

NON-LITIGATION MEDIATION IN THE RESOLUTION OF CHILD CUSTODY DISPUTES AFTER DIVORCE: AN ANALYSIS OF ISLAMIC LAW AND INDONESIAN POSITIVE LAW

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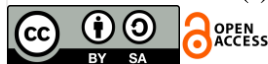
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Abstract : This study is based on the increasing number of child custody (hadhanah) disputes after divorce in Indonesia, which highlights the limitations of litigation-based dispute resolution, particularly in terms of time, cost, and the psychological impact on children. Therefore, there is a need for alternative dispute resolution mechanisms that are more oriented toward the best interests of the child. This study aims to analyze out-of-court child custody dispute resolution within the Indonesian legal system and to assess the effectiveness of non-litigation mediation based on the child's best interests through a case study of Non-Litigation Mediation Deed Number 078/AKTA-MED/LMKN-JKT/V/2024 issued by the Lembaga Mediasi Keluarga Nusantara (LMKN) Jakarta. The research method used is normative-empirical legal research with a statutory approach and case study analysis. The data are analyzed through the study of positive legal norms, legal doctrines, and the practice of child custody dispute resolution through non-litigation mediation. The findings show that the Indonesian legal system has provided a fairly comprehensive legal foundation for Alternative Dispute Resolution (ADR) mechanisms through Law No. 1 of 1974 on Marriage, the Compilation of Islamic Law (KHI), Law No. 35 of 2014 on Child Protection, and Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. There are five forms of ADR used in child custody disputes, namely negotiation, family mediation,

conciliation, customary deliberation, and institutional counseling. The LMKN case study demonstrates that a child-inclusive mediation model involving a psychologist co-mediator can produce more comprehensive agreements, including the application of joint legal custody with primary physical custody and a parenting schedule that is more adaptive to the child's needs. The findings also indicate that the joint legal custody model combined with primary physical custody can be integrated with the concept of *hadhanah* in Islamic law, particularly within the framework of *maqāsid al-sharī'ah* and the principle of child welfare (*maslahah al-walad*), and is therefore not contrary to Islamic law as long as it prioritizes the best interests of the child. This study concludes that child psychology-based non-litigation mediation is an effective dispute resolution model; however, it still faces challenges such as the absence of a specific family mediation regulation, low public literacy regarding ADR, and the limited number of certified mediators.

Abstrak : Penelitian ini berangkat dari meningkatnya sengketa hak asuh anak (*hadhanah*) pasca perceraian di Indonesia yang menunjukkan keterbatasan penyelesaian melalui jalur litigasi, baik dari segi waktu, biaya, maupun dampak psikologis terhadap anak. Oleh karena itu, diperlukan alternatif penyelesaian sengketa yang lebih berorientasi pada kepentingan terbaik anak. Penelitian ini bertujuan untuk menganalisis penyelesaian sengketa hak asuh anak di luar pengadilan dalam sistem hukum Indonesia serta menilai efektivitas penerapan mediasi nonlitigasi berbasis kepentingan anak melalui studi kasus Akta Mediasi Non Litigasi Nomor 078/AKTA-MED/LMKN-JKT/V/2024 yang dikeluarkan oleh Lembaga Mediasi Keluarga Nusantara (LMKN) Jakarta. Metode penelitian yang digunakan adalah hukum normatif-empiris dengan pendekatan peraturan perundang-undangan dan studi kasus. Data dianalisis melalui kajian norma hukum positif, doktrin hukum, serta praktik penyelesaian sengketa hak asuh anak melalui mediasi nonlitigasi. Hasil penelitian menunjukkan bahwa sistem hukum Indonesia telah menyediakan dasar yang cukup komprehensif bagi mekanisme Alternative Dispute Resolution (ADR) melalui Undang-Undang Nomor 1 Tahun 1974, Kompilasi Hukum Islam (KHI), Undang-Undang Nomor 35 Tahun 2014, dan Undang-Undang Nomor 30 Tahun 1999. Terdapat lima bentuk ADR yang digunakan dalam sengketa hak asuh anak, yaitu negosiasi, mediasi keluarga, konsiliasi, musyawarah adat, dan konseling lembaga. Studi kasus LMKN menunjukkan bahwa model *child inclusive mediation* dengan keterlibatan co-mediator psikolog mampu menghasilkan kesepakatan yang lebih komprehensif, termasuk penerapan *joint legal custody* dengan *primary physical custody* serta pengaturan *parenting schedule* yang lebih adaptif terhadap kebutuhan anak. Temuan penelitian juga menunjukkan bahwa model *joint legal custody* dengan *primary physical custody* dapat diintegrasikan dengan konsep *hadhanah* dalam hukum Islam, khususnya dalam kerangka *maqāsid al-syarī'ah* dan prinsip kemaslahatan anak (*mashlahah al-walad*), sehingga tidak bertentangan dengan hukum Islam selama mengutamakan kepentingan terbaik anak. Kesimpulan penelitian ini menegaskan bahwa mediasi nonlitigasi berbasis psikologi anak merupakan model penyelesaian sengketa yang efektif, namun masih menghadapi hambatan berupa kekosongan regulasi mediasi keluarga, rendahnya literasi ADR masyarakat, dan keterbatasan mediator bersertifikat.

