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The Legal Status of Mothers in Post-Divorce Child Custody under Indonesian Law

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Abstract
This study examines mothers' legal status in post-divorce child custody, assesses the consistency of judicial reasoning in custody determinations, and proposes a reconstructed custody framework grounded in the child's best interests and the principle of equal parental responsibility. Using a normative legal methodology and a conceptual approach, the study draws on a comprehensive review of the legal literature and applies qualitative descriptive analysis. The findings suggest that maternal custody should no longer be construed as an absolute entitlement but as a rebuttable presumption, whose application must remain subject to the child's best interests. Although judicial practice increasingly reflects this principle's primacy, inconsistencies persist in judicial reasoning and in determining custody arrangements. The study therefore advocates reconstructing the post-divorce custody framework to prioritise children's rights and welfare through strengthened shared parental responsibility, while preserving the mother's custodial role where this demonstrably serves the child's best interests. This approach seeks to reconcile maternal custodial presumptions with child-centred adjudication and equal parental responsibility, providing a normative foundation for more consistent and rights-based custody determinations.

Keywords: *Best interests of the child, Child custody, Divorce, Family law, Maternal legal status*

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INTRODUCTION

Divorce is a legal event that not only brings an end to the marital relationship between husband and wife, but also gives rise to complex legal consequences for the civil relationship between parents and children (Ottakkam Thodukayil et al., 2026). Dissolving the marriage does not remove parents' responsibility to fulfil children's rights, whether in relation to maintenance, upbringing, education, protection, or promoting optimal growth and development. In this context, disputes over child custody have become one of the most common family law issues arising after divorce, as they involve the intersecting interests of parental rights and children's rights.

This issue has drawn increasing attention in modern family law, as the focus of its resolution has shifted from protecting parental rights to protecting children's rights as legal subjects with independent interests. This paradigm shift makes the best interests of the child a fundamental principle in every legal decision affecting a child's life, including post-divorce custody arrangements. This principle is no longer understood merely as a moral consideration, but as a legal norm binding on legislators, the judiciary, and all state authorities when making decisions concerning children.

Developments in international law indicate that the concept of child custody has transformed significantly over the past few decades. Whilst legal systems in various countries once prioritised the doctrine of maternal preference, or the tender years doctrine, the assumption that young children are naturally better cared for by their mothers, contemporary developments reveal a different trend. Many jurisdictions are beginning to move away from a gender-based approach to child custody and are replacing it with a child-centred approach. This shift has been influenced by the growing recognition of children's rights through the Convention on the Rights of the Child (CRC), developments in developmental psychology, and a growing awareness that the quality of care cannot be determined solely based on a parent's biological status or gender. Nevertheless, the implementation of the principle of the best interests of the child still presents both conceptual and practical challenges (A. Putri et al., 2026; Ramadhan et al., 2026).

International literature indicates that this concept is dynamic and lacks a single, universally applicable definition. This flexibility allows judges to tailor their rulings to each case. However, it also leaves room for subjectivity, bias, and inconsistency if clear assessment criteria do not support it. Various studies suggest that differences in social, cultural, and legal system backgrounds can lead to different interpretations of what constitutes the best interests of the child.

In the Indonesian context, this issue is more complex because child custody provisions after divorce are scattered across various legal instruments with different characteristics. Law No. 1 of 1974 on Marriage, as amended by Law No. 16 of 2019, does not provide detailed provisions on child custody arrangements after divorce (Karimullah, 2026). The Compilation of Islamic Law tends to place children who have not yet reached the age of discernment (*mumayyiz*) in the mother's care, while the Child Protection Act places greater emphasis on fulfilling children's rights without giving preference to either parent (Bukido et al., 2025). These instruments indicate that the

Indonesian legal system combines a normative approach based on the maternal relationship with a child protection approach that has evolved within international law (Siregar et al., 2026). This creates considerable scope for interpretation in judicial practice, particularly when courts weigh the child's best interests against normative provisions that grant the mother a special position as the primary carer of young children.

On the one hand, the mother's position as the primary carer is historically, sociologically and legally legitimate. Various studies in the field of developmental psychology show that the emotional bond between mother and child in the early years of life makes a significant contribution to the formation of attachment, a sense of security, and the child's social-emotional development (Fadilah et al., 2026; Karimullah et al., 2024). However, developments in modern society have brought about changes in family structures, increased participation by women in the workforce, and greater involvement of fathers in day-to-day care (Karimullah et al., 2024; Sakinah et al., 2026). These changes mean that the assumption that a mother is always the best carer can no longer be applied universally. Instead, child protection must assess parenting ability based on each family's actual circumstances, rather than being trapped in gender stereotypes that could undermine the objectivity of the judicial process. This shift has become central to international discourse on family law, which seeks to balance the protection of children's rights with the principle of parental equality.

Judicial practice in Indonesia shows that custody determinations do not always yield uniform rulings. In some cases, custody is awarded to the mother based on the child's age and the provisions of the Compilation of Islamic Law, whilst in other cases it is transferred to the father due to considerations regarding parenting ability, moral character, domestic violence, neglect, or other factors deemed to affect the child's best interests. This variation reflects that judges do not merely apply legal norms literally but also engage in legal discovery by interpreting concrete facts presented in court.

