Validity Of Biological Father As Marriage Guardian Against Syubhat's Son

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**Abstract**

This study aims to understand and find out how the marriage guardian is determined for children born as a result of a relationship *Wath’i syubhat*, be it a relationship *Wath’i syubhat* because of the contract and/or relationship *Wath’i syubhat* due to actions, as well as the legal consequences of having a biological father who is the child's marital guardian *suspicous*. Indeed, in Law No. 1 of 1974 concerning Marriage in article 43 paragraph (1) it is explained that: "illegal children only have a civil relationship with their mother and their mother's family". But in context *Wath’i syubhat* of course there are differences. In *Wath’i syubhat*, children born in this case can still have lineage with his biological father, and has the same rights as the rights of children born in a normal contractual relationship, such as a biological father being able to become guardian for his daughter from *Wath’i syubhat*. Child's marriage guardian *watha’ syubhat* different from the marriage guardian of an adulterous child. Judging from the way it is mixed, if...*watha’ syubhat* there was a mix-up due to a misconception that the man and woman were a legal couple. While adultery sometimes there is an agreement or mutual consent, but they realize that the man and the woman have no one to legalize the intercourse. So the guardian marries the child*watha’ syubhat* that's the person who*give away* himself (biological father) if the child was born after six months after*dukhul* (intercourse).

**INTRODUCTION**

According to Law No. 1 of 1974 concerning the purpose of marriage is to form a happy family: "Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy, eternal family based on the belief in the Almighty God." A household will feel barren and less than perfect without children, even if the house is abundant with possessions and wealth. It is hoped that their existence will not only provide inner satisfaction or can support worldly interests, but more than that, children will be able to provide benefits to their parents in the future when they die (Puniman, 2018; Hanifah, 2019; Hudafi, 2020)


**E-ISSN:** 3032-6818

**Published by:** The Institute for Research and Community Service
The greatest wisdom of marriage is to care for children and grandchildren (lineage) and without lineage for the child, of course the child is uncertain who will take care of him and who will be responsible for him. A true marriage in Islam is intended for the benefit of the household and offspring as well as for the benefit of society (Basyar, 2020; Quthny & Muzakki, 2021; Simanjuntak, 2022).

About guardian issues and their connection with wathiq syubhat, in the book *Fiqih mazhab Arba'ah* explained that meaning wathiq syubhat is something that requires someone to give mubar and match it (Miftahuddin, 2021). While in the book *Mausu'ah fiqih Umar ibn Khatab*, suspicious is something that aborts or eliminates bad (punishment).

In the book *al Mughni* Ibn Qadamoah’s essay, according to Imam Abu Hanifah, he expanded the understanding suspicious. This goes very far when he says: "If a man takes a woman as his hire, then he commits adultery with her, or hires her to commit adultery with him, and then he actually does that, then there is nobad (adultery) for both of them. Because ownership of the use of women is something suspicious (Winario, 2020; Nurman, 2022).

Because a guardian is so important in marriage, it is also important for us to know that if there is a case of a woman being born as a result *Wathi syubbat*, who will be her guardian at her wedding? Is a guardian lineage-his? or guardian judge?

### METHODS

This research uses a qualitative method with a content analysis approach, all data is taken from various sources originating from classical scriptures, books, theories and opinions of ushul fiqh experts (Effendi & Oktovia, 2020; Zahrani, 2023). The design of this research approach can be carried out to discuss certain problems, issues or topics originating from the literature collected as a whole and then taking themes that are appropriate to the required data (Engkizar et al., 2018; Aryanti et al., 2022; Rahman et al., 2023). After the author has collected all the data, the next step is to select the required data according to the problems raised in this article. The method for determining research results, discussing results using an analytical approach, can be carried out using themes or main reviews in accordance with the issues and problems discussed.

### RESULT AND DISCUSSION

#### Understanding Wathiq Syubbat

In language, understanding be said is derived from a word that has the meaning of stepping on. Meanwhile, there is an expression that means having sex with a woman. As for suspicious etymologically is doubt, anxiety, uncertainty. Whereas in other expressions that mean worry, doubt (in a matter) (Wati, 2023; Ulum, 2023; Saefi, 2023)

As for understanding wathiq syubhat in terms, among others: First, according to syara’, Wathiq Syubhat means an action that can disqualify a person from the law (bad). An example of sexual intercourse is that a man commits against a woman because he thinks that the person he is having sex with is his own wife. Second, according to normative law, Wathiq Syubhat is a mental relationship between a man and a woman without any element of intention or in the language of criminal acts, it is more fitting to call it "negligence". Negligence is a form of error that is lighter than intentional, but also not light on purpose. An example is a man and a woman who are busy drinking and then unknowingly and intentionally both sleep together (Hadziq, 2019; Nurra’ida & Fatkhurrozi, 2023).

