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## Critical Analysis of the Judge's Considerations in the Mesuji Religious Court Decision No. 7/Pdt.P/2023/PA.Msj

**Daffa Ul-Haq Dinisa<sup>1\*</sup>, Relit Nur Edi<sup>2</sup>, Muhammad Haidir Syah Putra<sup>3</sup>**<sup>1</sup> Universitas Islam Negeri Raden Intan Lampung, Indonesia, [dafaulhaq48@gmail.com](mailto:dafaulhaq48@gmail.com)<sup>2</sup> Universitas Islam Negeri Raden Intan Lampung, Indonesia, [relitnuredi@ac.id](mailto:relitnuredi@ac.id)<sup>3</sup> Universitas Islam Negeri Raden Intan Lampung, Indonesia, [muhammadhaidir@gmail.com](mailto:muhammadhaidir@gmail.com)\*Corresponding: [dafaulhaq48@gmail.com](mailto:dafaulhaq48@gmail.com)

**Abstract:** This research is a critical study of the process and decision of the Mesuji Religious Court regarding the application for the determination of guardianship rights for a minor child named Abid Fariyanto bin Abdul Gani. The application was filed by Kabul Wakidi bin Rasiman and Sumarni binti Sutariyo on March 21, 2023. The panel of judges granted the application, appointed both applicants as responsible guardians, and imposed court costs of Rp 520,000. The judge's considerations were based on the facts of the child's parents' divorce, the absence of the father whose whereabouts are unknown since 2013, and the death of the biological mother in January 2023. The certificate of unknown whereabouts issued by the Village Head does not have the same force as a court order regarding supernatural status. Revocation of guardianship rights is a serious decision that must be made by a court decision, considering various factors in the best interests of the child, such as neglect, abuse of authority, and other dangerous conditions.

**Keywords:** Guardianship Rights, *Mafqud*

### INTRODUCTION

In the study of Islamic law, determining the *mafqud* (missing person) is very important because it determines the position of the *mafqud* in terms of obtaining rights and obligations in several matters in religion, such as inheritance, custody and even guardianship rights. If he is an heir, then his heirs need clarity regarding their status (whether the person concerned is still alive or dead) so that the law of inheritance and inheritance is clear, as well as if they are someone who has dependents or has care or guardianship over someone (Thalib, 2004). In determining the status of a *mafqud* (whether he is still alive or not), the fuqaha tend to view it from a positive perspective, namely by assuming that the missing person is still alive, until it can be proven with evidence that he has died. The position taken by fiqh scholars is based on the rule of *istishab*, namely establishing the law that applies from the beginning, until there is an argument that shows another law. However, the assumption that he is still alive cannot be maintained continuously, because this will cause harm to other people (Wahidah, 2008). Therefore, legal considerations must be used to seek clarity on the legal status of the *mafqud*.

Fiqh scholars have agreed that the person who has the right to determine the status of the missing person is the judge, whether to determine that the missing person has died or not. There are two kinds of legal considerations that can be used in seeking clarity on the legal status of the *mafqud*, namely: **first**, based on authentic evidence, which is justified by the Shari'a, which can determine a legal decision and **second**, based on the time period for the *mafqud* to be gone or based on expiration. The fuqaha have established several laws relating to missing/disappeared people, including: their wives must not be married/married off, their property cannot be inherited, and their ownership rights must not be disturbed, until their condition is truly known and it is clear whether they are still alive or dead (al-Syafi'i, 1990).

In the case of guardianship, a person or legal entity who has custody of a minor child, with the aim of fulfilling the child's basic needs, protecting the child's rights, and managing assets in the form of the child's property in order to guarantee their growth and future (Zuhriah, 2009).

Because in essence, the right of guardianship is the fulfillment of children's basic rights, which are part of the human rights contained in the 1945 Constitution and the United Nations Convention on the Rights of the Child. From the perspective of national and state life, children are the future of the nation and the next generation of the nation's ideals, so that every child has the right to survive, grow and develop, participate and have the right to protection from acts of violence and discrimination as well as civil rights and freedoms. Children are a trust and a gift from God Almighty, which must always be protected. Because in them is inherent dignity, honor, and rights as human beings that must be upheld.

