citizenship granted to children in this law is an exception. The children referred to in this law are children resulting from mixed marriages who are under 18 years of age or unmarried. Mixed marriage in the Marriage Law refers to a marriage between two individuals in Indonesia subject to different laws due to differences in nationality, with one party being a foreign national and the other party being an Indonesian national.

Essentially, these children become citizens of more than one country from birth, presenting unique challenges regarding their custody rights when their parents divorce. Protecting children's custody rights is a fundamental principle in the law and policies of almost all countries. The primary principle to uphold is the best interests of the child. However, when parents with different citizenships divorce, determining what is truly best for the child can become complicated. The decisions made must consider the emotional, psychological, and physical needs of the child as well as the potential

long-term impacts (Jimly Asshiddiqie, 2009). The relevant parties have a crucial role in handling cases of children with dual citizenship in the context of divorce. They must consider how these children can still receive protection and security.

Cases involving children with dual citizenship due to their parents' divorce often require cooperation between countries. This cooperation may involve negotiations between the parties and refer to relevant bilateral or multilateral agreements. Effective coordination among different jurisdictions is key to safeguarding the custody rights of children. In all these contexts, the primary focus should always be on the best interests of the child. This is a fundamental principle in the Convention on the Rights of the Child ratified by many countries worldwide. In the context of children with dual citizenship, finding solutions that respect their custody rights while considering their best interests poses a significant challenge.

## RESEARCH METHOD

This research is classified as a type of normative legal research, namely research method by prioritizing a statutory approach, or a case approach without a case study. This research uses three approaches, namely Statute Approach, Conceptual Approach, and Case Approach which is carried out based on paradigms, strategies, and qualitative model implementation.

In this research, there are two types of legal materials, namely primary legal materials and secondary legal materials. Primary legal materials are legal materials obtained directly by the researcher, through legislative approaches and literature reviews. Meanwhile, secondary legal materials refer to legal materials that have been processed or compiled previously by other parties and are ready for use by the researcher. Secondary legal materials generally include documents, books, or information that have been processed previously, journals, other scientific research, magazines, and newspapers. The analysis in this research focuses on identifying or addressing the issues present during the research and the results of the research, which are then processed and analyzed to conclude.

## RESULTS AND DISCUSSION

### The Legal Consequences of the Dissolution of Mixed Marriages on Custody Rights of Dual Citizenship Children

The purpose of marriage is to create a happy and lasting family. This noble purpose is essentially intended by every couple entering into marriage, even with the support and prayers of both families or the surrounding community. It is inherent that nothing in this transient world is eternal, including marriage. At some point, every marriage will inevitably dissolve or end. This is affirmed by Article 38 of the Marriage Law, which states: that marriage may end due to: death; divorce; or by court decision (Moch. Isnaeni, 2016).

Divorce as a cause of marital dissolution is regulated in greater detail by the law because divorce is never devoid of tension that can be distressing for the involved parties, especially the spouses, which often escalates into disputes. Additionally, divorce changes the legal status not only of the spouses but also of the underage children born from the marriage, necessitating immediate legal protection. Children who are minors, with the dissolution of their parents' marriage through divorce, are no longer under their parents' authority, and sometimes they are placed under guardianship. In court proceedings, it is often determined who holds custody, and typically, the party appointed by the judge to have custody will wield authority as the guardian to represent the underage child in legal matters, both within and outside the courtroom (Moch. Isnaeni, 2016)

Married couples of different nationalities who cannot continue their marriage and decide to divorce, raise various issues, such as the division of joint property and children's issues, namely: custody or guardianship issues, maintenance and allowances for minor children, education costs, and other costs. In a mixed marriage, the child is the party most affected by the divorce of his or her parents. Therefore, if the parents divorce, the child must still get legal protection, in this case who has the right to take care of the child. Child custody is the obligation of parents to provide services, protect, educate, and care for children until adulthood, both during the marriage period and when the parents of different nationalities divorce or break up their marriage.

