

## Local Examination in Child Custody Disputes: Judges' Efforts to Find the Best Interests of the Child

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### Abstract

**Introduction to The Problem:** Implementation of local examinations in the provisions of Article 153 HIR, Article 180 Rbg, and Article 211 Rv is optional. The judge has the authority to determine whether it is necessary or not to carry it out. Generally, local inspections are carried out in civil cases with the object of dispute being land or fixed assets. However, it does not rule out the possibility that local examinations can also be carried out on child custody disputes because there is no limit to certain cases that can be carried out by local examinations. Some cases of child custody, some are examined by carrying out local inspections and some are not.

**Purpose/Objective Study:** This study aims to describe the urgency of local examinations in child custody disputes, especially in ongoing cases and those that have been decided contradictory. Thus, it would exhibit the judges' efforts in identifying and determining the best interests of the child from the course of the examination process at the trial.

**Design/Methodology/Approach:** This study examines court decisions on child custody cases using a descriptive analysis approach in a qualitative study. This research was conducted on the basis of the efforts of judges to accommodate the interests of all parties so that research data were obtained from civil procedural law regulations, marriage laws, child protection laws, court decision documents, and related scientific journals. Data were analyzed using a normative approach

**Findings:** In the process of proving the trial of child custody disputes, there are differences in the attitude of judges, especially in carrying out local examinations. There are judges who consider it necessary to carry out local examinations and there are also judges who do not. Indeed, in the regulation regarding local examinations it is optional, but in trials that carry out local examinations, the judge gets an important picture of how to determine the best interests of the child whose custody rights are disputed. From the two cases that have been studied, there are two important elements to determine the best interests of the child. First, regarding the significance of the social environment for children, namely regarding the environmental conditions of the father and mother. And second, regarding the significance of the child's will, namely the information obtained by the judge from the process of direct interviews with the child at his place of residence.

**Paper Type:** Research Article



**Keywords:** Judges; Child Custody; Local Examination; Social environment; Child's Interest

### Introduction

The implementation of local inspections is generally carried out in civil cases where the object of dispute is land or other immovable properties (Ambarita, 2021). Furthermore, the issuance of the Supreme Court Circular Letter No. 7 of 2001 on Local Examinations is to respond the huge number of civil dispute decisions with permanent legally binding force that cannot be executed due to the object of the dispute being not in accordance with the *dictum* of the decision. In fact, based on the provisions of Article 153 HIR (Het Herziene Indonesisch Reglement), Article 180 Rbg (Rechtglement Buitengewesten), and Article 211 Rv (Reglement of de Rechtsvordering) there is no limitation as to certain disputes in which local examinations can be applied. Only that as long as it is deemed necessary and useful as material for consideration of a decision, the judges may conduct a local examination (Rosalina, 2018).

Examination of child custody disputes, due to the dualism of the judicial bodies authorized to adjudicate civil cases, namely the Religious Courts and District Courts, the party wishing to file the dispute depends on their religion to determine where the dispute will be filed. In accordance with its authority, the Religious Court examines and adjudicates cases between people who are Muslim. However, the procedural law that applies in the examination of cases in the Religious Courts and in the District Courts is generally the same. The provisions of Article 54 of the Law on the Religious Courts state that the procedural law that applies to the Religious Courts is the procedural law that applies to the examination of civil cases in the District Courts unless specifically regulated in the Law on the Religious Courts. Regarding the procedures for proving child custody disputes, there is no special regulation in the Law on Religious Courts. Thus, the proof of child custody disputes examined in the Religious Courts and in the District Courts is the same.

Custody of children who are yet to be considered *mumayyiz* or under 12 years of age is one of the objects of disputes that often poses an issue in divorce of married couples before the Religious Courts (Tanjung et al., 2021). In a such dispute, the primary issue and what must be proven before the trial is whether or not the mother is eligible to care for and educate the child, as pursuant to the provisions of Article 105 of the Compilation of Islamic Law, it has been determined that children who are yet to be considered *mumayyiz* are in the care of their mothers (Islami & Sahara, 2019). The judicial procedure for child custody disputes in Indonesia shows varied forms of examination, especially for ongoing cases and those that have been decided on contradictions (Martati, 2018). In the evidentiary, there are cases in which local examinations were applied and there are some others in which they did not. For example, in cases decided by the South Jakarta Religious Court No. 3658/Pdt.G/2014/PAJS and Manado Religious Court No. 183/Pdt.G/2021/PA.Mdo.



the judges considered it to be important and necessary to carry out a local examination. In other decisions, such as by the Madiun Religious Court No. 899/Pdt.G/2021/PA.Kab.Mn. and Makassar Religious Court No. 1898/Pdt.G/2017/PA.Mks. the examination was carried out without applying a local examination process.

