

## Material Rights of Children in Guardianship Maqashid al Sharia Perspective

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**Abstract:** The material rights of children in the ruling of religious court judges are a very important issue to be studied in relation to the protection of children's rights in guardianship. This study, not only to explaining the protection of children's material rights but also analyzes the paradigm of determining children's material rights in guardianship in the Religious Court, and analyzes the urgency of children's material rights in the determination of guardianship from the perspective of maqashid al sharia. Employing a qualitative descriptive approach, the study gathered data by reading the judge's decision on guardianship and literature study. Data analysis was conducted by describing and interpreting the data inductively to reach a conclusion. The findings in this study reveals that the protection of children's rights in guardianship has been contained in positive law in Indonesia, but so far the ruling of the religious court judge on guardianship often do not explicitly accommodate the material rights of children clearly, so there is no protection of children's material rights in the judge's decision, while children's material rights are something that is very urgent to protect in the perspective of maqashid al Sharia at the level of maqashid al-daruriyyat in terms of safeguarding assets (hifz al-maal). The paradigm for determining the material rights of children in guardianship within religious courts is also included in the maqashid al hajiyyat group.

## Introduction

The application for establishing guardianship of children in religious courts is still an interesting phenomenon to study, especially in relation to the protection of children's rights in guardianship. The purpose of submitting a guardianship application to the religious court is mostly to manage the child's property, both movable and immovable property (Rustam and Mustofa, 2021). Over the last 3 (three) years from 2019-2021, the number of guardianship cases in religious courts has increased significantly. In 2019, 3459 guardianship cases were registered in 332 courts of first instance (D. B. Mahkamah Agung, 2019), in 2020 there were 4602 cases (Direktorat Jenderal Badan Peradilan Agama, 2021) and in 2021 there were 7011 cases (D. B. P. A. Mahkamah Agung, 2021).

Ensuring children's rights in guardianship need to be considered by judges when determining guardianship issues for children. The determination of guardianship applications plays a very important role in protecting children's rights. The 1945 Constitution of the Republic of Indonesia Article 28B paragraph (2) states that every child has the right to

survival, growth, and development and the right to protection from violence and discrimination. Legal protection of children is also contained in the 1989 Convention on the Rights of the Child and has been ratified by the Government of the Republic of Indonesia in Presidential Decree No. 36 of 1990 on the Ratification of the Convention on the Rights of the Child. Protection of children is also regulated in Law of the Republic of Indonesia Number 17 of 2016 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law. Each country has its own policy regarding guardianship, but the purpose of the policy is the same, safeguarding children's rights (Killos et al., 2018; McGaw et al., 2022; Parolini et al., 2018)

Currently, the determination of guardianship applications in religious courts is only limited to determining the name of the guardian who will take care of the child, there is no assertion regarding the material rights of the child contained in the determination of the guardianship application. Therefore, studies related to the determination of children's material rights in the determination of guardianship cases in religious courts in the perspective of maqashid al Sharia are important to do so that there is legal certainty and justice for the material rights of children in the determination of guardianship.

The study of guardianship has been widely studied by several previous authors. Among them, research conducted by Firman Wahyudi (Wahyudi, 2020) about "Application of Prudential Principles in Child Guardianship Cases", which explains that if the guardianship power intersects with banking practices and the transfer of land rights, the bank and PPAT/Notary require a guardianship determination from the court. This aims to provide legal certainty and the application of prudential principles in the field of civil law. Yulita Dwi Pratiwi (Pratiwi, 2019) wrote "Harmonizing the Protection of Children's Property in Guardianship through Strengthening the Role of Supervisory Guardians". Yulita explained that the role of the supervisory guardian is very important to protect the child's property as regulated in the Civil Code. Taufik H. Simatupang (Simatupang, 2020) examines "Disharmony of Legislation in the field of Guardianship Supervision in Indonesia", the results of the study explain that the marriage law has not regulated strictly on guardianship supervision. Therefore, it is necessary to reform the marriage law regarding guardianship supervision which is adjusted to the contemporary needs.

This study is intended to complement previous research, by examining the material rights of children in guardianship from the perspective of maqashid al shari'ah. The establishment of guardianship for children in religious courts is to provide legal certainty regarding who is entitled and responsible for maintaining and managing children who are not yet adults. Additionally, the determination of guardianship applications must also provide protection for the interests and rights of children. Thus, this study aims to answer the questions (a) How is the protection of children's rights in guardianship law in Indonesia? (b) How is the paradigm of children's material rights in the determination of guardianship in religious courts? and

(c) How is the determination of children's material rights in guardianship in religious courts from the perspective of maqashid al sharia?