According to Zainuddin Ali, positive law regulates child custody, regarding the obligations to care for children resulting from divorce, both from the mother and father, and provides views on the differences and similarities between Islamic law and positive law. Positive law also determines the conditions for child custody, such as the adequacy and competence of parents in caring for and educating children. (Zainuddin Ali, 2006)

Divorce between spouses of different nationalities or mixed marriages resulting in children with dual citizenship often leads to disputes over custody rights for underage children. In mixed

marriages, children have the right to choose or, based on court decisions, be placed under the custody of one of the parents. If the child is unable to make a choice and their mother is an Indonesian citizen, for the best interests of the child or upon the mother's request, the government is obligated to handle the citizenship status of the child under the Republic of Indonesia.

According to Citizenship Law Number 12 of 2006, there are legal consequences for children born from mixed marriages, such as Children are allowed to have dual citizenship if necessary. Children resulting from mixed marriages are allowed to have dual citizenship until the age of 18 or marriage, and within 3 years after that or at the age of 21, the child must choose the citizenship of the father or mother. Additionally, the dissolution of marriage leads to issues regarding child custody.

As an example, there is a custody dispute for children who have dual citizenship due to the dissolution of a mixed marriage. Eventually, the wife filed a lawsuit with the South Jakarta District Court with case number 172/pdt.G/2019/PN.Jkt.Sel to obtain custody of her two children aged 7 and 5 years. Both children were born from a mixed marriage between the wife, who is an Indonesian citizen (WNI), and the husband, who is a Canadian citizen. The wife's lawsuit was based on the fact that the husband intended to take the children to Canada. The wife was concerned that her children would lose their cultural roots and the Indonesian language if they lived in Canada.

The existence of dual citizenship children after divorce does not always receive legal attention. Previously, Article 49 Paragraph (2) of the Marriage Law had sparked controversy. This article stated that children from mixed marriages could only acquire the nationality of the father. This has the potential to limit the custody rights of Indonesian mothers over children who share the same nationality as their foreign national fathers (WNA). (Atmoko, D., & Ahmad, B, 2022). However, in 2019, the Constitutional Court annulled that article. The annulment of the article, according to the Constitutional Court's decision, opens the opportunity for dual citizenship children to obtain custody from their Indonesian citizen mothers, considering the best interests of the child, regardless of the nationality of the parents.

### **Considerations of the Judge in Issuing Decisions for Legal Protection of Custody Rights for Children After the Dissolution of Mixed Marriages**

Based on the lawsuit filed by a wife seeking custody rights for underage children in case No. 172/pdt.G/2019/PN.Jkt.Sel, the judge of the District Court issued a verdict granting the wife's lawsuit. This decision is based on an effort to provide legal protection for the children.

Verdict No. 172/Pdt.G/2019/PN.Jkt.Sel is based on the principle of upholding the best interests of the child. Custody cases involving dual citizenship children after divorce often present complex legal and social dilemmas. An important example is Verdict No. 172/Pdt.G/2019/PN.Jkt.Sel has drawn attention to prioritizing the principle of the best interest of the child.

In this case, a couple consisting of an Indonesian wife and a Canadian husband with two children aged 7 and 5 are facing divorce. The wife sued for custody rights due to concerns that the husband intends to take the children to Canada, potentially erasing the cultural roots and Indonesian language of the children.