Studies on the issue of child custody have been carried out by a number of previous researchers from various perspectives. For example, the *first* is from a gender perspective (Kelly, 1994; Nufus, 2021), placing the mother as the most appropriate party to care for her child as long as there are no obstacles in caring for her child. *Second*, from a religious perspective (Azhimy et al., 2020; Rofiq, 2021), demonstrate that the religion adopted by the parents is the major consideration in determining the bearer of child custody. *Third*, the perspective of transition or revocation of custody (Ivana & Tantri Cahyaningsih, 2020), explaining the reasons for the release of child custody, and *fourth*, the perspective of justice (Sanjaya, 2015), elaborates procedural justice which in this perspective, there are various decisions with a justice orientation for all parties to the case. While research on local examinations has generally been carried out, namely examining local examinations with the object of the dispute in the form of land (Ambarita, 2021; Rosalina, 2018; Lukmawati & Harjono, 2018; Sucianti & Salenda, 2020). There is also research on local examinations in cases of polygamy permits (Zamzami, 2018), which describes that the judges conducted a local examination on the ground of the respondent never attended any summons at all.

Although research on the determination of child custody has been carried out by various researchers with various perspectives, there are still things that have not been critically examined. Research from the perspectives of gender, religion, justice, and the reasons for transitioning or revoking child custody still provides academic space for analysis of how the ideal proof mechanism is to determine who is the appropriate party as the holder of child custody of the disputing parents. Nevertheless, these previous studies are still related to each other and support this research because of the scope of the study regarding material aspects of matters affecting the determination of child custody. While this research focuses on formal aspects or in the realm of procedural law, especially regarding proving child custody cases. Studies that have been carried out regarding local examinations with land objects and local investigations of polygamy permit cases also support this research, but with a different object, namely child custody.

Thus, this research seeks to provide a clear and firm picture of the position and urgency of local examinations in child custody disputes, especially in ongoing cases and those decided in a contradictory manner. Additionally, this research aims to identify the judges' efforts to find and to determine the best interests of the child from the course of the examination in the judicial process.



This study employs the theory of consistency in interpretation from the perspective of Neil MacCormick (2003). For MacCormick, judges through their authority are obliged to find law both in cases where the rules are clear and have jurisprudence or those which do not. This theory lays out legal cases into two typologies, namely hard cases and clear cases, each of which requires consistent interpretation by judges to find law and justice. Hard cases are cases examined by judges but there is no jurisprudence yet, so that the legal findings are made by the judges themselves because there is no reference to the previous case decision. Whereas for a clear case, that is a case that already has a similar decision that was handed down by the previous judges. So that in this case it is easier for the judges to make a decision because it is enough to follow the rules of the previous judges' decision (Rohaedi, 2018).

### **Methodology**

This article uses a qualitative method by describing several cases of child custody disputes in a descriptive analysis. Cases are presented from predetermined court decisions. The selected court decisions are decisions that are in the process of proving using local examinations and not using local examinations. Next, make a comparison of the two differences in the examination process by taking into account the judge's considerations and the judge's attitude in the verification process. This research uses a case study approach that focuses on exploring the Decision of the South Jakarta Religious Court Number 3658/Pdt.G/2014/PA.JS, the Decision of the Manado Religious Court Number 183/Pdt.G/2021/PA.Mdo, the Decision of the Madiun Religious Court Number 899/Pdt.G/2021/PA.Kab.Mn, and Makassar Religious Court Decision Number 1898/Pdt.G/2017/PA.Mks. The four decisions of the Religious Courts were specifically chosen because there were differences in the process of proving them, even though they were in similar cases regarding child custody. Data was collected through a desk-review process through searching scientific literature in the form of judge's decisions, laws and regulations, journals, books, policy briefs, and various forms of published academic studies related to child custody and proving civil cases. This step is a process to collect through search performance data sources from various available platforms. After all the data was collected, the next researcher carried out the data analysis process using a predetermined theory, namely MacCormick's theory of consistency of interpretation. In this process, the researcher describes the data through several stages. First, display, second, reduction, and third, conclusion.

