

## Children Born Out of Adultery and Guardianship: The *Bahtsul Masail* Perspective on Old Marriage Cases

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### Abstract

Marriage is a sacred institution in Islam whose validity is determined by fulfilling the conditions and pillars that the Sharia has set. One of the main pillars is the presence of a marriage guardian. In Islamic law, children resulting from adultery do not have a *nasab* relationship with their biological father, so the father does not have guardianship rights. However, cases of marriages where the biological father is the guardian often pose a legal dilemma, especially if the marriage has been going on for a long time. This study aims to analyze the legal status of biological paternity guardianship in the context of children resulting from adultery based on a cross-sect approach, focusing on the view of the Maliki School that provides flexible space for certain situations. This research uses a normative approach with a content analysis method on fiqh literature, *Bahtsul Masail* fatwa, and other sources of Islamic law. The results of the study show that according to the Shafi'i School, the guardianship of the biological father is not valid, so the marriage must be repeated with a legal guardian, namely the guardian of the judge. On the other hand, the Maliki school allows the guardianship of the biological father if it is openly recognized, with consideration for maintaining family benefits and social stability. This approach is relevant in certain situations and is supported by the principles of Maqashid Sharia, which include safeguarding religion (*hifz al-din*), heredity (*hifz al-nasl*), and avoiding social and economic damage (*mafsadah*). This study concludes that the adaptive application of *ijtihad* is needed to provide legal solutions that are relevant to the conditions of contemporary society, without ignoring the principles of Islamic law.

**Keywords:** Children; Adultery; Guardianship; *Bahtsul Masail*; Marriage Cases

### Introduction

Marriage is a thing full of the values of purity and spirituality, which is the main foundation for building a harmonious family under Islamic law. The validity of a marriage in Islam depends on the fulfillment of the conditions and principles that have been set. One of the pillars in determining whether a marriage is valid or not is the

presence of a guardian. In Islam, guardianship is a fundamental thing in determining whether a marriage is valid or not (Maisarah, 2016).

However, what becomes a problem is when a child born from an adultery relationship is guarded by his biological father, which in the Islamic view the marriage is invalid because the father does not have a *nasab* relationship with the child. In Islamic law, a child resulting from adultery is a child born from a relationship that occurs outside the legal marriage bond according to Sharia. In this context, the child only has a *nasab* relationship with his mother, not with his biological father. This is based on the hadith of the Prophet Muhammad PBUH:

*"The child is to the owner of the bed (mother), and to the adulterer is a stone (without any right)." (HR. Bukhari and Muslim).*

The consequences of this status are first, the child has no relationship with his biological father. So the father has no legal rights or obligations such as inheritance, maintenance, or guardianship. Second, children resulting from adultery are not entitled to inherit property from their biological father, as affirmed in the fiqh of the four madhabs and the decision of Bahtsul Masail NU (Sayani, 2023). Third, the biological father cannot act as the guardian of the child's marriage because of the absence of a *nasab* relationship. The legal guardian in the marriage of a child resulting from adultery is the guardian of the mother, if any, or the guardian of the judge if there is no qualified guardian of the child (Jaya, 2023).

Guardianship in marriage is one of the main requirements that must be met for a marriage contract to be valid according to Islamic law. The guardian has an important role as a representative of the women's side, to ensure that the marriage contract process takes place with honor under Islamic principles. This is corroborated by the hadith of the Prophet PBUH which reads:

*"It is not valid to marry except with a guardian" (HR. Abu Dawud, Tirmidhi, and Ibn Majah).*

However, the position of the guardian in marriage is often debated. Some scholars argue that wali is one of the pillars that determines the validity of marriage. On the other hand, there is also an opinion that states that marriage is still valid even without a guardian, as long as both brides and grooms have reached the age of majority. According to Law Number 1 of 1974, a person is considered an adult when he has reached the age of 21. In the view of the madhhab, Imam Shafi'i, Maliki, and Hambali agree that marriage is invalid if the bride-to-be does not have a guardian. On the other hand, Imam Hanafi argued that guardians do not belong to the pillars of marriage and therefore are not obligatory. (Maisarah, 2016).

In the NU Online platform, Bahtsul Masail NU answered one of the questions that touched on the issue of guardianship of children resulting from adultery in marriage. The questioner said that she had married in 2019 with her father as the guardian in the marriage contract. However, she only found out that she was the result

of an extramarital relationship after the marriage took place. This raises concerns about the validity of his marriage contract, especially after reading that an adulterous child should not be guardian by his biological father (Nurhakim, n.d.).

