Habitual Residence on Children Victims of Divorce in Mixed Marriage: *Maslahah Mursalah* Perspective

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Abstract. This study aims to answer the problem of child custody in marriages of different countries. In addition, it explains more about the meaning of the concept of habitual residence. And make the concept of habitual residence as Maṣlaḥah Mursalah in the settlement of child custody rights in inter-state marriages. This type of research is qualitative with the support of library research and by using a doctrinal legal approach (doctrinal research). The sources of data used are the laws in force in Indonesia, books, articles, and journals related to this research. With the influence of globalization in Indonesia, there are many marriages between different countries. The author focuses on the impact of mixed marriage divorce, namely the struggle for child custody. Historically, The decision on child custody in inter-state marriages focuses on Law Number 62 of 1958 concerning Citizenship, that the Ius Sanguinis principle is used as an absolute principle. However, the law has generated a lot of controversy. Then, Law Number 12 of 2006 concerning Citizenship was born as a substitute. In this Law, the principle of Ius Sanguinis is absolutely replaced with an optional right. But these optional rights also have a negative impact on the welfare of children. The results of this study explain that child custody in mixed marriages of different countries is determined by the concept of habitual residence. Because the concept of habitual residence puts forward the principle of the best interest of child or prioritizing happiness for children.

Keywords: Custody, Mixed Marriage, Habitual Residence, Maṣlaḥah Mursalah

1 Introduction

In marriage, ideals are needed to build an ark that is harmonious, and filled with love and affection. Therefore, in the implementation of marriage, it is necessary to apply the law to regulate such matters. The goal is to fulfill the rights and obligations, as well as the responsibilities of each family member, in order to create the ideal in the household.

Mixed marriage is a marriage between two people who in Indonesia are subject to different laws because of different nationalities. According to Article 57 of Law Number 1 of 1974 concerning Marriage, it is stated that what is meant by mixed marriage is a marriage between two people who in Indonesia are subject to different laws, due to differences in citizenship and one of the parties is an Indonesian citizen. Mixed marriages are marriages that are international in nature because each of them has a different nationality, this can be seen from the point of view of the state law of the parties involved. in the state administrative law system in terms of registration of marriages.

In marriage, of course, there are many things that happen, both good and bad. Especially in mixed marriages where both parties have to get used to living in different cultures, customs,

