

The Role And Responsibility Of Public Notary To The Agreement Of Bequest Which Made (Legal Studies of the Revoked Bequest to the Children by Their Parents)

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Abstract. A bequest is a gift from someone to others in the end of his/ her life. A bequest can be given to anybody, including friend, relative, or the biological children. A bequest is included in the "free" agreement (*om niet*). It means there must be an achievement for one side, while another one doesn't need giving contra-achievement as a reward. This kind of agreement is also called as "unilateral" as a contrary of "bilateral" agreement. Generally, the agreement has feedback, as commonly there should be the one who undertakes an achievement as he/she will receive a contra-achievement. The definition above is according to the content of paragraph 1666 of the Book of Civil Law, which explains that bequest cannot be revoked. Contrary to the paragraph 212 of the Compilation of Islamic Law that explains that parents' bequest to their children can be revoked. Which law should be taken as a fundamental law to answer this case? Here, the role and responsibilities of a public notary are very needed to solve the case.

Keywords: Bequest; Role; Responsibility; Public Notary.

1. Introduction

A bequest is a gift to others in the end of his/her life. A bequest can be given to anybody, including friend, relative, or the biological children. A bequest is included in the "free" agreement (*om niet*). It means there must be an achievement for one side, while another one doesn't need giving contra-achievement as a reward. This kind of agreement is also called as "unilateral" as a contrary of "bilateral" agreement. Generally, the agreement has feedback, as commonly there should be the one who undertakes an achievement as he/she will receive a contra-achievement.³

The word of "in her/his life" of the grantor is to differentiate the grantor to the donations that are done on a statement (testament), which will have a power and be valid after the grantor dies and as long as the grantor is alive, it can be changed or revoked. According to the Book of Civil Law, the gift on a testament is called "Legaat" (grant of will) and it is regulated on the law of succession, while a bequest is an agreement. So, it can be revoked unilaterally by the grantor.

The Islamic Law allows someone to give or reward some or the whole of his/her wealth while he/she is alive to other, who is called as "intervivos".⁴ The gift, which is given while someone is alive, is called "bequest". In the Islamic Law, the amount of someone's wealth to be given is

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³ R Subekti 2010 *Aneka Perjanjian* PT Citra Aditya Bakti Jakarta p. 94-95

⁴ Fayzee A.A. 2008 *Pokok-pokok Hukum Islam II*. Tintamas. Jakarta p. 1

unlimited. The basis of Islamic Law in this case is:

وَعَطَى الْمَالَ حُلْهِهِ ذَوِي الْقُرْبَى وَالْيَتَامَى وَالْمَسَاكِينَ وَابْنَ سَيِّئِنْ وَالسَّاعِلِينَ

"And by giving the beloved wealth to the relatives, the poor children, travelers (who need help), and those who ask". (Q.S. *Al-Baqarah*: 177).⁵

It is explained that there are no limitations to give a bequest. But on the compilation of Islamic Law, it is regulated that maximum amount to be given is one-third of his/her wealth. This regulation refers to paragraph 210, a compilation of Islamic Law. By regulating the number, it is expected to avoid the further problem in the future after the grantor passed away.

The public notary as a practitioner of Civil Law has a responsibility to serve people who need proofs or legal documents, such as an authentic certificate and recognized by the state, as a perfect proof. The authenticity of the notarial deed as the general office is authentic, not only due to the Acts state so, but it also refers to paragraph 1868 Book of Civil Law.⁶

The public notary's duty is to control the relationship between law and other parties in both written and certain format. In the end, it is called an authentic certificate and becomes a strong document for certain legal process.⁷

How should a public notary respond to this case, while the paragraph 1666 Book of Civil Law explains that bequest that has been given cannot be revoked unless there is an agreement before. The provision of this paragraph contrast to paragraph 212 on the compilation of Islamic Law, which explains that parents' bequest to their children can be revoked.

Research Method

This research used a legal normative research. According to Peter Mahmud Marzuki²⁴ that normative legal research is "a process of finding a rule of law, legal principles, and legal doctrines to address the legal issues faced"⁸.

