



International Journal Islamic Education, Research and Multiculturalism (IJIERM)

Available online <https://journal.yaspim.org/index.php/IJIERM/index>

Legal Protection For Children After Divorce Through The Decision Of The Religious Court Of Medan City (Analysis Of Child Protection Law No. 23 Of 2002)

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Abstract: This study aims to analyze in depth the protection of children after divorce through the decision of the Medan City Religious Court according to Law No. 23 of 2002. This type of research is a qualitative empirical study with a case study approach, laws and regulations in the KHI and conceptually. The data collection methods used are interviews, observations, and documentation. The subject of the study was the head of the Medan City Religious Court. The results of the study describe that (1) The regulation of legal protection for children after divorce in the Medan City Religious Court is based on seven legal bases as rules in deciding child custody cases in the Medan City Religious Court, (2) The application of the law to child custody after divorce in the Medan City Religious Court is in accordance with Law No. 23 of 2002 concerning child protection even though there are several obstacles and barriers. The solution to overcome all of this is the need for re-socialization of the application of Law No. 23 of 2002, (3) The judge's considerations in deciding child custody after divorce in the Medan City Religious Court are based on the principles of justice, legal certainty and a problematic, social, psychological approach in order to achieve a decision that satisfies both parties.

Keywords: Legal, Protection, Children, Divorce

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INTRODUCTION

Marriage is a very important system in society. In Islam, marriage is a sacred object of the Prophet Muhammad, and every Muslim must follow it. It is highly recommended to marry in Islam in order to convey impulses to biological and psychological desires in a halal manner to avoid adultery.¹ The sources of Islamic teachings, the Qur'an and Hadith, have regulated the recommendation of marriage. The purpose of marriage is to form a *sakinah*, *mawaddah* and *warahmah* family². Of course, the process of establishing a *sakinah* family cannot be taken lightly, because the Prophet Muhammad SAW never underestimated it, so we must understand marriage first before carrying it out³. Life proves that maintaining a household life is not easy, because in household life it is inseparable from the turmoil that exists. If the couple cannot survive the turmoil, then it is undeniable that the marriage will end or be called divorce. Divorce can cause various problems⁴. In addition to the divorce process itself, the ratification of the divorce process also raises other problems, such as who has the right to *hanhanah* (care) for the child.

Before and after divorce, child custody is usually a problem. It is not uncommon for ex-husbands and ex-wives to fight for custody of their children, because children are the hope of their parents and it is difficult for parents to separate. Children are the unfortunate side of the divorce of one of the parents⁵. Children who are the next generation of the nation must be protected in accordance with the provisions of the 1945 Constitution, namely that every child has the right to live, grow and develop, and be free from violence and discrimination⁶. Children have lost the absolute affection needed by both parents.

¹ Indainanto, Y. I., Dalimunthe, M. A., Sazali, H., Rubino, & Kholil, S. (2023). Islamic Communication in Voicing Religious Moderation as an Effort to Prevent Conflicts of Differences in Beliefs. *Pharos Journal of Theology*, 104(4). <https://doi.org/10.46222/pharosjot.104.415>

² Sikumbang, A. T., Dalimunthe, M. A., Kholil, S., & Nasution, N. F. (2024). Digital *Da'wah* Indonesia *Ulema* in the Discourse of Theology. *Pharos Journal of Theology*. 105(1). 1-14. <https://doi.org/10.46222/pharosjot.1051>

³ Anshar, Hafiz. (2002). *Problematika Hukum Islam Kontemporer*. Jakarta: Firdaus.

⁴ Meliala, Djaja S. (2006). *Perkembangan Hukum Perdata Tentang Orang Dan Hukum Keluarga*. Bandung: Nuansa Aulia.

⁵ Dalimunthe, M.A. (2022). Keterampilan Komunikasi Antarbudaya Mahasiswa Malaysia di Kota Medan. *Langgas: Jurnal Studi Pembangunan* 1 (2), 82-89

⁶ Rambe, R.F. AL. K., Ritonga, A.R., Dalimunthe, M.A. (2023). Komunikasi Publik Pemerintah Kota Medan Dalam Pengalihan Kewenangan Kebijakan Terkait UU No. 23 tahun 2014. *Komunika*. 19(01), 39-44. <https://doi.org/10.32734/komunika.v19i01.11411>



No child only wants affection from their parents.⁷ Apart from income and education, they are not free from the role of parents.⁸ Therefore, in the "Child Protection Law" it provides another form, namely that parents are the main ones⁹ one. Guardianship transfers guardianship. Family authority. The intent and purpose of revoking guardianship is only to carry out child guardianship properly, not to sever the relationship between parents and children, revocation of guardianship is temporary.