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laws, and even philosophies of life. So a higher tolerance is needed to realize a happy and ideal marriage. If there is a lack of tolerance, it will have an impact on the running of the household. There will often be tension and incompatibility which can later lead to tension and even divorce. From divorce, there are many impacts that often occur, one of which is child custody. When a mixed marriage couple has children and then divorces, the problem is that the child gets custody of the father or mother, and gets the citizenship of the father or mother. This is the problem. In Islamic law, custody is only known for couples who are divorced and have children. Islam does not recognize custody in mixed marriages. Custody rights in mixed marriages are only known in Article 59 of the Marriage Law, where citizenship obtained as a result of marriage or divorce determines the applicable law, both regarding public law and civil law. Regarding the discussion of child custody in mixed marriages, one of the regulations comes from the Citizenship Law. For almost half a century the regulation of citizenship in mixed marriages refers to Law No. 62 of 1958 on citizenship, where children directly get custody of their father and follow their father's citizenship. This is known as the principle of Custody rights are only known to couples who are divorced and have children. Islam does not recognize custody in mixed marriages. Custody rights in mixed marriages are only known in Article 59 of the Marriage Law, where citizenship obtained as a result of marriage or divorce determines the applicable law, both regarding public law and civil law. Regarding the discussion of child custody in mixed marriages, one of the regulations comes from the Citizenship Law. For almost half a century the regulation of citizenship in mixed marriages refers to Law No. 62 of 1958 on citizenship, where children directly get custody of their father and follow their father's citizenship. This is known as the principle of Custody rights are only known to couples who are divorced and have children. Islam does not recognize custody in mixed marriages. Custody rights in mixed marriages are only known in Article 59 of the Marriage Law, where citizenship obtained as a result of marriage or divorce determines the applicable law, both regarding public law and civil law. Regarding the discussion of child custody in mixed marriages, one of the regulations comes from the Citizenship Law. For almost half a century the regulation of citizenship in mixed marriages refers to Law No. 62 of 1958 on citizenship, where children directly get custody of their father and follow their father's citizenship. This is known as the principle of Islam does not recognize custody in mixed marriages. Custody rights in mixed marriages are only known in Article 59 of the Marriage Law, where citizenship obtained as a result of marriage or divorce determines the applicable law, both regarding public law and civil law. Regarding the discussion of child custody in mixed marriages, one of the regulations comes from the Citizenship Law. For almost half a century the regulation of citizenship in mixed marriages refers to Law No. 62 of 1958 on citizenship, where children directly get custody of their father and follow their father's citizenship. This is known as the principle of Islam does not recognize custody in mixed marriages. Custody rights in mixed marriages are only known in Article 59 of the Marriage Law, where citizenship obtained as a result of marriage or divorce determines the applicable law, both regarding public law and civil law. Regarding the discussion of child custody in mixed marriages, one of the regulations comes from the Citizenship Law. For almost half a century the regulation of citizenship in mixed marriages refers to Law No. 62 of 1958 on citizenship, where children directly get custody of their father and follow their father's citizenship. This is known as the principle of where the citizenship obtained as a result of marriage or divorce determines the applicable law, both regarding public law and civil law. Regarding the discussion of child custody in mixed marriages, one of the regulations comes from the Citizenship Law. For almost half a century the regulation of citizenship in mixed marriages refers to Law No. 62 of 1958 on citizenship, where children directly get custody of their father and follow their father's citizenship. This is known as the principle of where the citizenship obtained as a result

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There are actually a lot of studies on Child Custody in Mixed Marriages. Hendri Novan Kartika, for example, wrote an article entitled Child Custody Due to Divorce in Mixed Marriages According to Law Number 1 of 1974 concerning Marriage. The findings in this study are child custody will fall according to the indicators that occur and will be decided by the court. The method used in this study is a qualitative literature review. Furthermore, Inggit Savana Putri et al. conducted a study entitled Juridical Analysis of the Status of Children Born in Mixed Marriages in view of Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia using qualitative methods as well as legal analysis. Inggit Savana Putri et al explain that the status of children born from mixed marriages in terms of Law Number 12 of 2006 concerning Indonesian Citizenship is to state that children born from mixed marriages whose father and mother are of different nationalities have the right to determine or choose citizenship. This right will be granted at the age of 18 years. If the divorce occurs when the child is under the age of 18, the guardianship will be decided by the judge. Next, Juanda Wiranta, in a study entitled Legal Protection of Children Due to Divorce from Mixed Marriages using qualitative methods explains that the right to protection in the convention on children's rights is an important child's right. In Law Number 23 of 2002 concerning Child Protection,

2 Methodology

In this study, qualitative research methods were used to explain to explain the rules for child custody of mixed marriages and the concept of habitual residence. This study uses a normative juridical approach, where the research is conducted by describing the polemics that occur in determining child custody in mixed marriages.

3 Result and Discussion

3.1 Maslahah Mursalah and Child Protection

The word “Maslahah” is rooted in slh; it is the masdar form of the verbs Salaha and Saluha, which are terminologically mean: benefit, benefit, good, good, worthy, worthy, appropriate. Viewed from the perspective of neuroscience (morphology), the word "maslahah" has a pattern and meaning with the word manfa'ah.[1] Terminologically. Al-maslahah is the benefit or suitability desired by Allah for all his servants. In another sense, maslahah mursalah is a form of taking benefit as well as conformity with keeping away harm as a form of maintaining maqasid al-sharia. According to the perspective of the study of Usul Fiqh, maslahah mursalah is a proposition that serves to establish a new problem that has not been explicitly mentioned in the main source, namely the Qur'an and as-Sunnah.[2] According to Abdul Wahab Khallaf, maslahah mursalah is a conformity when syar'i does not require the law to make it happen and there is no evidence stating an acknowledgment or cancellation.[3]