This development shows that analyzing the mother's role in child care after divorce can no longer be conducted purely in normative terms by merely citing statutory provisions (Karimullah, 2022). A thorough study must link legal norms with judicial practice, developments in modern family law doctrine, and the dynamics of child rights protection from a human rights perspective. This approach is increasingly important because Indonesia has ratified the Convention on the Rights of the Child and must ensure that every policy and court decision genuinely prioritises the best interests of the child, rather than treating it merely as a normative slogan (Hayatullah et al., 2026).

Previous studies have generally made significant contributions to understanding the relationship between child custody, child protection and judicial practice (Forslund et al., 2022; Schemmel et al., 2026). Some studies have focused on a normative analysis of custody provisions in the Marriage Act, the Compilation of Islamic Law and the Child Protection Act (Mustafid et al., 2025; Yasin et al., 2024). Other studies have emphasised judges' considerations when adjudicating custody disputes or evaluating the application of the 'best interests of the child' principle in specific cases. For example, Saraswati's study shows that the Indonesian legal system has not explicitly regulated

post-divorce child care arrangements and that judicial decisions vary in how they accommodate the best interests of the child principle. These studies also emphasise the need to strengthen a child-protection orientation in family court practice in Indonesia.

At the international level, the literature also reveals a similar trend. Various studies position the best interests of the child as a fundamental principle, while acknowledging that its application still faces methodological challenges because there are no uniform parameters for assessing the child's best interests. Some authors even criticise the fact that this concept is often used as a broad normative term, giving judges considerable discretion without clear evaluation mechanisms. Other discourses argue that the child's right to be heard, participation in the judicial process, and the continuity of the relationship with both parents must be integral to assessing the child's best interests.

Nevertheless, a review of the literature reveals several research gaps that require further investigation. First, most Indonesian studies still treat the analysis of the mother's status, the principle of the best interests of the child, and judicial considerations as separate issues and therefore have not produced a conceptual framework that comprehensively explains the relationship among the three. Second, previous studies have largely described the content of legal norms or catalogued court rulings without examining whether the legal construction of the mother's status remains consistent with developments in the international family law paradigm, which increasingly emphasises a child-rights-based approach and gender neutrality. Third, few studies critically examine whether the mother's privileged position in Indonesian positive law is an absolute norm, merely a rebuttable legal presumption, or one that must always be interpreted through the principle of the best interests of the child. Consequently, the relationship between national norms, judicial practice and global developments in family law has not yet been fully elucidated.

In light of these gaps, this study is based on the assumption that the mother's role in child care following divorce cannot be understood merely as a consequence of normative provisions, but must be analysed as a legal construct that continues to evolve in tandem with shifts in the child protection paradigm. This study seeks to offer a more integrative analysis by situating the mother's role within the child protection system, which must be assessed against the consistency of national legal norms, judicial reasoning, and developments in international family law principles. Consequently, this study aims to conduct a legal analysis of the mother's position regarding child custody following divorce based on the national legal framework, judicial practice, and developments in child protection principles under international law, whilst also evaluating the extent to which the prevailing legal construct has reflected the principle of the best interests of the child.

METHODS

This study employs a normative legal approach with a descriptive-analytical research design, chosen to examine, interpret, and evaluate the legal norms governing the mother's status in child custody following divorce, as well as their implementation in judicial practice. The focus of the study is directed towards the legal construction of

the mother's position based on legislation, legal doctrine, the principle of the best interests of the child, and judges' considerations in court rulings, which are operationally interpreted as the mother's legal position in obtaining child custody rights after divorce based on the national legal system and the principle of child protection. The legal sources utilised consist of primary legal sources, namely Law No. 1 of 1974 as amended by Law No. 16 of 2019, Law No. 35 of 2014 on Child Protection, the Compilation of Islamic Law, the Convention on the Rights of the Child, and relevant court rulings; whilst secondary legal sources include books, articles from reputable international journals, previous research findings and other academic documents; and tertiary legal sources consist of legal dictionaries and encyclopaedias.

The selection of legal materials was carried out purposively based on their substantive relevance to the research issue, whilst data collection was conducted through library research using documentation techniques and systematic searches of primary legal sources and credible scientific literature. The analysis's validity is ensured through triangulation of legal sources, systematic grammatical, historical, and teleological interpretation, and cross-checking against legal doctrine and case law to ensure consistent legal arguments. The data were analysed qualitatively using a normative-prescriptive analytical method through the stages of inventory, classification, interpretation, harmonisation, evaluation, and the construction of legal arguments to assess the alignment between positive law, judicial practice, and developments in the principle of the best interests of the child, thereby producing conceptual recommendations relevant to the development of family law and the protection of children's rights in Indonesia.

RESULTS AND DISCUSSION

The Shift in the Mother's Status from Maternal Preference to the 'Best Interests of the Child' Principle

The concept of the mother's status in child custody following divorce is essentially a legal construct that continues to transform in line with developments in the child protection paradigm within family law. Whilst in the early stages of the development of modern family law the mother's position was characterised as that of a subject who inherently held the primary right to care for children, particularly those of a very young age, contemporary legal developments indicate a fundamental shift towards an approach that is more oriented towards the best interests of the child (Hsb et al., 2025; Muttaqin et al., 2025). This shift does not merely reflect a change in legal policy preferences; it indicates an epistemological shift in what the law protects in custody disputes.

