

**BEST INTEREST FOR CHILDREN IN PERMA NO. 5 OF 2019
CONCERNING GUIDELINES FOR TRYING DISPENSATION
MARRIAGE APPLICATION CASES**

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ABSTRACT

Child marriage has a negative impact on individuals and the environment. Children who marry at an early age do not get the rights they should have so that, which has an impact on divorce and domestic violence due to the unpreparedness of children in building a household; things like that can also affect social structure and order in society, which ends in threats to children's welfare. Children with welfare problems need protection and guidance like children of the same age. The type of research used is library research. The descriptive-qualitative method uses a theoretical approach and facts through the information media, judge's decisions, articles and other sources. The results of the study show that the best interests of the child in PERMA No. 5 of 2019 are all actions that must be considered to ensure the protection, care, welfare, survival and development of children, including efforts to help prosper the growth and development of children and improve family life.

Keywords: *Best Interests for Children, PERMA No. 5 of 2019, Marriage Dispensation*

INTRODUCTION

Every child has the right to survival, growth and development and is entitled to protection from violence and discrimination. Children's rights are part of human rights that must be guaranteed, protected and fulfilled by parents, family, community, state, government and local government.¹ This is aimed at realizing child welfare which is an order of life and livelihood to guarantee the growth and development of children in a natural manner, spiritually, physically and socially. (Law No. 35 of 2014). Children with welfare problems need attention, service, protection and guidance as children of their age so that their life tasks can be by society's expectations. Child marriage is a form of neglecting the welfare, growth and protection of children; even the increasing number of child marriages affects society's social structure and order.

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The impact of neglecting child welfare is increasing PTSD, depression, stress and difficulty controlling anger. (Carolynu A. Greene uet al, 2020) Childhood neglect is an act of negligence that refers to the continuing inability of parents or caregivers to provide a safe and favourable environment that satisfies the child's basic physical needs, including parents' physical or psychological nonresponsiveness that interferes with the child's normal psychological development. (Noémie Bigras et al., 2020) Apart from child pregnancies, the factor that has triggered the increase in requests for dispensation from marriage is the change in regulations regarding the age limit for marriage. The age difference for child

marriage, according to the Marriage Law No. 1 of 1974, is considered to cause discrimination against women, so it was used as material for a judicial review lawsuit on December 13, 2018, by the Constitutional Court by granting part of the lawsuit to uphold children's rights as referred to in Article 28B paragraph (2) of the 1945 Constitution.

RESEARCH METHODS

The type of research used is library research. The writer uses a descriptive-qualitative method with a theoretical approach and facts through the media of information, judge's decisions, articles, and other sources.

RESULTS AND DISCUSSION

Best Interest for Children

Children are one of the human resources of the younger generation, potential successors to the ideals of the struggle of the state who have a strategic role, have characteristics, and need protection and guidance to experience complete physical and mental development in a harmonious and balanced way. To carry out coaching and provide protection for children, support is needed in terms of institutions and legal instruments that are more stable and adequate; therefore, provisions regarding the administration of justice for children need to be carried out specifically (Hadibah Zachra Wadjo dkk, 2020). Children are very important for human survival and the survival of a nation or state because of the important role that children play. The law explains that every child has the right to survival, growth, and development, as well as the right to protection from harassment and discrimination. Every child needs direction and protection to support complete, harmonious, balanced physical, mental and social growth and development.(Hadibah Zachra Wadjo dkk, 2020)

Abintoro defines the child's best interests as all actions and decision-making concerning children, whether carried out by the family, community, or law enforcement; the survival and development of children must always be the main consideration.(Salman Abdul Muthalib dkk, 2021) The child's best interests must be focused on the objective of justice, namely, not destroying the child's future.(Yohana Dwi Wahyu Nugraheni, 2021) The rules regarding the principle of the child's best interests are contained in Article 2 of



Law no. 11 of 2012 concerning the Juvenile Criminal Justice System, Law No. 35 of 2014 concerning Child Protection, Article 51 Paragraph (2) and Article 59 of Law no. 39 of 1999 concerning Human Rights, and Article 1 Paragraph (6) and Article 2 of Supreme Court Regulation No. 5 years 2019.