The main goal in implementing Islamic law is to realize the benefit of humans. Where we know that human benefit will move dynamically according to the times. Thus there will be many new problems in which there is no law that has been explicitly stated in the Qur'an and Sunnah.This is why it is necessary to formulate a systematic methodology that has a strong Islamic root base to produce a responsive and comprehensive legal product. In addition, benefit is also related to the basic needs of sweets in this world and in the hereafter. So benefit can be seen from the level of maqasid syar'iah. Maslahah mursalah and maqasid syar'i have an inseparable relationship. The theory of maslahah mursalah is tied to the concept that sharia should aim to provide benefits and eliminate harm for the benefit of society.

In addition to maslahah mursalah in this study, it is also touched through the theory of child protection. It is a certainty that every child born into the world is a blessing and a gift from the Almighty. They are all born pure. Their character and character will be formed through their parents and their environment. Children are the successors of the lineage which is a mandate from God and must be handled properly. According to common knowledge, the notion of a child is someone born from a male and female relationship. Meanwhile, what is meant by children or Juvenale, is someone who is still under a certain age and is not yet an adult and has not married.[4]

In Law Number 39 of 1999 concerning Human Rights in Article 1 sub 5 it is stated that a child is every human being under the age of 18 (eighteen) years and not yet married, including children who are still in the womb if this is in their interests. According to Law Number 35 of 2014 and Law Number 23 of 2002 concerning Child Protection, the definition of a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb. In the study of Islamic law, what is meant by a child is a person who has not Mukallaf, meaning someone who has not made sense or is of age.

Meanwhile, child protection is all efforts aimed at preventing, rehabilitating and empowering children who experience acts of mistreatment, exploitation and neglect in order to ensure the survival and growth of children naturally, both physically, mentally and socially.[5] Child protection can also be interpreted as an effort to protect the law against various freedoms and children's rights (fundamental rights and freedoms of children) as well as various interests related to children's welfar.[6] Child protection is qualified in two parts, namely, legal child protection and child protection in the social, health and education fields.

In the concept of child protection, protection for children is the right of the child, whether he has it or not. The purpose of the previous sentence is so that the child can feel protected so

that the child feels safe. If the child has a sense of security, he can freely explore and live in his environment. There are many reasons that explain why children need to be protected, one of which is of interest to the author is that children have a direct and long-term influence on actions/deeds or there is no action/action from the government or other groups. hinder the growth and development of children. It must be acknowledged that providing protection for children is not an easy matter.

3.2 *Hadhanah* and Habitual Residence

Hadhanah has the meaning of serving young children in educating and improving their personality by people who have the right to educate at a certain age.[7] According to Sayyid Sabiq, hadhānah is an attitude of nurturing a small child who has not been able to distinguish between good and bad, nor has he been able to take care of himself. Efforts to educate, maintain, and nurture them, both physically, mentally, to the point of reason, in order to be able to live a responsible life.[8] Article 105 of the Compilation of Islamic Law states that the limit for a child's mummayyiz is 12 years. Meanwhile, Law Number 1 of 1974 concerning Marriage states that a child is said to be mumayyiz if he is 18 years old or after getting married.