Whilst the previous paradigm placed parental rights at the centre of dispute resolution, the modern paradigm positions the child as an independent legal subject with constitutional and fundamental rights to receive the care best suited to their physical, psychological, emotional, social, and developmental needs. (Karimullah & Sugitanata, 2024). Consequently, an analysis of the mother's position within the Indonesian legal system can no longer be conducted in a purely textual manner, basing

arguments solely on positive norms that give preference to the mother; rather, it must be understood within the context of the evolution of international family law, which has shifted the orientation from a parent-centred approach towards a child-centred approach. This shift also indicates that the mother's position is no longer viewed as an absolute right arising from biological status, but as part of a child protection mechanism that must be assessed in light of the child's best interests in each case.

Within the Indonesian legal system, the legal construction of the mother's position has evolved through the interaction of various legal sources with differing normative characteristics. Law No. 1 of 1974 on Marriage, as amended by Law No. 16 of 2019, essentially reaffirms that the dissolution of marriage through divorce does not remove the obligation of both parents to care for and bring up their children. (Lenggono, 2025). This formulation indicates that the legislature did not explicitly grant either parent superiority in obtaining custody rights, but instead maintained joint parental responsibility. However, this provision does not provide operational parameters regarding how custody should be allocated if the parents fail to reach an agreement, thereby leaving considerable scope for judicial interpretation.

The Compilation of Islamic Law (KHI) later filled this regulatory gap, specifically Article 105, which provides that a child who has not yet reached the age of discernment (*mumayyiz*) should be in the mother's care unless there are legal grounds indicating the mother's unsuitability as a carer. In contrast, Law No. 35 of 2014 on Child Protection adopts a different paradigm, prioritising the child's best interests as the primary guiding principle for all actions relating to children, without giving preference based on the parent's gender. The interplay between these three legal instruments indicates that the Indonesian legal system does not, in fact, fully adhere to the doctrine of maternal preference, nor has it yet fully transitioned towards a custody system that is entirely centred on the best interests of the child.

The Compilation of Islamic Law is often understood as a normative basis that designates the mother as the primary holder of rights regarding the custody of children who have not yet reached the age of discernment (Mera et al., 2024). However, this understanding requires more critical scrutiny through the lens of legal interpretation theory and the development of child protection doctrine. Conceptually, this provision cannot be interpreted as granting the mother exclusive rights; rather, it reflects a legal presumption that, in the early stages of a child's development, the mother generally has a stronger emotional, psychological, and biological bond than the father.

This assumption has a scientific basis in developmental psychology, particularly attachment theory, which explains the importance of emotional bonding between a child and their primary carer in the early stages of life. However, scientific developments also indicate that the quality of care is not determined solely by biological ties, but is influenced by parenting capacity, environmental stability, mental health, the ability to meet the child's needs, and the continuity of the child's social relationships. Therefore, provisions granting preference to the mother should be understood as a rebuttable presumption, that is, a legal presumption that can be overturned if the

evidence presented in court indicates that care by the mother is, in fact, contrary to the child's best interests.

The interpretation that the mother's status constitutes a rebuttable presumption has gained legitimacy through judicial practice in Indonesia (van Huis, 2024). Various rulings by both religious and district courts demonstrate that judges do not always award custody to the mother, even when the child has not yet reached the age of *mumayyiz*. In a number of cases, custody has been transferred to the father due to findings of child neglect, violence, an inability to meet basic needs, moral misconduct, or other conditions that could potentially disrupt the child's growth and development. (N. Putri et al., 2025). This phenomenon indicates that judges' considerations extend beyond a textual interpretation of the Compilation of Islamic Law and place greater emphasis on an assessment of the child's specific circumstances.

This shift is, in fact, in line with developments in international law, which over the past few decades have moved away from the 'tender years' doctrine. This doctrine emerged in the 19th and early 20th centuries based on the assumption that young children naturally require their mother more than their father. With the increasing participation of women in the public sphere, changes in family structures, the growth of research on the role of fathers in child-rearing, and the strengthening of the principle of non-discrimination, various countries have begun to move away from a gender-based approach (Ayu et al., 2026).

Modern legal systems no longer assess suitability for custody based on the status of being a mother or a father, but on each parent's ability to ensure the child's welfare. Consequently, various jurisdictions, such as the United Kingdom, Australia, Canada, the Netherlands and New Zealand, have developed approaches that assess emotional bonds, environmental stability, parenting history, the parents' ability to cooperate, protection against violence, and the child's views, in accordance with their level of maturity, as key factors in determining custody arrangements. This shift shows that the category of mother is no longer determinative, but merely one variable considered alongside others in determining the child's best interests.

This paradigm shift has gained international legitimacy through the Convention on the Rights of the Child, specifically Article 3(1), which requires that all actions concerning children must take the child's best interests as the primary consideration. The United Nations Committee on the Rights of the Child, through General Comment No. 14 of 2013, even emphasised that the principle of the best interests of the child has three dimensions: as a substantive right of the child, a principle of legal interpretation, and a procedural rule that must be applied in every decision-making process affecting a child.