Then that third, according to the jurists, among others Mazhab al-Arba’ah, they must be the same in meaning Wathiq Syubhat namely an act that requires a person to pay a dowry and its equivalent. Then deep mabar and bad This by Syafi’iyah,
Hanafi, Malikiyah, and Hanabillah provides slightly different provisions (interpretations). From the various meanings of the terms above, two types of meaning can be distinguished: (a) Syubhat Akad, is when a man carries out a marriage contract with a woman as with any other valid marriage contract, but then it turns out that the marriage contract is fasid (flawed) for one reason or another. Example: marriage contract between a non-Muslim man and a Muslim woman. (b) Doubt of Action, is when a man interferes with a woman without any agreement between the two of them, whether legal or false, because he is not aware or believes that what he is interfering with is halal for him, but it turns out that it is haram for him to interfere with her. For example, a man has sex with a woman because he thinks he is his wife, but it turns out that he is not having sex with his wife, which is halal for him (Khairani & Susanto, 2019).

From these two forms of understanding, Abu Hanifah clarified and expanded the understanding suspicious shape fi'il This is in a very broad sense when he said, "if a man takes a woman as his hired hand, then he commits adultery with her, or hires her to commit adultery with him, then he actually commits the act, then there is no had (punishment for adultery for both). Because ownership of the use of women is something suspicious" (Hermawan, 2020).

Law Nasab Wath'i Syubhat

Every birth causes fixation lineage for the child from the mother who gave birth. When a woman gives birth, it is fixed lineage to him, whether from halal or haram relationships (Harlina, 2014; Asman, 2020).

As for determination lineage From a man there are several reasons for him to women, including:

First, suspicious because of the contract, the relationship from a legal contract becomes a broken contract, if a man marries a woman by means of a legal contract and fulfills all kinds of conditions and principles. Then after the contract the woman gave birth to a child. But later on it became known that her husband or wife was her biological brother or sister. So in this case his son remains in-lineage right in men without needing a clear explanation or bringing proof of the child's birth. Because of the words of the Prophet SAW that were narrated by the Jama'ah except for Abu Daud:

It means "A child (is casted) on the firasy (of his father) and for the adulterer al-hajar (losses, hindrances and stone throwing).

The word al-Hajar in the Hadith means that the adulterer is prevented from having the right of nasab (legitimate blood relationship) with his child. One opinion states that al-hajar means stone as a punishment for stoning an adulterer. However, this meaning raises other problems, considering that the law of stoning is only for muhshan adulterers, while in the hadith it has a general meaning.

But taking and determining lineage from the contract fascist the same as a contract authentic if the man really dukhl (having sexual intercourse) and if not then the child cannot be lineage to him.

Second, suspicious because of the act, this syubhat relationship cannot be equated with adultery. Form of suspicious This is when a man marries a woman, then he rushes to have sex with her, and accidentally and without realizing it, another woman comes so he thinks she is his wife. From this, if the woman being sexually assaulted gives birth to a child after six months or more, then she is still assigned to her and conversely if it is less than six months, then she cannot be lineage able to.

Third, mixing due to slaves being owned, this type of mixing is when a master takes a woman as his wage, then commits adultery with her as a use of his ownership. So the child from this result is lineage as a legitimate child from a valid marriage (Fageh, 2017).
Legal Status of Children

**Doubt**

Every child born is pure, the Prophet SAW said in a hadith narrated by Bukhari and Muslim which means 

"Every child is born in the state of fitrah (Islam), so it is the two parents who make them Jews, Christians, or Magians".

A child who is born is not burdened by the sins of his parents, God says in Surat al-An'am verse 164, which means:

"And no one commits a sin but harm returns to himself, and a sinner does not bear the sins of others".

Children born out of wedlock or born from sexual intercourse suspicious is a child who is sinless, therefore no child is born into the world with an illegitimate status, a child is not burdened with the sins or mistakes of his parents, the sins and mistakes of his parents are only borne by his parents (Syafi'i & Ihwan, 2021).