INTRODUCTION

Marriage is a physical and spiritual bond between a man and a woman as husband and wife, aimed at forming a happy and eternal family based on belief in One Almighty God (Indonesia, 1974). Yet in social reality, not every marital bond can last a lifetime. Divorce has become an increasingly significant social phenomenon in Indonesia, with data from the Central Statistics Agency (Badan Pusat Statistik) recording more than 500,000 divorce cases occurring every year (Khairuddin, 2024).

Divorce not only ends the bond between husband and wife but also gives rise to broad legal consequences for the children born of that marriage. In Islamic law, the matter of child-rearing after divorce is known as *hadhanah*, which is regulated in detail in the Compilation of Islamic Law (KHI). Article 105 of the KHI stipulates that the care of a child who has not yet reached *mumayyiz* (the age of discernment) or is not yet twelve years old is the right of the mother, while a child who has reached *mumayyiz* is given the right to choose (Lestari et al., 2022).

From the perspective of Islamic law, the obligation to nurture and protect children has a strong basis in the Qur'an and Sunnah. Allah SWT says in QS. At-Tahrim [66]: 6:

يَا أَيُّهَا الَّذِينَ آمَنُوا قُوا أَنفُسَكُمْ وَأَهْلِيكُمْ نَارًا وَقُودُهَا النَّاسُ وَالْحِجَارَةُ...

“O you who believe! Protect yourselves and your families from a Fire whose fuel is people and stones...” (QS. At-Tahrim [66]: 6).

This verse points to parents' responsibility to nurture, educate, guide, and protect their children so that they attain safety and happiness in this world and the hereafter. In addition, Allah SWT also says in QS. Al-Baqarah [2]: 233:

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُنِمَّ الرِّضَاعَةَ ۗ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ...

“Mothers shall nurse their children for two whole years, for those who wish to complete the nursing period. And upon the father is their provision and clothing according to what is fair...” (QS. Al-Baqarah [2]: 233).

This verse affirms both parents' obligation to nurture, nurse, and fulfil their children's rights properly, according to their respective abilities. These provisions show that *hadhanah* is not merely a parental right but a religious (*shar'i*)

obligation intended to guarantee the child’s optimal growth and development and to protect the child’s best interests.

This foundation is reinforced by a hadith of the Prophet, narrated when a woman brought a dispute concerning custody of her child before him. The Prophet said:

The Prophet said:

أَنْتِ أَحَقُّ بِهِ مَا لَمْ تَنْكِحِي

“*You have more right to him [the child] as long as you have not remarried.*” (HR. Abu Dawud, no. 2276; Ahmad, no. 6707).

This hadith is narrated from Abdullah bin Amr bin Al-Ash, concerning a woman who complained to the Prophet that her former husband wanted to take her child, even though she was the one who had carried, given birth to, nursed, and cared for the child. The Prophet then ruled that the mother has greater right to the custody of her child as long as she has not remarried. This hadith is one of the principal bases in Islamic jurisprudence (*fiqh*) regarding the right of *hadhanah* — namely, that in principle the mother has a greater right to care for a child who still needs attention and affection, so long as there is no *shar’i* reason preventing it. Nevertheless, the child’s best interests remain the paramount consideration in every resolution of a custody dispute.

The litigation pathway that has long been society’s mainstay for resolving child custody disputes has various fundamental limitations. Its lengthy process, high cost, and confrontational nature actually risk increasing the child’s psychological suffering (Witma, 2021). Children caught up in prolonged conflict between their parents are highly vulnerable to psychological trauma and disruptions in emotional development (Muhammad, 2022).

As a state that has ratified the Convention on the Rights of the Child, Indonesia is bound by the international obligation to always prioritize the best interests of the child in every policy and action concerning children (Indonesia, 2002). This principle is affirmed in Article 3(1) of the CRC (Khofifah et al., 2026) and has been adopted into Law No. 35 of 2014 on Child Protection.

In line with that principle, Islamic law recognizes the concept of the child’s welfare (*maslahah al-thifl*), which places the child’s wellbeing, safety, education,

health, and physical and psychological development as the primary objective in decision-making. This concept aligns with *maqasid sharia*, particularly the objectives of protecting lineage/offspring (*hifz al-nasl*) and protecting life (*hifz al-nafs*), which emphasize the importance of protecting children's rights as part of the core objectives of Islamic law. Therefore, every resolution of a custody dispute should not be oriented solely toward parental rights, but should instead prioritize achieving the greatest welfare for the child.

Awareness of the limitations of litigation has driven the development of Alternative Dispute Resolution (ADR) mechanisms outside the courts. Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution provides the legal basis for negotiation, mediation, conciliation, and arbitration mechanisms as alternatives for dispute resolution (Indonesia, 1999). Out-of-court dispute resolution is believed to be more efficient in terms of time and cost, more flexible, better at preserving good relations between the parties, and — most importantly — friendlier toward the child's interests (Hadrian & Hakim, 2020).