Cases in which the marriage is performed by an illegitimate guardian pose a legal dilemma. In the Shafi'i School, the marriage contract carried out by the invalid guardian is considered null and void and needs to be repeated with the legal guardian, namely the guardian of the judge. However, in the context of a long-standing marriage, annulling a marriage can have significant social and psychological consequences. Therefore, alternative views from other schools can be considered.

To anticipate guardianship problems in the case of children resulting from adultery, Bahtsul Masail NU provides an alternative view by considering the Maliki madhhab, which views that the fate of children resulting from adultery can be linked to their biological fathers. In this context, the biological father can act as the legal guardian, as long as there is no other guardian who is more entitled. In addition, Sheikh Wahbah az-Zuhaili's view of the concept of general guardianship also provides space to make the father a guardian in certain situations, as long as the Islamic requirements are met.

Therefore, this study is important to understand how the *ijtihad* method used by Bahtsul Masail, especially in accommodating cross-school views and the *maqashid sharia* approach, to provide solutions that follow sharia principles as well as relevant to the social conditions of Indonesian society. This research is expected to reveal the dynamics of Islamic legal thought in the Bahtsul Masail forum in responding to this contemporary issue.

## Research Methods

This study uses a normative approach that relies on the method of in-depth library search (*Library Research*). Secondary data sources in this study include various references such as books, laws, and fatwas of Bahtsul Masail that are relevant to the topic discussed (Achmad, 2007) (Fadli, 2021).

The analysis technique used is content analysis, which is a method to conclude the identification of specific characteristics of a message in an objective, organized, and systematic manner (Sugiyono, 2018). This method provides a comprehensive framework for understanding the research material thoroughly.

## Results and Discussion

### Guardian of Child Marriage Resulting from Adultery

A wali is a person who has the right to sharia to give authority to a person in deciding or ordering another party firmly. In the context of marriage, wali is one of the important pillars that must be fulfilled for the bride-to-be. The guardian acts to marry the prospective bride by maintaining the validity of the contract under sharia.

In Islamic fiqh, the term guardianship is known as *al-walayah* (الولاية), which etymologically has several meanings, such as *mahabbah* (love), *annasrah* (help), and taking care of or mastering something (*Rama al-Walayah*). This role of guardian reflects the responsibility to protect the honor and rights of women in marriage (Putra et al., 2022). In Islamic law along with some literature that the author found, several things are requirements for a person to become a guardian:

1. A marriage guardian must be Muslim, This is necessary to maintain the validity of the marriage contract under Islamic law.
2. Guardians must have common sense (*aqil*) and have reached the age of adulthood (*puberty*). This is important so that the guardian is able to understand the responsibilities and consequences of marriage.
3. The majority of scholars, as embraced in the Shafi'i madhhab, stipulate that the guardian of marriage must be a man (Rohmat, 2011)
4. In the view of madhhab Shafi'i, the guardian of marriage must be a just person, namely having a commendable nature and staying away from great sins (Maisarah, 2016)
5. The guardian must have a legal *nasab* relationship with the woman to be married. In the case of children resulting from adultery, the guardian's *nasab* is transferred to the guardian judge, under the view of the majority of scholars (Sayuti, 2011)
6. Some schools, such as Shafi'i and Maliki, require that the wali nikah should not be wicked (blatantly committed a great sin). However, this view is different from the Hanafi madhhab, which allows a wicked person to become a guardian (Rohmat, 2011).
7. The guardian must be able to act perfectly in the law, including the mental aspect and the ability to carry out the role of guardian (Mughni Labib Ilhamuddin Is Ashidique, 2021)

An adulterous child is a child born from an adultery relationship (Sayani, 2023). Regarding the fate of an adulterous child to his father, most scholars agree that the fate of an adulterous child is to be attributed to his mother (Warman, 2022). The main basis in this case is the hadith of the Prophet Muhammad Saw:

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ، أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ "الْوَلَدُ لِلْفِرَاشِ، وَلِلْعَاهِرِ الْحَجَرُ. متفق عليه

It means: "The child belongs to the owner of the bed (husband), and to the adulterer, it is a stone (no right whatsoever)." (HR. Bukhari and Muslim).

There are various definitions of child adultery, the following author will explain some definitions of child adultery from various literature, both from classical and contemporary scholars. An adulterous child, according to the view of classical scholars, is a child born from a relationship outside of a valid marriage according to

Islamic law, so he does not have a *nasab* relationship with his biological father. Imam Shafi'i stated, "The fate of an adulterous child is only connected to his mother, while his biological father has no legal right or responsibility towards the child." (Safi'i, n.d.).