Divorce has significant legal implications for husbands, wives, and children. Ideally, children should grow up in a harmonious, peaceful, and stable family environment. Parental conflicts, including those arising from divorce, should not negatively impact the child, even if the child lives with one parent post-divorce.¹⁰ The term "rights" refers to ownership, authority, property, or the legal power to perform actions as determined by law. Legal protection involves the process, actions, and legal mechanisms to safeguard a person's rights, authority, or power¹¹. When both parents are involved in post-divorce custody disputes, one party often claims a greater entitlement to custody, citing their sense of responsibility and sacrifices made for the child. Generally, courts decide that children under ten years old are entrusted to the mother, while children over ten are allowed to choose which parent they wish to live with. Ultimately, the judge determines which parent is better suited to hold custody¹². Despite these guidelines, legal certainty regarding the status of children from divorced couples remains unclear. The Supreme Court has not established a definitive policy, and it is uncertain which institution has the authority to enforce the court's custody

⁷ Humaizi, Hasan NNN, Dalimunthe MA, Ramadhani E. (2024). Harmony in virtual space: Forum Kerukunan Umat Beragama (FKUB) development communication in creating digital literacy based on religious moderation. *Journal of Infrastructure, Policy and Development*. 8(7): 4299. <https://doi.org/10.24294/jipd.v8i7.4299>

⁸ Gultom, Maidin. (2006). *Perlindungan Hukum Terhadap Anak; Dalam Sistem Peradilan Pidana Anak di Indonesia*. Bandung: Refika Aditama.

⁹ Dalimunthe, M.A., Irawanto, B. & Budiawan. (2020). Representation of Papuan identity in the reporting of local newspapers in Yogyakarta. *International Journal of Social Science Research* 2 (3), 34-44.

¹⁰ Fauzan, I., Arifin, A., Dalimunthe, M. A., & Rahmadani, S. (2023). The configuration of ethnic and religious relations towards the 2024 general election: A case study in Medan, Indonesia. *Multidisciplinary Science Journal*, 6(2), 2024006. <https://doi.org/10.31893/multiscience.2024006>

¹¹ Ritonga, A.R., & Utami, L. D. C. (2023). Representasi Konflik Agraria dalam Film Ben dan Jody. *Jurnal Kajian Agraria dan Kedaulatan Pangan (JKAKP)* 2 (1), 24-29.

¹² Zein, Efendi, S. (2004). *Problematisasi Hukum Keluarga Islam Kontemporer*. Jakarta: Kencana.



decisions. To address issues surrounding child custody rights, Indonesia enacted the Child Protection Law, Law Number 23 of 2002, which was later amended by Law Number 35 of 2014 to strengthen the legal framework for child protection.

THEORETICAL BASIS

Children have many meanings, especially if the word child is followed by other words, such as child, child, river, village child, etc. In the Civil Code, a minor child is a child who is under 21 years old and has not been married first. Law Number 1 of 1974 does not directly regulate that someone is classified as a child. Article 6 paragraph 2 regulates that a person who is under 21 years old must obtain the consent of his parents to apply for marriage. Article 7 paragraph 1 of Law No. 1 of 1974 regulates that the minimum age for marriage for children is 19 and 16 for women. Children are the children of life, the country and the future of the country. Therefore, children need guidance in order to achieve the best psychological and spiritual developmen.¹³ Child custody, commonly referred to as "*Ḥaḍānah*," can be simply understood as *Ja'alah Fi Hadhinihi*, meaning to embrace the child within one's care. Similarly, *Shana'ahu Fi Shadrihi* implies holding the child close to one's chest. In the context of *ḥaḍānah al-Thifl*, it encompasses the care, upbringing, and education of infants or children from birth until they reach adulthood, equipping them to protect themselves from various dangers and enabling them to live independently¹⁴