### **Results and Discussion**

#### **Local Examination in Child Custody Disputes: Position, Purpose, and Direction of Evidence**

In the examination of civil cases, including child custody disputes, the judges must first identify clearly the interests of the parties to the dispute before compiling their legal considerations. Then the judge orders the burden of proof to the parties to determine whether the plaintiff's request or the defendant's objection has sufficient



reasons (Juanda, 2016; Sunge, 2012). Hence evidence is crucial. The procedural law that applies to the examination of cases in the Religious Court is the civil procedural law that applies to general courts, except for matters specifically regulated in the Law on the Religious Courts (Fuada, 2015). Thus, the settlement of child custody disputes including the verification procedure refers to the provisions in the HIR or Rbg and the Civil Code.

Evidence that can be presented at trial is regulated in the provisions of Article 1866 of the Civil Code and Article 164 HIR or Article 284 Rbg, which include documents, witness testimony, presumptions, confessions and oaths. This list of evidence seems to be limitative, despite there are other pieces of evidence that can be submitted with the intention of proving the truth or clarifying an incident, such as a local examination (decentee) and expert opinion (Rosalina, 2018). In addition, there is an expansion of evidence as mandated by the Electronic Information and Transaction Law in the form of electronic evidence.

The definition of local examinations has been conveyed by several legal experts in Indonesia. Subekti offers his views regarding the local inspection, namely the implementation of the trial at the place where the disputed object was located. The things that the judges saw at that place were the same as what they saw at trial (Subekti, 1987). In line with Subekti's view, Riduan Syahrani argues that a local examination is a direct observation of the facts or circumstances of a case carried out by a judge because of their position where the object of the case is (Syahrani, 1988). While local examinations, according to Sudikno Martokusumo, are examinations of cases by judges because of their position that are carried out outside the building or place of court, so that judges can obtain an overview or information that gives certainty on the events that occurred in the dispute by looking at them (Mertokusumo, 2000).

In accordance with the provisions and understanding, the purpose of holding a local examination program is to make it clear and clear about the object being disputed by the parties, adjusting the arguments and evidence submitted by the parties in a case with the condition of the object of the dispute. So that after the decision handed down has permanent legal force, the decision can be executed without any problems regarding the confusion between the dictum of the decision and the situation of the object of dispute at the time the execution will be carried out (Chania, 2017). Therefore, local examinations are considered part of the evidence even though they are beyond the means of evidence in accordance with Article 164 HIR/284 Rbg, and Article 1866 of the Criminal Code, considering their purpose to offer confidence to the judges to find the truth in the arguments put forward by the parties to the case, particularly regarding the object of the dispute (Lukmawati & Harjono, 2018). Even more so if the judges conclude that a local examination is necessary and important to carry out.



Arrangements regarding local examinations are regulated in the provisions of Article 153 HIR, Article 180 Rbg, or Article 211 Rv which states that if a judge considers it important and useful, then a local examination can be carried out with the assistance of a court clerk. This provision is optional by giving authority to the judge to choose whether it is necessary to conduct a local examination or not so that the judge is not obligated to carry it out. However, with the words "if the judge considers it important and useful", then the nature of the choice in local examination arrangements changes towards being obligatory if in a civil case, efforts are needed to clarify the object of the dispute so that the court decision that has been handed down can be executed. If there is a court decision that cannot be executed due to unclear reasons regarding the object of the dispute, it will affect the trust of the justice seeker community. They will question the accuracy of the court in examining and deciding a case. So that under certain conditions a local inspection must be carried out, even though the arrangement is optional. For example, in a case with the object of a land dispute, the intent of the issuance of the Supreme Court Circular Letter No. 7 of 2001 concerning local examinations, namely because there have been many reports from justice seekers regarding decisions that cannot be executed due to differences in the object of the dispute described in the lawsuit with the object of the dispute in actual conditions on the ground.

The provisions of Article 153 HIR or Article 180 RBg, give no limitations on the type or form of objects that is subject to local examination. In practice, the judges interpret that the object is an immovable object hence impossible to present before the trial ([Rosalina, 2018](#)). However, because there are no specific restrictions on which cases a local examination can be applicable, it is possible and even considered important to carry out a local examination of child custody disputes.

