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Finding The Best Interests of The Child During Site Visit (Descente) In The Child Disputes Cases

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Abstract

This paper discusses site visit (Descente) in child custody cases, which commonly used in material dispute cases. Some legal experts are still debating Descente in child custody disputes. Some support its implementation, while others oppose it because there is no firm legal basis. However, many of the Panel of Judges have conducted Descente to complete the process of examining child dispute cases they are handling. This study is qualitative literary research that utilizes a literature approach, namely viewing and comprehending documents or other literature related to site visit (Descente) in Child Dispute Cases. According to the findings of this study, a Descente can provide a full view of the problems in the child custody dispute case under examination. As a result, even though there are no rules for carrying out Descente in examining child custody disputes, Descente can still be carried out to ensure the fulfillment of the best interests of the child.

Keywords: *Descente, Child Custody Disputes, Child Development, Child's Best Interests*

Introduction

Valid evidence binds judges in the examination of civil cases. A judge may only decide based on evidence determined by the law's provisions. Procedural law provisions have governed various types of evidence. Writings, witnesses, presumptions, confessions, and oaths are valid evidence, according to Article 164 HIR/284 R.Bg and Article 1866 of the Civil Code. Sudikno (2010) increased the number of pieces of evidence from five to 7 (seven) by including Local Examination and Expert Statements. On the other hand, Mukti Arto (2007) increased the number of pieces of evidence to 9 (nine) by having Bookkeeping and Judge Knowledge as evidence that a judge can use in making his decision. Aside from the debate over the number of valid pieces of evidence in civil cases, there is evidence that judges frequently use to obtain certainty about the truth of an event in dispute, namely the site visit (*descente, gereclitelijkplaatsopening en bezichtiging*) (Lukmawati, A.S. & Harjono. (2018). *Descente* or site visits are typically performed on material cases to avoid difficulties in making decisions later. However, it was discovered too in several non-material decisions,

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including in the Examination of child dispute cases. In child dispute cases, Descente was carried out as an ex of the panel of judges or solely based on a judge's decision rather than a request from each party in a case. The Judge's actions sparked several discussions about whether Descente has a legal basis outside of material cases.

Some of these discussions arose because jurists still debate Descente's application in child custody cases. One group of jurists believes that Descente in child dispute cases is a waste because children can quickly move to another location, so implementing Descente in child dispute cases will never achieve Descente's goal of avoiding difficulties in execution. Aside from that, Descente has no legal basis in child custody cases. Other groups believe that Descente in child cases is permissible and does not violate the rules as long as the judge requires it to complete the examination of the case he is handling. Another reason is that Descente's goal in child custody cases differs from Descente's goal in material instances (Fanani, A.z, 2020). Examinations conducted by courts in situations involving children, particularly in instances involving disputes over child custody, must be completed comprehensively. This is done so that children's rights are noticed during the examination process, so that decisions handed down by the court can provide justice for children, and so that the court can satisfy the needs and fulfill the goals in the children's best interests. Based on this explanation, the problems in this study are as follows: (1) How is Descente used in child custody cases, and (2) What is the use of Descente in child custody disputes?

This kind of research is known as qualitative research and uses the "literature approach." Specifically, it involves looking at papers or other literature sources related to the use of Descente in child custody cases (Soekanto & Mamudji, S., 2006). The data used in this article's writing are considered secondary data, which means that other parties obtained them (Sidiq, U & Choiri, M. (2019). The authors of this study make use of a variety of secondary sources to gather information for it. These sources include decisions by religious courts regarding disputes over child custody, law books, research results, journals, and other writings related to the topic under discussion. This study aims to determine the application of Descente in children's disputes and assess the utility of Descente's application for judges in making decisions that provide justice for children.

Literature Review

Definition of Site Visit (Descente)

Descente, as stated by Sudikno (2010), is an examination of a case carried out by a Judge due to his position. This examination takes place outside the courthouse so that the Judge can see the picture related to the object in dispute and the certainty of the events surrounding it. Sudikno's explanation is consistent with Yahya Harahap's (2010) explanation that Descente is a court hearing held at the location of the object of dispute (outside the courthouse), to see the state of the object of dispute directly conducted by one of the Judges or the Panel of Judges with the assistance of a Registrar. Thus, it can be concluded that Descente is a method provided by laws and regulations to Judges or Panels of Judges in order to clarify a disputed fact or object (Ambarita, M., 2021).

