

## LEGAL CERTAINTY FOR THE REMOVAL OF CHILD CUSTODY DUE TO NEGLIGENCE OF BIOLOGICAL PARENTS

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### **Abstract**

*Unitary Republic of Indonesia in ensuring the welfare of every citizen one of which is to provide protection of children's rights, which is one of human rights. The Indonesian government in its efforts to ensure in realizing the protection and welfare of children is through the promulgation of Law No. 35 of 2014 on Protection of Children. The protection of children as defined in Article 1 paragraph 2 of the Act are all activities to ensure also protect children and their rights in order to live, grow, develop and participate optimally in accordance with human dignity, as well as protection from violence and discrimination. This study uses normative juridical approach, namely by reviewing or analyzing secondary data in the form of secondary legal materials to understand the law as a set of rules or norms of positive law within the system. This is what the writer would do the assessment, considering the fact that there are many cases legal protection of children certainly concern us all, especially neglect of the child by his biological parents.*

**Keywords:** *Protection of children, neglect (negligence) of parents, the revocation of custody of children*

### **Abstrak**

Negara Kesatuan Republik Indonesia dalam menjamin kesejahteraan pada setiap warga negaranya salah satunya adalah dengan memberikan perlindungan terhadap hak anak yang merupakan salah satu dari hak asasi manusia. Pemerintah Indonesia dalam usahanya untuk menjamin dalam mewujudkan perlindungan dan kesejahteraan anak adalah melalui pembentukan Undang-Undang Nomor 35 Tahun 2014 tentang Perlindungan Anak. Perlindungan anak sebagaimana dimaksud dalam Pasal 1 angka 2 Undang-Undang tersebut adalah segala kegiatan untuk menjamin juga melindungi anak dan hak-haknya agar dapat hidup, tumbuh, berkembang, dan berpartisipasi secara optimal sesuai dengan harkat dan martabat kemanusiaan, serta mendapat perlindungan dari kekerasan dan diskriminasi. Penelitian ini menggunakan pendekatan Yuridis Normatif, yaitu dengan mengkaji atau menganalisa data sekunder yang berupa bahan-bahan hukum sekunder dengan memahami hukum sebagai perangkat peraturan atau norma-norma positif didalam sistem perundang-undangan. Hal inilah yang oleh penulis hendak melakukan pengkajian, mengingat dari fakta hukum yang ada banyak kasus perlindungan anak tentu saja memprihatinkan kita semua terutama penelantaran anak oleh orangtua kandungannya.

**Kata kunci:** *Perlindungan anak, pengabaian (kelalaian) orang tua, pencabutan hak asuh anak*

### **Introduction**

The son is the mandate and the gift of God that is within her inherent dignity and dignity as a whole person. The son is a budding, young generation, and the potential successor to the ideals of the struggle of peoples, has a strategic role and has special characteristics that guarantee the continuity of the existence of the nation and the country in the future. The provisions of article 28B of

paragraph (2) of the Constitution of the Republic of Indonesia mentioned that every child has the right to survival, grow and develop as well as the right to protection from violence and discrimination. Growth and development of children is very determined by the environment around the child. The closest environment to the child is the family consisting of father and mother who are often

known as parents (Nggeboe, F., & Hariss, A, 2017).

Child protection as a limit laid out in the sense of article 1 point 2 of the Act on the protection of Children can be realized if the support and the responsibilities of various parties. Support is needed in order to realize the protection of children's rights in Indonesia is regulated in the provisions of chapter IV of the Act on the protection of children. Article 20 the statute mentions that the State, Government, communities, families, and the parents liable and responsible for the Organization of child protection. In some current news we see parents who must care for his children, even inversely proportional, deliberately neglect their kids. This is a portrait image of Housing occurred in the Grand Cibubur, clusters of Nusa Dua, block E, in which married couples i.e. UtomoPurnomo and Sari Nurindria, dares to neglect five children of those who are still small. The incident makes the neighbors feel iba against fifth son and often also warn parents the child so that it does not happen again, but still just a fifth of their child neglect case.

The first cases of child protection is of course concern us all. The family as an institution within the child protection turns out to be not fully able to exercise his role well. Divorce cases, disharmoni families, poor families, the father or mother's behavior was wrong, the marriage of sirri, drugs and other issues became one of the triggers of terabaikannya rights of the child within the family, the issue is how the perfektif of the child protection law against the revocation of custody of the child due to the negligence of parents? Based on the above reasoning framework dikaitan the author is interested to do the research and write it with the title of legal certainty against the revocation of custody of the child due to the negligence of parents siblings.