Local examinations certainly cannot be carried out immediately even though deemed necessary by the judges. This is because there are several things that become obstacles and are taken into consideration, such as ([Rosalina, 2018](#)): The *first* is the cost efficiency aspect. Local examinations certainly require a large amount of fund and will be influenced by the financial stability of either the plaintiff or the defendant. *Second*, the interests of the parties ([Dirgantara et al., 2020](#)). Not all parties to the dispute, both the plaintiff and the defendant, would collectively agree to conduct a local examination, hence there an absence of one of the parties without legitimate excuses despite their legal and proper summon would be expected. *Third*, if the location is far and difficult to reach. Not only that this would result in a lengthy process, it will only be exacerbated if one must go through rough terrain in order to get to the location. *Fourth*, the security aspect. One party often provokes the public so that local examination may not run smoothly. However, to minimize these various obstacles, there is an idea to carry out local examinations electronically as part of the legal reform and utilisation of technology ([Anam, 2021](#)).



In the previous description it has been explained that the nature of conducting local examinations is an option, not an obligation. Likewise in child custody cases, the judge has no obligation to carry out local examinations. Decisions of courts that examine and decide cases of child custody are still considered valid even if no local examination is carried out. However, when viewed in practice, examinations of child custody cases in court have been dropped in a *verstek* and some have been dropped in a contradictory manner. The process of examining and imposing a verdict in a *verstek* is carried out in a simple manner because the defendant did not use his right to dispute the lawsuit or defend his rights in court. Unlike the case with cases that were ongoing and decided contradictory, the parties in the case argued against each other with arguments and evidence. The process of proving a case that is ongoing and decided on a contradictory basis is more complicated than the *verstek* case. Particularly in child custody cases, judges are required to be careful in determining and finding the best interests of the child in the verification process. This is because the best interest of the child is the main thing in child custody disputes, because it greatly affects the future for the child.

The purpose of implementing a local examination in a child custody dispute is different from the examination of a case with a tangible object of the dispute. Cases in which the object of dispute in the form of tangible objects are examined based on the conformity of the description of the location, area, form, and conditions directly related to the said object of dispute with the arguments put forward by the plaintiff in his lawsuit (Sucianti & Salenda, 2020). While the matters to be examined in the local examination of child custody disputes related to the condition of the environment where the child lives at the time of the local examination and later on after the decision is made. Conditions that better accommodate all the best interests in the form of needs for education, health, understanding of religion, and an environment that supports the growth and development of children (Tektona, 2012), whether it is at the residence of the father or mother. However, the fundamental difference is that the position of the mother is more dominant because it has been supported by the provisions of Article 105 of the Compilation of Islamic Law. Thus, if it appears that the results of a local examination at the place where the mother lives are the same as the father's in regards to fulfilling the best interests of the child, then it is almost certain that the judges tend to give the custody of the child to the mother. Meanwhile, if the results of the local examination find that the right to proper education, health, understanding of religion, and the environment appears to be better in the father's place, then the judges are required to put careful thoughts in drawing up their legal considerations so that they can deviate from which has been regulated in the provisions of Article 105 of the Compilation of Islamic Law. Certainly, with due regard to valid evidence in accordance with Article 164 HIR or Article 284 Rbg, and 1866 of the Criminal Code as it has set forth the regulation regarding the respective evidentiary power.



### **The Judges' Effort in Identifying the Best Interests of the Child**

The judiciary body as the executor of judicial power with free and independent elements, serves as a crucial feature of a state to guarantee the fulfillment of human rights in a just manner. The position of the judges as the ones carrying out the functions of the court is vital, hence it is obligatory for the judges to have an in-depth understanding of the law considering their responsibility set forth in the court decision with the aim of "For the sake of Justice Based on Belief in the One and Only God" (Sutiyoso, 2010). Therefore, the position of judges is supervised by various laws and regulations as well as provisions made by the Supreme Court. If a decision-making error occurs in carrying out the judicial process, the judges may be imposed a sanction (Suciawati & Soefyanto, 2019; Yulianto & Hesti, 2016).