### **Research Method**

This research employs a library-based qualitative descriptive approach. The data used is qualitative data, while the data source is secondary data. Secondary data sources are data sources obtained from books, articles, journals, reading several judge's decisions regarding guardianship and searching data via the internet whose discussion material is in accordance with the issues of this research.

The number of judge's decisions regarding guardianship studied in this research was determined to be five decisions. This guardianship determination comes from the West Jakarta Religious Court, Sumedang Religious Court, and Malang Regency Religious Court. The primary legal materials analyzed include the Civil Code, the Marriage Law, the Compilation of Islamic Law (KHI), and the Child Protection Law.

The data collection technique is using documentation techniques and literature study. Next, data reduction is carried out on the data that has been collected, then studied from the perspective of maqashid Syariah. Data analysis involves inductive description and interpretation to derive conclusions.

### **Result and Discussion**

#### **Protection of Children's Rights in Indonesian Guardianship Law**

Children are an essential part of human survival and the sustainability of a nation and state. In order to be able to be responsible for the sustainability of the nation and state, every child needs to have the widest possible opportunity to grow and develop optimally, both physically, mentally and socially. Therefore, it is important to implement good parenting patterns for children. Getting a good parenting style is a child's right (AB et al., 2024). The quality of Indonesian children greatly determines the existence and ability of the Indonesian nation to compete with other countries (Amberi, 2023). For this reason, protection efforts need to be made to realize the welfare of children by providing guarantees for the fulfillment of their rights without discriminatory treatment. (Child Protection Act No. 35 of 2014, 2014)

According to Law Number 23 of 2002 concerning Child Protection, as amended by Law Number 35 of 2014 (hereinafter referred to as the Child Protection Law), in principle, child protection activities are carried out based on Pancasila and the 1945 Constitution as well as the basic principles of the Convention on the Rights of the Child which include: 1. non-discrimination; 2. the best interests of the child; 3. the right to life, survival, and development; and 4. respect for the opinion of the child. The purpose of child protection is to ensure the fulfillment of children's rights, so that they can live, grow, develop and participate optimally in accordance with human nature and dignity, and

receive protection from violence and discrimination for the realization of quality, noble and prosperous Indonesian children.

Child protection activities have legal consequences, both in relation to written and unwritten law. The law provides a framework for child protection activities. Arif Gosita (Gosita, 1989) argues that legal certainty needs to be sought for the continuity of child protection activities and to prevent fraud that brings unwanted negative consequences in child protection activities. The nature of child protection can be divided into two parts, namely:

1. Juridical child protection, including: protection in the field of public law and in the field of civil law;
2. Non-juridical child protection, including: protection in the social, health and education fields (Said, 2018).

One aspect of child protection in the field of civil rights is the issue of guardianship. Guardianship in the definition of Indonesian Law is the authority given to a person to perform a legal act as a representative for the benefit and on behalf of a child who does not have both parents, or both parents or living parents are not capable of performing legal acts. (Mardani, 2017) Or it can also be interpreted as a legal protection given to a child who is not an adult or has never married who is not under the authority of his parents. (Pratiwi, 2019)

The issue of guardianship in Indonesian law is contained in several laws and regulations as follows:

1. Guardianship in the Civil Code.

Guardianship (*voogdij*) as defined by Subekti as the supervision of a minor child, who is not under the control of the parents and the management of the child's property or assets is regulated by law. What is meant by children in these provisions are those who are not yet adults. Article 330 of the Civil Code defines minors as "those who have not reached the age of twenty-one years, and have not previously been married". The categories of children that fall under the scope of guardianship are:

- a. A legitimate child whose parents have been deprived of their parental authority;
- b. A legitimate child whose parents are divorced;
- c. Children born outside of marriage (*natuurlijkkind*).