In line with that, Ibn Qudamah argued that "An adulterous child is a child born from an unlawful relationship that is not recognized by the Shari'ah, so he does not have a *nasab* relationship with his father" (Qudamah, n.d.). Al-Mawardi added that "The relationship of *nasab* can only be established through a valid marriage according to Islamic law" (Al-Mawardi, n.d.). Ibn Taymiyah also explained, "An adulterous child is not recognized by his biological father because he was born from a violation of the Shari'ah." (Taimiyah, n.d.).

Meanwhile, contemporary scholars provide a definition that is in line with classical scholars, but with an emphasis on children's rights. Shaykh Wahbah az-Zuhaili emphasized, "The fate of an adulterous child is only connected to his mother following the provisions of Islamic law" (Az-Zuhaili, n.d.). Muhammad Jawad Mughniyyah also explained that "Even though an adulterous child does not have a *nasab* relationship with his biological father, he still has basic rights such as protection and maintenance from his mother" (Mughniyah, n.d.).

Sheikh Ali Jum'ah emphasized that "Even if they are born from an illegitimate relationship, adulterous children should still be treated with compassion and justice by society" (Jum'ah, n.d.). Dr. Yusuf al-Qaradawi added, "Islam does not make an adulterous child responsible for the sins of his parents, and he must still be protected and given his rights as a human being." (Al-Qardawi, n.d.).

The definition of these scholars shows consistency in Islamic law that an adulterous child has no *nasab* relationship with his biological father but still has the right to protection and justice. Contemporary scholars emphasize a humanist approach to reducing the social stigma against child adultery.

### **Bahtsul Masail Ijtihad Method**

Bahtsul Masail is a discussion forum among Islamic scholars, especially in the field of jurisprudence, who operate in Islamic boarding schools affiliated with *Nahdlatul Ulama* (NU) (Jufrizal & Azwar, 2024). In this forum, various religious issues that have not had a firm legal explanation or have never been discussed by previous scholars are discussed in depth. One example of a question that has been asked is:

*Assalamualaikum*, I would like to ask about the issue of marriage. I got married in 2019, where at the time of the marriage contract, my father acted as a guardian. However, let me share a little story about my parents. In the past, my father and mother were involved in relationships outside of legal marriage, until my mother became pregnant and gave birth to me. In other words, I am a child born from an extramarital relationship. I only found out about this as an adult.

After my marriage took place, I read several articles on the internet that mentioned that adulterous children should not be guardians by their biological fathers. Is the information correct? In my family, no one ever discussed that my father was not entitled to be my guardian, and most likely they did not know this either. The question is, what is the status of my marriage contract? Is it legal or not? If it turns out to be invalid, do I need to renew the marriage contract? I don't want to continue to endure the sin of adultery until the end of my life. Please explain, and thank you for your time. Hopefully, you will be pleased to answer (Nurhakim, n.d.).

The answers given are as follows:

Indeed, according to the agreement of scholars, the biological father does not have the right to be the guardian of a child born outside of a legal marriage when the child is about to marry. This is based on the principle of Islamic law which states that the relationship of *nasab* is not recognized between the child resulting from adultery and his biological father.

When you want to get married, the person who has the right to be the guardian is from the mother's family, because in Islam, a child born outside of a valid marriage, destiny is only connected to the biological mother.

So what if the father has already married him, when in fact the questioner is the child of a relationship outside of a legal marriage?

In this case, the questioner may refer to the opinion of the Maliki School that differs from the majority of other scholars. The Maliki school views that a girl born out of wedlock can be linked to her biological father if the father acknowledges the child openly. This gives legitimacy to the biological father to act as the guardian of the marriage for the daughter resulting from an extramarital relationship.

As quoted from Mukhtashar Khalil al-Kharasyi, it is stated that:

*"If a man commits adultery with a woman, and she conceives a daughter, then it is haram for her to be married as a daughter whose destiny is connected to her; Because all children are created from the man's semen. So, she is a daughter or a kind of daughter according to popular opinion."*

This approach used by Batsul Masail can provide legal solutions for certain cases, especially in contexts where marriage contracts have been in place for a long time. Thus, the marriage contract carried out by the biological father can be considered valid according to the view of the Maliki School, so there is no need to repeat the contract.