Jumhur Ulama agree that the legal principle of child care is mandatory which is a consequence for the parents. This is stated in Qs. Al-Baqarah verse 233 and Qs. At-tahrim verse 6 which explains that every believer has the obligation and responsibility to take care of himself and his family. To protect himself and his family (children and wife) from the fire of hell, by trying to make all members of his family carry out Allah's commands and leave His prohibitions. It is obligatory to take care of young children, because neglecting them means exposing the children to the danger of destruction. Hadhānah is a right for children who are still small, because they still need supervision, care, implementation of their affairs from the person who educates them. Parenting or caring for children applies in two pillars, namely parents as caregivers (hadhīn) and children as being cared for (mahdhūn). Both of these components must exist along with the specified conditions for the care to be legal. However, if there is a conflict in it, then the person who is being cared for will take precedence.[9]

In a hadith from Abdullah Ibn Umar, it is narrated that the Messenger of Allah was visited by a woman, then she said, "Indeed this is my child, my belly which bears him, my milk which he drinks, and in my house is a gathering place, and indeed his father has divorced me and wants to take it from me." . Hearing the complaint, the Messenger of Allah made a decision saying, "You are more entitled to the child as long as you don't remarry.". From this hadith, the custody of the mother takes precedence over the father. Mothers are considered more entitled to raise children with consideration of generally greater affection than fathers, as well as a stronger inner relationship between mothers and children. The need for breast milk that only mothers have, and patience and gentleness that make mothers more capable of nurturing and caring for children.

When the child is mumayyiz, then he has the right to choose his father or mother. This is because after mumayyiz, children tend to be more independent, their dependence on their mothers is reduced. at that time, he has been able to make decisions and judgments about what is good for him. He can already choose which one is better to live with mother or father.

Scholars argue about who has the right to raise children. According to the Hanafi and Maliki scholars, the right to care for the child falls on the mother until she aborts the right. But according to Jumhur Ulama, the right to care for children is a right between the child and both parents[10]. In the event of a divorce and having children from his wife, the mother is more entitled to take care of the children until they are 7 years old. The reason is because the mother

has more affection than the father, who at a very young age the child really needs the love of a mother. But when the child has reached the age of puberty, then he may choose to go with whom (one of his parents) and for parents who are not chosen he must surrender himself .

Husband and wife who are divorced and have children. Imam Abu Hanifah is of the opinion that a mother is more entitled to take care of her son until the child can live independently of all his basic needs, after that only the father has the right to take care of his child. Likewise, mothers are more entitled to take care of daughters until they reach puberty and daughters are not allowed to choose to participate in the care of their mother or father. According to Imam Malik, mothers have more rights to take care of their daughters until they are married, while for sons until they reach puberty. Furthermore, according to Imam Syafi'i, mothers are more entitled to take care of boys and girls until the age of 7 years, and at a later age children can choose. Meanwhile, according to Imam Ahmad's opinion where mothers are more entitled to take care of boys until the age of 7 and girls at the age of 7 years are allowed to go with their mothers because they are not required to choose. Article 105 of the Compilation of Islamic Law (KHI) explains that it is the mother's right to take care of a child who is not mumayyiz or not yet 12 years old. Then the maintenance of the mumayyiz child is left to the child to choose between his father or mother as the holder of the maintenance right and the maintenance costs are borne by the father.

3.3 Habitual Residence

In legal matters, customs and place of residence are standards in determining decisions or applicable laws. The concept of habitual residence is part of common law jurisdictions created as an alternative to solving legal problems. Habitual residence has a meaning where the priority is the place of residence and habits (in this case for children who are not yet adults). The concept of habitual residence has been adopted internationally through the Hague Convention in 1961 with the theme convention concerning the power of Authorities and the Law Appicable in Respect of the Protection of Minors. This is one of the evidences of the development of international civil law.