According to *Al-Shana'ny*, the primary goal of *ḥaḍānah* is to nurture and protect children who are not yet capable of being independent or safeguarding themselves from harm and potential loss. Similarly, Sayyid Sabiq defines *ḥaḍānah* as the care provided to young children, whether boys or girls, or even older children who are difficult to manage, ensuring they can shield themselves from harm and maintain their well-being. This process also includes their physical and mental education, preparing them to face challenges and live independently and responsibly.¹⁵ The responsibility for raising children fundamentally lies with both parents. However, in cases where a marriage is dissolved, whether through conflict, separation, or divorce, the mother generally holds the primary right to custody, provided certain conditions are met. In Indonesia, the term *ḥaḍānah* has

¹³ Darwan, Prinst. (2003) *Hukum Anak Indonesia*. Bandung: Citra Aditya Bakti.

¹⁴ Musayyar, Sayyid Ahmad. (2008). *Islam Bicara Soal Seks. Percintaan. dan Rumah Tangga*. PT Gelora Aksara Pratama.

¹⁵ Bahari, Adib. (2012) *Prosedur Gugatan Cerai, Pembagian Harta Gono Gini, dan Hak Asuh Anak*. Yogyakarta: Pustaka Yustisia.



become an established legal term used to denote the position of a child who is the subject of custody disputes in court proceedings resulting from parental divorce.

Childcare services also mean that parents have the responsibility to supervise, provide appropriate services and meet the needs of parents for their children¹⁶. In addition, the responsibility for maintenance in the form of supervision and service and provision of sustainable life until the child becomes a *Mumayyiz* child who can live independently and reach legal age. Regarding the period of child custody, some scholars are divided. Imam Hanafi is of the opinion that the growth period for boys is 7 years, and the growth period for girls is 9 years. Imam Hambali is of the opinion that boys and girls have a care period of 7 years, after which they have the right to choose who they live with. According to Imam Syafi, "I think the limit of *mumayyiz* for a child is if the child is seven or eight years old. Imam Malik's Age Limit is 7. At the same time, education means that parents are obliged to provide education and teaching, so that children become capable and dedicated individuals, and have abilities and skills that are in accordance with the child's innate talents that will develop in Indonesian society.¹⁷ Divorce will certainly have legal consequences for both parties and the children in the marriage. These children must live in a single-parent family with their mother or only with their father. In the event of a divorce, of course the issue of child support is very much needed. The cost of raising children includes all living needs and applicable needs according to conditions and location, such as food, clothing, housing, education costs, etc.

According to Bahder Johan Nasution and Sriwarjiyati "If a marriage is terminated due to divorce, both the mother and father remain obliged to care for and educate their children solely for the benefit of their children, the court will decide who will control the child"¹⁸ The law regulates the obligations of parents to their children after divorce. marital status: 1) Both parents are obliged to care for and educate their children as much as possible. 2) The obligations as parents as referred to in paragraph (1) of this article remain in effect until the child is married or can be independent, even if the marriage between the two parents fails, these obligations remain in effect

¹⁶ Nuruddin, Amiur & Tagiran, Azhari Akmal. (2004). Hukum Perdata Islam diindonesia. Jakarta: Prenada Media.

¹⁷ Rofiq, Ahmad. (2013). Hukum Perdata Islam di Indonesia. Jakarta: PT Rajagrafindo Persada.

¹⁸ Johan, Bahder & Warjiyati, Sri. (1997). Hukum Perdata Islam, Komplikasi Peradilan Agama tentang Perkawinan, Waris, Wasiat, Hibah, Wakaf dan Shadaqah. Bandung: Madar Maju.



Divorce will certainly have legal consequences for both parties and the children in the marriage. These children must live in a single-parent family with their mother or only with their father. In the event of a divorce, of course the issue of child support is very much needed. The cost of raising children includes all living needs and applicable needs according to conditions and location, such as food, clothing, housing, education costs, etc. According to Article 156 of the "Collection of Islamic Law" in the "Presidential Instruction Number 1 of 1991" of the Republic, if the divorce is due to the wife's wishes (divorce suit), the cost of raising children will still be borne by the male parent (father), until the child reaches adulthood. Therefore, if you pay attention to the article above, then the right to *hadanah* of the child from the child in the womb (12 years old) is the mother's right. At the same time, if the child is already *mumayyiz*, then it can be left to the child to choose to join the mother or father.