### **The Method of Approach**

This research uses the normative Juridical approach, i.e. with the review or analyze secondary data in the form of secondary legal materials with understanding the law as a regulatory device or positive norms within the system of legislation governing

human life. So this research is understood as research librarianship, namely research on secondary data.

### **The Data Source**

This research includes the normative legal research, then the data types used are secondary data. Secondary data, namely data obtained from research libraries, books or literature, as well as the applicable legislation and issues relating to, among other things;

- a. The primary Legal Materials, namely a binding legal materials: namely in the form of legislation, government regulations or ministerial regulation consisting of:
  - 1) Of the Constitution of the Republic of Indonesia.
  - 2) Act No. 35 by 2014 on changes in Act No. 23 of 2002 on child protection.
- b. Secondary Legal Material, i.e. material that gives a description of the primary legal materials; that is the form of the internet, theory and literature related to the issue.
- c. Legal Materials tertiary, i.e. that gives a description of the primary law materials nor secondary law materials include: encyclopedia of Indonesia, Indonesian Language Dictionary, legal dictionary, English-United Kingdom, and various problems as well as law journal.

### **Methods of Data Collection**

In accordance with the secondary use of data in research, data collection is done by collecting, reviewing and processing library materials systematically as well as related documents. Secondary data either legal materials pertaining to primary, secondary and tertiary alcohols obtained from material, having regard to the principle of pustaka update and relevance.

Next in this research librarianship, principles, conception-conception, the views, the doctrines of the law and the rule of law content retrieved through two main references are:

- a. Public Nature, consisting of books, texts, encyclopedias;
- b. Special, consisting of reports of research results, the magazine or journal

Given this research focuses on secondary data, then data collection is a research library and study the documents.

### **The Method of Data Analysis**

The data analyzed in the normative-qualitative with road construction and interpret the statements contained in the documents and legislation. Normative because this research starting from dotted regulations that exist as norms of positive law. While the qualitative means of data analysis in the business decline dotted the discovery of principles and new information.

### **Discussion**

Unitary State of the Republic of Indonesia in ensuring the well-being of its citizens on each one of them is to provide protection for the rights of the child which is one of human rights. The Government of Indonesia in its efforts to ensure and realize the protection and child welfare is through the formation of Act No. 35-year 2014 on changes in Act No. 23 of 2002 on child protection. Protection of the Child as stipulated in article 1 point 2 of the Act is the *"child protection is all activities to ensure and protect children and their rights in order to live, grow, evolve, and participate optimally in accordance with the dignity and the dignity of humanity, as well as the protection from violence and discrimination"*.

In the Convention on the rights of the child adopted by the UN General Assembly on 20 November 1989, in article 27 paragraph 2: *"Parents or those responsible for child bear the primary responsibility to secure, within the limits of its capabilities and their finances, the living conditions necessary for the development of the child"*.

Basically each parent shall be obliged to keep her children. The maintenance of the child covers everything from food, shelter, education, daily living needs, even up to the psychological development of the child. So that a child can grow and develop to the maximum, in addition to must have a good maintenance, also need to be in a good environment. In the event of the occurrence of a divorce between the parents, a child must also requested his opinion, as set forth in article 10 of the Act Number 35 by 2014 on the protection of the child which States: *"every child has the right to be heard and expressed*

*his opinion, receive, search for, and provide information in accordance with the level of intelligence and age for the sake of developing itself in accordance with the values of decency and propriety"*.

From it, the child protection can be done directly or indirectly. Directly the meaning its activities directly addressed to the child who was subjected to a direct infringement. Activities such as this can be by way of protecting children from a range of threats from outside and in like educating, fostering, accompany the children in various ways. Child protection indirectly, namely activities not directly addressed to children, but other people are doing or involved in child protection efforts.

All parents surely once upon a time feel angry towards her son. Addressing the child's behavior is indeed not easy. Just by saying "no" is not necessarily the only can stifle the obnoxious attitude. In the face of the attitude and behaviour of the troublesome children many parents are out of control so as to say or do something that endangers the child so that they later regret. If this situation often recurs, it is said as the torture of children, both physically and mentally.

Neglect of children classified as torture as with the waiver, children do not get their rights, whether it's right to be loved, to live, to grow, to get an education and schools, a sense of security, health, protection, have the future, etc. Let and or encourage children to consume liquor, drugs (illegal drugs), smoking as well as any that are harmful to children's health already belongs to the Act of abandonment. We cannot understate the impact of waiver than violence because both have the potential of damaging and endangering the survival of the child.