From an international legal perspective, the principle of the best interests of the child is not an abstract concept that can be applied uniformly without considering each case's characteristics. General Comment No. 14 sets out that an assessment of the best interests of the child must be carried out on a case-by-case basis, taking into account the child's identity, the child's relationship with each parent, their emotional and psychological needs, their level of security, continuity of care, social environment, and

the child's views, in accordance with their age and level of maturity. Consequently, this concept does not automatically favour either the mother or the father; instead, it requires judges to undertake a multidimensional, evidence-based assessment. This approach shows that modern family law no longer focuses on identifying the parent with the greater right, but on determining the care environment best able to ensure the comprehensive fulfilment of the child's rights.

When compared with these developments, the Indonesian legal system is, in fact, in a phase of normative transition. On the one hand, norms still accord the mother a special position as the primary carer of young children (Hess et al., 2023). On the other hand, judicial practice increasingly prioritises the child's best interests through a progressive interpretation of legislation. This suggests that the mother's position can no longer be understood as a standalone normative right, but rather as part of a child protection mechanism whose application depends on an assessment of the child's welfare. In other words, a preference for the mother can be upheld only if it is proven to provide the greatest benefit to the child. Conversely, if the facts indicate that the father, or even shared parenting, better serves the child's best interests, the law should allow judges the discretion to award such custody arrangements without being bound by gender-based assumptions.

Consistency in Judges' Considerations When Determining Child Custody Following Divorce

Consistency in judges' considerations when determining child custody following divorce is a key indicator of the family law system's effectiveness in balancing legal certainty, substantive justice, and the protection of children's rights. From the perspective of the rule of law (Rechtsstaat), court rulings serve not only to resolve disputes but also to realise the constitutional values alive in society. Therefore, every judicial consideration in child custody cases cannot be understood as a mechanical application of normative provisions, but rather as the result of a process of judicial reasoning involving the interpretation of legal norms, the evaluation of trial evidence, the weighing of the parties' interests, and the harmonisation of national law with international human rights principles.

This complexity means that child custody cases have a distinct character compared to general civil disputes, as the primary object of protection is not merely the rights of the parents, but the interests of the child as a legal person who possesses the fundamental right to protection, care, and an optimal environment for growth and development. Consequently, the quality of a judge's reasoning becomes a crucial factor in ensuring that the resulting judgment not only meets formal legal requirements but also reflects substantive justice oriented towards the protection of the child (Politis et al., 2026).

Within the Indonesian legal framework, a judge's considerations regarding child custody following divorce are built upon several interrelated layers of legal norms. Law No. 1 of 1974 on Marriage, as amended by Law No. 16 of 2019, emphasises that divorce does not absolve either parent of their obligation to care for and educate their children.

Law No. 35 of 2014 on Child Protection further reinforces this orientation by establishing the best interests of the child as the primary foundation for any action relating to children. Meanwhile, the Compilation of Islamic Law provides more specific provisions on the care of children who have not yet reached the age of discernment, giving preference to the mother unless circumstances indicate her unsuitability as a carer.

If these norms are analysed systematically, it becomes apparent that the legislators did not create a hierarchy that makes any single instrument the sole basis for determining custody, but instead established a legal system that requires systematic interpretation. In practice, this process shows that judges do not act as '*la bouche de la loi*' as conceived in classical legal positivism, but rather as *'rechtsvinders'* (discoverers of law) who actively construct the law's meaning from the concrete facts revealed in court proceedings. This perspective aligns with the theory of legal discovery developed by Paul Scholten and later enriched by modern legal thinkers, who argue that judges do not merely apply norms but also connect legal rules, legal principles, values of justice, and social reality.

In child custody cases, this function becomes even more important because legislation cannot detail every variation in the highly diverse range of family circumstances (Duncan, 2025). Consequently, judicial discretion is unavoidable. However, such discretion is not absolute, as it remains constrained by the principle of legality, the principle of child protection, the principle of non-discrimination, and the obligation to provide rational and justifiable legal reasoning. The principle of the best interests of the child as the primary parameter in determining child custody further reinforces the evaluative nature of the judge's reasoning process. The United Nations Committee on the Rights of the Child, through General Comment No. 14 of 2013, emphasises that the best interests of the child is not merely a substantive right, but also an interpretative principle and a procedural rule that all judicial institutions must apply consistently (Livingstone et al., 2024). This General Comment requires every court to explain explicitly how the best interests of the child have been assessed, what factors have been considered, how the balancing of factors was carried out, and why certain factors were given greater weight than others. In other words, it is not sufficient for a judge merely to state that their decision has taken the best interests of the child into account; they are obliged to present a line of reasoning that can be rationally verified.

If this standard is used as a yardstick for evaluating judicial practice in Indonesia, the quality of judges' reasoning still varies considerably. Some judgements have developed comprehensive legal reasoning by assessing the child's emotional bond with each parent, the child's psychological condition, financial capacity, parenting track record, social environment, and the potential long-term impact on the child's development. In such judgements, judges demonstrate a multidimensional reasoning process, ensuring that the principle of the child's best interests truly forms the primary basis for decision-making (Wittmann, 2022). However, many judgements still prioritise the mother's right to custody under the Compilation of Islamic Law as the dominant consideration, without conducting an in-depth evaluation of the child's actual

circumstances. Consequently, legal arguments tend to stop at the textual application of legal norms and do not yet fully demonstrate the best interests assessment process as required by international standards. This suggests the main issue is not the existence of legal norms, but the consistency of the judge's reasoning when linking those norms to the case's concrete facts.