Marriage Dispensastion

Application for marriage dispensation is regulated in Supreme Court Regulation No. 5 of 2019, which defines a child as someone who is not yet 19 years old or has never been married according to statutory regulations. Marriage dispensation is defined as a permit to release an obligation or a prohibition in the form of concessions on something that is not permissible (Thoby Nusabahari and Edi Mudjaidi Amin, 2021). Applications for marital dispensation must be based on urgent reasons accompanied by relevant supporting evidence. As for what is meant by urgent reason is a situation where there is no other choice that causes a marriage to be forced. Accompanied by relevant and sufficient supporting evidence in the form of a certificate of the age of the prospective groom and woman who is under 19 years of age and a certificate from a health worker to complete the parent's statement so that it can prove that the marriage is urgent (Irma Suryanti and Dewa Gde Rudy, 2021). Application for marriage dispensation in Supreme Court Regulation No. 5 of 2019 is judged and based on the child's best interests. Judges must base their decisions on the exemption from discrimination, gender equality, equality before the laws, justice, benefits, and legal certainty. (Irma Suryanti and Dewa Gde Rudy, 2021)

Interpretation of the Best Interest Principle for Children in PERMA No. 5 of 2019

Child marriage is a complex issue, so the Court is authorized by law as an institution whose duty is to assess whether or not child marriage is urgent by considering legal facts that are explored from various aspects of consideration. Law No. 16 of 2019 states that marriage is only permitted if the man or woman is at least 19 years old based on considerations for the benefit of the family and marriage household, namely that the prospective husband/wife must be mentally and physically mature, to realize the goals of marriage well without ending in divorce and get good and healthy offspring. Fiqh never mentions the minimum age limit for marriage for men and women. In Islam, a person is

considered an adult when he reaches puberty. From a religious perspective, the term early marriage is performed by someone who has not yet reached puberty. Meanwhile, Rasulullah SAW ordered that someone get married when he has reached *al-ba'ah* (able), as stated in the hadith:

يَا مَعْشَرَ الشَّبَابِ مَنْ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ ، فَإِنَّهُ أَغْضُ لِلْبَصْرِ ، وَأَحْصَنُ لِلْفَرْجِ ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ فَإِنَّهُ لَهُ وَجَاءٌ

In this hadith, there is no quantitative limit on numbers or age requirements for marriage. Still, it only uses the *al-ba'ah* formula, which has a very qualitative meaning, that is, if one is able. The legal experts of the Shafi'i school allow the marriage of underage boys if they fulfill the element of benefit, namely based on the child's best interests. Therefore, if there are no indications of benefit for the child, underage marriages are prohibited or unlawful. (Ali Imron, 2013) Meanwhile, early marriage by country is limited to the age of 19 years based on Law no. 16 of 2019 for both men and women; previously, the minimum age for women was 16 years, and for men was 19 years. (Law No. 1 of 1974) This is a form of effort to protect children from the rise of early marriages in Indonesia.

It is hoped that the revision of the Marriage Law Article 7 Paragraph (1) will encourage the creation of new cultures and norms for ideal marriages. However, the Marriage Law No. 16 of 2019, which increases the minimum age of marriage for women and men, does not necessarily guarantee that child marriages can be prevented because the Marriage Law allows you to apply for dispensation from marriage if the bride and groom do not meet the minimum age requirements for marriage. Data from the Supreme Court evidence that in 2018 the application for dispensation for marriage was 20 times higher than in 2005. The number of dispensations recorded was 13,783 cases in the Religious Courts. As many as 190 cases in the General Court, even the granting of requests for dispensation for marriage, reached 99 % of cases with consideration: children are at risk of violating social, cultural, and religious values; both pairs of children already love each other; unwanted pregnancies and premarital sex.

Granting a marriage dispensation is a matter of subjectivity involving consideration of values, norms, and culture. The Supreme Court is aware that child marriage in Indonesia

is a very serious problem and impacts the quality of life of women, children, and future generations. To overcome this, the Supreme Court also issued PERMA No. 5 of 2019 concerning Guidelines for Trialing Applications for Marriage Dispensation, which aims to assist Religious Court Judges and General Courts in adjudicating applications for marital dispensation by considering child protection rights.

In PERMA No. 5 of 2019, the judiciary acts as the final gatekeeper for preventing child marriage by applying the principles of children's best interests, respect for children's opinions, non-discrimination, gender equality, and equality before the law in resolving marriage dispensation cases. In dealing with requests for dispensation from marriage, the child's best interests must always be considered to achieve justice for the child. According to PERMA No. 5 of 2019, the best interests of children are all actions that must be considered to ensure the protection, care, welfare, survival, and development of children. Article 2, letter d of Law no. 11 of 2012 concerning the Juvenile Criminal Justice System in the child's best interest is that all decision-making must always consider the survival and development of the child. According to Article 2 of the Declaration on the Rights of the Child, the best interest of the child is that the child must enjoy special protection and must be given legal opportunities and facilities in other ways to enable the child to develop physically in a healthy and normal way and conditions of freedom and dignity. According to the UN Committee on the Rights of the Child, for a child or group of children, it is very important to consider all the important factors before choosing to evaluate what is in the child's best interest. The assessment process usually involves more than one expert or institution and brings together different viewpoints, disciplines, and (especially) children's views because there are many elements to consider. According to the UN Committee on the Rights of the Child, a number of factors must be considered when assessing what is in the best interest of the child, including the child's ideas and goals, identity of the child (including age, gender, and personal background); care, protection, and welfare of children; family environment; bond with family; and interaction with family; social interactions between children and adults and their peers; develop children's skills and capacities; vulnerability (such as the hazards children face and their sources of protection, resilience, and empowerment); rights and needs for health and education; the maturation of children