With normative juridical research methods, the object of legal juridical-normative research includes (1) research on legal principles, (2) research on legal systematics, (3) research on the level of legal synchronization, (4) legal history research, And (5) comparative law studies.⁹

It is a legal research that is done by observing the materials coming from various regulations of law and other materials from the various literature that have correlation and relevant to the related case, and legal theories and so the opinions of the scholars. In other words, this research observes the literature or secondary data. In this case, the researcher observes the

⁵ Q.S. *Al Baqarah* (2): 177

⁶ Habib Adjie 2017 *Hukum Notaris Indonesia* Refika Aditama Surabaya p. 42

⁷ Tan Thong Kie 2009 *Studi Notariat Serba-Serbi Praktek Notariat Buku I: Ichtiar Baru Van Hoeve Jakarta*. p. 59

⁸ Hidayatullah, Gunarto, Anis Mashdurohatun and Ahmad Rofiq, "*Ideal Reconstruction of Law Number 41 Year 2004 on the Position and the Authority of Money Wakaf Law Based on Justice Values Towards Improving the Moslem Economy*", in International Journal of Economic Research, Volume 14 Number 15 2017 p. 317

⁹ Anis Mashdurohatun, Zaenal Arifin and Gunarto, "*The Inconsistency of Parate Execution Object Warranty of Rights in Banking Credit Agreement in Indonesia*", in International Journal of Applied Business and Economic Research Volume 15 Number 20 2017 p. 269

Acts of Notary Office, Acts of Civil Law, and compilation of Islamic Law related to roles and responsibility of public notary to the deed of a bequest that has been made.

The specification of this research uses descriptive analysis type, which is a research besides giving a description, writing and reporting an object or phenomenon, also giving the general conclusion of the case. In this research, hopefully, it can reveal the real situation both in theory and practical life, so the case will be solved at the end of this research; whereas the data collection focuses on the main issue so there is no irrelevancy nor vagueness under consideration.

The types of data in this research is primary and secondary data. The data analysis method is qualitative, which is non-statistical analysis. The content of all data is analyzed using the principle of law, legal theory, and the opinions of the jurists and rules of law, to be arranged systematically in the form of a thesis.¹⁰

2. Result And Discussion

At the beginning of the discussion of roles and responsibility of public notary to the deed of bequest they have made (legal studies of a revoked bequest to the kids by their parents), we should figure out how is the procedure of making the deed of the bequest. The most important thing in making the deed of bequest is the subject or the grantor and the object or materials that will be granted.

The subject of this case can be done by an individual or a person and corporation, such as a company, office, incorporated company, and others. In this research, the subject is an individual where his/her parents give a bequest to. In fact, the bequest between parents to their children and the bequest between someone to someone else is similar in terms of process. But there is a little difference, which is the term of income tax. While the bequest from parents to their children isn't an object of income tax, it does the contrary to the other types of the bequest.

Furthermore, the bequest object can be tangible or intangible objects or immovable objects. The tangible objects can be cars or other valuable objects; while intangible objects can be land and building above. For the tangible/ movable objects, the deed of bequest can be created by a public notary; while the intangible objects should be created by Land Titles Registrar. The reason why the land of the bequest's deed is created by the Land Titles Registrar is due to after getting bequest, the land and building can be registered furthermore in the National Land Agency.

According to paragraph 1666 book of Civil Law, the bequest cannot be revoked, but it doesn't mean that in reality it cannot be canceled or revoked. It is according to the basis of law, as:

- "A bequest cannot be revoked or canceled, except for following cases:
- If the requirements of the grantor cannot be fulfilled by the receiver.
 - If the receiver is guilty by doing or joining a murder or other crimes to the grantor.
 - If the grantor is falling into poverty, and the receiver refuses to give them a living."¹¹

¹⁰ Arikunto.S 2013 *Prosedur Penelitian Suatu Pendekatan Praktek* Rieneka Cipta Jakarta p. 7

¹¹ Paragraph 1688 of *The Books of Civil Law*

The result of an interview with Nurhadi, a public notary in West Kotawaringin, is that he states that the bequest can be conditioned if a receiver cannot fulfill the requirements on the deed of the bequest, so the grantor is allowed to ask a lawsuit to cancel the bequest. For example, the grantor grants his land to be built a mosque on and the receiver agrees; as time goes by the receiver doesn't build any mosque but an entertainment building. So the grantor is allowed to cancel the bequest. Similar to the case of parents' bequest to their children. After the parents grant them a bequest, they have a responsibility to take care and provide for their parents; if this responsibility isn't fulfilled, so the parents are allowed to cancel.

After he continues that the bequest cannot be over 1/3 of the grantor wealth, this statement is based on regulation on paragraph 210. "Individual whose age is above 21 years, sensible, without any coercion is able to grant maximum 1/3 of his/her wealth to others or institution in front of two witnesses to be owned."¹²

Related to whether parents' bequest to their children can be revoked; according to paragraph 1666 books of Civil Law, this bequest cannot be revoked. While according to the compilation of Islamic Law paragraph 212: "Bequest cannot be revoked, unless a bequest from parents to their children,"¹³

Nurhadi states that it is acceptable for parents to revoke their bequest to their children if they don't meet the requirements on paragraph 1688 books of Civil Law or the grant is not appropriate based on legitimate portie (LP), which is over 1/3 of their wealth. But the final destination is on the judge whether the revoked bequest is possible or not, since basically the public notary only has full responsibility to the certificate that he/she has made according to the procedure that has been decided, and all parties have a responsibility to the agreement on the certificate.

