

## **Optimizing The Deliberation Process To Reach An Agreement In The Procurement Of Land For Public Interest**

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**Abstract:** In the compilation of Islamic Law Article 105 paragraph 1 mentioned that Hadhanah (custody) against an immature child (Mumayyiz) is the right of his mother, except when it is evident that the mother has apostatized and embraced a religion other than Islam then the mother's right to nurture the child. But in the decision of the religious court of Maumere No. 1/PDT. G/2013/PA. The MUR is decided that child custody is still given to mothers even though it has been converted. The purpose of this research is to explain the legal position of children born from a married couple of different religions, as well as consideration in setting child custody of the spouses of married couples after divorce. The results showed that the legal position of children born to spouses of different religions when referring to the provisions of article 42 of the Marriage Act that the legitimate child is a child who is born in or resulting from a legitimate marriage. The consideration in setting child custody of a married couple in different religions after divorce is based on the condition of the child who is underage and needs the care of the mother while her father proved to behave poorly and has been involved in the child's abandonment case.

**Keywords:** Custody, Divorce, Different Religions.

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### **I. INTRODUCTION**

Indonesian people are heterogeneous in all aspects with various cultures, tribes and religions adopted by the community. The entire religion has its own rules, both vertically and horizontally, including in the His marriage ordinances (Purwanto, 2008: 58).

The marriage law that applies to each of these religions is different from each other but not conflicting. Nevertheless every religion requires his people to be married with the one who is religious. Marriage according to Sayuti Talib, is a sacred covenant of forming a family between a man and a woman. The treaty was intended to show a facet of marriage and to expose it to the general public, while a sacred title was intended to declare its religious terms from a marriage (Sayuti Thalib, 1992: 47).

Marriage under the provisions of the law is as mentioned in article 1 of Law No. 1 of 1974 on marriage (UU No. 1 year 1974) that "marriage is the inner birth bond between a man and woman as husband and wife With the aim of forming a happy and eternal family based on the almighty Godhead. According to customary law in Indonesia, the marriage is not only meant to be a civil alliance but also an alliance or a customary relationship and is an alliance of kinship and hardness (Wahyudi, 2015: 288).

The occurrence of a bond of marriage is not merely a result of the relationship of the cause, such as the rights and obligations of the husband, the shared property, the child's position, the rights and obligations of the parents but also concerning the relationships The customs of inheritance, kinship, kinship and sectariness and concerning traditional and religious ceremonies (Hadikusuma, 2003: 11).

The marriage between a man and a woman is essentially a human instinct as a social creature to continue his descendants. Therefore, judging from the human aspect, the arrangement of marriage is not only based on the legal norm made by humans only, but also sourced from the Law of God which is contained in religious law.

The review of marriage from the aspect of religion in this regard is mainly seen from Islamic law, which is the belief of most Indonesians. According to Islamic law, especially organized in the science of fiqh, the notion of marriage or marriage contract is "the bond that concurs the association and restricts the rights and obligations and the tolling of a man and a woman between the Both are not Muhrim ". According to article 2 of the compilation of Islamic law that: marriage according to Islamic law is a marriage, which is a powerful Akad or miitsaaqoon Gholiidhan to obey God's command and perform it as a worship (Indra, 1994: 12).

Marriage according to Islamic law is the ' Akad ' of the alliance between the female Guardian (future wife) with her husband's male candidate. The marriage contract must be pronounced by the woman's guardian clearly in the form of Ijab (surrender) and accept (Kabul) by the prospective husband who performed in the presence of two qualified witnesses. If not so then the marriage is not valid because contrary to the Hadist prophet Muhammad SAW narrated by Ahmad who declared "unauthorized marriage except with a guardian and two witnesses are just" (Meliala, 2015: 98).

Both parents are obliged to nurture and educate their children as properly as possible. Parents ' obligation to nurture and educate children born in a marriage applies until the child marries. The implementation of such obligations shall apply even if the marriage has been broken, it is as stipulated in article 45 paragraph (2) of LAW No. 1 of 1974. Thus the break-up of marriage does not eliminate the obligation of parents educating and nurturing children, although the child's maintenance rights are handed on the mother's hand, the father is obliged to bear the cost of living children to adult children (Ilyas, 2015:173).

In the compilation of Islamic law has been determined that the child who is not yet Mumayyiz is 12 years old is the right for mothers to nurture it, as mentioned in article 156 sub B and C is a child who already mumayyiz have the right to choose to obtain Father or mother. When the holders of Hadhanah apparently could not guarantee the physical and spiritual safety of the child, although the cost of the living and Hadhanah has been covered, then on request of the relatives concerned the court of religion can transfer the rights of Hadhanah to relatives Have the right of Hadhanah.