This inconsistency can be explained through the theory of judicial reasoning, which views a judge's decision as the result of an interaction between legal rules (rule-based reasoning), facts (fact-based reasoning), values (value-based reasoning) and the purposes of the law (purposive reasoning). In child custody cases, all four dimensions must be present in balance. Solely text-based considerations risk overlooking the child's evolving needs, while considerations that place too much emphasis on the value of justice without a clear normative basis may undermine legal certainty. Consequently, the quality of a judgement depends heavily on the judge's ability to integrate positive legal norms, the principle of child protection, evidence presented in court, and developments in modern family law doctrine (Forslund et al., 2022). This integration produces a reasoning process that is not merely deductive but also argumentative and contextual, ensuring that each judgement explains why custody by the mother, the father, or even joint custody is the option most consistent with the child's best interests in a particular case.

From the perspective of Gustav Radbruch's theory, the law has three fundamental values: legal certainty (*Rechtssicherheit*), justice (*Gerechtigkeit)* and expediency (*Zweckmäßigkeit*). These three values often complement and, at the same time, constrain one another. In child custody cases, legal certainty is realised through the consistent application of statutory provisions, whilst justice is realised through an individual assessment of each child's and each family's circumstances. At the same time, the law's utility is reflected in its ability to provide tangible protection for the child's future growth and development. Consequently, judges must not unduly sacrifice legal certainty for justice, or vice versa. A ruling that prioritises legal certainty solely through the mechanical application of provisions regarding the mother's right of custody may indeed provide predictability. Still, it does not necessarily result in the best protection for the child. Conversely, a ruling that relies too heavily on individual discretion without a clear normative framework may undermine the consistency of case law and create legal uncertainty.

Reconstructing the Mother's Position within the Post-Divorce Child Care System

Reconstructing the mother's position within the post-divorce child care system is a logical consequence of the evolving family law paradigm, which no longer places parental rights at the centre of dispute resolution. Instead, it makes protecting children's rights the fundamental objective of every policy and court ruling. This shift reflects a broader transformation in contemporary family law theory, namely a transition from a status-based family law paradigm towards a child-centred family law paradigm, in which the legal relationship between parents and children is no longer built on the basis

of the superiority of one parent, but on the basis of shared responsibility to ensure that all the child's rights are fulfilled.

From this perspective, the mother's role remains central in child-rearing. Still, it shifts from a presumptive right to a legal responsibility that must always be assessed in light of the child's best interests (Rabadán Sánchez-Lafuente, 2023). This reconstruction matters because social developments, changes in family structure, women's increasing participation in the public sphere, and fathers' growing involvement in child-rearing have challenged the traditional assumption that child-rearing is synonymous with the mother (Wiranti et al., 2025). Consequently, a legal system that maintains a gender-based orientation without assessing the child's specific circumstances risks conflicting with evolving principles of non-discrimination, parental equality, and the protection of children's rights in international law (Rifa'i et al., 2026).

Within the context of Indonesian law, provisions regarding child care following divorce still exhibit characteristics that tend to favour a single-custody model (Kurniawan et al., 2025). These characteristics are evident in the normative framework of the Compilation of Islamic Law, which grants preference to the mother as the holder of the right of hadhanah over children who have not yet reached the age of discernment (*mumayyiz*), whilst the father remains primarily responsible for providing maintenance. Historically, these provisions stemmed from the sociological assumption that the mother is the figure closest to the child during the early stages of development and is therefore regarded as better able to fulfil the child's needs for affection, emotional protection and character development (Parhi et al., 2025).

This assumption had an empirical basis when family roles were still traditional, with the mother performing domestic functions while the father acted as the primary breadwinner. However, social changes over the last few decades show that modern family structures no longer fully follow this pattern. The increasing participation of women in the workforce, the growth of the concept of the dual-earner family, and the increasing involvement of fathers in caregiving roles have led to a more dynamic division of roles between fathers and mothers (Fattah et al., 2025). Consequently, the assumption that the mother is always the best carer can no longer be upheld as a normative generalisation applicable in all cases.

The Indonesian legal system's tendency to maintain the single-custody model also appears in judicial practice, which generally still treats custody as a right to be awarded to one parent (Aziz et al., 2025). Although some court rulings have granted custody to the father based on the child's best interests, the pattern of dispute resolution remains focused on determining who gets primary custody, rather than on how both parents can continue to fulfil their parenting responsibilities on an ongoing basis after divorce.

This approach indirectly reinforces the dichotomy between the parent who is granted custody and the parent who is granted only access or visitation rights. In fact, various studies in the fields of developmental psychology and family law indicate that children generally benefit more from maintaining a stable, continuous and meaningful relationship with both parents, provided there is no violence, neglect or other conditions that endanger the child's safety. Consequently, the paradigm that focuses

solely on granting custody to one parent is increasingly seen as inadequate to address the complex needs of children in post-divorce families.