The scope of guardianship based on Article 383 Paragraph (1) of the Civil Code includes organizing the maintenance and education of children in accordance with their wealth and can represent in all actions on behalf of children. The Civil Code also acknowledges several kinds of guardians, namely:

- a. Guardians appointed by parents while they are still alive (through a will), as stated in Article 355 Paragraph (1) of the Civil Code;
- b. Guardian according to the law. The parent who has lived the longest will become the guardian, based on Article 345 of the Civil Code;
- c. Guardian designated by the judge. The parents die so that the guardian is appointed by the judge, based on Article 359 of the Civil Code.

Guardianship commences varies depending on the type of guardian. If the guardian is appointed based on the parent's will, the guardianship begins at the time of the parent's death and after the guardian has accepted the appointment. The appointed guardian, except for legal entities, must take an oath before the BHP, as stipulated in Article 362 of the Civil Code. If the guardian is appointed according to the law, the guardianship starts from the occurrence of the event that gives rise to the guardianship, for example the death of one of the parents. Whereas a guardian is appointed by a judge, the guardianship begins at the time of appointment if he or she is present at the appointment.

The obligations of guardians according to the KUHPdt (Heriyani & Yuniarlin, 2015) are:

- a. As soon as the guardianship begins, it is obligatory to notify the BHP of the occurrence of guardianship (Article 368 KUHPdt).
- b. Must take care of the property of the minor child as a good father and be responsible for costs, losses and interest that are expected to arise due to poor management (Article 385 KUHPdt).
- c. Obligated to organize the maintenance and education of the child's personality and represent him in all civil actions (Article 383 paragraph (1) KUHPdt).
- d. Make a brief account of his management to the supervisory guardian (BHP) (Article 372 KUHPdt).
- e. Conduct an inventory of the child's assets which must be attended by the supervisory guardian (BHP) (Article 386 paragraph (1) KUHPdt).
- f. Holding a guarantee to ensure the guardian's management of the child's property (Article 335 KUHPdt).
- g. Sell the child's household furnishings and all immovable property that does not yield any income (Article 389 KUHPdt).
- h. Registering state receivables (Article 392 KUHPdt).
- i. Hold a closing calculation and accountability at the end of the guardianship (Article 409 KUHPdt).

In addition to the guardian being obliged to manage the child's property properly, the guardian is also responsible for losses incurred due to poor management. Guardians are also limited in their powers as stipulated in Article 393 of the Civil Code:

“For the benefit of the minor, the guardian is prohibited from borrowing money, may not alienate or mortgage his immovable property, nor may he sell or surrender bonds, accounts receivable and shares, without being authorized to do so by the District Court. The Court shall not grant this authorization except on the basis of absolute necessity or if it is obvious that there is a benefit and after having heard or legally summoned the blood relatives or relatives in law of the minor and the guardians of the minor”.

The legal actions performed by the guardian are not absolute control without restrictions when becoming a guardian. The guardian can be

dismissed and even compensated if his actions are considered detrimental to the interests of the child.

## 2. Guardianship in the Marriage Law.

Law Number 1 Year 1974 (hereinafter referred to as the Marriage Law) regulates guardianship in Chapter XI, Articles 50 to 54. The Marriage Law determines the limits of children in guardianship as stipulated in Article 50 Paragraph (1) which states that children who have not reached the age of 18 (eighteen) years or have never entered into marriage, who are not under the authority of their parents, are under the authority of a guardian. The obligations of a guardian according to the Marriage Law include:

- a. The guardian is obliged to take care of the child under his/her control and his/her property as well as possible with respect for the child's religion and beliefs (Article 50 paragraph (3)).
- b. The guardian is obliged to make a list of the property of the child under his/her control at the time of commencing his/her office and record all changes in the child's property (Article 51 paragraph (4)).
- c. Guardians are responsible for the property of the child under their guardianship as well as any losses incurred due to their fault or negligence (Article 51 paragraph (5)).

The scope of guardianship in the Marriage Law covers the child's person and property. Article 52 in conjunction with Article 48 of the Marriage Law stipulates that the guardian is not allowed to transfer rights or mortgage fixed assets owned by the child unless the interests of the child require it. Notably, the Marriage Law does not regulate it at all.

## 3. Guardianship in the Compilation of Islamic Law

Guardianship is also regulated in the Compilation of Islamic Law (hereinafter KHI), which is material law for Religious Court judges. Guardianship in KHI Article 1 letter h is defined as the authority given to someone to carry out a legal action as a representative for the benefit and on behalf of a child who does not have both parents, the parents are still alive, and are not capable of performing legal actions. (Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, 1991) The provisions of guardianship in KHI are regulated separately in Chapter XV concerning guardianship. Guardianship in KHI only applies to children who are not yet 21 years old or have never entered into marriage. The scope of guardianship in KHI relates to the self and property of the child.