In examining civil disputes, based on Rian Saputra's study (2019), it is laid out a view that the orientation of finding formal truth was no longer in line with civil procedural law. According to Saputra, at the evidentiary stage, the parties including the panel of judges are demanded not only to reveal the formal truth, but also the material truth simultaneously because the current civil procedural law no longer applies the principle of judicial passivism, but rather the judicial activism. This condition was then used as the foundation for the birth of a new view by M. Yahya Harahap who attempted to oppose the principle of total judicial passivism with the principle of argumentative judicial activism (Harahap, 2011).

The form of judicial activism provides justice for the community not only in examining cases but also up to the imposition of a decision (Talli, 2014). The response of the Supreme Court as the actor of the highest judicial institution by issuing a Supreme Court Circular Letter or a Supreme Court Regulation against the application of laws and regulations that are unclear and do not reflect the sense of justice, according to the author, can be qualified as an application of the principle of argumentative activism. This is reflected in the reason for the issuance of various Supreme Court Circular Letters or Supreme Court Regulations with the desire to fix the deficiencies that exist in the laws and regulations that regulate civil procedural law. For example, the reason behind the issuance of the Supreme Court Circular Letter No. 7 of 2001 on local examinations, namely because there have been reports from justice seekers on many decisions that are unexecutable. The Supreme Court is of the opinion and appeals to all Courts of First Instance to undertake a local examination first passing a decision on a dispute in which the object is in the form of an intangible object. According to Cahyadi, although the Supreme Court does not act as a legislator, it is aimed at fulfilling justice, certainty and benefiting the law for the community (Cahyadi, 2014).

If drawing from the rules of the Supreme Court Circular Letter No. 7 of 2001 in the examination of disputes over child custody, especially in ongoing cases and those decided in a contradictory manner, it can be considered important and necessary for a local examination to be carried out (Shidarta, 2012). This is based on the premise



that the interest of the child is an important element due to the fulfillment of the child's rights after the divorce of both parents indubitably needs to be accommodated. An explanation regarding the best interests of the child, although there is no standard definition, is generally described as follows:

“best interests of the child,” the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. “Best interests” determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the paramount concern ([Child Welfare Information Gateway, 2020](#)).

In Indonesia, the protection of general rights for children has been accommodated through the ratification of the Convention on the Rights of the Child which has been spelled out in several laws and regulations such as the Marriage Act 1974 and Child Protection Act ([Nurusshobah, 2019](#)). The Convention on the Rights of the Child provides the principles of child protection to ensure the fulfillment of the best interests of the child ([Muhaemin, 2016](#)). These principles are, *first*, in all actions concerning children carried out by government or private institutions in the field of social welfare, being primarily oriented to the best interests of the child ([Putra, 2018](#)). *Second*, member states must guarantee the protection and supervision of children's welfare, while taking into account the rights and obligations of the child's parents, legal guardians, or other persons who are legally responsible for the child concerned ([Lestari, 2017](#)), and *third*, member states must guarantee that the institutions or agencies responsible for the care and protection of children, pay attention to the safety and health, both in terms of the number and adequate competency of the officers.

### ***Significance of the Social Environment***

A child's social environment is generally divided into three, namely the family environment, school environment, and community environment where the child can play and interact with people around them ([Kusumasari, 2015](#)). The social environment also refers to the individual's physical environment, community of resources, and social relations. The physical nature of the surrounding environment will have an impact on the quality of care which in turn affects the health and welfare of the child. The social environment also influences the nature and quality of social relations in which parents and the child are involved, because the social environment determines who, how often between parents and the child interact ([Chaudhary, 2015](#)).

The family environment is the first environment experienced by the child and thus has implications for the child's health ([Lee et al., 2020](#)). Parents play a role in providing opportunities to develop the child's confidence with various choices in life



so that the child can fully experience the consequences of the choices they make. Another goal is so that the child would understand what they need. Children have the right to be able to know all the consequences of the choices they make and for other people in their environment to respect their choices. This very function of social education can only be given when parents have enough time to accompany their child (Hulukati, 2015).

One of the examination cases regarding child custody is in the Decision of the South Jakarta Religious Court Number 3658/Pdt.G/2014/PA.JS. The case in this decision is that the plaintiff (father) filed a lawsuit for child custody on the grounds that the defendant (mother) is considered unable to meet all the needs of the child and there are also actions by the defendant who have neglected rights that endanger the safety and life of the child. However, the defendant denied all the arguments filed by the plaintiff. In the evidentiary stage, each party submits evidence such as documentary evidence, witnesses, and also experts.