Article 156 letter (d) The compilation of Islamic law mentions that all the costs of Hadhanah and a living child are the responsibility of the father according to his ability, at least until the adult children can take care of themselves (21 years). But in the compilation of Islamic Law Article 104 paragraph (1) mentions that all the cost of child inresponsibility is accountable to his father. If his father has died, then the cost of the breastfeeding is charged to the person who has the obligation to provide his father or guardian.

According to the Civil Code (civil law) The parents ' obligation to his children is not much different from the provisions of LAW No. 1 of 1974. In article 298 of civil law) determined that (Sjarif, 1983: 43), the father and the mother, both are obligated to nurture and educate all of their children who are immature. Losing the right to any parent's power or to be a guardian does not waive them from liability, give allowances in balance by obtaining them, in order to finance the maintenance and education.

If in a Muslim family there is a divorce between a wife and one of them is apostate then automatically the children must be foster by parents who are Muslim. Similarly, the right of Hadanah to be deciduous from the parties that there is a strong indication of the effort to influence the child becomes transformed religion. In such conditions, the most decisive is the implementation of the judge to stipulate that the party that will do Hadanah towards the child is the party where the child is assured of his religious safety. As long as there are no things that get in the way of nurturing the child then it is certain that the the mother must perform the Hadanah (Sjarif, 1983).

To answer the problem it is interesting to study one of the ruling obtained from the Supreme Court of the Republic of Indonesia No. 1/PDT. G/2013/PA. Myrrh. In the ruling, it is known that married couples are Muslims. But then the wife changed the religion so that it was sued by her husband who was then decided by the Maumere religious court and the custody of the child who was still under the age to his mother but the father can still devote affection and interfaith with his children. From this ruling it is interesting to be studied further because the judge decides the custody of the child to the party of the wife who was accused of moving religion.

Based on the background of the problem above that is the problem in this research is how is the position of the child's law born from a married couple of different religions and What is considered by the judge in setting the custody of the child of a different married couple religion after the occurrence of divorce.

The method used is normative is a method of research conducted by researching the library material that is secondary data as the primary source and primary data as a source of support. Secondary data that is the main source in the writing of this law is data obtained through a literature study consisting of primary legal materials and secondary legal materials (Muhammad, 2004: 56).

With regards to the data gathered can be accountable, and can produce the correct answer of a problem, it needs a technique of precise data analysis. Data analysis is the next step to process research results into a report. The data analysis techniques used in this legal study use inductive mindset or logic, namely the mindset to draw conclusions from tangible cases into general conclusions. Basically the processing and analysis of data depends on the type data. In the normative legal research then in the processing and analyzing of primary legal materials, secondary legal material can not be separated from a variety of legal interpretations known in the legal sciences (Sunggono, 2010: 78).

## **II. LITERATURE REVIEW**

Divorce from the word "divorced" which according to the dictionary of Bahasa Indonesia means: Split, breakup as husband and wife, Talak. Then, the word "divorce" implies: separation, the subject of divorce (between husband and wife), division. As for the word "divorced" means: do not mix (connect, Unite) again, stop husband wife. The term divorce is contained in article 28 of LAW No. 1 of 1974 which contains the factative provisions that "marriage may break due to death, divorce, and on court judgment".

So, juridically, the term divorce means the break-in, which resulted in a disconnection as a husband or a wife stop on a Bini (lukewarm) as interpreted in the Great Dictionary of Bahasa Indonesia above. The term divorce according to LAW No. 1 year 1974 as a positive rule of law regarding divorce indicates the presence of:

1. A legal act that can be done by a husband or wife to break the marital relationship between them;
2. The legal event that broke the husband and wife, the death of the husband or wife in question, which is a definite provision and is immediately established by the Lord Almighty;
3. The ruling is declared by a court that results in the ruling of a marital relationship between a husband and wife.

While in the term fiqh is called "Thalaq" which means opening the bonds of canceling the treaty. Divorce in the term fiqh is also often called Furqah, which means divorce, ie the opposite of gathering. Then both terms were used by the Fiqh experts as a term meaning "divorce of the husband" (Soemiyati, 1992:103).