Wali bertanggungjawab terhadap harta anak dan mengganti kerugian terhadap harta anak sebagai akibat kesalahan atau kelalaian. (Idami, 2012) The obligations of the guardian in guardianship are regulated in KHI Article 110 as follows:

- 1) Guardians are obliged to take care of the person and property of the person under their guardianship as well as possible and are obliged to provide religious guidance, education and other skills for the future of the person under their guardianship.

- 2) Guardians are prohibited from binding, encumbering and alienating the assets of the person under their guardianship, except when such actions are beneficial to the person under their guardianship which cannot be avoided.
- 3) The guardian shall be liable for the assets of the person under his guardianship, and shall compensate for any losses incurred as a result of his fault or negligence.
- 4) Without prejudice to the provisions set out in Article 51 paragraph (4) of Law No.1 of 1974, the liability of the guardian referred to in paragraph (3) must be proven by books of account which are closed once every year.

Guardianship can be revoked by the Religious Court on the basis that the guardian is a drunkard, gambler, spendthrift, insane and/or neglects or abuses his rights and authority as a guardian for the benefit of the person under his guardianship.

#### 4. Guardianship in the Child Protection Act

The regulation of guardianship issues in Law No. 2 of 2002 (hereinafter referred to as the Child Protection Law) is regulated in a separate chapter, namely Chapter VII on guardianship, Articles 33 to 36. To become a guardian of a child, it must be done through a court decision. A guardian who, based on a court order, can represent a child can perform legal actions, both inside and outside the court for the best interests of the child, as confirmed in Articles 33 and 34 of Law No. 12/2002 on Child Protection. Article 33 paragraph 4 also emphasizes that the guardian also has the obligation to manage the child's property for the benefit of the child. The supervisory guardian is regulated in Article 35 paragraph (2) which designates the Balai Harta Peninggalan (Estate Office) as capable of acting as a supervisory guardian to safeguard the child's interests. In the event that the appointed guardian turns out in the future to be incapable of performing legal acts or abuses his/her power as guardian, his/her guardianship status is revoked and another person is appointed as guardian through a guardianship decision. In the event of the death of the guardian, another person is appointed as guardian through a court decision as stipulated in Article 36. The Child Protection Law does not regulate in detail the supervisory guardian as found in the Civil Code.

Based on the explanations contained in the Civil Code, Marriage Law, KHI and Child Protection Law related to guardianship issues, juridically, the state has provided legal protection of children's rights in guardianship issues. The Civil Code regulates in great detail the duties and responsibilities of guardians and even guardians are supervised by supervisory guardians in carrying out their duties, although the Marriage Law and KHI do not explicitly regulate supervisory guardians.

### **Paradigm of Children's Material Rights in the Determination of Guardianship in Religious Courts.**

The Religious Court is one of the executors of judicial power for the people seeking justice who are Muslims regarding "certain civil matters" which become their absolute competence, including in the case of an application for guardianship determination. According to Edi Marsis (Marsis, 2022), Judge of Blitar Religious Court, who explained that the ruling of the Religious Court on guardianship, until now has not changed and has not kept up with legal developments, where the determination of guardianship in the religious court only determines the Applicant as the guardian of the child, while the material rights of the child and the obligations of the guardian do not exist at all in the ruling of guardianship. Whereas the issue of guardianship is related to the person of the child concerned and his property, as confirmed in Article 50 Paragraph (2) of the Marriage Law, Article 14 Paragraph (1) letter (d) of Government Regulation Number 29 of 2019 concerning the requirements and procedures for the appointment of guardians and Article 107 compilation of Islamic law. This has shown in several Religious Court decisions as follows:

**Table 1.** Stipulation of Guardianship in the Religious Courts

<b>No.</b>	<b>Case Number</b>	<b>Announcement of Decision in the Religious Court</b>
1.	Sumedang Religious Court Decision Number 192/Pdt.P/2017/PA.Smdg August 22, 2017	Grant the Petitioner's request; Declare the Petitioner (Kokom Komanah bint Salaman) as the guardian of her biological child named Hani Putria Ramadhani, born on 04 October 2005; Burden the Applicant? to pay the costs of this case? Rp. 181,000.00 (one hundred and eighty one thousand rupiah);
2.	Decision of the Religious Court of MALANG Regency Number 539/Pdt.P/2018/PA.Kab.Mlg May 15, 2018	DECIDE: 1. Grant the Petitioner's request; 2. Determine the Petitioner (TARMI bin WIRO) as the biological mother as guardian of her 2 (two) biological children named:- Desi Nurul Hidayah bint Samai, female, born in Malang, December 12 1998 (age 19 years) or has never been married; - Deny Wahyu Firmansyah bin Samai, male, born in Malang, June 9 2009 (age 9 years);3. Determine the Petitioner as the biological mother to represent her two children named:- Desi Nurul Hidayah bint Samai, female, born in Malang, December 12 1998 (age 19 years) or never married;- Deny Wahyu Firmansyah bin Samai, male, born in Malang, June 9 2009 (9 years old); carrying out legal actions both inside and outside the court by prioritizing the principle of the best interests of the two children 4. Charge the Petitioner a fee for this case of Rp. 171,000,- (one hundred and seventy one thousand rupiah);
3.	WEST JAKARTA Religious Court Decision Number	DECIDE: 1. Grant the Petitioner's request; 2. Declare that M. Ali bin Oni died on May 17 2011;



97/Pdt.P/2018/PA.JB May 23, 2018	3. Determining the Petitioner (Anah Bionti Amsar) as a guardian who has the right to and represents legal interests on behalf of her child CHILD II, male born in Jakarta 29 March 2010, who is still a minor inside and outside the Court; 4. Punish the Petitioner (Anah bionti Amsar) to exercise guardianship rights over her child (CHILD II) as determined by the applicable laws and regulations; 5. Charge the Petitioner to pay court costs in the amount of Rp. 216,000.00 (Two hundred and sixteen thousand Rupiah);
4. SUMEDANG Religious Court Decision Number 205/Pdt.P/2018/PA.Smdg September 3, 2018	Grant the Petitioner's request; 2. Determining the Petitioner (Yeni Nurhayati bint Sumpena) to be the guardian of Princess Anggraeni bint Rusli (born 10 December 2011); 3. Charge the Petitioner a case fee of Rp. 141,000.00 (one hundred and forty one thousand rupiah);
5. WEST JAKARTA Religious Court Decision Number 337/Pdt.P/2020/PA.JB November 12, 2020	DECIDE: 1. Grant the Petitioner's request; 2. Determine the child named: XXX, male born in Jakarta, July 20 under the guardianship of the Petitioner (Applicant); 2. Charges the Petitioner to pay court costs which until now have been calculated at IDR. 131,000 (one hundred thirty-one thousand Rupiah);

Source: Data processed from the Directory of Religious Courts, June 2023.

Based on Table 1 above, the ruling of the Religious Court on guardianship only confirms who is determined to be the guardian of the child. It is not normatively written what are the rights of the child, especially the problem of the child's property and what are the obligations of the guardian while carrying out the duties of guardianship. This shows that the child is still not guaranteed protection over the property that will be obtained after the child matures from his guardian. By not including the child's property and the guardian's obligations in the ruling on guardianship, it can create a paradox, it can protect the guardian who spends the child's property and is difficult to be held legally accountable.

The material rights of children under guardianship are rights related to the material or financial interests of children who are under the guardianship of parents, guardians or caregivers established by the court. The establishment of material rights of children under guardianship aims to protect and ensure that children under guardianship have adequate access to material resources necessary for their life, growth and development. Several material rights of children under guardianship are:

1. Right to basic needs: Children are entitled to basic needs such as clothing, food, shelter and adequate health care;
2. Right to education: Every child has the right to an adequate and quality education. This includes access to adequate schools, adequate education facilities, equal learning opportunities. Children are also entitled to financial assistance or scholarships.

3. Right to legal protection: Children have the right to be protected from exploitation, child trafficking and other forms of material exploitation.
4. Right to inheritance: Children have the right to inherit property and material possessions from their deceased parents or relatives. This right involves legal recognition of the child's right to property, or assets owned by parents or family.
5. Right to participation and material decisions: Children have the right to be involved in decisions that relate to their material interests. They are given the right to express their opinions, are provided with adequate information, and have the opportunity to participate in decision-making processes that affect their lives and finances.
6. Right to property management: If children have property under guardianship, they have the right to manage and control their property. A responsible guardian must act as an honest and responsible manager of the child's property. Guardians must manage the child's property in good faith and in the best interests of the child.
7. Right to financial information: Children under guardianship have the right to information about their finances, including assets, income and expenses. The responsible guardian must provide transparency about the child's finances and relevant information, in accordance with the age and maturity level of the child.