Furthermore, Batsul Masail also added the view of Wahbah az-Zuhaili, in the Maliki School there is a concept known as *general trust* (*'ammah territory*). This concept states that a person who is a Muslim can act as a marriage guardian for certain individuals who do not have a *nasab* guardian. The main requirement to become a guardian in this context is that the person must be a Muslim. This general guardianship includes women who do not have a legal relationship or guardian. Shaykh Wahbah az-Zuhaili explained in *Al-Fiqhul Islami wa Adillatuhu* that the

concept of general guardianship (*'ammah territory*) in the Maliki School is based on one main condition, namely Islam. He mentioned:

*"General trust: owned for one reason, namely Islam. This trust is for all Muslims. One of them is one of them by a woman asking to be represented by one of the Muslims to carry out her marriage contract. The condition is that he does not have a father or a person bequeathed by his father; And she was a commoner, not a noblewoman. Commoner women are women who do not have beauty, wealth, destiny, honor, and offspring. A person who does not have a nasab is a daughter born as a result of adultery, or syubhat, or a freed female slave."* (Az-Zuhaili, n.d.)

This opinion shows that in the Maliki School, a person who qualifies as a Muslim can be appointed as a guardian to carry out the marriage contract of a woman who does not have a guardian of the *nasab*. These women include children from adultery, children from *syubhat* relationships, or female slaves who have been freed. This approach provides a legal alternative for cases where the guardian of the *nasab* does not exist or is invalid.

In the context of Indonesia, which generally follows the Shafi'i School, a marriage contract carried out with an invalid guardian is considered void and must be repeated. However, the opinion of the Maliki School can be used as an alternative in certain cases, so that the contract that has been carried out can be considered valid without the need for repetition.

### **Analysis of Batsul Masail's Ijtihad on Children Resulting from Adultery and Guardianship**

In the Shafi'i School, a marriage contract made with an invalid guardian is considered invalid (Adam, 2022). However, Bahtsul Masail opens the space to use the opinion of the Maliki School, which recognizes the biological father as the guardian in certain cases, so that the marriage contract can be considered valid without the need to repeat. However, it should be noted that the application of the opinion of the Maliki School states that a child resulting from adultery can be given to his biological father if there is a confession from the father, without any doubt or other claim to the child's fate.

In the context of guardianship, the biological father can act as a guardian if no guardian from the mother's side is entitled or qualified to carry out the marriage contract. In addition, the role of biological fathers can also be considered if a guardian judge is not available or the appointment of a guardian judge is considered to be able to cause significant social difficulties. However, if there is a guardian judge, of course, based on the number of judges, we must prioritize. This is based on the words of the Prophet PBUH:

*"The Sultan (wali hakim) is the wali for anyone who does not have a wali."*  
(HR. Abu Dawud, Tirmidhi, and Ahmad).

In the view of Imam Mazhab Shafi'i, the guardian of the judge is the party who takes over the role of guardian if there is no legitimate guardian of the *nasab*. The case of children resulting from adultery falls into this category because the biological father does not have a *nasab* relationship with the child.

Imam Nawawi explained:

*"If there is no valid guardian of the nasab, then the guardianship is transferred to the guardian judge, because the Sultan or his deputy has the authority to ensure the validity of the marriage contract."*

In the context of positive law in Indonesia, the Compilation of Islamic Law (KHI) Article 23 states:

*"The guardian of the new judge can act as the guardian of the marriage if the guardian of the nasab does not exist or is unable to present or is not known where he lives, or is reluctant to become a guardian or others."* (COMPILATION OF ISLAMIC LAW, 1991).

This is relevant in the case of children resulting from adultery, where the guardian of the biological father is invalid. Thus, the guardian judge is a clear legal solution and is recognized by the state. However, if we reflect on this case, the approach offered provides a practical solution in certain situations, especially when other options are not possible or will have a greater impact.

This *ijtihad* also shows the flexibility of Islamic law by accommodating the opinions of the Maliki School, which allows legal solutions without having to follow the strict views of the dominant Shafi'i School in Indonesia. Some scholars have different views on cross-sectarian matters. Ibn Taymiyyah allows cross-sections if the main purpose is to achieve the benefit of the ummah and does not contradict the principles of the Shari'ah. He stated:

*"There is no prohibition to take a lighter opinion from another sect, as long as it is under the Shari'ah and does not violate the clear nash."* (Taimiyyah, n.d.)