According to Article 1 of Law Number 23 of 2002 concerning Child Protection, a child is *"a person who is not yet 18 (eighteen) years old, including a child who is still in the womb"*. Furthermore, Article 2 states, *"Child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and dignity, and receive protection from violence and discrimination"*. So it can be concluded that the survival and welfare of children, especially minors, is highly prioritized here, the judges who handle cases like this do not only use formal regulations such as laws but also use other considerations where these considerations aim to provide a decent and prosperous life and this is not far from the best interests of the child.

The transfer of guardianship rights from one party to another due to *mafqud* (lost) status is a common occurrence and is not something to be taken lightly, this is because determining this status requires the involvement of a judge or a court decision. In resolving this case, the judge will of course adhere to applicable procedural law, starting from the examination process, evidence, to the verdict. While the opinions of the jurists are only used as considerations in sentencing a person whose condition is unknown and reportedly deceased, there is a requirement for *ijtihad*. Therefore, a judge's *ijtihad* plays a crucial role in seeking possibilities and strong signs that can lead him to a decision, and this opinion is what is closer to the form of benefit. In addition, he can determine based on visible indications, or can detect through clear reasons (arguments) (Summa, 2005).

Based on the description of the background of the problem above, the researcher formulates the following questions:

1. What is the content of the Mesuji Religious Court Decision No. 7/Pdt.P/2023/PA.Msj regarding the determination of the right to seek legal protection for the transfer of child custody?
2. What is the perspective of Islamic family law regarding the content of the Mesuji Religious Court Decision No. 7/Pdt.P/2023/PA.Msj regarding the determination of the right to seek legal protection for the transfer of child custody?

## METHOD

This research uses a qualitative approach, emphasizing the analysis on the process of drawing comparative conclusions and analyzing the dynamics of the observed phenomena using scientific logic (Azmar, 2001).

This research is library research. This study will analyze the Mesuji Religious Court Decision No. 7/Pdt.P/2023/PA.Msj concerning the Transfer of Child Custody Rights Due to a Faithful Guardian.

## RESULTS AND DISCUSSION

### Definition of *Mafqud*

The word *mafqud* is a ism *maf'ul* derived from the words *faqada-yafqudu-faqdan*, which means lost. Terminologically, there is no substantial difference among jurists in defining *mafqud*; they only differ in the wording of the expression.

1. According to Muhammad Abu Zahrah

المفقود هو غائب لا يدري مكانه ولا يعلم حاله أ هو حي أم ميت

*Mafqud* is someone who is unseen (lost) and whose location is unknown and whether he is still alive or dead is unknown (Zahrah, 1957).

2. According to Wahbah al-Zuhailiy

المفقود هو الشخص الذي غائب عن بلده بحيث لا يعرف أثره علي فقده زمان بحيث لا يعرف أنه حي أم ميت

*Mafqud* is someone who disappeared from his country without knowing his place and whereabouts and time has passed and it is not known whether he is still alive or dead (al-Zuhailiy, 2011).

3. According to Muhammad Ali al-Shabuni

الغائب الذي إنقطع خبره وخفي أثره فلا يدري أنه حي أم ميت

*Mafqud* is a person who has disappeared and has had information about himself cut off so that it is no longer known about his condition, whether he is still alive or dead (al-Shabuni, 1968)

4. According to Syarqawi

المفقود من انقطع خبره

*Mafqud* is a person who has broken up (there is no) news about him (al-Syarqawi, 1997).

5. *Mafqud* is a person who has disappeared and his place of residence is unknown and it is also unknown whether he is still alive or dead, so the judge orders someone to look after his property and fulfill his rights, and support his wife and young children from his inheritance. And the man must not be separated from his wife, if the *mafqud* has reached the age of 90 years since his birth then he can be considered to have died, and his wife is undergoing 'iddah.

Based on the definition above, it can be seen that a *mafqud* is a person whose news is unknown, whether he is still alive or dead. A person who disappeared from his country for a long time and whose whereabouts are no longer known whether he is still alive or dead. An example is a trader who went to trade in an area that was being hit by war, his contacts who were contacted did not know his whereabouts, because according to them, the trader had returned to his country, while his family at home stated that he had not returned for a long time. *Mafqud* or missing person is a person who has been cut off so it is not known whether he is alive or dead. However, this person once lived and it is not known for certain whether he is still alive or not. In determining the status of a *mafqud* (whether he is still alive or not), *fiqh* scholars tend to view it from a positive perspective, namely by assuming that the missing person is still alive, until it can be proven with evidence that he has died (al-Zuhailiy, 2011).