Some of the material rights of the child must be well guaranteed in the ruling of the religious court when the child is under the guardianship of someone either his own parents or guardianship that has been established by the court.

Along with the development of the law, guardianship issues are not only related to the issue of who is the guardian, sometimes the guardian must take legal action such as taking money in the bank, selling goods belonging to the child for the benefit of the child. This condition requires clear and definite legal protection of the child's rights so that the child continues to get his property until the child matures. Recently, the issue of guardianship has undergone a paradigm shift. The new paradigm in the establishment of guardianship, according to Edi Marsis (Marsis, 2022) contains at least 3 things, namely:

1. Judges are obliged to include children's assets in the ruling on guardianship with the formulation "in the event that the child gets a share of the money taken at the Bank or from the property to be sold by the Guardian". This aims to determine the amount of money or property that will be obtained and provide protection to the child's right to get finances or property obtained after adulthood.
2. Guardians are obliged to record the assets of children under their guardianship, with the formulation "If the applicant has been appointed as Guardian and there is a right to money or property belonging to the child under his guardianship, the Guardian is obliged to record the money or property that belongs to the child under his guardianship, including recording changes in the property". This concept aims to protect the child's property from unaccountable actions

of the guardian and to obtain legal certainty about the amount of the child's property that will be obtained after the child becomes an adult. For the guardian, this is to facilitate the reporting of the child's assets when the child under his guardianship has grown up.

3. Guardians are obliged to report the development of the assets of children under their guardianship once a year, with the formulation "Guardians are obliged to report money or assets owned by children under their guardianship every year to the Social Service". This formulation aims to provide supervision to guardians to be more careful in carrying out guardianship duties in the field of children's material rights, including supervision of changes in the assets of children under their guardianship.

With clearly defined the rights of children and the obligations of guardians in the determination of guardianship of children in the Religious Court clearly defined, this will become a legal umbrella in resolving guardianship issues as a guarantee of protection and legal certainty over the material rights of children and avoid the risk of causing disputes in the future. Therefore, apart from determining who is entitled to guardianship rights, the judge must also mention the child's rights and the guardian's obligations in the court decision. because, the main reason for guardianship is for the welfare and protection of the child himself (Rolock & White, 2017; Wright, 2010). In a study, it was stated that one of the rights of children that is no less important is their participation in the juridical decision-making process which greatly influences their lives (Strömpl & Luhamaa, 2020). In fact, children's participation is supported by moral imperatives and international conventions (Keddell, 2023).

### **The Urgency of Determining Children's Material Rights in Guardianship from the Perspective of Maqashid al Sharia.**

The application for the establishing guardianship either from biological parents or close relatives against children is one type of voluntary case submitted to the Court with the aim of obtaining legal legality related to the authority of parents, guardians or legal entities against their children in acting legally representing the interests of children both for themselves and their property inside or outside the court. In general, voluntary legal products (determination/beschikking) aim to provide legal certainty and protection to the parties and at the same time the determination is valued as an authentic deed. (Harahap, 2005) Article 1868 of the Civil Code states that "An authentic deed is a deed made in the form prescribed by law, by or before a public servant authorized to do so at the place where it is made".

The function of a certificate or writing in terms of evidentiary law according to Yahya Harahap is as follows:

1. Serves as a formal causa, meaning that the deed functions as a condition for the validity of a legal action taken. If the legal action or legal action taken is not in accordance with the letter or deed, then the action is legally invalid, because it does not meet the formal requirements of causa.

2. Serves as evidence, as stipulated in Article 1864 of the Civil Code that deeds are designated as evidence in the first order. The main purpose of making a deed is intended and used for evidence.
3. Functioning as a *robationis causa*, meaning that the letter or deed concerned is the only one that can and legitimately prove a certain thing or event. Without this deed, the event or legal relationship that occurred cannot be proven. The position and function of this deed is specific.