#### **a. Judge's Considerations:**

Before issuing a decision on a resolved case, the judge must provide a consideration. The judge's consideration is a stage where the panel of judges considers the facts revealed during the trial process. The judge's consideration is one of the most important aspects in determining the realization of the value of a judge's decision that contains justice and legal certainty, besides that, it also contains benefits for the parties concerned so the judge's consideration must be addressed carefully, well, and carefully. (Mukti Arto, 2004)

In essence, the judge's consideration should also contain the following matters:

- 1) The subject matter and matters that are admitted or arguments that are not denied.
- 2) There is a juridical analysis of the verdict in all aspects concerning all facts/matters proven in the trial.
- 3) The existence of all parts of the Plaintiff's petition that must be considered/adjudicated one by one so that the judge can conclude whether or not it is proven and can draw conclusions about whether or not the claim has been proven and can be granted / at least the claim in the verdict. (Mukti Arto, 2004)

In their deliberations before making a decision, Judges favor the best interests of the child by considering important factors:

- 1) Custody rights as a fundamental right of the child.
- 2) Environment and stability ensuring optimal growth and development of the child.
- 3) Parental caregiving capabilities, cultural understanding, and financial conditions.
- 4) The child's nationality, although not the primary determining factor.

b. Judge's Decision:

The judge granted the mother's lawsuit, awarding custody to the mother. This decision emphasizes that the best interests of the child, not solely nationality, serve as the primary basis for decision-making.

In his considerations, the judge argued that custody rights are fundamental rights of the child that cannot be denied by anyone, including parents. Custody of the child must be awarded to the parent who is most capable of ensuring the child's optimal growth and development.

This verdict is significant in upholding the custody rights of dual-citizenship children. It demonstrates that the judge has prioritized the best interests of the child, regardless of the child's nationality. Here is a more detailed explanation of the verdict:

- a. The verdict grants the wife's lawsuit.  
This decision upholds the wife's lawsuit to obtain custody of her two children. This means that custody of both children is awarded to the mother.
- b. Custody rights are children's fundamental rights.  
In his considerations, the judge argued that custody rights are fundamental rights of the child that cannot be denied by anyone, including parents. Custody of the child must be awarded to the parent who is most capable of ensuring the child's optimal growth and development.
- c. The wife is deemed more capable of ensuring the children's growth and development.  
The judge assessed that the wife is more capable of ensuring the growth and development of her children due to several considerations, including:
  - 1) The wife is the biological mother of the children and has cared for and raised them since birth.
  - 2) The wife is an Indonesian citizen (WNI) and has lived in Indonesia for decades, thus having a better understanding of Indonesian culture and customs.
  - 3) The wife has a stable job and income, enabling her to fulfill both the material and non-material needs of her children.

Based on these considerations, the judge decided that custody of both children should be awarded to the mother. This decision demonstrates that the judge has prioritized the best interests of the child in determining custody rights. The judge has taken into account various factors that can influence the physical, mental, and emotional development of children. The verdict also indicates that the judge had considered the nationality factor in determining custody rights. The judge assessed that the wife can better ensure the optimal growth and development of her children in Indonesia because she is an Indonesian citizen (WNI) and has lived in Indonesia for decades.

The Judge's Decision Number 172/Pdt.G/2019/PN.Jkt.Sel highlights the judge's considerations as follows:

- a. Child's rights: Custody is viewed as an inseparable right of the child. Children are entitled to an environment that ensures optimal growth and development, regardless of their parents' marital status.
- b. Best interests of the child: The decision favors the best interests of the child, considering factors such as environment, language, culture, and life stability.
- c. Nationality: The judge considers the dual nationality status of the children but it is not the main determining factor. The caregiver's abilities, environment, and life stability are prioritized.

The decision No. 172/Pdt.G/2019/PN.Jkt.Sel underscores the importance of drafting specific regulations regarding the custody rights of dual nationality children. These regulations can provide clarity and legal certainty, as well as strengthen the enforcement mechanisms to protect the rights of dual nationality children.

Fair and consistent law enforcement, based on the principle of the best interest of the child, is key to ensuring that dual nationality children can grow and develop optimally regardless of their nationality status.