The stance taken by these Islamic jurists is based on the principle of *istishab*, which stipulates the law that applies from the beginning until evidence suggests otherwise. However,

this assumption of life cannot be maintained indefinitely, as it would harm others. Therefore, legal considerations must be used to clarify the legal status of the missing person. Islamic jurists have agreed that the judge has the authority to determine the status of the missing person, whether to determine whether the missing person is deceased or not. The implications of this stance regarding the assets of the missing person are as follows:

1. Assets may not be distributed to heirs in accordance with the distribution of their respective inheritances.
2. The judge has the right to take *mafqud* assets to support his wife and children according to their needs. If the assets left by the *mafqud* are in the form of merchandise, the judge has the right to sell them for the needs of the *mafqud*'s wife and children.
3. All transactions carried out by the *mafqud* before he leaves the country are not cancelled. According to *fiqh* scholars, the judge has the right to appoint a *mafqud* representative to handle the transaction and matters related to it.
4. The judge acts as custodian of the *mafqud* assets until their status is clear and acts for the benefit of the assets. For example, if the property left behind is property that is easily damaged, such as fruit, then in order to safeguard the welfare of the judge, the judge has the right to sell it and keep the proceeds of the sale.
5. The judge also has the right to appoint someone who will be responsible for maintaining, managing and developing the *mafqud*'s assets. If the *mafqud* is declared dead based on available and convincing evidence, then his assets can be distributed to the heirs who have the right to receive them, including *fiqh* scholars agreeing that the judge also has the right to determine the status of the missing person whether he is still alive or dead. If the judge determines that the *mafqud* has died, then the assets can be distributed to the heirs who are entitled to receive them and the wife can marry.
6. *Fiqh* scholars agree that judges also have the right to determine the status of a missing person whether he is still alive or dead. If the judge determines that the *mafqud* has died, then the assets can be distributed to the heirs who are entitled to receive them and the wife can remarry after undergoing the 'iddah period (Sulfinadia, 2022).

### Understanding *Al-Wilayah* (Guardianship)

Guardianship (*voogdij*) is the supervision of a minor child who is not under the authority of their parents. Therefore, guardianship can be defined as a substitute parent for a child who is not yet capable of performing legal acts. The word "*wali*" in Arabic comes from the word *wilayah* (*noun*) and the verb "*walia*" (*verb*) (Gultom, 2003).

Generally, in every guardianship arrangement, there is only one guardian, unless a guardian-mother (*moerdervoogdes*) remarries, in which case her husband becomes the guardian. If one of the parents dies, then according to law, the other parent automatically becomes the guardian of the child. This guardianship is called statutory guardianship (*wettelijke voogdij*).

A child born out of wedlock is under the guardianship of the parent who acknowledges the child. And if a child is not under the authority of his parents and does not have a guardian, the judge will appoint a guardian at the request of one of the interested parties or because of his position (*datieve voogdij*). However, there is a possibility, a father or mother in his will (*testamen*) appoints a guardian for his child. This kind of guardianship is called guardianship according to a will (*testamentair voogdij*) (Gultom, 2003).

### Regulations for Determining Guardianship in Court

Every person, both men and women, naturally desires to form a family through marriage. The foundations of marriage are shaped by the natural elements of life itself, biological needs and functions, the need for affection and brotherhood, the nurturing of children

born of that marriage, and the education of those children to become well-rounded members of society. While no particular form of marriage is given by nature, various forms of marriage function as institutions.

In reality, children who still have their parents, if they encounter problems in their lives, are responsible for resolving them. However, when faced with legal challenges, the state, as a protective institution, must be present to resolve children's issues, both related to public law and private law. In the Indonesian context, a child is the future generation of the nation. It is hoped that their future will not be bleak simply because they face unresolved issues through religion, customs, or the law. One of the legal problems faced by children is the problem of guardianship caused by the death of one or both of the child's parents.