In resolving family disputes, Islam also promotes the principle of *islah* (reconciliation) — that is, the effort to reconcile the parties through deliberation and a fair agreement. This principle aims to preserve family harmony and minimize the negative impact of conflict on children. Therefore, out-of-court dispute-resolution mechanisms such as mediation are, in essence, aligned with the values of Islamic law, because they prioritize dialogue, reconciliation, and the protection of the child's best interests.

This article comprehensively examines efforts to resolve child custody disputes out of court after divorce, enriching the normative analysis through a real case study of a Non-Litigation Mediation Deed issued by the Lembaga Mediasi Keluarga Nusantara (LMKN) Jakarta. Through a normative-empirical approach, this research is expected to make a meaningful contribution to the development of family law in Indonesia.

RESEARCH METHOD

This study uses the normative-empirical legal method, a method that combines the study of legal norms with an analysis of their implementation in practice within society. The normative approach is carried out through research on

statutory regulations, legal doctrine, jurisprudence, and Islamic legal provisions relating to child custody (*hadhanah*) after divorce (Muhaimin, 2020). Meanwhile, the empirical approach is carried out through a case-study analysis of Non-Litigation Mediation Deed Number 078/AKTA-MED/LMKN-JKT/V/2024 as primary data representing the practice of out-of-court resolution of child custody disputes in Indonesia (Arum & Hadi, 2021).

This study also uses a *maqasid sharia* approach to analyze the extent to which out-of-court child-custody dispute resolution mechanisms have reflected the objectives of the sharia, particularly in protecting lineage (*hifz al-nasl*), protecting life (*hifz al-nafs*), and realizing welfare (*maslahah*) for the child as the primary interest (Fachrurrazy & Siliwadi, 2024). In addition, a comparative-law approach is used to compare Islamic legal provisions on *hadhanah*, the Compilation of Islamic Law (KHI), Law No. 1 of 1974 on Marriage as amended by Law No. 16 of 2019, Law No. 35 of 2014 on Child Protection, and provisions on alternative dispute resolution in Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.

The analysis is carried out in several stages. First, an inventory of norms — identifying and collecting all legal provisions, sharia principles, and doctrines relating to the resolution of child custody disputes. Second, legal interpretation — interpreting these provisions grammatically, systematically, and teleologically to obtain a complete understanding of the regulation of child custody and its dispute resolution. Third, synchronization of Islamic law and positive law — analyzing the compatibility between the principles of *hadhanah* in Islamic law and national legal provisions, and assessing their implementation in non-litigation mediation practice based on the case study examined. The results of this analysis are used to assess the effectiveness of out-of-court resolution of child custody disputes in realizing the child's best interests, and to provide recommendations for the development of family law in Indonesia.

DISCUSSION/RESULTS AND DISCUSSION

LEGAL FRAMEWORK FOR OUT-OF-COURT RESOLUTION OF CHILD CUSTODY DISPUTES

A. The Marriage Law as the Primary Normative Foundation

Law No. 1 of 1974 on Marriage is the primary legal instrument regulating all aspects of marital life in Indonesia, including the legal consequences arising from the dissolution of marriage. Article 41 of this law expressly states that both mother and father remain obligated to care for and educate their children after divorce, based solely on the interests of the child (Indonesia, 1974). This provision affirms that parents' obligations toward their children are permanent and cannot be erased even by the event of divorce.

The implication of this provision is that in every process of resolving a child custody dispute — whether through the courts or outside them — the principle of safeguarding the child's interests must be the primary, non-negotiable frame. This law thus becomes a binding normative foundation, not only for judges in court, but also for mediators and parties who resolve disputes peacefully.

This principle is consistent with the views of Islamic jurisprudence (*fiqh*) scholars regarding *hadhanah*. According to Imam Syafi'i, custody of a child who cannot yet distinguish between right and wrong (*ghair mumayyiz*) fundamentally rests with the mother, because she is considered more capable of providing the affection, attention, and care the child needs during the growth period (Sukri, 2025). However, if the mother no longer meets the requirements to be a caregiver, or there are circumstances that could endanger the child, the right of *hadhanah* may shift to another party more capable of safeguarding the child's welfare.

A similar view is expressed by Wahbah Zuhaili, who explains that the primary purpose of *hadhanah* is to safeguard the child's safety, education, health, and overall development (Syahrin & Munir, 2025). Therefore, the determination of custody is not based solely on biological relationship or parental rights, but on who is most capable of realizing welfare (*maslahah*) for the child. Thus, the child's best interests become the primary consideration in determining the most suitable caregiver (Faizzati, 2024).

Sayyid Sabiq, in *Fiqh al-Sunnah*, likewise affirms that *hadhanah* is an obligation aimed at caring for a child who is not yet able to look after himself, protecting him from all forms of harm, and ensuring his education, health, and moral formation (Sirait, 2025). Therefore, a custody dispute should not be viewed as a contest for rights between father and mother, but as an effort to determine which party is most capable of meeting the child's needs and interests.