The break of the marriage is governed by the state through LAW No. 1 of 1974 and its implementation rules and also arranged in the compilation of Islamic law. The notion of Talak is mentioned in KHI article 117 which explains that Talak is a pledge of husband before the trial of religious court which is one of the reasons for marriage. Article 39 ACT No. 1 year 1974 governing divorce consisting of 3 verses with a formulation:

1. Divorce can only be done in front of a court hearing after the court in question seeks and does not successfully reconcile both parties;
2. To do a divorce there must be enough reason, that between the husband of the wife will not be able to live as husband and wife;
3. The procedure for divorce in front of a court session is governed by its own legal regulations.

Provisions on the necessity of divorce in this court shall not be governed in the fiqh of any sect, including the Syi'ah Imamiyah, in consideration that a divorce specifically named Talak is the absolute right of a husband and he can use it in Anywhere and anytime; And therefore do not need to tell much less ask for permission to anyone. In the Fiqh view the divorce as the circumstances of marriage is a personal affair and therefore does not need to be governed by public provisions (Syarifuddin, 2007: 228).

Then the legal consequences are the consequences posed by the legal event. While the notion of a legal event is a community event that carries the consequences governed by the law. The result of the law in relation to the consequences of this divorce is governed in article 41 of LAW No. 1 of 1974 which was previously described.

## **III. LEGAL POSITION OF CHILDREN BORN TO SPOUSES OF DIFFERENT RELIGIONS AND CONSIDERATIONS IN SETTING CHILD CUSTODY**

### **A. The Legal Position Of Children Born In Spouses Of Religious Wives**

The problem of different religious marriages in Indonesia is one of polemics without completion that is clear and complete despite the provisions of UU No. 1 year 1974 on marriage that becomes the umbrella of the Law of marriage organizing. In this discussion the marriage of different religions which is taken as a sample is about the marriage that was originally religious namely Islam, but then one of the parties turned to Christianity as contained in the list of Supreme Court ruling in this case the ruling of the religious court of Maumere No. 1/PDT. G/2013/PA. Myrrh.

According to the Islamic religion that is embraced by the majority of the population in Indonesia is strongly opposed to the existence of interfaith marriage in society. Similarly, the guardians who marry the parties who want to marry in the context of different religious marriages are also forbidden by Islam. This is as the word of Allah SWT quoted by H. Mohd Anwar that "for the Muslims is not allowed to marry (to be the Guardian) of his Gentile daughters, and the heathen, and the heathen shall not marry (to be guardians) of his daughter The relationship between the two is interrupted "(Anwar, 1991: 18).

Based on the explanation mentioned above, it means the heathen those who do not have God or conviction of Allah, who worship only idols such as sculpture, Wood, and stone. Islam is indeed a prohibition of marriage of different religions, but on the other hand the opinion of the scholars also have the Allow. Although the opinion is inviting a lot of contraversi, but in the Qur'an also there is no explicit prohibition on the existence of different religious marriages are forbidden or permissible. In general, different religious marriages according to Islam are divided into 2 (two) sections: Marriage between Muslim men and non-Muslim women and marriage between Muslim women and non-Muslims (Makalew, 2013:131).

Marriage between a Muslim man and a non-Muslim woman, but a member of the book is permissible because it also learns about the gospel and the Torah as it teaches Islam that has been handed down by Allah SWT. The rules of religious law sourced from the Qur'an are in fact the same essence as those taught to the members of the book. So, according to some scholars, the marriage is permissible because in the marriage, Muslim men can easily guide women in navigating the household ark so that if the woman is true to cling to The Gospel and the Torah, according to the scholars, they will follow the Islamic religion. This decision is Ijma ' meaning agreement that is the agreement of the scholars in establishing a legal law in religion based on the Qur'an and hadith in a case that occurs (Makalew, 2013).

In the development of different religious marriages referred to also exist that ended in divorce or breakup of marital relations including also divorce occurs due to one party moved to another religion whereas in such marriage there has been a child Who were born before divorce occurred.

Regarding the position of a child born in the marriage of different religions after the divorce is examined by one of the Supreme Court's decision as stated earlier, that is the verdict obtained from the directory of Supreme Court ruling of the Republic of Indonesia No. 1/PDT. G/2013/PA. MUR (Mauwere). In the ruling, it is known that married couples are Muslims. But then the wife changed the religion so that it was sued by her husband who was then decided by the law of the Mauwere religious court and custody of the child who was underage submitted to his mother but the father can still devote affection and communicate with his children.