The Implementation of Site Visit (Descente)

Descente is based on the provisions of Article 153 HIR/Article 180 RBg, Articles 211-214 Rv, and Supreme Court Circular Number 7 of 2001 regarding Site Visit (Descente). According to Articles 153 HIR and 180 Rbg, Descente must be preceded by a Judge's order. The Judge must state the order in an Interlocutory Decision, which includes two (2) essential matters: who will lead the implementation of Descente and what objects will be examined (Yahya Harahap, 2010).

Descente can be accomplished in a variety of ways. (1) The trial begins in the courthouse. The Panel of Judges and parties depart to the object's location, and the trial can be resumed in the courthouse or at the object's location. (2) The Panel of Judges and the parties opened the trial immediately at the location of the object to be examined and closed it immediately at the exact location when it was completed. (3) The Panel of Judges opened the trial, and the parties departed to the object's location before closing at the village office or the object of dispute (DITJEN BADILAG MA RI, 2014).

Because Descente is on the trial agenda, the procedural law principles in the courthouse must also apply at Descente. In this case, the Panel of Judges must correctly use the procedural law (Anam, A.Z., 2021). The following principles must be strictly adhered to in Descente: (a) *Audi et alteram partem*. That is, the Panel of judges must respect the parties' rights. They must give each party the same chance. The examination must be carried out while still equating the parties' positions. (b) *Partium ultra partium*. This principle aims to ensure that the parties determine the scope of the object of dispute in civil cases. Judges are only permitted to rule on what is requested. (c) The trial is open to the public. (d) *Maxims of the future*. This principle states that judges must actively preside over trials to ensure an orderly, effective, and efficient. (e) Easy, quick, and inexpensive. All trial agendas, including Descente, must always be oriented toward administering justice simply, fast, and cheaply. And other regulations that govern the investigation of civil cases (Mujahidin, A, 2012).

Audi et alteram partem are one of the legal principles the Judge must consider, as explained above. The Judge must ensure the presence of the parties at the Descente location in its application. That is, the Judge must notify both parties clearly in advance about the implementation of Descente (site visit), including the time and object to be examined. If, after being told, one of the parties is absent without a valid reason (default without cause), Descente can be performed without one of the parties presence. On the other hand, Descente can only be rescheduled if the parties have been notified (Yahya Harahap, 2010).

Descente can be followed by the entire assembly or by three judges at the same time. If all of the judges cannot attend, the Chairman of the Panel may appoint one or two judges from the Panel with the assistance of a Registrar (Soeroso, R., 2011). The Registrar is responsible for composing a report in the Descente minutes. This follows Article 153 paragraph (2) HIR/Article 180 RBg and Article 212 Rv, which states that "*the Registrar makes an official report on all matters that occur at the place where the examination is carried out.*" Furthermore, suppose the location of the object of the dispute is

outside the territory of Court hearing the case. In that case, the Chairperson of the Tribunal may seek assistance from Court, whose jurisdiction is to be carried out by Descente and send a report on its execution to Court hearing the case (Yahya Harahap, 2010).

As for arrangements regarding Descente costs or fees, this is regulated in article 214 Rv. This provision states that if a party wishes to have a descente or requests that a Descente is performed, the requesting party will bear the cost. If, on the other hand, Descente is ordered by a judge, the fee is set by the Judge. The Judge is free to determine who is responsible for paying the Descente fee, whether to the Plaintiff or the Defendant, based on the provisions of Article 214 paragraph (2) Rv. Descente cannot be carried out if the burdened party refuses to pay (Hermawan, M., 2007).