Roles and responsibilities of a public notary to the deed of the bequest, which is revoked by their parents, is to suggest the parents make a lawsuit in the Religious Court for those who are Muslim and in the District Court for those who aren't Muslim. Since the authorized party of this case is the judges by doing some judicial process until the decision is made.

If the lawsuit is granted by the judges, the ownership of the bequest property is reverted back to the grantor so they get all of the rights of ownership. Especially if the object is a land and building. If the certificate of its property is on behalf of the name of the receiver, so it won't be valid any longer and the grantor is allowed to apply to the National Land Agency so the certificate of the object isn't valid any longer. So the certificate will be on behalf of the grantor. In this case, the obstacle that has been faced by the public notary that I got an interview with is in terms of supporting data. Although it seems simple it can be very fatal for a public notary if he isn't sharp in issuing the deed of the bequest. So, every time he needs to issue a deed of the bequest, all parties have to bring identity card, family card, marriage certificate and land certificate if the bequest is a land or building. The purposes are to ensure that all parties present are suitable to their ID card as a must requirement. After the certificate of all parties

¹² Paragraph 210 of *The Compilation of Islamic Law*

¹³ Paragraph 212 of *The Compilation of Islamic Law*

have been created, they are read by the public notary in front of all parties by including two witnesses, who are the staffs of the public notary, and another public notary have to take pictures as an evidence that there have been signing moment in front of public notary, and others use CCTV as an evidence that all parties have attended to the public notary in certain date.

As mentioned before, the obstacle faced by the public notary is less supporting data to create the certificate, such as parents who don't have marriage certificate nor birth certificate, ID card, family card nor other supporting data. This must obstruct the process of certificate issue. The solution for this issue is for some public notary, who I got an interview with, are similar, which is all parties who don't have complete data should ask the reference issued by the village officers or sub district head. This reference becomes a strong evidence that the parties are suitable for all supporting data.

The completeness of supporting data is a role and responsibility of a public notary to run his task by guarantee the authenticity and the power of deed according to Acts of a public notary and public notary code of ethics. If a public notary has fulfilled those requirements, so he/she has run his/her role and responsibility well.

3. Closing

3.1. Conclusion

According to the result of research about role and responsibility of public notary to the deed of bequest they have made (Legal Studies of the Revoked Bequest to the Kids by Their Parents) can be concluded as follow:

- Role and responsibility of public notary to the revoked deed of a bequest to the children by their parents as follow:

A public notary must give the legal counseling related to the revoked bequest so the bequest that has been given to their children can be revoked. The cancellation process is the grantor can request a lawsuit in the Religious Court for those who are Muslim and District Court for those who aren't Muslim. In the series of court process that ends up with the decision by the judges that is final and binding, if the lawsuit is accepted so the bequest receiver must give back the bequest he/she has received before. Especially if the object of bequest is a land and building if it has been on behalf of his/her name so it won't be valid any longer and the grantor is allowed to request to the National Land Agency to cancel the validation of the disputed object due to the bequest revoke. In the end, the certificate will be on behalf of the grantor.

- The obstacles and solutions to the role and responsibility of the public notary who work for the revoked deed of a bequest to the children by their parents. The obstacle faced by the public notary, in this case, is the completeness of supporting data for the certificate-making process. Practically, the public notary finds husband and wife who don't have a marriage certificate, birth certificate and so on. The incompleteness of this supporting data is a fatal issue, due to if this supporting data isn't complete so the notarial deed can be called an imperfect or legal defect. It is due to it doesn't meet the requirements of the

Acts. Whereas the solution of this issue is a public notary must suggest all parties who have incomplete supporting data to request a reference from village officers or sub district head as a strong evidence that all data have been appropriate.

3.2.Suggestion

According to the conclusion of this research about the Revoked Bequest to the Kids by Their Parents, the writer gives suggestion or advice to this case:

- The public notary should give more legal counseling to the clients or the parties. The purpose is to make all parties understand the legal issue they are facing and the efforts of the parents to give a bequest shouldn't be over the maximum limit of the bequest granting, which 1/3 of total wealth. It happens rather frequently since someone has to count the whole aspect of the wealth to know exactly what number the wealth is. So, my advice is to bequest objects to the children, the parents should avoid granting too big or expensive objects. So they can avoid the further issue in the future if the bequest is over maximum limitation.
- The government should improve the socialization in the society about the importance of personal identities, such as ID card, family card, marriage certificate and so on. By owning these personal identities, we are obeying the rules for the sake of the ideals of the Nation. In accordance to the supporting data issue, we shouldn't rely on government nor public notary; but we have to collaborate to various elements and apparatus of the government in certain sectors, such as village officers, sub district head, etc.

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