Based on the verdict analysis, where the judge decides the child custody to the party of the wife who was accused of moving religion and linked to the provisions of article 42 UU No 1. The year 1974 that "the lawful child is a child born in or as a result of a legitimate marriage" and the provisions of article 43 paragraph (1) state that "a child born outside of marriage has only a civil relationship with his mother and mother's family". Therefore, concerning the position of the law of children born from a couple who divorced this religion, then refer to the provisions of article 42 UU No. 1 year 1974 which mention that the child is a legitimate child who is born in or as a result of a marriage that is Legitimate. Thus, a child born of a legitimate marriage that is performed both in the Office of Religious Affairs (for Muslim Couples) and the Civil Registry office (for a religious spouse other than Islam), then the position of the child is a legitimate child in the eyes Law and have the rights and obligations of children and parents as contained in article 45 and article 49 UU No. 1 year 1974.

In addition, different parents of religion also need to pay attention to the provisions of article 42 UU No. 23 year 2002 on child protection ("UUPA") which reads: (1) Every child has protection to worship according to religion. (2) Before the child can determine his choice, the religion embraced by the child follows his parents ' religion. In the explanation of Article 42 paragraph (2) the Constitution is explained that the child can determine the religion of his choice if the child has been resourceful and responsible, as well as qualified and procedures in accordance with the provisions of the religion, and the provisions Applicable laws and regulations.

Then when associated with the inheritance can be examined about the law of inheritance is governed in the civil position of book II on the material. According to the Islamic religion the law of inheritance as a system of legislation is governed in the Divine revelation found in the Qur'an Surah Annisa verses 7-12, 13 and 176; Besides, it also bases on opinions in the Qur'an and hadith. The three elements of inheritance are:

1. The heir is the person who dies leaving treasures to others;
2. The heir is a person who replaces the heir in his position on inheritance, both for the next and for some;
3. Treasures of inheritance are all property of the dead (Purwanto, 2008: 20).

The children of the legacy of inheritance are the most important heirs because they are essentially the only heirs, meaning that other relatives do not become heirs when the heir leaves the children . The terms of inheritance according to Islamic law are:

1. The righteous who have been dead and can be proved legally that he has died.
2. People who live in the life of the person who bequeath death and can be proved in the law.
3. There is a relationship between the person who is to the person who inherits:
  - a. Lineage relationship is kinship or descent,
  - b. marriage relationship is one can inherit or the wife of someone who bequeath as the word of Allah Swt,
  - c. The relationship of slavery and
  - d. because of Islamic religious relations (Nasution, 2012: 75).

In general the marriage of different religions is very potential to raise the problem of the law alone, both to the spouse itself and to the outside/third parties including the birthright of a child born from a different religious marriage. The validity of the marriage will cause the right and obligation between the husband and wife. The right of the wife of the living and the joint property is entirely dependent on the absence of legitimate marriage as its legal base, as well as from a legitimate marriage that will bear legitimate children (Komari, 2015: 123).

## **B. Consideration In Setting Child Custody Of A Different Married Couple Religion After The Occurrence Of Divorce**

The consideration of judges is one of the most important aspects in determining the value of a judge's decision to contain justice (*ex aequo et Bono*) and contains legal certainty, in addition to it also contains benefits to the parties concerned that the judgment of this judge must be carefully, well, and carefully. If the judgment of the judge is Inscrutiny, well, and careful, then the judgment of the judges will be cancelled by the High Court/Supreme Court (Arto, 2004: 140).

The judge in the examination of a case also requires proof, where the result of the evidence is used as a matter of consideration in breaking things. Proof is the most important stage of examination in the trial. The evidence is aimed at obtaining assurance that a given event/fact is actually happening, in order to obtain a true and righteous judgment. The judge was not able to impose a verdict before real for him that the event/fact was actually happening, namely evidenced the truth, so that there was a legal relationship between the parties.

In addition, the judge's consideration should also include the following things:

1. The subject matter and the matters acknowledged or the evidence is not denied.
2. The existence of a juridical analysis of the ruling on all aspects concerning all the facts/things proved in the trial.
3. The existence of all parts of the claimant's *petitum* must be considered/tried one after another so that the judge can draw conclusions about the proven/not and can be granted the claim in the ruling Amar

The basic judge in dropping a court ruling needs to be based on the theories and results of interconnected research so that the results of research are maximally and balanced in the level of theory and practice. One effort to achieve the justice law certainty, where the judge is a law enforcement officer through its verdict can be a benchmark to achieve a legal certainty.