In addition to evidence in the form of letters, witnesses and experts, the panel of judges considered it important to carry out a local examination with the following considerations:

“Considering, that in order to see the current and actual situation of the child named xxxx and the Defendant's condition as the bearer of child custody rights, the Panel of Judges deemed it necessary to conduct a local examination, thus on the 21<sup>st</sup> of August 2015, the Panel of Judges visited the Defendant's residence at Jalan Tulodong Bawah, Number C-5, RT.010, RW. 04, Selong Village, Kebayoran Baru District, South Jakarta. The same goes for visiting the Plaintiff's residence at the Darmawangsa Apartment.”

From the local examination, the panel of judges observed firsthand the current and actual situation of the child's life and the living conditions of both the plaintiff (father) and the defendant (mother) in their respective residences. In addition, it was found that the child and the defendant lived together in a house and that the defendant also lives with the defendant's biological father and two women as household assistants and a driver. When the panel of judges visited the defendant's residence, the panel of judges did not see the plaintiff's and the defendant's child, because they had already gone to school. Furthermore, the defendant was preparing to pick up her child from school. Meanwhile, when the panel of judges visited the plaintiff's residence, it was found that the plaintiff lived in an apartment assisted by two women as household assistants but did not live with the plaintiff. The plaintiff admitted that he had lived in the apartment for more than a year, admitted that he used to go out of town and stay overnight, and admitted that he had never invited his child to come to the apartment.

From the facts revealed as a result of the local examination, the panel of judges gave the consideration that if the child were to live with the plaintiff, the child would experience difficulties living alone without assistance and supervision, and the hope



to grow and develop optimally would not be fulfilled. If the plaintiff accompanies the child all the time, the plaintiff would in return find himself in trouble as he would not be able to carry out his duties or daily work as an entrepreneur. As for the defendant's residence, according to the results of a local inspection, the child had been living with the defendant since birth. After the divorce between the plaintiff and the defendant, the child still lived with the defendant. The daily activities of the child which primarily consisted of going to school, being driven and picked up by the defendant. In daily life the child is also accompanied by his grandfather, the biological father of the defendant and accompanied by two women as the household assistants who also live with the defendant. These facts are then taken into consideration by the judge before making a decision. It can be concluded that the panel of judges has an orientation towards fulfilling the interests of children in aspects of their social environment. The final result of this case is that the South Jakarta Religious Court which examined case Number 3658/Pdt.G/2014/PAJS, stated that it rejected the plaintiff's claim in its entirety.

#### ***Significance of the Interest of the Child***

Another example is regarding the examination of child custody cases, also in the case at the Manado Religious Court with registered number 183/Pdt.G/2021/PA.Mdo. The case in the decision was that there was a married couple who had two children as a result of their marriage. Then the plaintiff and his wife divorced, but after they divorced, the plaintiff's children were in the care of the defendant (the child's grandmother). Subsequently, the plaintiff's wife died. As a form of the plaintiff's concern for his children, the plaintiff filed a lawsuit so that his children were under his care. In addition, another reason is that the plaintiff was prevented by the defendant from meeting and raising their children.

From the course of the case examination and verification process, a local examination process was carried out. The judge's considerations in carrying out the local examination are:

“That the panel of judges had conducted a local examination session (descente) on the 17<sup>th</sup> of September 2021 at the defendant's residence in Sector II No. 111, Sarongsong Satu Village, Airmadidi District, North Minahasa Regency. The plaintiff's two children live with the defendant to hear the opinions of the two children regarding who they will be cared for.”

In carrying out the local examination, the panel of judges conducted a questions and answers process with the plaintiff's children who were in the possession of the defendant. As a result, the panel of judges found that the plaintiff's children stated that they wanted to follow their father (the plaintiff). Subsequently, the judges' understanding of the interest of the child is supported by the opinion of Wahbah Zuhaili (2011), which states that if there is a conflict between people who are entitled to child custody, then the priority lies on the right of the child being cared for. This provides an understanding that children are given the opportunity to choose who will



care for them because their interests are to be held above all else. Thus, even though in this case the child is yet to be considered *mumayyiz* or under twelve years old, according to the provisions in Law Number 1 of 1974 and the Compilation of Islamic Law, if the child wished to live together with his father because his mother had died, then his interests must be heard. The Manado Religious Court which examined case number 183/Pdt.G/2021/PA.Mdo decided that the plaintiff's claim was granted in its entirety. One of the main considerations in making the decision was the child's will to live with the plaintiff (his father).