According to the explanation of the function of the deed or writing and the characteristics inherent in the function of the deed, the legal product in the form of a determination (*beschikking*) is attached to the value of perfect and inherent evidentiary power (*volledig en bindende bewijskracht*). Perfect and inherent proof in the judge's decision means that every court decision product aims to provide legal certainty value and as a basis for written evidence that can be used to act legally to take care of the interests of civil rights, (Wahyudi, 2020) for example banking transactions carried out by guardians or transferring children's material rights.

The paradigm of including the material rights of children and the obligations of guardians directly in the ruling of guardianship in religious courts is something that is urgent to be done by religious court judges. The determination of guardianship becomes written evidence as part of the principle of legality (*lex scripta*) and provides legal certainty for the material rights of children and the obligations of guardians. The legal principle arising from *lex scripta* is the principle of formal legality, considering that order to achieve justice is formulated in a legal rule that is enforced through legal means in the form of laws, so that it has more legal certainty value and justice value according to law (formal justice) (Gunakaya, 2014). One of the theories used in this principle is the theory of legal certainty. Legal certainty is when a regulation is made and promulgated with certainty because it regulates clearly and logically. Clear means that it does not cause doubts (multiple interpretations), and logical means that the rule becomes a system of norms and does not conflict with other norms. Legal certainty is the certainty of the rule of law, not the certainty of actions in accordance with the rule of law. Legal certainty pertains to the certainty of legal norms, rather than predicting actions in accordance with those norms (Savira et al., 2007)

Court decisions (*beschikking*) are part of efforts to realize the principle of legal certainty itself. By establishing this as a court product, it will bridge the gap between the normative text of the law and the reality of the context of modern society and give birth to a norm that was previously abstract and becomes a concrete norm. This is where the importance of court decisions as the embodiment of written legal principles (*lex scripta*) is to provide an element of legal certainty in the form of formal legality to the parties. This determination in the form of formal legality can be used as a legal basis for acting in guardianship matters related to determining the child's material rights and the guardian's obligations.

Based on the explanation of the legal force of determination as a legal product of the court, determining the material rights of children under

guardianship in religious courts is very important and can bring benefits to the child and his property. Benefit is the goal of law or maqashid al sharia.

Determining the material rights of children under guardianship in religious courts from a maqashid al sharia perspective can be analyzed as follows: Maqashid al Syariah is the goal of law revealed by Allah. According to al Syatibi, the laws that Allah has enshrined are aimed at human benefit. Imam al-Gazali stated that benefit is maintaining the aims or objectives of syara', namely achieving benefit and rejecting harm. (Al-Gazali, 1971) Syatibi also explained that al-maslahat is something that is understood to be maintained as a servant's right in the form of achieving benefits and rejecting benefits that are not based on certain conditions on independent discovery of reason. If the Shariah acknowledges that it rejects it, then the Muslims agree to reject it as an agreement. (Al-Syatibi, 2002) In order to realize benefits, based on research by ushul fiqh experts, there are five main elements that must be maintained and realized, namely religion, soul, reason, lineage and wealth. (Djamil, 1997)

For purposes of legal determination, the five elements above are divided into 3 levels, namely dharuriyyat, hajiyyat, and tahsiniyyat. The dharuriyyat level is a primary (essential) need for human life, which includes the need for maintaining religion, soul, mind, offspring and property. Not fulfilling these primary (essential) needs results in the threat to the existence of these five basic needs. Hajiyyat, on the other hand, denotes secondary needs that support the dharuriyyat group. Finally, tahsiniyyat refers to tertiary or complementary needs. (Djamil, 1997)

The paradigm for determining the material rights of children under guardianship in religious courts includes maqashid al-syariah at the level of maqashid al-daruriyyat in terms of safeguarding assets (hifz al-maal). Maqashid al daruriyyah is to maintain al jasad dhururiyyat in human life as a cornerstone of the existence of human life which must benefit them, as has been revealed by al-Ghazali and al-Syatibi. Protection of property (hifz al mal), Islam forbids stealing, cheating, carrying out and consuming usury, damaging one's own property or that of other people. It is prescribed to acquire property in a halal manner. (Jauhar, 2009) The child's material rights in the form of assets inherited from his parents which are managed by the guardian and what the guardian's obligations are while carrying out his duties as guardian should be clearly stated in the guardianship determination so that the child's property rights can be known when he grows up and the guardian does not take inappropriate actions. can be detrimental to the interests of children, especially in managing children's assets. The determination of the material rights of children under guardianship in a religious court becomes an authentic deed and has legal force and functions as formaitas causa, evidence and robatonis causa.