as they approach adulthood and independent existence; Other unique requirements. By paying attention to the child's best interests, child protection seeks to uphold the rights and welfare of children. Children's rights are fundamental requirements that must be fulfilled to survive, develop, and be protected from violence, exploitation, and neglect, as well as from violations of their civil, economic, social, cultural, and social rights.

The definition of the child's best interests, as contained in PERMA No. 5 of 2019, can be interpreted as an effort by the government, law enforcers, the community, or families to create welfare for children. In addition to playing an important role in the life of society, nation, and state, children are also buds that will grow and develop as the next generation of struggles to realize the ideals of the state. Therefore, children must be cared for, nurtured, and their welfare improved so that they grow and develop according to their age in terms of personality, capacity, and skills to carry out their duties and functions in life. The welfare of the child in question includes actions taken to promote the growth and development of the child to improve the standard of living of the child who is the subject of a marriage dispensation application. The child whose opinion is requested for dispensation from marriage must be heard in court to ensure the child's best interests. Children have the right to be treated humanely by considering their needs according to their age. Children have the right to be heard and to express and give their opinions freely without discrimination, including when the child is asked for a dispensation from marriage. The court can find out about the conditions imposed on the child and what conditions can be met by hearing the child's statement so that the court can make a fair decision by considering it from the child's point of view.

However, based on the results of the study, it can be concluded that the number of requests for dispensation from marriage is increasingly difficult to reduce; apart from increasing the minimum age limit for marriage, the association of children nowadays, which is increasingly free and uncontrolled, is the main trigger. This case can be seen in the case of Determination No. 43/Pdt.P/2022/PA.Btl states that an unwanted pregnancy has occurred in a child who has been running for almost eight months, so to minimize the possibility of harm to the child, both parents of the two children apply for a marriage dispensation.

Things like this are complex and become a fundamental consideration for determining whether to grant or reject a request. On the one hand, children have the right to get the right to go to school and play like children of their age; on the one hand; there are also long-lasting social consequences for fear that children will get if they don't get married immediately. Children have the right to life, growth, and development at their age. Still, in the case of requests for dispensation from marriage, some things must be sacrificed and given up, so to grant or reject the application for dispensation from marriage, the Judge must look at the long-term welfare opportunities for the child. Children even by granting a marriage dispensation request. Many children who are applied for in the application for dispensation from marriage are not ready in terms of health, psychological, sociological, cultural, and economic problems and have the potential to experience disputes and domestic violence and do not reach the ideal conditions as the maturity of the prospective bride and groom should be. Such as the Determination of Marriage Dispensation Application No. 8/Pdt.P/2021/PA.Btl, which the Judge rejected by considering that the applicant's child and her future husband were not even 19 years old. Both of them still want to continue their education and have no desire to get married, so they are worried that it will impact the marriage if it continues. In consideration, the Judge stated that the child's desire to continue his education should be respected. Geny's theory can strengthen this to find the meaning of the child's best interests,(W Friedmann, 1990) a matter that cannot only be seen from the literal-juridical construction of laws. The correct interpretation of the law is a balanced blend between the law's spirit and the case's context. Laws are never perfect; that's why judges, in deciding a case, must carry out a massive interpretation by considering the existing case's context. The child's best interest is an effort to keep the child away from greater losses, even though it has to classify the rights that should be obtained as children of their age. Every child who applies for a marriage dispensation cannot be equated with one another, so if you dig deeper into each case, the Judge will find a different meaning of justice for each applicant.

CONCLUSION

Child welfare will indeed be fulfilled if the right to obtain survival, the right to protection, the right to growth and development, the right to participate, and the right to



identity are fulfilled properly. The increase in the number of requests for dispensation from marriage granted by the Court is not because Judges ignore children's rights that should be fulfilled but because Judges have other views regarding children's future and long-term welfare. The Judge considers the benefits and harms the child will receive if the marriage is granted or rejected. If the child applying for dispensation from marriage can still be saved and wants directions to avoid early marriage, the Judge will reject the request submitted. On the other hand, the Judge will grant the request for dispensation from marriage if it is feared that the child will not be able to take care of himself or has already experienced an unwanted pregnancy.

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