The Purpose of Site Visit (Descente)

The purpose of Descente is explained in the Supreme Court Circular Letter Number 7 of 2001 concerning Descente, which is to avoid difficulties in making decisions later. This is because examining the object of the case solely through the trial process in the courthouse frequently gives the impression or indication that the entity or object of the lawsuit still needs to be clarified (Rosalina, M, 2018). One of the benefits of conducting a site visit (Descente) is to avoid difficulties in executing a decision, as stated in the Supreme Court Circular Letter Number 3 of 2018, which states that if the location, size, and boundaries of land or buildings have been described in a lawsuit regarding land or buildings. Boundary, but there is a difference between the disputed object data in the case and the Descente results, so the physical data from the Descente results are used.

Discussion

The Concept of Site Visit (Descente) in Child Disputes Cases

1. The Implementation of Site Visit (Descente) in Child Dispute Cases

The use of Descente in child custody cases is not explicitly regulated by statute. As a result, the provisions of Article 153 HIR/Article 180 RBg and Article 211 Rv continue to provide the basis for its implementation. However, when examining guardianship cases, the Judges must follow the Descente process if the applicant for the guardianship case cannot bring the child/person being asked for guardianship to court. This is stated in Civil Code Article 439:

“The District Court (pronounced Religious Court), after hearing or legally summoning these people (in the previous article), must also attend the person for whom guardianship is requested. If that person cannot come, one or more people must conduct the examination at his home. The judge appointed for this examination is accompanied by a clerk and the Prosecutor's Office. If the person seeking the pardon lives within ten miles of the District Court, the Judges may delegate the examination to the head of the local administration. This examination must be documented in an official report, a copy of which is sent to the District Court....”.

The provisions mentioned above indicate that a site visit or Descente is not only related to material

disputes but can also be carried out in other civil disputes as long as the Descente is deemed necessary by the panel of judges.

2. The Purpose of Site Visit (Descente) in Child Dispute Cases

The goal of implementing Descente in child custody disputes differs from the goal of Descente in material cases. The goal of implementing Descente in child custody disputes is to ensure the objective condition of the child as a whole to ensure the fulfillment of children's rights based on the child's best interests so that it can add information regarding the issues being examined by the Panel of Judges.

3. The Nature of Site Visit (Descente) in Child Dispute Cases

The nature of Descente implementation in child custody disputes is closely related to the governing norms in this topic. It is non-compulsory because there are no specific norms governing mandatory Descente. Implementing Descente in child custody requires the judge to investigate, follow, and comprehend legal values and a sense of justice in society (Sulardi, 2015). The implementation of Descente is different from the examination of custody cases, which in its norms clearly state the word "must," and it is even further stated that if the position of the child or person whose guardianship is requested is outside the jurisdiction of the examining court, assistance can be delegated (*tabayyun*) to the court that administers the child or person whose custody is asked for (Article 439 of the Civil Code).

According to the explanation above, Descente's implementation is left to each Judge. If the Judge believes that Descente must be carried out, then the Judge can do so. On the other hand, Descente does not have to be carried out if the Judge thinks it is unnecessary because the facts at trial have been presented fully (Fanani, A.Z., 2020).

4. The Reasons for Conducting a Site Visit (Descente) in Child Dispute Cases

Based on several decisions related to child custody disputes, including Tanggamus Religious Court Decision Number 1063/Pdt.G/2022/PA.Tgm, Pasir Pengaraian Religious Court Decision Number 585/Pdt.G/2020/PA.Ppg, Pasuruan Religious Court Decision Number 1409/Pdt.G/2021/PA.Pas, Depok Religious Court Decision Number 3118/Pdt.G/2021/-PA.Dpk, Sungguminasa Religious Court Decision Number 419/Pdt.G/2022/PA.Sgm, and in the West Jakarta Religious Court Decision Number 3315/Pdt.G/2021/PA.JB, the Panel of Judges, put forward several reasons, including the following:

a. Children who are the subject of a dispute between the Parties are not admissible in court

In child custody cases, bringing children into the courthouse is critical. There are at least two (two) reasons why the parties should do this. First, the Panel of Judges can hear the child's opinion about whether he wants to live with his father or mother. Second, the Panel of Judges can see the child's

actual condition, whether the child is in good health, depressed, happy, or in other conditions that the Panel of Judges can directly assess.