Meanwhile, Ibn Qudamah, in *Al-Mughni*, holds the view that the right of *hadhanah* is given to whichever party provides the most benefit to the child (Maulana, 2024). If circumstances arise that cause the caregiver to no longer be able to guarantee the child's safety, education, or welfare, a judge may transfer custody to another party who better meets the requirements, in order to safeguard the child's welfare.

This view is reinforced by Al-Kasani in *Bada'i' al-Shana'i'*, who affirms that the primary purpose of *hadhanah* is to protect the child from all forms of harm, whether physical or psychological (Grape et al., 2024). Therefore, all provisions concerning custody must be directed toward achieving optimal benefit for the child, not merely toward satisfying the parents' interests.

These scholarly views align with the legal maxim (*qaidah fihiyyah*):

بالمصلحة منوط الرعية على الإمام تصرف

"A leader's policy toward the people must be based on the public welfare."

This maxim carries the meaning that every decision made by a judge, mediator, or other authorized party in resolving a custody dispute must be oriented toward the welfare of the child, as the party most in need of protection. In the context of out-of-court dispute resolution, the parties' agreement must likewise reflect the child's best interests and must not sacrifice the child's rights (Tutty et al., 2026).

In addition, another relevant legal maxim applies:

درء المفسد مقدم على جلب المصالح

"Averting harm takes precedence over securing benefit."

This maxim affirms that in child custody disputes, the top priority is to protect the child from the negative impact of parental conflict, such as psychological pressure, emotional instability, or disruption of the child's growth

and development (Muchlis et al., 2025). Therefore, resolving disputes through mediation or other non-litigation mechanisms that can minimize conflict and preserve a good relationship between the two parents is, in essence, more aligned with the objectives of both Islamic law and Indonesian positive law, both of which prioritize the principle of the best interests of the child (Hoffman, 2011).

The implication of this provision is that in every process of resolving a child custody dispute, whether through the courts or outside them, the principle of safeguarding the child's interests must be the primary, non-negotiable frame (Atmadja & Budiarta, 2018). This law thus becomes a binding normative foundation, not only for judges in court, but also for mediators and parties resolving disputes peacefully.

Beyond its regulation under Indonesian positive law, the concept of child custody (*hadhanah*) also has a strong basis in Islamic law. Islamic jurisprudence scholars place the child's welfare as the primary objective in determining custody. Imam Syafi'i holds that a child who is not yet *mumayyiz* fundamentally belongs in the mother's care, because the mother is regarded as more capable of providing the affection, attention, and care needed during the child's early growth (Sukri, 2025). Nevertheless, this right can shift if the mother no longer meets the requirements to be a caregiver, or if there are conditions that could endanger the child's interests.

B. The Compilation of Islamic Law as Substantive Law

For Muslims, who make up the majority of Indonesia's population, the Compilation of Islamic Law (KHI) is the most specific source of substantive law governing child custody. Article 105 of the KHI stipulates that the care of a child who is not yet *mumayyiz* is the mother's right, while the care of a child who is already *mumayyiz* is left to the child's own choice. Article 156 of the KHI further regulates the order of persons entitled to *hadhanah* rights if the biological mother is unable to carry out her caregiving function (Muizzudin & Anwar, 2023).

These KHI provisions do not preclude the possibility of resolving *hadhanah* disputes through deliberation or mediation. Indeed, in the tradition of Islamic law, resolving disputes peacefully through the mechanism of *islah* is highly encouraged. The KHI serves as a normative guide that determines the boundaries

of a valid agreement, so that agreements reached out of court do not conflict with applicable legal provisions. In the LMKN case examined, the provision of Article 105 of the KHI became one of the grounds for the decision to designate the mother as the holder of primary physical custody of both children, who were still under twelve years of age.

C. The Child Protection Law

Law No. 23 of 2002 as amended by Law No. 35 of 2014 provides a comprehensive dimension of state protection for children's rights. Article 14 specifically regulates the child's right to be cared for by his or her own parents, unless there is a valid reason that such separation is in the child's best interests (Indonesia, 2002). This provision carries an important consequence: every agreement regulating child custody must be justifiable on the basis of the child's best interests, not merely on the basis of the parents' wishes or interests.

D. Law No. 30 of 1999 as the Basis for ADR

Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution is the general legal basis that provides recognition and regulation for out-of-court dispute-resolution mechanisms. Article 1(10) defines Alternative Dispute Resolution as an institution for resolving disputes through procedures agreed upon by the parties outside the court. Although this law was designed primarily for commercial disputes, its general principles concerning voluntariness, confidentiality, and the binding force of agreements can be applied by analogy in the context of child custody disputes (Indonesia, 1990).

E. Supreme Court Regulation No. 1 of 2016

Supreme Court Regulation (PERMA) No. 1 of 2016 on Mediation Procedure in Courts provides a detailed procedural framework for the conduct of mediation (Agung, 2016). Although it primarily regulates court-annexed mediation, the principles it contains provide valuable guidance for out-of-court mediation practice. Furthermore, this PERMA clearly recognizes the value of mediation as a legitimate dispute-resolution instrument acknowledged by the state, and regulates the mechanism for strengthening mediated agreements through a settlement deed (*akta perdamaian*) with executory force.