There are mistakes that occur due to mistakes, both mistakes that occur during marriage, or mistakes during sexual intercourse which also result in the birth of a child. Children born as a result of marriages fasakh as a result of a mistake in marriage, whether the mistake occurred to the guardian who married them or to the husband/wife whose marriage was actually forbidden, either because mabram or breast milk.

Likewise, children are born due to mistaken sexual intercourse with a partner who turns out to be not their legal husband or wife. Children born as a result of these mistakes are called children suspicious. The question now is, what about the children suspicious, who is responsible for the child, and what is their status?

Jawad Mughniyah explained that, circles Sunni argue, people born through relationships suspicious, he is a legitimate child as is the case with children born through a legal marriage, without the slightest difference, either suspicious it is suspicious contract, or suspicious action. So, anyone who cheats on a woman while drunk, delirious, crazy, or does it before the age of puberty or thinks she is his wife, but it turns out not to be, then the woman gives birth to a child, then the child is associated with him.

According to Imamiah, lineage legally established for the child along with the rights he or she has through suspicious the. If the person who did the suspicious it does not recognize the child, hence the relationship lineage the child didn’t understand at all deny, even the man was forced to admit it.

In the book al-Ahwal Syakhsiyyah, Muhydin's essay as quoted by Muhammad Jawad Mughniyah explained that lineage cannot be set with suspicious any kind, except the person who does it suspicious it admits it, because it actually knows more about itself. Legal experts among the legal community agree on this last point Sunni and Shia.

Scholar Sunni and Shi'i agree that, when suspicious If one of the definitions above has occurred, the woman must undergo it Iddah as befits a divorced woman, as is the obligation to pay her the full dowry. The woman is punished in the same way as a (legitimate) wife in terms of Iddah, mahar and determination lineage.

Furthermore, according to Muhammad Jawad Mughniyah, suspicious This can happen to both men and women, that is, both do not know and are not aware. But it can also happen to one of the parties, for example the woman knows that she has a legitimate husband (and she also knows that the man who is interfering with her is not her husband), but she hides this from the man. Or, the man is sane, while the woman is crazy, or drunk. If suspicious If this happens to both parties, then the children resulting from the relationship are linked lineage on both of them. Meanwhile, if it only happens to one party, then the child is linked lineage it's only in people who experience the suspicious, and eliminated in people who do not experience it (Muhammad et al., 2021)
Validity Of Biological Father As Marriage Guardian Against Syubhat's Son.

However true the principles of sharia, good among people Sunni nor Shi'ite equally advocating that it is not allowed to pronounce judgments against human children born from their sperm as children of adultery (illegitimate children) as long as it is possible to place them as children of suspicion. If the judge has 99 indicators to determine a child as a child of adultery and one indicator as a child suspicious, then he must apply the indicators mentioned later, and throw away the other 99 indicators, in order to greedy (Prioritize) the halal over the haram, the legal over the illegal.

Child suspicious still have a relationship lineage with his father if in cases suspicious in the contract, namely the mixing between husband and wife who apparently have a sibling (blood) or sibling relationship. However, if this happens in the cases suspicious in action, namely mixing (it's over) that occurs between a man and a woman because of a misunderstanding, then the child has a relationship lineage with his father if he is recognized as his child. Child suspicious different from children produced by adultery, lineage for the illegitimate child only to the mother (Al Amruzi, 2022).

Mawardi in his book al-Hawa al-Kabir says that children suspicion of lineage it still depends on the person who wait. As well as inheritance, it is unlawful to marry, which is a different law from children resulting from adultery.

Parents' attitudes towards children Doubt

In article 43 paragraph (1) of UU No. 1 1974, the formulation of which is the same as article 100 KHI, is:

"A child born out of wedlock only has a lineage relationship with his mother and his mother's family".

Therefore, children born outside of marriage only have a civil relationship with their mother and their mother's family.

Based on article 43 paragraph (1) as well as article 100 KHI above, there are several possibilities about children that can be presented as follows: i) Children born to women who do not have a valid marriage bond with the man who impregnated them. ii) A child born to a woman whose pregnancy is the result of rape by one or more men. iii) Children born to women who are bis (denied) by her husband. iv) A child born to a woman whose pregnancy was the result of the wrong person (mistaken opinion), which her husband thought was not the case. v) Children born to women whose pregnancy is the result of a forbidden marriage, such as marrying a sibling or half-brother.