According to this explanation, bringing children to court is an attempt to implement the "*principle of respect for children's opinions*," which is one of the basic principles that must be met in efforts to protect children, as stated in the Convention on the Rights of the Child (Law Number 35 of 2014). Children are not only used as objects of examination in child dispute cases, but they are also subject to examination that Judges can use to make fair and wise decisions based on the child's best interests. The principle of "*respect for the child's opinion*" is respect for the child's right to participate directly so that the child can express his opinion and his opinion can be considered in the decision-making process, particularly concerning decisions that may affect the child's life (Analiansyah, 2015).

The obligation to present children to the courthouse does not simply appear. It can be seen in examining child custody cases listed in the provisions of the Islamic Law Compilation. Article 105 of that provision states that for children who are 12 years old (*mumayyiz*), the Panel of Judges is obliged to listen to the child's opinion, whether he wants to live with his father or mother. When a child custody dispute involves a child over 12, the Panel of Judges must examine the child and question him about his preference, whether he wants to live with his father or his mother. This obligation stems from the fact that children have the right to choose (*kebijaran*) their means of support. According to the authors, based on several court decisions, the Judges must hear even children under 12. This was demonstrated by the prophet Ibrahim *'alaibissalam*, who actively involved his son, Ismail *'alaibissalam*, and asked his opinion regarding Allah's orders that concerned him, even though Ismail was still 7 (seven) years old (Ibrahim Al-Bajuri, n.d). As a result, if the parties cannot bring the child to court, it is critical to conduct a Descente to ensure that children's rights are protected

b. The judge was undecided about the child's objective condition

If the Panel of Judges cannot determine the child's objective condition with certainty, the Descente process is one of the tools used. The judge will conduct a direct examination of the child's condition. Although Descente does not include evidence as defined in Article 1966 of the Civil Code, Article 164 HIR, and Article 284 RBg, it can add clarity and certainty about the examination object. As a result, Descente serves as a statement that explains the child's last condition (Yahya Harahap, 2010). Furthermore, because Descente is part of the trial, any information obtained during Descente is the same as that received during a courtroom examination, so the Panel of Judges is bound to consider this information when deciding (Arkisman, A., 2016)

According to the explanation above, implementing Descente aims to see the child's objective condition. Thus, the object of examination in Descente is related to the child and other objects related to the child. Several factors were considered during the Descente process, as evidenced by some of the decisions listed above, including:

- 1) The child. Examine children to determine whether the child is in good health, depressed, and so on. Furthermore, if the child can communicate, the Panel of Judges can inquire whether he prefers to live with his father or mother.
- 2) The Plaintiff's place of residence. The Judges conducted this examination to inspect the Plaintiff's residence's facilities and infrastructure, such as children's playgrounds, children's rooms, and access to learning places, as well as other aspects that support children's growth and development, such as the presence of children's peers.
- 3) The defendant's place of residence. The Judges conducted this examination in the same manner as at the Plaintiff's home. The environment where Plaintiff and Defendant live is examined to determine which location best ensures the child's growth and development.

The Panel of Judges may involve experts related to children, such as psychologists or pediatricians, professional social workers, and social welfare workers in Descente, to obtain more comprehensive information and explanations related to the child's condition, as confirmed in the provisions of Article 211 Rv. Furthermore, the Panel of Judges can gather information from the Parties' neighbors relating to the Parties in caring for their children. The judge will consider aspects of morality, health, society, and other aspects related to the parties. Then the judge will compare which is more supportive of growth and development and suitable for the child.

The Use of Site Visit (Descente) in Examination of Child Disputes

1. As Child Rights Protection in the Child Dispute Examination Process

Parenting, also known as the *badlanah* concept, is one of several guardianship concepts with clear rules. The arrangements discussed in this concept are about who has the right to care for the child and how the holder of custody rights can fulfill the child's rights and best interests (Banjarbaru Religious Court Compilation Team, 2018). Parenting, according to Islamic law, begins when the child is still in the womb and ends when the child is born into the world. That shows that Islamic law recognizes the importance of children's roles in the family. As a result, the need for child-rearing procedures so that the child can grow and develop properly later in life can play an essential role in the development of religious symbols and the nation and state.