RESEARCH METHODS

This type of research is qualitative empirical research, in qualitative research the researcher also acts as a research instrument, the data collection process takes place, the researcher is really expected to be able to interact with the object (community) that is the target of the research. This research uses a case study approach, laws and regulations in KHI and conceptually. In this study, a descriptive analysis method will be used according to this analytical descriptive method, the author will describe the situation, then process and analyze it, and obtain research results. In this descriptive method, data collected in the form of words and images are used instead of numbers¹⁹. This is because by applying qualitative methods, everything that is collected can be the key to what is being studied. Primary data sources are data obtained through field research with related parties in connection with this research in the form of observations, interviews, informants, and Secondary data sources such as primary legal materials, secondary legal materials, and tertiary legal materials. Data analysis techniques are carried out by means of, Data reduction refers to the process of selecting, focusing, simplifying, abstracting, and changing the "raw data" that

¹⁹ Arfa, Faisar Ananda. (2010). Metodologi Peneitian Hukum Islām. Bandung: Cipta Pustaka Media Perintis.



appears in written field notes. Data Presentation, The author presents the data after summarizing the data. Then introduce the data obtained and draw conclusions. Qualitative data is presented in the form of narrative text (in the form of field notes), matrices, graphs, networks and charts. Finally, drawing conclusions/verifying conclusions. The third step of the analysis activity is drawing conclusions and verifying. Since the beginning of data collection, researchers have begun to make decisions by considering regularity, patterns, interpretations, possible configurations, causality, and proportions²⁰. In order to strengthen the validity and validity of the data obtained in the study, researchers use the Lincoln and Guba data validity standards quoted by Salim and Syahrurum (2012), namely: credibility, transferability, trustworthiness and confirmability²¹.

RESULTS AND DISCUSSION

Regulation of Legal Protection for Children After Divorce at the Medan City Religious Court

The Marriage Law regulates the rights and obligations between parents and children concerning several things: *First*, it regulates the obligation of maintenance and education, that both parents are obliged to maintain and educate their children as well as possible. The obligations of parents referred to in Article 45 paragraph (1) of the Marriage Law apply until the child is married or can stand alone, which obligation continues to apply even if the marriage between the two parents ends. This provision is regulated in Article 45 of the Marriage Law. *Second*, it regulates the opposite, namely the obligations of children towards their parents, namely: Children are obliged to respect their parents and obey their wishes properly. If the child has grown up, he is obliged to maintain according to his ability, parents and family in a direct line upwards, if they need his help (Article 46 of the Marriage Law).

Third, it regulates the obligation for children to be represented by their parents in all legal acts regulated in Article 47, namely: Children who have not reached the age of 18 (eighteen years). Or have never been married are under the authority of their parents as long as they are not revoked from their authority. Parents represent the child regarding all legal acts in and out of court.' *Fourth*, it

²⁰ Sugiyono. (2009). Metode Penelitian Bisnis (Pendekatan Kuantitatif, Kualitatif, dan R&D). Bandung: Alfabeta.

²¹ Salim & Syahrurum. (2012). Metodologi Penelitian Kualitatif. Bandung: Cipta Pustaka Media.



is regulated in Article 48 of the Marriage Law which states that: Parents are not allowed to transfer rights or pawn fixed assets owned by their children who are not yet 18 (eighteen) years old or have never been married, unless the interests of the child require it. *Fifth*, it is regulated in Article 49 of the Marriage Law regarding the possibility of revocation of authority, namely: one or both parents may have their authority revoked over one or more children for a certain period of time at the request of the other parent, the child's family in a direct line upwards and adult siblings or authorized officials, by court decision in the following cases: He is very negligent in his obligations towards his child, He behaves very badly²².

Even though the parents have their authority revoked, they are still obliged to provide maintenance costs to the child. Guardianship or custody should be given to the party who has free time to raise the child. Then financially, it is also mature enough to meet the child's living needs including education costs. However, if this is not agreed upon, then the court process is the solution. Every guardianship determined by both parties should be in court if the divorce decision has legal certainty, this is for legal certainty in protecting the child.