In the Unitary State of the Republic of Indonesia, three legal systems are adopted as the basis for establishing legislation: civil law, Islamic law, and customary law, each with its own distinct characteristics. This has led to legal pluralism in Indonesia. Legal pluralism can arise when faced with a legal issue within society, such as the determination of guardianship in court. National legal arrangements for guardianship are regulated in the Civil Code, Law Number 1 of 1974, the Compilation of Islamic Law, Law Number 23 of 2002 in conjunction with Government Regulation Number 29 of 2019. These laws and regulations are comprehensive and adequate, providing guidance in resolving guardianship issues. Based on these regulations, a guardian is defined as a person or entity that, in reality, exercises parental authority over a child. Further examination reveals that parents requesting guardianship is highly inappropriate. Guardianship can be implemented when both parents have died, both parents or the surviving parent has had their guardianship revoked by a court order, is declared incompetent to act, and has an unknown address. If one of the parents is still alive, has not had their guardianship revoked, is competent to act, and has a clear address, there should be no need for a guardianship appointment by the court.

However, to safeguard a child's interests, court proceedings often involve parents requesting the appointment of a guardian upon the death of one of their parents. This is usually to manage the child's assets, as the child is not yet legally competent.

### **Guardianship According to the Civil Code and the Marriage Law**

Guardianship of a child can occur in the event of a divorce between the child's parents, resulting in the termination of parental authority (*ouderlijke macht*) and the transition to guardianship (*voogdij*). In divorce law, this does not simply occur. Rather, there must be legally justified grounds for a divorce. The court will assess whether the divorce is permissible, depending on the underlying reasons.

As a result of a divorce, guardianship arises to manage the child and protect their rights. Guardianship can be filed in court as a result of a divorce, as regulated in the Civil Code, which explains that:

1. The wife regains her status as an unmarried woman;
2. The marital property is terminated, and it can be separated and divided. The joint property is divided in two (Article 128 of the Civil Code). In the case of a second marriage, this is regulated in Articles 181 and 182 of the Civil Code;
3. Parental authority is also terminated. For minors, it is up to the court to determine who will be appointed guardian (Article 229 paragraph 1 of the Civil Code). The obligation to provide child support also ceases, except as stipulated in Article 225 of the Civil Code.

Meanwhile, Article 41 of Law Number 1 of 1974 concerning Marriage, as amended by Law Number 16 of 2019, explains that the consequences of a dissolution of marriage are:

1. Whether the mother or father remains obliged to care for and educate their children, solely based on the interests of the child, if there is a dispute regarding control of the children, the court shall make a decision;



2. The father is responsible for all maintenance and education costs required by the child, if the father is in fact unable to fulfill these obligations, the court can determine that he will also bear these costs;
3. The court can require the ex-husband to provide living expenses and/or determine obligations for the ex-wife.

Apart from that, if the marriage is broken up due to divorce, the ex-husband is obliged to:

1. Give appropriate mut'ah to his ex-wife, either in the form of money or objects, unless the ex-wife is *qobl al-dukhul*;
2. Providing maintenance, dowry and kiswah to a former wife who has been sentenced to *talak ba'in* or *nusyuz* and is not pregnant;
3. Pay off the dowry owed in full, and half the dowry if *qobl al dukhul*;
4. Providing *hadhanah* costs for children who have not reached the age of 21 years.

### **Guardianship according to Law Number 23 of 2002 concerning Child Protection, as amended by Law Number 35 of 2014**

In the General Provisions as referred to in Article 1, a guardian is defined as a person or entity that, in reality, exercises parental authority over a child. Guardianship itself is regulated in Chapter VII, Articles 33 to 36. The duties of a guardian, according to Law Number 23 of 2002 concerning Child Protection, as amended by Law Number 35 of 2014, are:

1. Obligated to manage the child's assets (Article 33);
2. May represent the child in legal proceedings, both inside and outside the court, in the best interests of the child (Article 34).

If a child has not been designated as a guardian due to the absence of a court decision, the child's assets can be managed by the Estates Office or another institution with the authority to do so. The Estates Office or other institution as referred to in paragraph (1) acts as a supervisory guardian to represent the child's interests. Management of assets as referred to in paragraphs (1) and (2) must be determined (Article 35). If the appointed guardian is later found to be incompetent to perform legal acts or abuses his or her powers as guardian, his or her guardianship status will be revoked and another person will be appointed as guardian by court order. If the guardian dies, another person will be appointed as guardian by court order (Article 36).