The process of taking into account the opinion of a child by the judges in this case, can only be carried out with the voluntary willingness of the child. Opportunities are given as wide as possible for the child to convey important information that determines their custody rights, especially if the parents do not want to be accompanied during the process of extracting this information. Including the legal counsel of the parties cannot intervene. Legal counsel only plays a role in monitoring and submitting questions through the judges (Rogers, 1987). Another effort that can be undertaken to find the information is through an assessment from a psychologist (Turkat, 2016). However, this assessment in proving a civil case includes evidence of expert opinion. The results are deemed similar to the local examination (Lengkong, 2020), because the psychologist has made observations and compiled them in a report that can provide conclusions regarding the condition of the child's development and growth during care from the social, educational, health, and spiritual aspects (Valerio & Beck, 2017).

#### ***Judicial Procedure without Local Examination***

The results of the examination of the case before the Madiun Religious Court under the Decision Number 899/Pdt.G/2021/PA.Kab.Mn show that the panel of judges considered it unnecessary to carry out a local examination in making the decision and was only guided by the evidence that had been regulated in a limitative manner in Article 164 HIR or Article 284 Rbg, and 1866 Criminal Code. The facts obtained from documentary evidence and witnesses, namely the condition of the child in dispute is in the care of the plaintiff had been in a conducive circumstance. According to the panel of judges, the conducive circumstance of the child was evidenced by the well-run educational conditions of the child who attended the Early Childhood Education (*Pendidikan Anak Usia Dini*, PAUD) in the morning and at Al-Qur'an Education Park (*Taman Pendidikan Al-Qur'an*, TPA) in the afternoon.

To be able to conclude the said conducive circumstance and deviate from the provisions of Article 105 of the Compilation of Islamic Law, the panel of judges must pay attention to the best interests of the child whether they were with the mother or not and not only look at the father's ability to care for the child while in his care. The fact that the defendant did not have a permanent residence and was still busy with the medical co-assistant education and internships as a medical graduate, and the condition of the defendant who did not have a fixed job with a stable income needed



to be further considered whether this was indeed an obstacle in the child care. This was due to the fact that it was not only the child's condition at the time of the trial that was considered, but also the child's condition in the future. Including the fact that the child was apparently not in full care of the plaintiff as he worked in a different area. In that regard, the communication between the plaintiff and the child is only through video call media, thus the parenting of the child is assisted by the plaintiff's parents.

Whereas in the decision number 1898/Pdt.G/2017/PA.Mks before the Makassar Religious Court, the panel of judges also did not consider it necessary to carry out a local examination and was only guided by the provisions of Article 105 of the Compilation of Islamic Law. The primary point of the dispute being, the plaintiff (mother) filed a lawsuit against the defendant (father) on the grounds that the defendant had limited and prevented the plaintiff from seeing the child who was in the care of the defendant. The facts revealed before the trial concluded that there were nothing that prevented the plaintiff from obtaining child custody, hence the panel of judges granted the plaintiff's claim.

The position of the child's best interest in a custody dispute can be found in the evidentiary process at trial. The proving process is a way to reconstruct past events so that they can strengthen the arguments presented by the parties. However, in cases of child custody, apart from reconstructing past events, they also formulate views in the future about how life is proper for the child whose custody is being contested. The judge must be careful to determine a decent life that supports the child's development in the future, whether it lies with the mother, father, or other parties.

The process of seeking the best interests of each child is contained in the examination of child custody cases which are in the process of proving to carry out local examinations and also do not carry out local examinations. The difference is, in the aspect of the significance of the social environment, the judge who carries out the local inspection can directly see the condition of the social environment in the current condition and in the future. The knowledge of judges who do not carry out local examinations about aspects of the significance of the social environment is only obtained from the process of proving the parties carried out in the courtroom, not knowledge based on direct experience of seeing the actual conditions on the ground.