The determination contained in it is that the national law of the child will apply, which results in questions from agencies or persons giving consent that must be heard by law. Regarding the implementation of this hearing by the child's national law, it may be implied that the judge must hear the statement of the child or his family members[11]. Parents had certain powers over their children (ourderlijke macht, patria potetas of Roman law). Based on legal considerations in the family, the personal law of the father's affection is used to determine the legal relationship between the two parents and the child. In modern times like today it is possible for the wife and children to have different personal laws (different nationalities). This is the main problem, when there are differences in citizenship. The benchmark of a person's life is certainly seen from the provisions of the law. The place of residence or place of residence of a person (ordinary residence) and habits (habitual) are facts that cannot be affected by law. As one example, a wife is considered to have her domicile at the domicile of her husband, even though the wife may have a separate habitual residence, which is not the same as her husband.[12]

The concept of habitual residence is the concept of resolving child custody cases incorporating various countries, especially Continental Europe. Where its existence is stated as a term of law for the settlement of family law cases. Habitual residence which has been adopted in International Civil Law is here to avoid rigid rules regarding the concept of domicile. This concept is usually used to decide a case in which there are differences in citizenship. Even some family law courts (Family Court) use this concept as a way to settle child custody.[12] Apart

from child custody, cases of fighting over children whose custody has been terminated but causing dissatisfaction by one of the parents and leading to kidnapping are also resolved using the concept of habitual residence.[13] Quoted from a book written by Prof. Zulfa Djoko Basuki, the concept of habitual residence is a concept in which the law of daily residence and the physical presence of children at a certain time become a measure of court decisions. So the main consideration in deciding each case is the best interest of the child.[14]

According to researchers, the concept of habitual residence has a coercive or mandatory nature. Because by applying this concept, it is seen from how long the child lives and the habits that the child does in his growth and development, the custody decision will be in accordance with these two things. For example, a child of a mixed-married divorced couple who has been living in Indonesia for a long time. So the judge's decision on custody must prioritize comfort in the environment and the child's habits so far have grown, namely, remain in Indonesia. Because automatically the child already has an attachment to culture, the environment and even the spiritual atmosphere while living in Indonesia. Furthermore, child custody will also have an impact on the family of the father and the family of the mother. That's because they are the ones who will be the substitute guardian of the child when both parents die.

3.4 The Habitual Residence Concept in the Perspective of Maslahah Mursalah

In fact, the practice of mixed marriages has been carried out since ancient times. In this study, the location of the problem does not come from the practice of mixed marriages, but in the event of a divorce which has an impact on many things, one of which is the struggle for child custody. According to the author, the struggle for child custody is the most serious concern that needs to be discussed due to the fact that divorce does not break the responsibilities of husband and wife in the field of child care. Then from the struggle for child custody, various polemics arise and the most highlight is about children who must be cared for by fathers, mothers or maybe other people.

Historically, the determination of child custody in mixed marriages refers to Law Number 62 of 1958 concerning Citizenship which was promulgated on July 29, 1958, where the citizenship of the child follows the father, in accordance with Article 13 paragraph (1) of Law No. 62 of 1958. This emphasizes on the consequences of the principle of Ius Sangunis. The principle of Ius Sauinis is the principle of citizenship which is determined from the descendants of the person concerned. This principle is also called the law of the blood which also does not heed the place of birth. Article 1 (b) states that an Indonesian citizen (WNI) is a person who at the time of birth has a legal family relationship with his father who is an Indonesian citizen, with the intention that the family relationship is official before the person is 18 years old. Therefore,

if there is a case of marriage between an Indonesian woman and a foreign man, the children born will follow their father's foreign citizenship wherever he was born. This law is included as a controversial regulation during its validity. At that time, many parties voiced the discourse of changing the law.

As explained above, cases of fighting over child custody in inter-state marriages have often been in the spotlight during the implementation of this Law. Especially for the wife of an Indonesian citizen with a foreign husband. Juridically, the husband benefits more because the child follows the nationality of his father. The ius sanguinis principle is reinforced by the 1902 Hague Convention (Convention Governing Guardianship of Infants) which is used as a benchmark in determining child custody rights. The Hague principles are detrimental to Indonesian women who marry foreign men. This provision clearly provides injustice for women and children born from marriages of Indonesian citizen women with foreign men. Even though,

In practice, the adoption of the ius sanguinis principle also does not provide legal certainty, especially in district courts. There are no exceptions for granting child custody in marriage divorces between different countries. Unlike the religious courts, who has the right to get custody is based on the guidelines in the Compilation of Islamic Law article 105. This is one of the reasons that this Law is considered to discriminate against women and does not look at the principle in considering the settlement of child custody cases, namely the best interest of the child.