Decision No. 172/Pdt.G/2019/PN.Jkt.Sel represents a step forward in the legal protection of custody rights for dual nationality children post-divorce. However, effective law enforcement for such cases still needs to be optimized. In terms of custody rights, court decisions must be based on clear and objective considerations, taking into account the following factors:

- a. The best interest of the child
- b. Parental caregiving capabilities
- c. The child's environment and life stability

Court decisions should consider the holistic needs and development of the child, including their physical, mental, and emotional well-being. The court should also consider the parent's ability to meet the child's needs and development. Regarding nationality, dual-nationality children have the right to

choose their nationality when they reach adulthood (Suryatni, 2020). Indeed, until the child reaches adulthood, both countries of their nationality must recognize and protect the rights of the child. Therefore, both countries of the child's nationality must work together to provide ease and legal certainty for the child regarding nationality, education, health, and child protection.

## CONCLUSION

The legal consequences of the dissolution of mixed marriages for children with dual nationality include not only issues regarding child support, education expenses, and others but also custody or guardianship issues. Although there are already several laws governing child custody, disputes over child custody often become contentious in court and require fair handling by judges. It is important to ensure that children do not become victims of their parent's divorce.

The judge's considerations in issuing a verdict to provide legal protection for the custody of children after the divorce of their parent's from a mixed marriage prioritize the application of the principle of the best interest of the child. The judge's decision to grant the mother's lawsuit is based on several considerations, including:

- a. Custody as a fundamental right of the child;
- b. Environment and stability ensuring the optimal growth and development of the child;
- c. Parenting ability, cultural understanding, and financial condition of the parents; and
- d. The child's nationality, although not the primary determinant factor.
- e. In the judge's considerations, it is also evaluated that the wife is better able to ensure the growth and development of her children due to several reasons:
- f. She is the biological mother of the children and has cared for and raised them since birth.
- g. She is an Indonesian citizen and has lived in Indonesia for decades, thus having a better understanding of Indonesian culture and customs.

She has a stable job and income, capable of meeting both the material and non-material needs of her children.

## REFERENCES

- Atmoko, D., & Ahmad, B. 2022. *Marriage and Family Law*. Malang: CV Eternal Archipelago Literacy.
- Hamidi, J., & Charles, C. 2021. *Immigration Law for Foreigners in Indonesia*. Jakarta: Sinar Graphics
- Jimly Asshiddiqie. 2009. *Introduction to Constitutional Law*. Jakarta: Rajawali Pers PT.Raja Grafindo Persada.
- Law Number 12 Year 2006 Concerning Citizenship
- Law Number 23 Year 2002 Concerning Child Protection in conjunction with Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection.
- Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage
- Martiman Prodjohamidjojo. 2011. *Indonesian Marriage Law, 3rd Edition*. South Jakarta: Indonesia Legal Center Publishing.
- Megiani, Ni Made, Kasim, Nur Mohamad, & Mustika, Waode, 2023, Comparison of Laws on the Rights of Children with Dual Citizenship due to Divorce Victims (BW and Privaatrecht comparative), *Journal of Comprehensive Science (JCS)*, 2(2), 646–657.
- Melani Wuwungan. 2009. *Status And Position of Children from Mixed Marriages Reviewed from Law Number 12 of 2006 concerning Indonesian Citizenship*. Semarang: Thesis, Master of Notary Program, Postgraduate Program, Diponegoro University.
- Moch. Isnaeni. 2016. *Indonesian Marriage Law*. (Surabaya: PT Revka Petra Media)
- Mukti Arto, 2004, *Civil Case Practice in Religious Courts*, cet V (Yogyakarta: Student Library)
- Marsella, 2015, *Legal Study on Children from Mixed Marriages*, *Mercatoria* Vol. 8 No. 2 December.
- Suhayati, Monika, 2020, *Legal Protection for Children Victims of International Child Abduction*, *Kajian*, 24(2), 73–88.
- Suryatni, Luh, 2020, *Law Number 12 Year 2006 concerning the Citizenship of the Republic of Indonesia in Protecting the Rights of Women and Children (Perspective: Marriage between Indonesian Citizens and Foreign Citizens)*, *Aeronautical Legal Scientific Journal*, 10(2).