Implementation of Law on Child Custody Rights After Divorce According to the Perspective of the Child Protection Law at the Medan City Religious Court

After a couple divorces, one of the issues that often becomes a problem is child custody. The process of determining child custody not only causes stress for parents, but also trauma for children which will later affect the child's attitude and behavior during growth or during the development of the child's soul itself. Thus, divorce is something that will have a negative impact on the child's future, especially children who in their childhood did not feel complete love from their parents who had separated. On that basis, comprehensive consideration is a must for divorced husbands and wives to care for and fulfill the obligations and needs for the rights of their children, if the divorce has reached a level that cannot be revoked, then the problem will be children who are still minors, namely children who are not yet adults.

In accordance with the provisions of Law Number 1 of 1974 concerning Marriage, where in Article 41 it is explained that if a divorce occurs, the rights of children have been explained in the article which reads: Article 41 of the Marriage Law The consequences of a marriage breaking up due to divorce are: Both the mother and the father remain obligated to care for and educate their children,

²² Syarifudin, Amir. (2006). Hukum Perkawinan Islam di Indonesia. Jakarta: Putra Grafika.



solely based on the interests of the child; if there is a dispute regarding control of the children, the court will make its decision. The father is responsible for all costs of care and education required by the child; if in reality the father cannot fulfill these obligations, the court may determine that the mother must bear these costs. The court may grant the ex-husband to provide living expenses and/or determine obligations for the ex-wife.

Based on the provisions explained above, it can be concluded that even though a divorce has occurred, both parents are still required to pay attention to the rights of the child that must be provided as regulated in the following laws and regulations: Law Number 23 of 2002 concerning Child Protection explains the rights of children, as follows:

- a) Every child has the right to live, grow, develop, and participate fairly in accordance with human dignity and dignity, and to receive protection from violence and discrimination;
- b) Every child has the right to a name as a self-identity and citizenship status;
- c) Every child has the right to worship according to his/her religion, to think, and to express himself/herself according to his/her level of intelligence and age, under the guidance of his/her parents;
- d) Every child has the right to know his/her parents, to be raised and cared for by his/her own parents;
- e) In the event that for some reason the parents cannot guarantee the growth and development of the child, or the child is neglected, the child has the right to be cared for or adopted as a foster child or adopted child by another person in accordance with the provisions of applicable laws;
- f) Every child has the right to receive health services, social security according to his/her physical, mental, spiritual, and social needs;
- g) Every child has the right to receive education and teaching in order to develop his/her personality and level of intelligence according to his/her interests and talents;
- h) Every child has the right to express and have his/her opinion heard, to receive, seek, and provide information according to his/her level of intelligence and age for the sake of his/her development according to the values of morality and propriety;
- i) Every child has the right to rest and use his/her free time, to socialize with peers, his/her talents and level of intelligence for the sake of his/her development.



Meanwhile, the obligations of children are stated in Article 19 of Law Number 23 of 2002, namely that every child is obliged to: Respect parents, guardians, and teachers. Love society, family, and love friends. Love the homeland, nation and state. Perform worship according to their religion, and. Implement ethics and noble morals. In Article 26 paragraph (1) and paragraph (2) of Law Number 23 of 2002 explains the obligations and responsibilities of families and parents, namely parents are obliged and responsible for:

- a) Nurturing, caring for, educating, and protecting children;
- b) Developing children according to their abilities, talents and interests;
- c) Preventing child marriage.

Judge's Considerations in Deciding on Child Custody Rights After Divorce According to the Child Protection Law at the Medan City Religious Court

Protection of children's rights in relation to parental divorce is by the judge making the right decision in the divorce process based on the plaintiff's lawsuit while still considering the interests of the child whose parents are divorced, by first considering the things that are considered important before giving the right to child custody to one of the parents (father or mother). The right to child custody is the right to care for and educate children until they are adults or able to stand alone, if a child is born in a marriage, then the marriage not only gives rise to rights and obligations between husband and wife but also obligations between parents and children. The rights and obligations between parents and children are regulated in Law Number 1 of 1974 concerning Marriage are regulated in Articles 45 to 49. While in the Compilation of Islamic Law it is regulated in Articles 105, 149, and Article 156. Article 45 of the Marriage Law states that both parents are obliged to care for and educate their children as well as possible, this child's obligation applies even though the marriage between the two people ends. In addition to the obligation to educate and care for the child, parents also have control over their children who are under 18 years of age or have never been married. This parental authority includes the authority to represent their underage child in carrying out legal acts both in court and outside the court, as regulated in Article 47 of the Marriage Law, although this parental authority is absolute, the authority in this article is intended as custody, but there are limits, namely that they may transfer the child's rights or pawn permanent property owned by their child who is under 18 years of age or has never been married, unless the child's interests require it.