Regarding the provisions of the judicial authority is governed in chapter IX of article 24 and article 25 of the Constitution 1945 and in Law No. 48 year 2009 on the provisions of judicial power. The Constitution 1945 guarantees a free judicial authority. It is expressly stated in article 24 in particular in the explanation of Article 24 paragraph (1) and explanation of article 1 paragraph (1) of LAW No. 48 year 2009, i.e. judicial authority is the power of independent state to conduct the judiciary to enforce the law and Based on Pancasila and the Constitution 1945 for the implementation of the State law of the Republic of Indonesia.

Freedom of the judge should also display the position of the impartial judge (unpartially Judge) Article 5 paragraph (1) UU No. 48 year 2009. The term impartiality here should not be literal, because in dropping its verdict judges have to favor the righteous. In this case it is not interpreted as unconscionable in consideration and judgment. More the formulation of LAW No. 48 year 2009 Article 5 paragraph (1): "The court is prosecute under the law by not discriminate people".

Under the provisions of a judge is obliged to enforce the law and justice by impartiality. The judge in giving a justice should first study the truthfulness of the events submitted to him and then give an assessment of the event and associate it with applicable law. After that the new judge can impose a verdict on the event.

If it is linked to any of the decisions obtained from the directory of Supreme Court ruling of the Republic of Indonesia No. 1/PDT. G/2013/PA. Myrrh. When examined the ruling is known that the parties are Mr. X (Applicant), age 39 years, Islamic religion, employee work PT. Bank Rakyat Indonesia (Persero) Tbk. Maumere Branch, located in the space hall behind Yamaha Yes, Alok subdistrict, Sikka district. Whereas Mrs. Y (the respondent), aged 39 years, Islamic religion, housewife work, residing on Jalan pigeon Kampung Sabu, Kelurahan Beru, Kecamatan Alok, Sikka District gave power to Meridian Dewanta Dado, SH, Advocate, who is located on Jalan Jendral Sudirman number XX Maumere, based on the special power of attorney on January 20, 2013 registered in the Committee of Religious Court of Maumere No. 1/advocate/PA. MUR on 29 January 2013.

In order to sit the case is the applicant in his letter of petition dated 9 January 2013 have applied for divorce, the application is listed in the Committee of Religious Court of Maumere, No. 1/PDT. G/2013/PA. MYRRH on January 10, 2013, in fact, proposes the following things:

1. That the applicant and the respondent are the lawful husband in accordance with the quotation of marriage certificate issued by the Office of Religious Affairs District of Maumere, Sikka district.
2. That the applicant and the respondent are married on a similar basis like and previously have known each other for approximately 4 (four) years;
3. That after marriage applicant and the respondent residing together as the husband of wife on Jalan Kartini Kelurahan Beru for 1 (one) year and Jalan Merpati village Beru for 2 (two) years and the village house contracts Madawat home contract belonging to H Taning for 1 (one) year, the home contract of CV Andi's which now stands Adira Office for 2 (two) years, the contract of the house owned by Mr. Sukanda for 1 (one) year. The applicant is now residing in the rear aisle of Yamaha Yes until now;
4. That the household of the applicant and the respondent is quite harmonious and happy, so it is blessed with 3 (three) children, each male 12 years, 9 years of age and 8 years. But entering the age of the 9 (nine) years

- of marriage, households between the applicant and the respondent often occur continuously disputes and quarrels;
5. That the disputes and quarrels caused by the respondent has converted the religion of the original from the Muslim converted into Protestant Christianity;
  6. That the respondent every week goes to church with the parents of the respondent secretly without the applicant's knowledge, because the respondent from home to go shopping to the market;
  7. That in the end the applicant sees direct the respondent go to worship in the church on December 25, 2008 until now;
  8. That the applicant has rebuked and reminded to be aware of what the respondent did, but not be ignored at all even the respondent is increasingly brighter to do what is forbidden by the religion of Islam in front of the applicant;
  9. That the respondent in the end chose to leave the house by carrying the three children of the applicant and the respondent, without the applicant's knowledge from February 2009 to present;
  10. That the respondent intentionally feed the food forbidden by Islam is pork to the three children of the applicant at the time of celebrating Christmas with the respondent's parents in the House of the respondent;
  11. That the respondent commits the defamation by reporting the applicant to the police with the alleged abandonment, whereas the respondent who deliberately leaves the house and hides in the House of the respondent's parents without a request at all in the applicant as the head of the family;
  12. That with this incident the applicant became unsettled and always restless so that the applicant suffered a birth and a bathin;
  13. That the deeds of the respondent have reflected that the respondent was a wife who could not keep the honor of the husband and religion so that the respondent could no longer be a good Wife/mother to the applicant and his son;
  14. That as a result of the deeds of the respondent between the applicant and the respondent has split the residence for approximately 4 (four) years, from 26 December 2009 until now where the applicant lives in the Hall of space behind Yamaha Yes Kelurahan Waioti City District Alok District of Sikka and the respondent stayed in his parents ' home in Jalan Merpati Kampung Sabu Beru subdistrict of Alok
  15. That because every effort to live further with the respondent has not succeeded, then the purpose of creating a home that Sakinah Mawaddah and Rahmah as the original ideals are no longer possible to be achieved, therefore the applicant intends to divorce the respondent in front of the Maumere religious court;
  16. That the applicant is able to pay the cost of this matter;