In the work *Al-Fiqh al-Islami wa Adillatuhu*, Wahbah az-Zuhaili states that cross-sectarianism can be done in an emergency or when it is necessary to achieve greater benefits. However, he emphasized that this must be done with caution and not to avoid sharia obligations (Az-Zuhaili, n.d.). Meanwhile, Imam Nawawi warned that crossing schools should not be done with the aim of seeking relief (*Tatabu' al-Rukhas*), because it is considered to violate the integrity of Islamic law.

*"Taking opinions from other schools without the basis of sharia will only weaken the authority of Islamic law"* (Safi'i, n.d.)

Al-Ghazali emphasized that a Muslim should adhere to one school consistently, except in an emergency or if the mufti permits to use other opinions (Al-Ghazali, n.d.).

Looking at the various opinions of classical and contemporary scholars, eating across schools can be allowed under certain conditions if it aims to achieve benefits and is done carefully. The majority of scholars agree that cross-sectarianism should not be done solely to seek relief, but must be based on clear sharia needs and with



guidance from religious authorities. This approach reflects the flexibility of Islamic law in responding to contemporary challenges.

This *ijtihad* also uses the principle of *maqashid sharia*, which is to maintain the benefit (*Maslahah*) and prevent damage (*mafsadat*). By accepting the view of the Maliki School, the validity of marriage can be guaranteed without causing further damage in the family. The case of an adulterous child who is guardianshiped by a biological father in marriage can be analyzed from the perspective of *Maqashid Syariah* to understand *maslahat* (goodness) and prevent *mafsadah* (damage). *Maqashid Syariah* aims to protect five main aspects of life: religion (*Hifz al-din*), soul (*Hifz al-Nafs*), reason (*Hifz al-AQL*), descendants (*Hifz al-Nasl*), and property (*Hifz Al-Mal*) (Maulidi, 2022).

Guardianship of children resulting from adultery is important in the context of *Hifz al-Nasl*. According to Imam Al-Syatibi, *maqashid* in caring for offspring is not only to maintain the legitimacy of the *nasab* but also to provide protection to children from negative social impacts due to their status (Rahmi, 2023). In this case, using the Maliki School to allow guardianship by biological fathers can avoid damage to family relationships that have been established. The need to maintain the benefits is the core of *Maqashid Sharia*. According to As-Syatibi, the benefits must be universal and not contradict the principles of *Sharia* (Nasrullah Kartika MR & Noor, 2014).

In the case of a marriage that has been going on for a long time, the annulment of the marriage can create a huge social, economic, and psychological impact. Therefore, maintaining marital status based on the views of the Maliki School provides a broader solution to the benefits. In addition, this is also related to the principle of *Hifz al-Din* related to maintaining the validity of marriage in the *Shari'a*. By ensuring the existence of a legal guardian according to one of the *madhhab*s, marriage can still be considered valid without violating *Sharia* principles (Ahmad Suganda, 2020). In addition, it also emphasizes the principle of *Hifz al-Mal* involves avoiding significant financial losses due to the annulment of marriage. This is relevant in ensuring the economic sustainability of the family that has been formed (Nasrullah Kartika MR & Noor, 2014).

From the perspective of *Maqashid Sharia*, the decision to accept biological paternal guardianship in the context of the Maliki School is a form of applying benefits in facing contemporary social challenges. This solution not only protects the individual but also ensures justice and family sustainability, in line with the goals of Islamic law.

## Conclusion

Marriage is a very sacred institution in Islam, which requires the fulfillment of conditions and harmony to be considered valid. One of the important pillars is the presence of guardians for women. However, in the case of children resulting from adultery, Islamic law states that the biological father does not have custody rights due to the absence of a legal *nasab* relationship. This view is based on the principles

formulated by the majority of scholars, including the Shafi'i School, which affirms that the fate of an adulterous child is only connected to his mother. In this situation, the guardianship can be transferred to the guardian of the *nasab* from the mother's side or the guardian of the judge if there is no qualified guardian of the guardian.

*Ijtihad Bahtsul Masail* shows the flexibility of Islamic law by adopting the view of the Maliki School as an alternative in certain situations. In the context of a marriage contract that has been going on for a long time, the use of *ijtihad* methods such as *maslahah* allows the biological father to act as a guardian to maintain the family's benefits, social stability, and the validity of marriage. This approach is also follows the principles of Maqashid Sharia, which aims to maintain religion (*hifz al-din*), and heredity (*hifz al-nasl*), and avoid damage (*mafsadah*). Thus, this solution not only maintains social harmony but also ensures the sustainability of Islamic sharia values in the face of contemporary challenges.

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