A waiver can be interpreted as the absence of attention to good social, emotional and physical, that should have already received by the child. The psychiatrist who gathered in the set of Preventive Community Violence On children in the United Kingdom (1999) argues, that waiver is also the attitude of children against torture but more passive. The effects of torture or negligence against the equally bring bad consequences.

## **Factors Cause Neglect of Child**

Why is until there is an old man who dares to torture or ignoring his son? According to the logic of the laity and supported by the opinion of some experts, parents who do that certainly had the background reason, historical or potentially trigger violence not only against children, may also be against the couple. Let's see the following, namely:

### 1. Unhealthy parenting

A very authoritarian parents, do not provide opportunities for expression, his son often parents enforce the will of the child regardless of the compatibility with the situation, needs and character of the child. The attitude of imposing a pattern of habits, rituals and regulations without giving room for newness and flexibility can trigger a tension between the parents with the child.

### 2. The immature Characters

Many of the perpetrators of this violent act is the older people who make-kanakkan. Despite its age old but a mindset, attitude, action still like kids, such as impulsive, reactive, emotional, tantrum, etc. A teenager (even people who are already old enough), potentially having problems like this when bringing up his son if he still want to be the center of attention.

### 3. Emotional Problems

Prolonged unresolved problem can cause stress to go beyond the threshold of mental resilience of parents that triggers both actions of violence or neglect. Moreover, if the threshold of mental resilience of parents, then easily once the emotions parents not awake until they lose self-control.

### 4. The use of illegal drugs

Alcoholis families tend to be more volatile and unpredictable behavior. All the rules of the game may change at any time, and often easy to renege on the promises that have been made. Similarly with parenting parents towards the child. Parenting that is applied is often fickle inconsistently; and there is no room for any family to express her feelings are what they are because of the many restrictions and ban to discuss the "ugliness" of the family.

The other members often demanded keep the secret so that no one knows. This

situation is of course creating a feeling depressed, frustrated, angry, uncomfortable and unease in the hearts of his children. Children often think that they have done something to cause confusion elderly people have bad habits. As a result, a sense of disbelief, difficulty expressing emotions appropriately, as well as the difficulties of social relations closely and true, be a problem borne until adulthood. According to the research of some experts, the children of these families are more at risk of developing a habit of alcoholism in adulthood than children who did not come from a family of alcoholis.

### 5. Psychiatric Problem parents

Psychiatric problems who came upon one of the parents is certainly brought impact to the growth and development of the souls of his sons. Not only that, the psychiatric problems of parents certainly affected the patterns of interaction and communication that are interwoven within the family. In systems theory, if one family member is experiencing problems, the psychological affects other family members and cause changes in various facets of family life.

Disorders of the soul that parents are much less aggressive often bring an atmosphere of terror in the life of the child, especially if the cruelty or violence occurs in random and unpredictable appearances. As a result of course is difficult for a child to be developing the confidence and belief on others because they are difficult to find an environment that provides a sense of security.

### 6. Marital problems

One of the greatest joys in life is to feel the warm relations and full of affection from people who loved. But not forever everyone can feel it, especially if they are in families that are experiencing strange issues not only affect family harmony, but his influence to the emotional life of its members.

As a result, each family member feel the increasing burden of mental or emotional distress that continuously grow from day to day. This mental burden will be more severe if the atmosphere in the family seemed threatening, as in the grave, no one dare suggests the emotions and the mind, and

there is no discretion to act. There is no atmosphere of openness this will only increase the tension of each family member.

The experts who adhere to understand systems theory holds, that actually, if people see a child who seems troubled, whether it's a matter of adaptability, learning problems or other issues, actually to look for to know the source of the cause is not in the child, but rather on the elderly and interactions that occur within that family. Because, the troubled children is actually a sign of the existence of irregularities in the relationship of the family itself. So, the problems shown by children represent the dysfunction that occurs in the lives of his family.

#### 7. Other personal Problems

This day and age many of the problems can be used as an excuse the actions of the emotional and irrational person, like the economic crisis, the debt incurred, prices of goods go up, rents go up, while the price yourself down because it doesn't have a job and an income. But once again, the ability of the parents to find a way out of the right and healthy, depends on internal factors, such as creativity, mental endurance and fighting power, motivation, self-control, and several other factors.

At this present time, torture and neglect against children occurs not only at home, but can also occur in schools and in organizations. Suicides and murders and torture that occurred in the school environment have become evidence that violent acts against anyone weaker party, already widely recognized. It is time everyone looking forward, what the long-term impact of torture and neglect against children so as not to undermine any incident.