On the basis of consideration the Tribunal judges in the subject matter further decided that:

1. Grant the applicant to a partial application.
2. Declare the marriage of the applicant and the respondent to break because of Fasakh.
3. Reject the applicant's application for other than and more.
4. Charge the applicant to pay a case fee of Rp. 331,000, (three hundred thirty one thousand Rupiah).

Thus the ruling was dropped on Monday the 11th of March 2013 CE to coincide with the 28th Rabiul end of 1433 Hijriyah by Dra. Hj. Hasnia HD., M.H. as Chairman of the Tribunal, Miftahuddin, S.H.I. and Miftah Faridi, S.H.I. respectively as The judge of the member who on that day was also pronounced by the Chairman of the Tribunal in an open hearing to the public by being attended by the member judge and assisted by Rusdiansyah, S.H. as a clerk and attended by the applicant, outside the presence of the respondent.

Based on the case description as described above, it can be noted that the consideration in setting the child custody of the spouse of a different religious husband after the occurrence of divorce in the basic condition of the child who is not mumayyiz or still Underage and still need mother care while her father proved to behave poorly and had been involved in the child's abandonment case. Therefore, the judges are more concerned with the behavior and moral factors that the holder has on the custody of the child recalled when the birth of all children of Islam and the marriage conducted in Islam is essentially Hadhanah To a child who is not Mumayyiz is the right of his mother.

According to the analysis of the authors in the ruling that the Tribunal judges more concerned with the ruling on the marriage relationship between the applicant and the respondent so that in its verdict only give the ruling by declaring the marriage applicant and the respondent Break up because Fasakh while the petition for custody of the child (Hadhanah) is rejected because in reality children are still underage and yet mumayyiz and still need the care of a mother. Regarding the accusation of the wife (mother of children) has apostatized still need more complete proof of evidence.

This is of course in accordance with Article 105 paragraph (1) of the compilation of Islamic law, basically hadhanah towards children who are not mumayyiz is the right of his mother, except when it is evident that the mother has apostatized and embraced a religion other than Islam, then it is a mother's right to nurture the child. Similarly, the jurisprudence of the Supreme Court of INDONESIA number: 210/K/AG/1996, which

contains the abstraction of the law that religion is a requirement to determine the absence of a mother's right to the care and care (Hadhanah) of his son who has not mumayyiz, because a mother who becomes non-Muslim is not eligible anymore as a holder.

So in this ruling the difference between religious factors is not a concern of the judge because the marriage that was implemented previously is in the Islamic religion and is carried out legally according to the quotation of the marriage certificate issued by the Office of Religious Affairs District of Maumere Sikka District. The three children in the marriage also have a lair in Islamic State. Therefore, to obtain custody of the child the applicant may file custody claims after the divorce is decided pursuant to the provisions of article 105 paragraph (1) of the compilation of Islamic law and jurisprudence of the Supreme Court of Indonesia number: 210/K/AG/1996 above.

#### IV. CONCLUSION

The legal position of children born in different religious spouses when associated with existing provisions and provisions in Islamic religion can be said that the position of the law of children born from a couple who divorced this religion, then refer to Provisions of article 42 UU No. 1 year 1974 that the legitimate child is a child who is born in or as a result of a legitimate marriage. Thus, a child born of a legitimate marriage that is performed both in the Office of Religious Affairs (for Muslim Couples) and the Civil Registry office (for a religious spouse other than Islam), then the position of the child is a legitimate child in the eyes Legal and have the rights and obligations of children and parents.

Consideration in setting child custody of a married couple in a different religion following the occurrence of divorce in the condition of the child who is still mumayyiz or still underage and still needs the care of the mother while her father proved Misbehave and have been involved in child abandonment cases. Therefore, the judges are more concerned with the behavior and moral factors that the holder has on the custody of the child.

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