The paradigm of determining the material rights of children under guardianship in religious courts is also included in the maqashid al hajiyyat group. The needs at the hajiyyat level aim to make life easier and eliminate difficulties or provide better maintenance of the five basic elements of human life. Determination of the child's material rights under guardianship in the religious court, seen from the level of hajiyyat, provides benefits in terms of

facilitating and providing clarity regarding the child's material rights in the form of property that is his or her rightful property that he or she can take when he or she grows up and clarity on what duties and the guardian's responsibilities while serving as guardian.

Maqashid al sharia are the goals of Islamic sharia contained in every rule. Imam ash Syatibi explained that sayings and functions aim to uphold or create benefits for humans in this world and in the afterlife. If it is related to determining the material rights of children under guardianship in the products of judges in religious courts, it reflects a sense of justice. Where children get legal certainty regarding the assets that are their rights. One of the indicators in the standard standards for realizing justice in religious courts is the party who is entitled to what according to the conscience of justice is their right in the case, whether requested or not requested in the petitum. (Arto, 2018)

Mukti Arto (Arto, 2018) explained that in order to realize justice in the decisions or determinations of judges in religious courts, it is necessary to establish concrete standards of justice based on the type of case. Regarding the protection of children's rights in guardianship and the obligations of guardians during guardianship duties, standard standards of justice include:

1. Standards of distributive justice, namely applying the principle of balance between rights and obligations in order to achieve distributive justice in the form of fair rights. This standard is applied by judges in cases relating to the division or distribution of material rights or other rights. Distributive justice is a right that must be fulfilled by other parties who are obliged to fulfill it. One of them is in guardianship cases, where the determination of the child's material rights is a child's right that must be fulfilled by the guardian as an obligation and handed over after the child becomes an adult. Apart from that, children's material rights are also inheritance rights from their parents which are managed by guardians as long as they are not yet adults. When the child is an adult, the assets must be handed over to the child.
2. Individual benefit standards, involve implementing the principle of benefit (goodness) for the parties concerned based on humanitarian needs in order to realize the protection of individual rights and humanitarian rights. Individual benefit is the right to fulfill human needs in a just and civilized manner. This includes the issue of guardianship of people who are not competent to carry out legal actions. This individual benefit is the right of every individual which must be protected by the state and recognized and respected by other individuals. Protecting individual benefits constitutes an essential aspect of justice.
3. The standard of the child's best interests, namely by implementing what is in the child's best interests physically and psychologically for children who are not yet able to care for themselves or are not yet mumayyiz in order to realize child protection. The best interests of the child are the child's rights which must be protected and fulfilled by

those who according to the law must be responsible for the child, including in cases of child guardianship.

The protection of children's rights and the obligations of parents or guardians have been explained in the Qur'an and hadith. And it has also been concretized in several positive legal rules that apply in Indonesia as stated in the Marriage Law, Child Protection Law, Compilation of Islamic Law, Civil Code related to guardianship issues. The type of benefit in the paradigm of determining the material rights of children in guardianship in religious courts is the benefit of mu'tabaroh. The problem of mu'tabaroh is the benefit that is supported by sharia' in both form and type. This means that there are special arguments that form the basis for the form and type of benefit.

### **Conclusion**

Based on the discussion described above, it can be concluded that the protection of children's rights in guardianship has been regulated in Islamic law and Indonesian positive law. Therefore, to provide legal protection for the rights of children under guardianship requires legal reform in the determination of guardianship through legal products from religious courts. The order determining guardianship does not only determine who will be the child's guardian but also needs to contain an order which contains a determination of the child's material rights that will be obtained once he is an adult as well as the obligations of the guardian who will carry out guardianship duties. The paradigm for determining children's material rights in religious courts, from the perspective of maqasid al-sharia (objectives of Islamic law), aims to safeguard children's assets (hifz al-mal) as one of the five main objectives. It is recommended that Religious Court judges in determining guardianship cases pay attention to and include the child's material rights in the decision to determine guardianship in an effort to provide protection for children's rights and provide legal certainty and justice regarding children's material rights. It is recommended that the guardian be able to exercise guardianship powers and manage the child's assets oriented towards the child's best interests.

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