

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 *suspicious*. 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 *dukebni* (intercourse).

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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)

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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 *watha' syubhat*, in the book *Fiqih mazhab Arba'ah* explained that meaning *watha' syubhat* is something that requires someone to give *mahar* and match it (Miftahuddin, 2021). While in the book *Mausu'ah fiqih Umar ibn Khatab, suspicious* is something that aborts or eliminates *had* (punishment).

In the book *al Mughni* Ibn Qadamah'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 *Wath'i syubhat*, 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 *Wath'i Syubhat*

In language, understanding *he 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 *wathi' syubhat* in terms, among others: *First*, according to syara', *Wath'i syubhat* means an action that can disqualify a person from the law (*had*). 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, *Wath'i 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 *Wath'i syubhat* namely an act that requires a person to pay a dowry and its equivalent. Then deep *mahar* and *had* This by Syafi'iyah,

Hanafiah, 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 she 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 towards 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 frasy (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 muhsan 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 *dukbul* (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 *suspicion* the. If the person who did the *suspicion* 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 Syakhsyyah*, Muhyidin'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 *suspicion* 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*, *mabar* 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 *suspicion* 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 *suspicion*, and eliminated in people who do not experience it (Muhammad et al., 2021)

However true the principles of sharia, good among people *Sunni* nor *Shi'ie* qually 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 haraam, the legal over the illegal *if ascist*.

Child *suspicious* still have a relationship *lineage* with his father if in case *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 case *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 *wai'* As well as inheritance, it is unlawful to marry, which is a different law from children resulting from adultery.

When *watha' syubhat* happens to married women, then *lineage* The child born is seen from the time of the child's birth, if the child was born within six months or more from the time of the birth *watha' syubhat* that, then *lineage* the child to the man who did it *watha' syubhat* and vice versa if the child is born before six months from when it occurs *finished'* that, then *lineage* the child remains with her husband.

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 *his* (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* his, 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 (*watha'*) *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 relationship *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, *Syarab al Ahkam asy Syar'iyah fi Ahwal asy Syahsiyah*, Volume 2, By Muhammad Zaid al-Abyani, he explained: "That the *Watha' Syubhat* relationship, whether in terms of contract or mahal (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 Ahwal al Syahsiyah*, Volume 1, by Badran Abu al-Ainain Badran, explains: "According to the al-Arba'a school of thought, they appoint a guardian for children resulting from a *wathi syubhat* relationship, if six months or more have passed, starting from the time of the *shubhatan*." Third, the Book of al Ahwal Al-Syahsiyah written by Muhammad Abu Zahra, explains: "That the *watha' 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 *dukbul*." (Aiman, 2016; Sukron, 2018; Muslimah & Rusdiawan, 2020; Masyhuda, 2020)

Sexual intercourse *watha' 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 *watha' syubhat* different from the marriage guardian of an adulterous child. Judging from the way it is mixed, if *watha' 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 *watha' 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' syubhat* is the person who *it's over' itu sentiri* (the biological father), if the child is born after six months after *dukbul* 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' syubhat* So there are several things that can be concluded: First *Doubt* because of the contract, the relationship of the contract is valid but the contract is *asakb* (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' 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 *dukbul* (intercourse).

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