Due to the many factors that make this Law no longer in line with the needs of the Indonesian people and very detrimental to women and children born in mixed marriages, which constitutes gender discrimination, a replacement Citizenship Law was drafted which is expected to be more effective. attention also reflects the rights of women and children's rights. After the reformation, Law Number 12 of 2006 concerning citizenship was born as a substitute for Law Number 62 of 1958 concerning Citizenship. In this law, the principle of ius sanguinis is absolutely replaced with an optional right. Where the child is welcome to choose or the determination is determined by the court judge.

The existence of Law Number 12 of 2006 concerning Citizenship has been able to accommodate the unrest that occurred when Law Number 62 of 1958 concerning citizenship was still in effect. This law contains the principles of general or universal citizenship. Basically, this law does not recognize bipatride (dual citizenship) or statelessness (apatride). However, dual citizenship granted to children in this law is an exception. However, according to the researcher, Law No. 12 of 2006 still has shortcomings by prioritizing optional rights in determining child custody. There are several court decisions that have referred to Law number 12 of 2006 but do not reflect justice for children. In fact, children are the weakest people in this matter. For example in the decision number 0341/Pdt G/2015/PA.JS with child custody cases. In ibi's case it was explained that there had been 2 lawsuits related to child custody, because the person who was given the right to care for was irresponsible and did not provide comfort for the child. In fact, when there is a divorce, many of them are never able to return to normal conditions. They tend to experience distress, anger, anxiety, and even distrust with their parents and their environment. And psychologically children still need parental guidance. When he was forced to follow one of his parents through a court decision, but in the course of his upbringing he did not feel protected, and his rights were not protected. Whereas what must be prioritized is the principle of the best interest of the child or prioritizing in terms of children's happiness. There is no specific statement that says about child custody. Law Number 1 of 1974 concerning Marriage explains in article 45 that, "parents are obliged to maintain and educate their children as well as possible. The obligation is valid until the child marries or can stand alone even though the parents are divorced.

With this kind of polemic, the concept of habitual residence that has been used abroad as one of the principles for the settlement of mixed-marriage divorce custody can be a reference as a mursalah maslahah. This concept is based on the interests, comfort, and happiness of children. Habitual residence focuses on the habits and place of residence of the child as a direction for decision making. From this reason, it is clear that the priority is happiness and comfort for the child. Children do not need to be asked to choose to whom custody is transferred. Because by using the concept of habitual residence, the decision will automatically be in accordance with the circumstances and environment where the child lives.

The concept of habitual residence has become one of the solutions by highly upholding the happiness and comfort of children. This is shown by the many results of decisions in foreign courts that apply the concept of habitual residence. With things like that, it shows that the concept of habitual residence is not only fixated on the issue of citizenship. But this concept is also present to provide convenience for children in determining which parents they think are comfortable to live in and which environment has been their place of growth and development. For this reason, habitual residence can be a maslahah mursalah against Law Number 62 of 1958 concerning Citizenship, Law Number 12 of 2006 concerning Citizenship,

And the concept of habitual residence can be categorized as al *Maṣlaḥah adh-dharuriyyah*. Because the issue raised is about child custody which is clearly related to maqāṣid shari'ah, namely maintaining offspring. Therefore, the concept of habitual residence needs to be used in solving child custody issues. And if this concept is not used, it will undermine the urgency and purpose of child custody.