Developments in international family law indicate a fundamental shift toward shared parenting, joint custody, and co-parenting as forms of care that better respond to children's rights. Although these three concepts are often used interchangeably, they differ significantly. Joint custody generally refers to shared legal responsibility (legal custody), meaning both parents retain joint authority to make important decisions about the child's education, health, religion, and future. Shared parenting emphasizes a proportional division of parenting involvement, including allocating the child's time with each parent in accordance with the child's needs and best interests.

Meanwhile, co-parenting is a broader concept as it concerns not only the division of rights and obligations but also the quality of cooperation, communication and coordination between both parents in carrying out their parenting responsibilities following divorce. These three concepts converge on one key principle: that whilst divorce ends the marital relationship, it does not end the parental relationship (parenthood). The adoption of these concepts across jurisdictions reflects a shift from an approach centred on parental rights to one centred on the child's rights.

Australia, for example, has developed the principle of shared parental responsibility through the Family Law Act, which requires both parents to remain involved in making important decisions about the child even after the marital relationship ends. Canada has also shifted the terminology from 'custody' to 'parenting orders' and 'parenting responsibilities' through the Divorce Act, amended in 2021, to reduce the competitive nature of custody disputes and place greater emphasis on the continuity of shared responsibility (Archer-Kuhn et al., 2024). Similarly, England and Wales, through the Children Act 1989, no longer use a parental rights-based approach, but have developed the concept of parental responsibility, which places the child's best interests at the heart of all care decisions. This change in terminology is not merely legal language. Still, it reflects a paradigm shift: the child, not the victory of one parent in securing custody, is the primary object of legal protection.

This transformation demonstrates that the concept of shared parenting does not mean dividing care time mathematically or always requiring the child to spend equal amounts of time with both parents. Instead, it emphasises flexibility based on the child's individual needs. In some cases, a relatively balanced division of time may indeed be the best option. However, in other cases, the child's best interests are better safeguarded if the child lives with one parent while maintaining a close relationship with the other.

When compared with these developments, the Indonesian legal system faces both opportunities and challenges in reconstructing the post-divorce parenting model. From a normative perspective, the Marriage Act has in fact established the principle that both parents remain obliged to care for and educate their children even after the marriage has ended due to divorce (Idris et al., 2024). This principle can serve as a foundation for developing a more progressive interpretation of shared parenting responsibilities without necessarily negating the Compilation of Islamic Law's preference for the mother for children who have not yet reached the age of discernment.

Implementing the shared parenting model in Indonesia also faces various structural, cultural, and institutional barriers. Sociologically, society's legal culture still tends to view the mother as the primary carer and the father as the breadwinner; consequently, the father's involvement in parenting after divorce is often seen as an exception rather than part of an equal sharing of responsibilities. Furthermore, high conflict between former partners, weak family mediation mechanisms, and a lack of national guidelines on shared parenting mean implementing this model requires adequate institutional strengthening.

CONCLUSION

Under the Indonesian legal system, the mother's position regarding child custody following divorce should no longer be understood as an absolute normative right, but rather as a rebuttable presumption that must always be assessed in the light of the principle of the best interests of the child, as a constitutional and universal standard for child protection. Consequently, the legal framework governing custody requires harmonisation among the Marriage Act, the Child Protection Act, the Compilation of Islamic Law, case law, and the Convention on the Rights of the Child, within a consistent, objective judicial reasoning framework oriented towards substantive justice. These findings reinforce and refine previous studies by shifting the focus of family law away from gender-based preferences to caregiving responsibilities grounded in children's rights and parental equality. Thus, they implicitly propose a conceptual shift from the 'maternal preference' model to an adaptive, contextual, child-centred system of care.

The implications of this study not only enrich the development of family law theory and child protection theory, but also provide a conceptual foundation for policy reform and guidelines for judicial decision-making, ensuring that the application of the principle of the best interests of the child is more measurable, consistent and responsive to the dynamics of modern families. Nevertheless, this study remains limited to a normative legal approach and thus does not yet accommodate the empirical dimensions regarding the implementation of court rulings and the experiences of the parties following the determination of custody rights; consequently, further research needs to integrate socio-legal approaches, comparative studies across jurisdictions, and empirical analyses of shared parenting practices to test the effectiveness of the proposed reforms, whilst also promoting reforms to Indonesian family law that are more in line with developments in international law without neglecting national social and cultural characteristics and legal values.

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REFERENCES

Archer-Kuhn, B., Hughes, J., Saini, M., Tam, D., Beltrano, N., & Still, M. (2024). A

balancing act when children are young: Women's experiences in shared parenting arrangements as survivors of domestic violence. *Journal of Family Violence*, *39*(2), 221–233. https://doi.org/10.1007/s10896-022-00452-z

Ayu, R. F., Hassanal, M., Obubakar, M., & Sholehoddin, S. (2026). Legal Analysis of the Position of Women as Heads of Households in National Law. *Indonesian Journal of Gender Justice and Family Law*, *1*(1), 52–68. https://doi.org/10.65586/ingefal.v1i1.4

Aziz, M. F., Mubarok, M. Y., Nurfahillah, A. R., Napiah, I., & Najmudin, D. (2025). Analysis of Legal Norms and Gender Equality in Relation to the Concept of Joint Custody for Minors. *Muwazah*, *17*(1), 84–98. https://doi.org/10.28918/muwazah.v17i1.9200