It is possible that children belonging to groups number 4 and number 5 above in Islamic law are called children suspicious which when prohibited, as acknowledged by the father suspicious, and lineage her breasts can be connected to it.

Child suspicious In fact, it is a child born to a woman whose pregnancy was the result of a mistake (mistaken opinion) that her husband thought was not, or a child born to a woman whose pregnancy was the result of an alleged marriage, fasakh because previously it was not known that the marriage was actually a forbidden marriage, such as marriage with siblings and half-brothers.

The child is actually a child born outside of a legal marriage. According to civil law: a child born out of wedlock is a child born if the child's parents are not married to another marriage (son, virgin, widower, widow) they have sexual relations and give birth to a child, then the child is an illegitimate child. And if the child's parents, one or both of whom are still in another marriage, then have sexual relations and give birth to a child, then the child is a child of adultery.
According to the Compilation of Islamic Law for children suspicious, is declared a child born outside of marriage, as explained above, because the child is only related lineage to his mother or his mother's family only, unless the father recognizes him as his child, then it can be related lineage to him.

The child's status according to the law only has a relationship lineage with his mother and his mother's family alone, then those who are obliged to provide support for the child are his mother and his mother's family alone. Meanwhile, for natural fathers, even though the child is biologically a child whose sperm originates from him, in formal juridical terms, as intended by article 100 of the Compilation of Islamic Law above, he does not have a legal obligation to provide support for the child. This also results in the loss of the father's responsibilities towards the child and the loss of the child's rights to the father (Al Kamal, 2023).

In the book "Kanzu al-Raghibin", Imam Jalaluddin Muhammad al Mahalli stated that, according to Syafi'i, wives who become pregnant from sexual intercourse (watha') syubhat, there is no obligation for the husband to provide support for children born from the relationship suspicious said, because it has no relationship lineage with a father who impregnated his mother. Meanwhile, for Hanafi, the child is still obliged to provide for him, because even though the child was born as a result of watha' syubhat, he still comes from his father's seed so that lineage is still connected to him.

From this information, there are two fundamental differences regarding the status of children of sexual intercourse (watha') syubhat:

First, children from intercourse (finished) suspicious Which lineage is only connected to his mother and his mother's family. So this child is only obliged to be given maintenance by his mother and his mother's family, because what is seen is a relationship suspicious which happens between a mother and a man who has sex with her, unless the man admits it.

Second, child watha' syubhat Which lineage He is still connected to his parents. So this child is still obliged to be provided for by both parents because what is seen is that he was born in the previous marital status of his parents before he was born fasakh not on the relationship suspicious her.

Based on the explanation from Muhammad Jawad Mughniyah, it can be seen that children are born from sexual intercourse (watha') syubhat it is divided into two types: First, if the suspicion that happens to both parties, then the child whose status is the result of their relationship is punished as the second child, as in a valid marriage. Second, If the suspicion that happens to only one of the parties, then the child who is the result of the relationship is linked to the person who experienced the suspicion, while the other party has nothing to do with it lineage with him.

Children born to suspicion occurs from both parties, then the legal consequences for the child are permanent lineage His family is linked to his parents, and he has the right to receive support from both of them, as well as mutual inheritance between them. Because in essence, he was born the same as in a legal marriage and is not a child of adultery. For example, children who are born from the marriage of their parents turn out to be related by blood due to incest or breast milk without prior knowledge. So the child is still obliged to be provided for by both parents.

Regarding marriage suspicious and then in-fasakh According to the Marriage Law and the Compilation of Islamic Law: "a child born from a marriage, the status of that child remains lineage or have a civil relationship with his father and mother even though his father and mother's marriage is invalid according to the Marriage Law and the Compilation of Islamic Law.

Article 75 of Law Number 1 of 1974 explains that "a decision to annul a marriage does not apply retroactively to children born in the marriage", likewise in article 28 paragraph (2) "a decision does not apply retroactively to children born to
the marriage”, Article 76 states that “The annulment of a marriage will not terminate
the legal relationship between the child and his parents”.

However, if the child is born as a result of intercourse (wathâ’) syubhat what
happened to suspicion if it is only on one party, then the child will get legal
consequences lineage only attributed to people who experienced the suspicion that's all,
namely the mother who gave birth to him and he is obliged to provide support for
his child, and it is not related lineage for people who do not experience it (the man) so
he has no obligation to provide support for the child. Unless the man recognizes him
as his child, it will have legal consequences for his status lineage the child and his
support are linked to his father.