F. International Legal Instruments

The UN Convention on the Rights of the Child, ratified by Indonesia through Presidential Decree No. 36 of 1990, is the most important international legal instrument in the field of child protection. Article 3(1) of the CRC obliges all parties to make the best interests of the child a primary consideration in every action concerning children. This obligation binds not only government institutions but also mediation and family-counseling institutions that facilitate the resolution of child custody disputes.

ANALYSIS OF THE LMKN JAKARTA NON-LITIGATION MEDIATION CASE

A. Case Profile and Background

The parties' divorce obtained final and binding legal force on 18 March 2024, involving two children as the subjects of the dispute: Nayla Kusuma Sari (7 years old, Grade 1 elementary school) and Farhan Adi Kusuma (4 years old, senior kindergarten). The panel of judges did not definitively determine custody in the divorce ruling, but instead granted the parties a 90-day period to resolve the custody dispute through out-of-court mediation before returning to litigation.

The parties' initial positions were sharply opposed: the mother sought sole custody, on the grounds that she had been the primary caregiver during the marriage, while the father wanted joint custody with a 50:50 time split, based on his stronger financial capacity. This tension reflects the general pattern of child custody disputes, in which each party tends to emphasize their own strengths rather than focusing on the child's interests.

The resolution model reached by the parties through the *joint legal custody* mechanism shows a paradigm shift from a pattern of fighting over custody toward sharing caregiving responsibility based on the child's best interests. Under this model, both parents retain joint authority in making important decisions concerning the child's education, health, religion, and development, even though physical care may rest with one party based on the agreement.

From the perspective of Islamic law, this concept can be understood as a form of consultation (*syura*) between the two parents. Although classical *fiqh* mostly discusses which party is entitled to *hadhanah*, the basic principle of sharia

continues to encourage the resolution of family matters through deliberation and agreement, so long as the child's rights are not disregarded. Therefore, *joint legal custody* does not contradict the principles of Islamic law, so long as it is able to provide better protection for the child's interests.

Moreover, this mechanism can be seen as an implementation of the principle of welfare (*maslahah*). The determination of custody is no longer oriented solely toward one party "winning," but is directed toward ensuring that the child's physical, psychological, educational, and social needs are met on an ongoing basis. This approach aligns with the objectives of *maqasid sharia*, particularly in protecting lineage (*hifz al-nasl*) and protecting life (*hifz al-nafs*), so that dispute resolution is directed toward creating greater benefit and preventing the negative impact of parental conflict.

From the perspective of the development of Islamic family law, *joint legal custody* can also be seen as a form of contemporary *hadhanah*. Although the term is not explicitly known in classical *fiqh* literature, its substance remains consistent with the purpose of *hadhanah* — namely, guaranteeing the child's protection, education, and welfare. Thus, the division of caregiving authority between father and mother constitutes a form of legal *ijtihad* that adapts to the developing needs of modern society without disregarding the basic principles of sharia.

Similar practices have also developed in several countries that apply Islamic family law. In Malaysia, through the Sharia Court system, both parents are given room to continue to play a role in decisions concerning their children after divorce, although physical custody is generally granted to one party based on the child's best interests. In Egypt, provisions on *hadhanah* still favor the mother as caregiver up to a certain age, but the father retains responsibility for financial support and has the right to interact with, and participate in, important decisions concerning the child. Meanwhile, Morocco, through the 2004 reform of the *Mudawwanah*, places the child's best interests as the judge's primary consideration and provides broader scope for arranging custody based on each family's concrete circumstances.

This comparison shows that family law in Muslim-majority countries is developing toward a more collaborative model of parenting, without abandoning

the basic principles of *hadhanah*. Thus, the non-litigation mediation practice that produced the *joint legal custody* agreement, as reflected in the LMKN Jakarta Mediation Deed, can be seen as a form of family-law reform that remains aligned with Islamic legal values while also being consistent with the principle of the child's best interests under both national and international law.

B. Mediation Process and Stages

Session I – Opening Meeting (15 April 2024)

The lead mediator, Dr. H. Ahmad Fauzi Hakim, S.H., M.H., CMed., opened the session by introducing himself and explaining the mediator's role as a neutral facilitator. The mediator affirmed the principles of mediation: confidentiality, voluntariness, and the parties' own determination of the outcome. The parties signed a Mediation Consent Form and stated their willingness to proceed in good faith. The psychologist co-mediator, Rina Puspita Dewi, M.Psi., explained the importance of the "best interest of the child" approach as the primary compass for every decision.

Session II – Individual Caucuses & Psychological Assessment (22 April 2024)

The mediator held caucuses (separate meetings) with each party. The psychologist co-mediator conducted in-depth interviews to understand each parent's caregiving patterns, emotional closeness with the children, and home environment. A crucial finding: the mother had a more flexible work schedule (3 days in-office, 2 days working from home), while the father had a demanding work schedule but was supported by a spacious home and household caregiving staff. During the caucus, the father privately acknowledged that the children's emotional closeness with the mother was stronger, but still wanted to be actively involved in caregiving.