### **Guardianship According to the Compilation of Islamic Law (KHI)**

Guardianship in the Compilation of Islamic Law is regulated in Chapter XV, Articles 107 to 112. Chapter XV, Article 107, paragraphs 1-4 of the Compilation of Islamic Law (KHI), states that:

1. Guardianship is only for children under 21 years of age and/or who have never been married.
2. Guardianship includes guardianship of the child's person and assets.
3. If the guardian is unable or negligent in carrying out his or her guardianship duties, the religious court may appoint one of his or her relatives to act as guardian at the request of the relative.
4. The guardian shall, whenever possible, be from the child's family or another adult, sound-minded, just, honest, and well-behaved individual, or a legal entity.

Meanwhile, Article 108 of the Compilation of Islamic Law (KHI) states that parents may entrust a person or legal entity with guardianship over their child or children's property after their death. According to Article 109 of the KHI, the revocation or termination of guardianship is regulated by the Religious Court. The guardianship of a person or legal entity may be revoked and transferred to another party upon the request of a relative if the guardian is an alcoholic, gambler, spendthrift, insane, or neglects or abuses their rights and authority as

guardian for the benefit of the person under their guardianship. The guardian's obligations regarding the child's property and property under guardianship are outlined in Articles 110-111 of the KHI.

Based on the consequences of guardianship arising from divorce between husband and wife, as explained above, the author, using Lawrence M. Friedman's legal structure theory, analyzes the following:

1. The creation of guardianship rights must be achieved through a court decision, which then grants authority to guardians as stipulated in Article 51 and Article 52 of Law Number 1 of 1974 concerning marriage, as amended by Law Number 16 of 2019. Article 48 of this Law also applies to guardians, namely the prohibition on transferring rights or pawning immovable property owned by a child under 18 (eighteen) years of age or who has never been married, unless the child's interests require it.
2. The guardian's authority may be revoked if the circumstances stipulated in Article 49 of Law Number 1 of 1974 concerning marriage, as amended by Law Number 16 of 2019, are met.
3. In the event that the authority of a guardian is revoked, as intended by the Court, another person shall be appointed as guardian (Article 53). A guardian who has caused loss to the property of a child under his/her control, upon the demand of the child or the child's family, may be required by the relevant court decision to compensate for the loss.

### **Considerations of the Mesuji Religious Court Judge in Determining Petition Number 7/Pdt.P/2023/PA.Msj**

Determining the guardianship rights of a minor child naturally requires a court proceeding. Therefore, in the interests of a child named Abid Fariyanto bin Abdul Gani, Kabul Wakidi bin Rasiman (Petitioner I) and Sumarni binti Sutariyo (Petitioner II) filed a petition with the Mesuji Religious Court on March 21, 2023, through the Mesuji Religious Court Clerk's Office. In their petition, the two petitioners submitted the following primary requests:

1. Granting the petitions of Petitioners I and II, who wish to transfer guardianship rights.
2. Declaring Petitioners I and II as the guardians responsible for directly supervising and acting in the interests of Abid Fariyanto bin Abdul Gani.
3. Determining costs according to law.

And in their subsidiary applications, applicants I and II submitted the following requests:

“If the panel of judges has a different opinion, ask for another decision that is as fair as possible.”

After the trial, and after reviewing the evidence and witness testimony, the Panel of Judges issued the following ruling:

1. Granting the petition of Petitioner I and Petitioner II.
2. Appointing Petitioner I (Kabul Wakidi bin Rasiman) and Petitioner II (Sumarni binti Sutariyo) as legal guardians of the child named Abid Fariyanto bin Abdul Gani.
3. Charging Petitioners I and Petitioner II with court costs of Rp. 520,000 (Five Hundred Twenty Thousand Rupiah).

Having learned the judge's considerations in this ruling, the author provides criticism and commentary on the court's ruling as a response to the legal decision made in the context of the case under discussion, as follows:

In the trial, testimony explained that:

1. Abdul Gani and Sumariyah binti Sutaryo are the parents of a child named Abid Fariyanto bin Abdul Gani.
2. Abdul Gani and Sumariyah binti Sutaryo, the parents of Abid Fariyanto bin Abdul Gani, are divorced.

3. Abdul Gani left Abid Fariyanto bin Abdul Gani in 2013 and his whereabouts are unknown.
4. Sumariyah binti Sutaryo, Abid Fariyanto bin Abdul Gani's biological mother, passed away on January 31, 2023, leaving her unable to care for and support his education.