Both parents should ideally raise every child. This is based on the fact that children can do more positive things if both parents support them, unlike children who are only cared for by one of their parents, who are at a high risk of engaging in harmful behavior, academics, and social activities (Suprihatin, T., 2018). So the most important thing for children is to have the opportunity to be cared for by both parents simultaneously. That explanation, as stated in Article 14 of the Child Protection Law, defines that every child has the right to be cared for by their parents unless there is a valid reason or the rule of law. In addition, the separation between the child and his parents must be based on the child's best interests and is the final consideration.

However, parenting is frequently a source of contention between parents. Each party believes they

are the most entitled to the child. This issue spawned new legal issues concerning child custody disputes, which must be resolved through a court examination. Resolving child custody disputes in court is an attempt to grant the court authority to determine who has the right to carry out the duties and obligations to care for children to ensure the child's fundamental rights fulfillment until the child is an adult and independent (Asnawi, N, 2019).

Children are generally only used as objects of case examination when examining child custody disputes. Children must be positioned as the subject of case investigation. The Panel of Judges, in this case, must actively seek information and opinions from the child about who they will live with. The judge, in digging up the child's opinion, is based on the principle of respect for the child's view as stated in the provisions of Article 2 of Law Number 35 of 2014, which explains that "*Child protection is all activities to guarantee and protect children and their rights so they can live, grow, develop, and participate optimally following the dignity of humanity and receive protection from violence and discrimination.*" Respect for children's opinions was taught in the Qur'an long before this rule existed, as in the story of Ibrahim asking Ismail for advice before carrying out God's command to slaughter his son when he was only seven, Ismail. Ibrahim's communication pattern suggests that everything should include the child's opinion, especially something that will affect the child's future (Wahbah Zuhayli, n.d). Based on this, even if the child is not yet *mumayyiz*, his parents must always involve him in everything by asking his opinion. Hearing children's views can be the simplest way for parents to understand their child's condition and wishes because listening does not require special skills or strengths (Bainar, 2020). In this case, every adult, including judges who hear cases involving children, only needs to set aside time and opportunity to listen to children's opinions.

Respect for children's opinions refers to the right of children to participate in and express their views in decision-making processes, particularly those affecting the child's life in the future. In cases of child disputes, the involvement of children to have their opinions taken is critical because decisions about who the child will live with can directly impact the child's future (Gosita, A., 2004). As a result, if the parties cannot present the child in the dispute or the child cannot be brought to court, then *Descente* becomes a tool that the Panel of Judges can use to hear the child's opinion or see the child's condition directly.

2. To clarify the Issues Under Consideration by The Judging Panel

The primary goal of implementing *Descente* is to maximize the child's best interests. This relates to the legal psychology concept, which states that the child's interests can be divided into legal and physical custody. Legal custody refers to all issues concerning the child's full legal rights, which are the obligation of the father and mother. Meanwhile, physical custody refers to the child's desire to take care of himself physically. These two requirements must be met when raising children to ensure the child's best interests. If the mother is shown to be the primary provider for the child's needs, the mother is given the rights and responsibilities of caring for the child. If these needs are proven more dominantly met by the father, then the rights and obligations of caring for the child

are transferred to the father (Arto, M., 2015). Descente is one solution for determining which party guarantees the child's best interests. As a result, in Descente, the Panel of Judges will consider the child's objective condition and measure and assess the parties' residence (father or mother). After collecting this information, the Panel of Judges will compare which locations ensure the fulfillment of children's needs. Is it at the father's or the mother's place of residence?.

As stated in the Decision of the Pasir Pengaraian Religious Court Number 585/Pdt.G/2020/PA.Ppg, Descente was able to clarify problems in child custody disputes. In this decision, the Panel of Judges obtained detailed information about the Parties' residences (fathers and mothers). The decision stated that his father's home was clean, tidy, and well-maintained. Furthermore, the house has a special children's room and a playground, and the environment is close to other places (neighboring), there are children of the same age, the house is quite far from crowds and main roads, and the house is close to the children's worship (mosques and madrasas). Meanwhile, the Panel of Judges noticed that his mother's house was clean, tidy, well-maintained, and had children's play facilities. The house, however, is attached to her mother's cafe, which is open 24 hours a day. There is only one room in the house, the neighborhood is remote from other dwellings and directly adjacent to the main road, and the house is remote from the children's place of worship. Based on the findings of the Descente mentioned above, the Panel of Judges concluded that the father's residence is the one that best supports the child's future development. Aside from that, the Panel of Judges realized that the mother was prone to losing control of her emotions. When the Panel of Judges attempted to reconcile the two, the Defendant reacted angrily, even daring to speak dirty and rudely, smashed chairs, kicked flower pots, and threw his bag and car keys at his father. Based on these facts, the Panel of Judges determined that the father had greater parental rights to his child (as the holder of custody of his child).