Session III – Child Observation & Parenting Plan Discussion (29 April 2024)

The psychologist co-mediator conducted separate play sessions with each of the two children, to observe their expressions and needs without directly interrogating them. The observation showed that both children had a good attachment to both parents and showed no signs of trauma or excessive anxiety. This approach is consistent with the child-inclusive mediation approach recognized under Article 12 of the CRC (Khofifah et al., 2026). The mediator

introduced the concept of “primary residence with generous visitation” as an alternative to both sole custody and a 50:50 split.

Session IV – Final Negotiation & Signing of the Deed (06 May 2024)

In the final session, the parties reached a comprehensive agreement on all points of the dispute. The mediator and co-mediator helped translate the agreement into a draft that was read and jointly approved, which was then set out in the official Mediation Deed. The entire process took place over 4 sessions across 21 days — far shorter than the average time to resolve a custody dispute through litigation, which can take months to years.

C. Analysis of the Content of the Mediation Agreement

The mediation agreement reached reflects a model of *joint legal custody* with *primary physical custody* awarded to the mother. The mother was designated as the holder of primary physical custody based on three considerations: the children’s very young age, their stronger emotional attachment to the mother, and the mother’s more flexible work schedule (Arum & Hadi, 2021). Meanwhile, important decisions concerning education, health, religion, and travel abroad must be made jointly through deliberation.

This agreement model is a far more progressive and child-oriented approach compared to an exclusive sole-custody model. The detailed visitation schedule (Arum & Hadi, 2021) ensures that the father continues to have a meaningful and ongoing relationship with his children — a concrete implementation of the principle of the child’s best interests in the dimension of the relationship with both parents.

Table 1. Summary of the LMKN Jakarta Mediation Agreement

Aspect	Content of the Agreement	Basis for the Decision
Physical Custody	Mother as holder of primary physical custody	Children’s age, emotional attachment, mother’s schedule flexibility
Legal Custody	Joint legal custody – important decisions made jointly	Education, health, religion, travel abroad

Aspect	Content of the Agreement	Basis for the Decision
Time with Father (Routine)	Wednesday evenings + even-numbered weekends	Preserving a meaningful father-child relationship
Holidays & Major Occasions	Alternating each year (odd/even)	Fairness and certainty for both parents
School Holidays	Split evenly 50:50 between both parents	Balance of quality time
Dispute Mechanism	Direct deliberation → LMKN re-mediation → Religious Court	Staged, prioritizing peaceful resolution

D. Innovative Aspects of the LMKN Case

This case has several innovative aspects worthy of being adopted as best practice for the development of family mediation in Indonesia. First, the involvement of a child psychologist as co-mediator brings a developmental-psychology perspective into the mediation process, ensuring that consideration of the child’s interests is not merely normative-legal in nature, but also evidence-based.

Second, the caucus approach (separate meetings) used in Session II provided a safe space for each party to express their real concerns, including the father’s spontaneous acknowledgment of the children’s emotional closeness with the mother, which later became a turning point in formulating the agreement. Third, observing the children through play sessions is a concrete implementation of the child-inclusive mediation approach, which respects the child’s right to be heard without placing pressure on them.

Fourth, the staged dispute-resolution mechanism set out in Article 9 of the Mediation Deed (Arum & Hadi, 2021) is an important institutional innovation. By establishing the sequence of direct deliberation → LMKN re-mediation → the court pathway, this agreement structurally encourages the parties to continue prioritizing a peaceful path even after the first agreement is reached.

LEGAL FORCE OF OUT-OF-COURT AGREEMENTS

A. Binding Force under the Law of Contract

An agreement on child custody reached out of court is fundamentally a contract subject to the law of contract as regulated in Book III of the Indonesian Civil Code (KUHPerdata). The principle of the binding force of contracts (*pacta sunt servanda*), affirmed in Article 1338(1) of the KUHPerdata, states that all agreements lawfully made are binding as law upon those who made them (Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek Voor Indonesie), 1847).

For an agreement to have valid legal force, it must satisfy the four conditions for a valid contract under Article 1320 of the KUHPerdata: (1) free consent, (2) legal capacity of the parties, (3) a specific object, and (4) a lawful cause (Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek Voor Indonesie), 1847). Article 11 of the LMKN Mediation Deed explicitly refers to Article 1338 of the KUHPerdata as the basis for the agreement's binding force, showing the parties' and mediator's awareness of the legal framework binding them (Arum & Hadi, 2021).

From the perspective of Islamic law, an out-of-court dispute-settlement agreement has a strong basis through the concept of the *sulh* contract (*ṣulḥ*) — a peace agreement voluntarily made by the parties to end a dispute. The *sulh* contract is a form of contract recognized in *fiqh muamalah* and carries binding force so long as it fulfills the pillars and conditions determined by sharia and does not conflict with Islamic legal provisions. Thus, an agreement on child custody reached through mediation is, in essence, a form of reconciliation contract that carries legal consequences for the parties.

This concept is closely related to the principle of *ishlah* — the effort to reconcile disputing parties through deliberation and an agreement oriented toward the creation of mutual welfare. The normative basis for this principle is found in QS. An-Nisa, verse 128, which affirms that reconciliation is the best path in resolving disputes. This verse shows that Islam grants legitimacy to peaceful dispute resolution, so long as it does not eliminate the rights of parties protected by sharia.