Legal Consequences of a Biological Father as a Child's Marital
Guardian Doubt

A marriage performed by a child born in the relationship suspicious. It is
good suspicious because of the contract, or the relationships suspicious because his actions
as guardian by his biological father have several legal consequences arising from the
marriage.

Scholars express their opinions in several classic books regarding marriage
guardians for children suspicious: First, Syarah al Ahkam asy Syar'iyyah fi Abwal asy
Syahsiyah, Volume 2, By Muhammad Zaid al-Abyani, he explained: "That the Wathâ' Syubbat relationship, whether in terms of contract or masal (deed), if that really happens, then the
child from the results will still be assigned to the person who did it " Second, Kitab Fiqh Muqarran Lil Abwal al Syahsiyah, Volume 1, by Badran Abu al-Ainan Badran,
explains: "According to the al-Arba'a school of thought, they appoint a guardian for children
resulting from a wathâ' syubhat relationship, if six months or more have passed, starting from the
time of the shubbatan." Third, the Book of al Ahwal Al Syahsiyah written by Muhammad
Abu Zahra, explains: "That the wathâ' syubhat relationship related to the child being born
remains obligatory if the pregnancy causes the birth of a child after six months from the time of
dukhul." (Aiman, 2016; Sukron, 2018; Muslimah & Rusdiawan, 2020; Masyhuda,
2020)

Sexual intercourse wathâ' syubhat in this case that is due to a wrong
assumption. So the guardian who has the purpose of preventing defamation that may
occur and is a condition for the validity of a marriage, in this case the guardian of the
child's marriage wathâ' syubhat different from the marriage guardian of an adulterous
child. Judging from the way it is mixed, if wathâ' syubhat there is a mix-up due to a
wrong assumption, where the man and the woman are a legal couple. While adultery
sometimes there is an agreement or mutual consent, but they realize that the man
and the woman have no one to legalize the intercourse.

Therefore, to prevent harm, there is a determination of guardians for
children wathâ' syubhat is indispensable. In ushul fiqh there is a rule which states:
It means: "Rejecting damage is preferred over attracting benefits, and when there is a
conflict between mafsadat and maslahah, it is preferable to reject maslahah."
In the meantime, while scholars such as Imam Izzudin bin Abdi Salam are of
the opinion that jurisprudence is only centered and revolves around one rule, namely
the rule:
It means: "Attract good and repel harm"
The benefits required by a guardian include: i) Preventing slander from
occurring. ii) As a condition for the validity of a marriage, according to the following
hadith:
It means: "The marriage contract is not valid except with a guardian and two witnesses"
Then from normative law, the presence of a guardian strengthens the
marriage bond (in accordance with article 19 KHI). Meanwhile, disadvantages that
may occur without a guardian include: i) Implicitly, article 26 (1) of the Marriage Law
clearly indicates that, if a marriage is not attended by a guardian, the marriage is void and can be annulled. ii) The husband’s lack of responsibility in managing the household. iii) There is arbitrariness by husbands towards their wives, such as: easily divorcing, leaving the wife without a good reason, and so on.

Therefore, it can be concluded that the marriage guardian is for the child *watha’ syubbat* is the person who *it's over’ itu sentiri* (the biological father), if the child is born after six months after *dukhul* and *finished* it really happened because of guesswork or conjecture. Because in any case the child must have a clear guardian in his marriage later.

**CONCLUSION**

From the description and explanation above regarding the resulting child's marriage guardian *watha’ syubbat* So there are several things that can be concluded: First *Dou’bit* because of the contract, the relationship of the contract is valid but the contract is *asakh* (disabled), if a man marries a woman by means of a legal contract and fulfills all kinds of conditions and principles. Then after the contract the woman gave birth to a child. But later on it became known that her husband or wife was her biological brother or sister. So in this case his son remains in-lineage to men without having to require a clear explanation or provide proof of the child's birth. And if the child is a girl, then her marriage guardian is her biological father. The two Guardians marry their children *watha’ syubbat* different from the marriage guardian of an adulterous child. Judging from the way it is mixed, if...*watha’ syubbat* there was a mix-up due to a misconception that the man and woman were a legal couple. While adultery sometimes there is an agreement or mutual consent, but they realize that the man and the woman have no one to legalize the intercourse. So the guardian marries the child *watha’ syubbat* that’s the person who *give away* himself (biological father) if the child was born after six months after *dukhul* (intercourse).

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