Bukido, R., Muslihin, M. A., & Karimullah, S. S. (2025). Family Economic Empowerment Strategies in Gangga II Village: A Maqashid Shariah Perspective. *Al-Mujtahid: Journal of Islamic Family Law*, *5*(1), 1–12. https://doi.org/10.30984/ajifl.v5i1.3438

Duncan, N. G. (2025). Home ownership and social theory. In *Housing and identity* (pp. 98–134). Routledge. https://doi.org/10.4324/9781003670391-5

Fadilah, N., Maulida, H., Touré, I., & Diallo, K. (2026). Regulatory Reform of Child Marriage Dispensation in Indonesia: Advancing a Women's Protection Framework. *Indonesian Journal of Gender Justice and Family Law*, *1*(2), 149–170. https://doi.org/10.65586/ingefal.v1i2.20

Fattah, A. A., Jumiyah, R., Alam, Z. S., Mediana, A. N., & Rauf, I. J. (2025). Negotiating Women's Reproductive Rights Within the Framework of Islamic Law. *Insani: Jurnal Pranata Sosial Hukum Islam*, *1*(2), 178–193. https://doi.org/10.65586/insani.v1i2.57

Forslund, T., Granqvist, P., Van IJzendoorn, M. H., Sagi-Schwartz, A., Glaser, D., Steele, M., Hammarlund, M., Schuengel, C., Bakermans-Kranenburg, M. J., & Steele, H. (2022). Attachment goes to court: Child protection and custody issues. *Attachment & Human Development*, *24*(1), 1–52. https://doi.org/10.1080/14616734.2020.1840762

Hayatullah, M., Nasir, M., Kumala, N., & Noval, N. (2026). Implementation of Gender Equality Principles in Religious Court Decisions Related to Divorce. *Indonesian Journal of Gender Justice and Family Law*, *1*(1), 36–51. https://doi.org/10.65586/ingefal.v1i1.3

Hess, M., Schmitz, W., Naegele, L., & Stiemke, P. (2023). You will take care of me when I am old: Norms on children's caregiver obligations-An analysis with data from the European Values Study. *Journal of Family Research*, *35*, 196–211. https://doi.org/10.20377/jfr-854

Hsb, P. H., Siregar, F. A., & Karimullah, S. S. (2025). Inheritance in the Mandailing Community: Value Changes from a Legal Culture Perspective. *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat*, *25*(1), 83–108. https://doi.org/10.19109/nurani.v25i1.24870

Idris, A. R., Khusaini, M., & Al-Mansyuri, S. A. (2024). Contemporary Islamic Law in Indonesia: The Fulfillment of Child Custody Rights in Divorce Cases Caused by Early Marriage. *MILRev: Metro Islamic Law Review*, *3*(1), 1–21. https://doi.org/10.32332/milrev.v3i1.8907

Karimullah, S. S. (2022). The Urgency of Building Legal Awareness on Care of Children in the Family. *Amsir Law Journal*, *3*(2), 76–86. https://doi.org/10.36746/alj.v3i2.66

Karimullah, S. S. (2026). Harmonising Islamic Law with Gender Equality Principles in Indonesia's Family Law. *Indonesian Journal of Gender Justice and Family Law*, *1*(2), 104–123. https://doi.org/10.65586/ingefal.v1i2.18

Karimullah, S. S., Basuki, N. A., Sugitanata, A., & Aminah, S. (2024). The Concept of Nāfaqah in Islamic Law and Women's Right to Financial Support. *El-Izdiwaj: Indonesian Journal of Civil and Islamic Family Law*, *5*(2), 222–242. https://doi.org/10.24042/el-izdiwaj.v5i2.23534

Karimullah, S. S., & Sugitanata, A. (2024). Urgensi Pemahaman Gender Pada Anak dalam Membangun Kepribadian yang Berkualitas. *NOURA: Jurnal Kajian Gender Dan Anak*, *8*(1), 54–70. https://doi.org/10.32923/nou.v8i1.3340

Kurniawan, M. R., Fathony, M. R., Yasin, D. T., Jibu, S. A., & Shamat, A. (2025). Political Analysis of Islamic Law on the Regulation of Interfaith Marriage in Indonesia. *Insani: Jurnal Pranata Sosial Hukum Islam*, *1*(1), 32–47. https://journal.mahkotascience.org/index.php/insani/article/view/2

Lenggono, R. P. (2025). Islamic Inheritance Law in Practice Among Multiethnic Muslim Families in Indonesia. *Insani: Jurnal Pranata Sosial Hukum Islam*, *1*(2), 127–143. https://doi.org/10.65586/insani.v1i2.39

Livingstone, S., Third, A., & Lansdown, G. (2024). Children vs adults: negotiating UNCRC General comment No. 25 on childrens rights in the digital environment. In *Handbook of media and communication governance* (pp. 414–428). Edward Elgar Publishing. https://doi.org/10.4337/9781800887206.00042

Mera, N., Marzuki, M., Sapruddin, S., & Cahyani, A. I. (2024). Child Custody Rights for Mothers of Different Religions: Maqāṣid al-Sharī'ah Perspective on Islamic Family Law in Indonesia. *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam*, *8*(3), 1645–1668. https://doi.org/10.22373/sjhk.v8i3.23809