In addition to the decision above, the West Jakarta Religious Court Decision Number 3315/Pdt.G/2021/PA.JB demonstrates that Descente can clarify the issues under investigation. The Panel of Judges stated in their considerations that the child at a point between Plaintiff and Defendant was proven to be physically and mentally healthy. Furthermore, the Panel of Judges obtained a complete picture through Descente that the child was born closer to the family than the father, namely the Plaintiffs and their families. As a result, the Panel of Judges determines that the Plaintiff has custody of the child.

Like the two preceding decisions, the Decision of the Sungguminasa Religious Court Number 419/Pdt.G/2022/PA.Sgm demonstrates that Descente can clarify the dispute issues under consideration. During the Descente implementation, the Panel of Judges received information that the Defendant's residence, where the child had lived, provided everything a child required, such as a proper bedroom, wardrobe, study table, supporting equipment such as a laptop, entertainment facilities, and a good environment. Furthermore, the Panel of Judges can ensure that the child is healthy. According to the child's information, he felt happy and comfortable living there, and he stated that he was willing to visit the Plaintiff's or the Plaintiff's parents' home but not stay

overnight. Based on these facts, the Panel of Judges concluded that the child receives complete affection from the Defendant (his mother) as long as he lives with the Defendant (his mother), ensuring his rights are not violated. As a result, the Panel of Judges dismissed the Plaintiff's child custody claim.

The descriptions in the preceding decisions demonstrate that the Panel of Judges can obtain various other comprehensive, objective information related to the child's condition through Descente to clarify the issues under investigation.

3. The Effectiveness of Site Visit (Descente) Proof in Child Dispute Cases

Some experts continue to debate the importance of proving Descente in civil disputes, including examining child custody cases. According to some experts, Descente is part of the evidence with a "free" proving value. The Panel of Judges has complete discretion over whether or not to use the results. While some experts believe that Descente is not evidence, it only determines whether there is an object of dispute. This second opinion is based on the fact that Descente is not listed as evidence in Article 164 HIR, Article 1886 of the Civil Code, or Article 283 R.Bg. Experts agree, however, that the Descente results can be used as additional information for the Panel of Judges in assessing the entire examination process, which can then become a judge's presumption that the Panel of Judges can consider in deciding whether to grant or reject the case (Indrasari, F, 2015). As a result, Descente cannot stand alone; the results will always be linked to other valid evidence presented by the trial parties, such as written evidence, witness testimony, confessions, and oaths (Juanda, E, 2016).

However, aside from the debate over the evidentiary value of the site visit (Descente), the process of carrying out Descente can affect the socio-psychic community. This means that the public will conclude that the examination conducted by the court was thorough (Lukmawati, A.S, 2015).

Conclusion

Based on the results of the preceding discussion, the authors can draw the following conclusions:

1. Descente implementation in Child Dispute Cases is similar to that in Material Cases. The distinction is due to the inspection object and the objective of its implementation. In material disputes, the Panel of Judges reviews land, buildings, and other property. In child disputes, the Panel of Judges investigates the children, the parties' domicile, and other issues concerning the child at the time. Simultaneously, the major purpose is to ensure the child's entire objective state to secure the fulfillment of children's rights.
2. The use of Descente in examining cases of child custody disputes is an effort to ensure the fulfillment of children's rights, particularly the right of children to have their opinion heard. Aside from that, its other purpose is to clarify the issues under consideration and provide additional information to the Panel of Judges to evaluate the case examination process as a whole.

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