The custody of one or both parents over their child is revoked for a certain period of time at the request of the other parent, the child's family in a direct line



to the child's adult siblings or an authorized official, based on a court decision in the event that the parents are proven to have seriously neglected their obligations to the child, the parents behaved very badly (Articles 48-49 of the Marriage Law). However, even though the custody of one of the parents is revoked, they are still obliged to provide for the maintenance of their child. Parents are obliged to care for and develop the assets of their children who are minors or under their care and are not permitted to transfer or mortgage the child's assets except for urgent needs if the child's interests require it or a reality cannot be avoided. Parents must also be responsible for losses arising from their mistakes and negligence in carrying out their obligations.

The judge must consider the child's preference regarding whether they wish to live with their mother or father. In making their decision, the judge refers to the applicable laws and regulations while also considering the factors outlined above. Additionally, the judge may explore and incorporate unwritten legal values that exist within the community to ensure that the decision aligns with both the law and the prevailing sense of justice in society. As explained earlier, the judge can grant child custody rights to the party with better personal qualities. If the custodian possesses good personal traits, it is expected that they will fulfill their obligations to meet the child's needs, both materially and immaterially. In the Medan Religious Court, child custody rights for minors are typically granted to the mother, unless it is proven in court that the mother has been neglectful, unable to provide adequate affection, has committed violence, or has abandoned the child. In such cases, custody may be transferred to the father based on the court's decision. This is to prevent potential harm to the child's moral development and to ensure their rights are safeguarded. Despite decisions made by the judge regarding custody, disputes over child custody rights remain common.

To address this issue, a new legal approach, although not yet implemented in the Medan Religious Court, involves promoting the concept of joint custody. In this arrangement, both parents share equal rights and responsibilities in making long-term decisions about the child's welfare, including matters such as education, health, and overall well-being. This approach ensures that both parents have an equal voice in decisions affecting the child's future²³ This joint custody of children can minimize conflicts over the struggle for children that arise due to parental divorce and reduce the traumatic effects on children. Without

²³ Prodjohamidjojo, Martiman. (2002). *Hukum Perkawinan Indonesia*. Jakarta: Indonesia Legal Center Publishing.



reducing the importance of a mother's presence, a child who is a victim of divorce needs to spend the same time with his father in order to receive affection from the father, this is very much needed in building a balanced psychological foundation for the child's development process. So in this case, both parents should exercise child custody together, but in this case it is better to do it when the child is no longer a toddler. Thus there will be no restrictions or one party preventing one of the other parties (parents) from meeting their child, and the fight for child custody which often occurs even ends in conflict, with this it is hoped that there will be no fight for child custody due to parental divorce.

CONCLUSION

The regulation of legal protection for children after divorce in the Medan City Religious Court is based on seven legal bases as rules in deciding child custody cases in the Medan City Religious Court, namely: the 1945 Constitution, Law No. 4 of 1979 concerning Child Welfare, Law No. 3 of 1997 concerning Juvenile Court, Law No. 39 of 1999 concerning Human Rights, Law No. 26 of 2000 concerning Human Rights Court, Law No. 23 of 2002 concerning Child Protection, Presidential Decree No. 36 of 1990 concerning Ratification of the Convention on the Rights of the Child. The application of the law on child custody after divorce in the Medan City Religious Court is in accordance with Law No. 23 of 2002 concerning child protection, although there are several obstacles and barriers. The solution to overcome all of this is the need for re-socialization of the application of Law No. 23 of 2002 concerning child protection in related parties, namely the community, government and state institutions, religious figures, health services, social services, education services. The judge's consideration in deciding child custody after divorce at the Medan City Religious Court is based on the principles of justice, legal certainty and a problematic, social, psychological approach in order to achieve a decision that satisfies both parties. The researcher hopes that the Medan City Religious Court can be consistent in regulating and implementing Law No. 23 of 2002 concerning child protection and considering decisions in handling cases of child custody after divorce. The researcher hopes that the community, government and state institutions, religious figures, health services, social services, education services can cooperate with the Medan City Religious Court in implementing Law No. 23 of 2002 concerning child protection. The researcher hopes that other researchers will further improve and develop other aspects that are deficiencies in this study.



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