Mustafid, M., Rajab, K., Arisman, A., & Algifari, M. F. (2025). Child Custody Rights After Divorce in Indonesia from a Contemporary Islamic Family Law Perspective. *Al-Hurriyah: Jurnal Hukum Islam*, *10*(2), 150–164. https://doi.org/10.30983/al-hurriyah.v10i2.10096

Muttaqin, M. A., Rifa'i, S. D., Yahya, H., & Sakinah, H. (2025). The Dynamics of the Relationship between Islamic Law and Customary Law in Inheritance Disputes in Indonesia. *Insani: Jurnal Pranata Sosial Hukum Islam*, *1*(1), 80–95. https://doi.org/https://journal.mahkotascience.org/index.php/insani/article/view/6

Ottakkam Thodukayil, F. S., Palaniswamy, U., & Kunjumon, A. (2026). The causes of divorce and its effects on women: a systematic review. *Marriage & Family Review*, *62*(2), 59–94. https://doi.org/10.1080/01494929.2025.2484781

Parhi, N. Z., Hudafi, H., Pangestu, R., & Elmurtadho, F. (2025). Tension between Islamic Law and Human Rights in Child Marriage Cases in Indonesia. *Insani: Jurnal Pranata Sosial Hukum Islam*, *1*(1), 96–110. https://journal.mahkotascience.org/index.php/insani/article/view/3

Politis, S., Sivasubramaniam, D., Gogan, T., Morris, A., Lomas, K., & Papalia, N. (2026). Child Protection Practitioners' Perspectives About the Feasibility of Implementing Justice Principles and Professional Judgement in Practice. *Child & Family Social*

Work. https://doi.org/10.1111/cfs.70191

Putri, A., Azzahra, N., Akmal, N., & Diarra, O. (2026). Gender Justice in the Regulation of Joint Marital Property Following Divorce in Indonesia. *Indonesian Journal of Gender Justice and Family Law*, *1*(2), 86–103. https://doi.org/10.65586/ingefal.v1i2.17

Putri, N., Martin, A., Rahman, O., Aini, N., & Rahmawati, A. (2025). Moral Militarisation in the Implementation of Islamic Law in Public Dress Code Raids. *Insani: Jurnal Pranata Sosial Hukum Islam*, *1*(2), 194–210. https://doi.org/10.65586/insani.v1i2.77

Rabadán Sánchez-Lafuente, F. (2023). The Best Interests of the Child and Gender Perspective. In *Gender Perspectives in Private Law* (pp. 85–103). Springer. https://doi.org/10.1007/978-3-031-14092-1_5

Ramadhan, M., Taufik, M., Hossein, M., & Fatima, M. (2026). A Constitutional Analysis of Women's Rights within Indonesia's Family Law Framework. *Indonesian Journal of Gender Justice and Family Law*, *1*(2), 124–148. https://doi.org/10.65586/ingefal.v1i2.19

Rifa'i, S. D., Luthfi, M. H., Noer, M. A., & Layla, O. N. (2026). Reformulation of Marriage Law Based on a Gender Justice Perspective. *Indonesian Journal of Gender Justice and Family Law*, *1*(1), 69–85. https://doi.org/10.65586/ingefal.v1i1.5

Sakinah, H., Syaiful, A., Malik, A., Nurhayati, N., & Hossain, A. (2026). Legal Policy on Women's Protection in the National Family Law System. *Indonesian Journal of Gender Justice and Family Law*, *1*(1), 19–35. https://doi.org/10.65586/ingefal.v1i1.2

Schemmel, J., Zell, K., Senberg, A., Sahlfeld, A.-L., Otzipka, J., Volbert, R., & Zumbach-Basu, J. (2026). Child Sexual Abuse Allegations in Child Custody, Child Visitation, and Child Protection Proceedings: A Scoping Review. *Trauma, Violence, & Abuse*, 15248380261429518. https://doi.org/10.1177/15248380261429518

Siregar, M. A. H., Abdeldzhalil, A., & Hamim, M. (2026). Reconstructing the Concept of Gender Justice in Indonesia's Family Law System Based on Constitutional Values. *Indonesian Journal of Gender Justice and Family Law*, *1*(1), 1–18. https://doi.org/10.65586/ingefal.v1i1.1

van Huis, S. C. (2024). The shadow of legal pluralism in Indonesian Islamic courts: Child and spousal maintenance. *The Indonesian Journal of Socio-Legal Studies*, *4*(1), 4. https://doi.org/10.54828/ijsls.2024v4n1.4

Wiranti, B., Latif, F. A., Hibbatulloh, I., Sakinah, H., & Hidayatullah, M. W. (2025). Political Feminism and Women's Representation in Public Policy in Indonesia. *Jurnal Pelita Raya*, *1*(1), 1–16. https://journal.mahkotascience.org/index.php/jpr/article/view/11

Wittmann, J. P. (2022). A three-factor ethical reasoning model for court-involved practitioners: Services, roles, and values. *Family Court Review*, *60*(3), 507–529. https://doi.org/10.1111/fcre.12656

Yasin, R., Rahman, N. H. A., Ghani, S. A., & Belal, M. (2024). Guardian's Responsibility For The Welfare Of Children In Marriage: A Study According To Islamic Law. *Malaysian Journal of Syariah and Law*, *12*(3), 778–789. https://doi.org/10.33102/mjsl.vol12no3.765