4 Conclusion

Mixed marriages of different countries are something that is currently commonplace due to the development of globalization. According to Article 57 of Law Number 1 of 1974 concerning marriage, it is stated that what is meant by mixed marriage in this Law is a marriage between two people who in Indonesia are subject to different laws, due to differences in nationality and one of the parties is an Indonesian citizen. In this study, the location of the problem does not come from the practice of mixed marriage itself but when a divorce occurs which has an impact on many things, one of which is the struggle for child custody. This is the most serious concern because divorce does not break the responsibilities of husband and wife in child care. Historically, in deciding the custody of children of victims of divorce in marriages from different countries, the courts often reflect on Law Number 62 of 1958 concerning citizenship. This law focuses on the consequences of the ius sanguinis principle. In other words, absolute custody of the child falls into the hands of the father. After the reformation, Law Number 12 of 2006 was issued as a replacement for Law Number 62 of 1958 concerning Citizenship. In this law, the principle of ius sanguinis is absolutely replaced with an optional right. Where children are welcome to vote or determination is determined by the court. According to the researcher, Law No. 12 of 2006 has shortcomings by prioritizing optional rights in determining child custody. There are several decisions which in fact refer to Law No. 12 of 2006 but do not reflect justice for children. One example of the decision number 0341/Pdt G/2015/PA.JS with child custody cases. In this case it is explained that there have been 2 lawsuits related to child custody, because the person who was given the right to care did not provide comfort for the child. With the existence of two lawsuits related to child custody, the author means that Law Number 12 of 2006 still does not reflect good values in determining child custody. So we need a new concept that is able to accommodate the determination of child custody that prioritizes the comfort and happiness of the child. In this case it is explained that there have been 2 lawsuits related to child custody, because the person who was given the right to care did not provide comfort for the child. With the existence of two lawsuits related to child custody, the author means that Law Number 12 of 2006 still does not reflect good values in determining child custody. So we need a new concept that is able to accommodate the determination of child custody that prioritizes the comfort and happiness of the child. In this case it is explained that there have been 2 lawsuits related to child custody, because the person who was given the right to care did not provide comfort for the child. With the existence of two lawsuits related to child custody, the author means that Law Number 12 of 2006 still does not reflect good values in determining child custody. So we need a new concept that is able to accommodate the determination of child custody that prioritizes the comfort and happiness of the child. With the existence of two lawsuits related to child custody, the author means that Law Number 12 of 2006 still does not reflect good values in determining child custody. So we need a new concept that is able to accommodate the determination of child custody that prioritizes the comfort and happiness of the child. With the existence of two lawsuits related to child custody, the author means that Law Number 12 of 2006 still does not reflect good values in determining child

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In Islam only recognizes the marriage of one religion or different religions. But regarding custody, according to the fact of the religious court that the custody of children who are not yet mumayyiz falls in the hands of their biological mothers in accordance with Article 105 of the KHI. From this explanation, it can be concluded that the issue of child custody in mixed marriage divorces has a conflict between the Citizenship Law Number 62 of 1958, the Citizenship Law Number 12 of 2006, and Islamic Law. Therefore, a new concept is needed as maslahah mursalah to fulfill needs. The concept of habitual residence is a concept that is used as a way to resolve child custody disputes in family courts abroad. According to Prof. Zulfa Djoko Basuki as Professor of the Faculty of Law, University of Indonesia, the concept of habitual residence is a concept in which the law of daily residence and the physical presence of children within a certain time becomes a measure of court decisions. So "the best interest of the child" becomes the main consideration in deciding each case. Habitual residence can be a problem for child custody because this concept is based on the interests, comfort, and happiness of children. Habitual residence, focused on the habits and place of residence of the child as a direction for decision making, from this reason it is clear that the priority is the happiness and comfort of the child. Children do not need to be asked to choose to whom custody is transferred. Because with the concept of habitual residence, the decision will automatically be directly in accordance with the circumstances and environment where the child lives.

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