Based on legal considerations, the panel of judges used a certificate of unknown whereabouts in the name of Abdul Gani issued by the Head of Berasan Makmur Village, Tanjung Raya District, Mesuji Regency, Number: 140/07.2014./MSJ/III/2023 on March 27, 2023. Furthermore, to determine someone's status as *mafqud* (missing/invisible) requires a trial and a court ruling explaining the case.

Legally, a certificate of missing is not equivalent to a religious court ruling. Both have different roles, legal basis, and evidentiary weight in divorce proceedings. The differences are as follows:

1. Certificate of Absence
  - a. Issued by: Prepared and issued by the village head or sub-district head, not by the court.
  - b. Legal Force: Serves as preliminary or administrative evidence indicating that one party (husband/wife) has left their residence and their whereabouts are unknown.
  - c. Function: Used as an administrative requirement for filing a divorce petition or lawsuit with the Religious Court. This document serves as the basis for the court to initiate the summons process for the party whose whereabouts are unknown.
  - d. Process: Issued based on information from family and neighbors in the residential area concerned.
2. Determination of Mafqud (Occupation/Disappearance)
  - a. Issued by: The Determination is issued by a panel of judges at the Religious Court through a ruling or decision.
  - b. Legal Force: It has binding legal force because it is issued by the judicial institution after a trial process. This determination is not merely a certificate, but rather the result of a careful examination by the judge.
  - c. Function: The court issues a determination of occultation after issuing a formal and proper summons through the mass media, but the party concerned remains absent from the hearing. With this determination, the panel of judges can continue the examination of the case and decide the case by default (without the defendant's presence).
  - d. Process: This is part of the court trial process that involves issuing a legal and proper summons.

The absence of a guardian in this case, as a father, has several implications, resulting in the automatic loss of guardianship rights. Revocation of guardianship rights is a serious legal action that must be determined by a court decision, as responsibilities and rights remain. Even if a father does not live with the child, he still has legal responsibilities and the right to make important decisions in the child's life.

Other factors will be considered. The court will consider various factors, not just the length of absence. Reasons may include:

1. The reason why the father left.
2. Whether he attempted to maintain contact.
3. The extent to which his absence affected the child's well-being.
4. Whether he continued to provide financial support.

If these four reasons are known, then revocation of guardianship rights can be carried out if there are strong reasons in the best interests of the child. Some of these reasons include:

1. Neglect or abandonment: If the father leaves the child for an extended period without attempting to establish contact or provide adequate support.
2. Abuse of authority: If proven to have committed violence, neglect, or physical, emotional, or sexual abuse against the child.
3. Misconduct: Committing actions that endanger the physical or mental safety of the child.



4. Endangering conditions: Involvement in substance abuse or a criminal history that affects the ability to care for the child.
5. Failure to comply with court orders: For example, failing to meet child support payments or violating other custody orders.

## CONCLUSION

A missing person is someone whose whereabouts are unknown, whether they are alive or deceased. This definition is agreed upon by Islamic jurisprudence scholars, although with varying wording. The whereabouts of a missing person are unknown after a period of absence and loss of contact. In Islamic law, a judge has the authority to determine the status of a missing person, whether alive or deceased, after a trial and sufficient evidence is presented. While the status of a missing person is uncertain, the estate must be managed by a party appointed by the judge to meet the needs of heirs, such as spouses and children. Distribution of the estate may not occur until the status of the missing person is confirmed.

Guardianship in Indonesian and Islamic law is the supervision of a minor child who is not under parental authority, usually occurring when a parent dies, divorces, or is unable to fulfill their responsibilities. Guardianship can be established by a court and carried out by a qualified guardian. The law regulates the duties and rights of a guardian, including managing the child's assets and representing the child in legal proceedings in the child's best interests. If the guardian is unable to perform their duties, the court can revoke guardianship and appoint another guardian. The court also considers the child's best interests when revoking guardianship rights, for example due to neglect or abuse of authority.

Determining the status of a child's guardianship often involves a court process that considers evidence such as a certificate of absence and a formal summons. In cases of divorce, guardianship of the child is transferred according to legal provisions to ensure the child's care and education in accordance with their best interests.

Thus, guardianship and guardianship are important concepts in Islamic and Indonesian national law, governing the protection of a child's assets and rights in the event of the loss or absence of a parent or legal guardian.

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