This principle is further reinforced by a hadith of the Prophet:

“Reconciliation may be made among Muslims, except a reconciliation that makes lawful what is forbidden or forbids what is lawful.” (HR. Abu Dawud, At-Tirmidzi, and Ibn Majah).

This hadith affirms that resolving disputes through reconciliation has valid standing in Islamic law, so long as the content of the agreement does not conflict with sharia provisions. Therefore, a mediation agreement concerning child custody derives legitimacy not only from contract law under the KUHPerdata, but also from the principles of Islamic law.

The validity of the *sulh* contract is also based on the principle of mutual consent (*an-taradhin*) — that is, the existence of consent arising from the free will of the parties, without coercion, mistake, or fraud. This principle aligns with the requirement of a valid contract under Article 1320 of the KUHPerdata concerning the parties’ consent. Thus, an agreement produced through the mediation process fundamentally reflects the parties’ free will, and therefore carries binding force under both positive law and Islamic law.

In the context of resolving child custody disputes, out-of-court mediation mechanisms are a concrete implementation of Islamic teachings that prioritize deliberation, reconciliation, and welfare. Dispute resolution through the *sulh* and *ishlah* contracts is not only aimed at ending the dispute between the parents, but also at ensuring that the resulting agreement continues to prioritize the protection of the child’s rights and best interests. Therefore, the binding force of a mediation agreement stems not only from the principle of *pacta sunt servanda*, but also derives legitimacy from Islamic legal principles that encourage the peaceful, fair, and welfare-oriented resolution of disputes.

B. Strengthening through a Court Settlement Deed

The strongest mechanism for giving an agreement legal force equal to a court ruling is to petition the court to strengthen the agreement in the form of a settlement deed (*akta perdamaian*). Under PERMA No. 1 of 2016 (Agung, 2016) and Article 6(7) of Law No. 30 of 1999 (Indonesia, 1999), an agreement that has been registered with the District Court/Religious Court has executory force equal to a final and binding court ruling.

Article 11 of the LMKN Mediation Deed expressly states that the parties agreed to register the deed with the East Jakarta Religious Court in order to obtain a ruling with executory force, in accordance with Article 36 of Law No. 30 of 1999 (Indonesia, 1999). This step is a best practice that should become the standard for all child custody mediations in Indonesia.

C. The Modifiable Nature of the Agreement

Unlike civil matters in general, an agreement on child custody is not absolute and is not unmodifiable forever. This is because a child is a developing subject, and their circumstances can change significantly over time. The doctrine of *rebus sic stantibus*, recognized in contract law, allows an agreement to be modified if a fundamental change of circumstances occurs. The periodic-review provision in Article 10 of the LMKN Mediation Deed is an appropriate implementation of this principle.

Table 2. Levels of Legal Force of Out-of-Court Agreements

Form of Agreement		Legal Force	Executory Force
Ordinary agreement	written	Binding under Article 1338 of the KUHPerdata	None; requires a new lawsuit
Notarial deed		Full evidentiary value (authentic deed)	None; requires a new lawsuit
Mediation Deed with Registration	+ with Religious Court	Binding as a valid contract	Yes; equal to a final, binding ruling
Settlement Deed (<i>Dading</i>)		Very strong; cannot be annulled on grounds of legal error	Yes; direct execution via the Religious Court

APPLICATION OF THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

A. Dimensions and Interpretation

The principle of the best interests of the child is a cornerstone of the entire modern child-protection system. This principle places the child's interests,

welfare, and development as the primary consideration in every policy or decision concerning children. From the perspective of Islamic law, this principle has substantial correspondence with the concept of *mashlahah al-walad* (the child's welfare) — that is, the effort to realize the greatest possible welfare for the child through protection of their rights, safety, education, health, and physical, mental, and spiritual development. Therefore, the determination of custody and the resolution of family disputes must not be based solely on parental interests, but must be directed toward fully meeting the child's welfare.

The concept of *mashlahah al-walad* is an implementation of *maqāṣid al-sharī'ah* — the core objectives of Islamic law in realizing benefit and preventing harm. In the context of child custody, *maqāṣid al-sharī'ah* is realized through the protection of life (*hifz al-nafs*), the protection of lineage (*hifz al-nasl*), the protection of intellect (*hifz al-'aql*) through proper education, and the protection of religion (*hifz al-din*) through moral and spiritual formation. Thus, the principle of the best interests of the child fundamentally has objectives aligned with Islamic law — namely, guaranteeing the child's optimal growth and development, and protecting them from various forms of harm that may arise from parental conflict or divorce.

This alignment is also reflected in national law. Law No. 35 of 2014 on Child Protection makes the child's best interests one of the fundamental principles in every aspect of child protection (Indonesia, 2024). This shows a harmonization between international law, national law, and Islamic law, all of which place children's welfare and protection as the primary objective in every decision concerning children.