The power of parents against children is based on Article 45 Paragraph (1) of Law No. 1 of 1974 concerning Marriage, which provides an obligation for parents in exercising their power to nurture and educate their children properly, where such obligations will not ends by the breakup of marriage by both parents and will continue until the adult child and able to stand alone. Furthermore, pursuant to Article 47 of Law No. 1 of 1974 concerning Marriage confirms that parents represent the interests of the child concerning legal acts both inside and

outside the court, where such power will continue until the child is 18 years old or has grown (Dongoran, 2017).

If viewed from the glasses of the law, then they obviously can incur criminal provisions of Act No. 35-year 2014 about child protection, Chapter XII, section 77B which reads: every person who contravenes the provisions as referred to in article 76B, are convicted with imprisonment not more than 5 (five) years and/or a fine.

But it is not just that alone makes us concerned, how does such a case, the problem of child neglect is closely related to poverty. If dealing with poverty then this issue became such a vicious circle. Poverty not only in terms of the material but moral degradation and poverty than adults who should have been able to carry the responsibility as a parent. May is also the result of one's unpreparedness to become adult parents.

Embodiments in obtaining security are guaranteed against children, Legal policies are carried out by the Government's laws aimed at providing legal protection. The regulations referred to are the Criminal Code (KUHP), Law No. 4 of 1979 on Child Welfare, Law No. 39 on Human Rights, Law No. 23 of 2004 on the Elimination of Domestic Violence, Law Number 35 of 2014 on Amendment to Law No. 23 of 2002 on Child Protection.

Legal Protection Against Children Victims of Abandonment By Parents in the Criminal Code, there are five Articles, namely articles 304, 305, 306, 307, 309. the position of the child in criminal law has been explained Criminal Code is placed in the sense of an immature child, special rights and need to be protected under applicable law (Nggeboe, F., & Hariss, A, 2017).

Then in the case of the revocation of custody of the child, due to the negligence of parents in described as set forth in article 30 of Act No. 35-year 2014 about child protection, which reads:

"(1) In the case of parents as stipulated in article 26, for neglecting its obligations, it can be done the Act or power of supervision of foster parents can be revoked."

"(2) The supervisory Action against parents or revocation power of foster care as referred to in subsection (1) is

done through the determination of the Court"

In addition, in article 31 paragraph (1) of the child protection Act also States: "*one of the parents, sibling, or family up to the third degree, can apply to the Court to obtain a determination of the Court about the lifting power of the foster parent or the supervisory action if there is a strong reason for it*"

Therefore, on article 14 of Act No. 35-year 2014 on the protection of the child, which States:

- (1) Every child has the right to be raised by his parents own, unless there is a reason and/or rules of law legal separation shows that it is in the best interests of the child and was the last consideration.
- (2) in the event of separation as referred to in paragraph (1), the child still has the right to:
  - a. meet directly and personally in touch regularly with both parents;
  - b. get the care, maintenance, education and protection for the process of growing flowers from his parents in accordance with their abilities, talents, and his interest;
  - c. obtaining financing life from both parents; and
  - d. obtain the child more.

In his explanation confirmed that, "Separation referred to in this provision did not remove the relationship of the child with parents". So, even though there is already a provision of the law that States one of the parents as a holder of the "power of the foster child", still no reason for banning other parents met with his son.

Due to the Deprivation of Parent Power, that is, in principle it can be stated that by the parent's removal from one parent the parent's authority does not end, but by law (Van Rechtswege) is done by another parent, if the parent others do not lose the power of their parents (revoked or released). Concretely, if the parent's power over a father is deprived then the one who exercises the power of the parents is the mother, provided that the father and the child in question must be in one house. Obligations of Parents who are deprived of their Parent's Power in Relation to the Giving and Livelihood of their Children, the Parent is still obliged to provide his assistance in the provision of livelihood and the giving of life to

his children, even though his master's power has been revoked. The grant shall be granted on a weekly or monthly or quarterly basis to the designated and / or determined Guardian of the Court, at the amount determined by the Religious Courts. The Reimbursement of Parental Power can be made by requesting the reinstatement of the parent's power through the Religious Courts. Deprivation of parental power results in the loss of the right to enjoy the outcome and the power and power of the child (Dongoran, H. P., 2017).

## Conclusion

Revocation of custody due to the negligence of parents can be done based on article 30 of Act No. 35-year 2014 about child protection, as mentioned in paragraph (1) and (2) that is done through the determination of the Court. Although there is already provision for the removal of custody due to negligence of the parents then under article 14 of Act No. 35-year 2014 about child protection, although there's been a decision from the Court, still there is no reason to ban parents met with his children.

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