In the aspect of the significance of the child's will, there are things that need to be considered besides the potential for children to say things that are not true. The process of seeking information by conducting interviews with children can be determined on the condition that whether the child can be invited to verbal communication properly or not. Children who are still before the pre-school period cannot communicate properly (Semiawan, 2000). Thus, the implementation of local inspections with the aim of finding out about the child's wishes can only be carried out in certain cases, namely children who are not yet mumayyiz but have been able to be invited to communicate verbally well.



### ***Typology of Child Custody Disputes***

MacCormick's typology lays out legal cases into two categories, namely hard cases and clear cases that is applicable in countries that adhere to the common law system (MacCormick, 2003). However, it can also be analyzed in cases in which their settlement adhere to the civil law system as implemented in Indonesia. The difference is that hard cases in the common law system focus on the cases which there has been no jurisprudence at all. Judges hence play an important role in finding the law for these cases that they examine (Rheinstein, 1952). Whereas, in the civil law system, hard cases refer to cases which there has been no provisions set forth in laws and regulations at all, or the provisions may already exist but they have an open-ended meaning, or the provisions are optional. Hence the application of the *ius curia novit* principle can be jointly applied to the common law system as well as the civil law system. In Indonesia, this has been regulated in the provisions of Article 10 of Law Number 48 of 2009 on Judicial Power, which states that a court cannot refuse to conduct an examination and pass a decision on a case filed on the grounds that there is no law or the law is unclear, instead it is obligatory to examine and decide on the case because the judge is deemed able to find the law (Wicaksana, 2018). Furthermore, for clear cases in the common law system, namely cases that have their jurisprudence thus it is easier for the judges to make decisions. In the civil law system, namely in cases where the provisions in laws and regulations are clear and supported by the existence of jurisprudence based on a judges' decision in a similar case.

Examination of the child custody disputes such as some of the examples of disputes in the aforementioned decision can be categorised as hard case cases because in practice, there are differing views of judges in determining whether it is necessary to carry out a local examination. However, through the rules of the Supreme Court Circular Letter No. 7 of 2001, in order to ensure that the court decisions that have been handed down are not illusory or are executable, the local examinations hence pose urgency to be carried out. Even though it is limited only to the object of the dispute in the form of immovable objects, by referring to the primary orientation of the judges in examining child custody disputes based on the best interests of the child, so that the decision will not be illusory, the judges are required to seriously evaluate the determination of the best interests of the child, one of which is by reviewing directly to the environmental conditions where their parents live.

Disputes that are subject to local examination are different from disputes that do not undergo local examinations. Of the four examples of cases mentioned above, the fundamental difference is that the judges who conducted the local examination could immediately observe the condition of the residence of both parents, also observe firsthand the living condition and listen to the opinion of the child in dispute. However, during the local examination, there were also obstacles in determining the best interests of the child. The judges who observed directly the condition of the child

and the residence of their parents means subject to making a subjective assessment, that is, they merely look into the current condition and not the future (Skivenes, 2010). In addition, there is the potential for inaccurate judge evaluations due to the fact that evaluation of child custody is one of the most complicated forensic evaluations (Otto et al., 2000). Meanwhile, in addressing the process of obtaining direct confirmation from the child regarding their wish to live with whom by taking into account the opinion child, such as in the case before the Manado Religious Court Decision Number 183/Pdt.G/2021/PA.Mdo., according to Myers, children aged five and over have a tendency to lie because they have been able to process facts with the excuse of avoiding negative consequences from the people around them. Whereas children aged five and under, as long as they can communicate well, will tell the truth (Myers, 1987).

### **Conclusion**

The urgency of a local examination in child custody cases is to find out where the best interests of the child are, especially in cases that are ongoing and decided in a contradictory manner because each party disputes the appropriateness of caring for the child. In the process of proving the trial of child custody disputes, there are differences in the attitude of judges, especially in carrying out local examinations. There are judges who consider it necessary to carry out local examinations and there are also judges who do not. Indeed, in the regulation regarding local examinations, it is optional, but in trials that carry out local examinations, the judge gets an important picture of how to determine the best interests of the child whose custody rights are disputed. From the two cases that have been studied, there are two important elements to determine the best interests of the child. First, regarding the significance of the social environment for children, namely regarding the environmental conditions of the father and mother. And second, regarding the significance of the child's will, namely the information obtained by the judge from the process of direct interviews with the child at his place of residence. Both of these were found in the local inspection process.

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