Substantively, the principle of the best interests of the child covers four dimensions that must be considered holistically: (1) the physical and health dimension, covering the fulfillment of basic needs, care, and health protection; (2) the psychological and emotional dimension, relating to the child's sense of security, affection, and emotional stability; (3) the educational and potential-development dimension, guaranteeing the child's right to education and to develop their abilities according to their talents and interests; and (4) the social dimension, covering the maintenance of a meaningful relationship with both

parents, siblings, and extended family. These four dimensions serve as indicators for assessing whether a form of caregiving or a mediation agreement has truly realized *mashlahah al-walad* in line with the objectives of *maqāṣid al-sharī'ah*, while also fulfilling the principle of the best interests of the child.

B. Implementation in the LMKN Case

The LMKN case presents a comprehensive model for implementing the principle of the best interests of the child. First, the involvement of a child psychologist as co-mediator ensures that psychological considerations for the child become an integral part of the decision-making process, rather than a mere formal consideration. Observing the children through play sessions allows their needs to be assessed based on actual behavior, rather than solely on parents' statements, which are potentially biased.

Second, the agreed *joint legal custody* model is a real acknowledgment that the child's best interests include the right to have a meaningful relationship with both parents. Article 9 of the Convention on the Rights of the Child affirms the right of a child separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, unless this is contrary to the child's best interests.

Third, the provision in Article 6 of the Mediation Deed, which requires both parents not to place the child in an uncomfortable position by speaking negatively about the other parent in front of the child, is explicit protection for the child's psychological dimension. Developmental psychology research consistently shows that exposure to intense parental conflict is a significant risk factor for a child's psychological health.

Fourth, the provision on remote-communication rights in Article 8 of the Mediation Deed, which allows the parent who is not with the child to make video calls at reasonable times, is an adaptive response to the realities of modern, technology-based life, while also giving effect to the child's right to remain connected to both parents.

C. Determining Factors in Evaluating the Child's Interests

Supreme Court jurisprudence has developed a set of criteria for evaluating the best interests of the child in custody cases, relevant to the mediation context:

(a) the child's age and level of maturity; (b) the quality of the emotional relationship with each parent; (c) the stability of the environment that can be provided; (d) financial capacity and caregiving capacity; (e) the caregiving history during the marriage; (f) the presence or absence of a history of violence; and (g) the child's own wishes, if old enough. The LMKN case shows that all of these factors were systematically considered throughout the four mediation sessions conducted.

CONCLUSION

Based on the normative analysis and case study conducted, several main conclusions can be drawn. **First**, Indonesia's legal framework has, in principle, provided a fairly comprehensive foundation for the development of a system for the out-of-court resolution of child custody disputes. This is reflected in the provisions of Law No. 1 of 1974 on Marriage, the Compilation of Islamic Law (KHI), Law No. 35 of 2014 on Child Protection, Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, and PERMA No. 1 of 2016 on Mediation Procedure in Courts. Nevertheless, there remain significant regulatory gaps, particularly the absence of specific, comprehensive, standalone Family Mediation legislation.

Second, there are several forms of alternative dispute resolution (ADR) that can be used in child custody disputes, namely direct negotiation, family mediation, conciliation, customary deliberation, and institutional counseling. Each mechanism has different characteristics and levels of effectiveness, so the choice of resolution method must be adapted to the psychological, social, and relational condition of the parties, while continuing to prioritize the child's best interests.

Third, the case study of non-litigation mediation at LMKN Jakarta shows that a child-psychology-based mediation model with the involvement of a psychologist co-mediator can produce agreements that are more comprehensive, sustainable, and oriented toward the child's best interests, compared to a conventional mediation model. Therefore, this model has the potential to be developed as a standard for resolving child custody disputes in Indonesia.

Fourth, the legal force of agreements arising from out-of-court mediation processes is tiered — ranging from a civil contract based on Article 1338 of the

KUHPerdata, to a notarial deed, up to a settlement deed with executory force if registered and ratified in court. Registering the agreement with the court is therefore an important step to obtain legal certainty and ensure the effectiveness of its implementation.

Fifth, implementing the principle of the best interests of the child in resolving custody disputes requires a multidisciplinary approach that integrates legal, child developmental-psychology, and family-counseling aspects. The LMKN Jakarta case study shows that such integration is not only practically feasible, but also produces agreements that are fairer and more oriented toward the child's welfare.

Sixth, the findings of this study have implications for the reform of Islamic family law in Indonesia, particularly in developing the concept of *contemporary hadhanah* that is more adaptive to the needs of modern society. A mediation model based on the child's welfare can become a form of institutional *ijtihad* in expanding the implementation of the principle of *maqāṣid al-sharī'ah* in family law.

Seventh, this study recommends the need to establish specific regulation in the form of a National Family Mediation Law that comprehensively regulates the mechanism for resolving family disputes out of court, including mediation standards, the involvement of psychology experts, and protection of the child's best interests as a primary principle.

Eighth, there is a need to strengthen the integration between Islamic law and modern mediation practice through the development of a family-mediation model based on *maqāṣid al-sharī'ah*, so that dispute resolution is not only valid under positive law, but also has normative legitimacy from the perspective of Islamic law, and is able to holistically address the need for child protection.

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