

THE PRINCIPLE OF THE BEST INTERESTS IMPLEMENTATION OF THE CHILD IN A DECISION TO CANCEL A CHILD'S BIRTH CERTIFICATE

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Abstract

This research aims to provide an understanding of the determination to cancel a child's birth certificate that can potentially violate children's human rights. So that the role of judges as a judicial institution is needed to protect children's rights as it should. Marriage registration is merely an administrative action and does not affect the validity of the marriage. Errors in marriage registration should not necessarily affect the status of the child's position. Because after all, birth certificates are issued by the state to protect and provide legal certainty over the child's status. This research used a typology of research with a prescriptive form and then normative juridical research methods with secondary data derived from laws and regulations relating to child protection. In conclusion, legal action to cancel a child's birth certificate due to legal defects in a marriage can be said to be an action that is contrary to the principle of the best interests of the child, therefore it is fitting that the application for annulment of a child's birth certificate be properly considered by the panel of judges who act as an extension of the state in the judicial field.

Keyword: Birth; Cancellation; Certificates; Child; Protection.

A. INTRODUCTION

In every judge's decision relating to the rights of a child, it should not be detrimental to the child's future, even if it is a request made by the child's biological mother. This is because the decision given by the judge will have lasting consequences until the child reaches adulthood. A marriage that is legally defective can cause the marriage to be annulled, which often impacts the future civil status of the child. If the marriage has been blessed with a child and has a valid birth certificate, to prioritize the principle of the best interests of the child as stated in Article 2 of Act No. 35 of 2014 concerning the amendment of Act No. 23 of 2002 concerning Child Protection (hereinafter referred to as the Child Protection Law), then whatever the reason for the annulment of marriage should not be the reason for also canceling the child's valid birth certificate.

The legal consequences of marriage have an effect on relationships between husband and wife, the position of children and property. One of the consequences of a legal marriage is that the children born of the marriage

are legal children (*wettig*).¹ The child here means someone who is not yet 18 (eighteen) years old, including children who are still in the womb.² A valid marriage must of course fulfill the formal and material requirements specified in Act No. 1 of 1974 concerning marriage (hereinafter referred as the marriage law).

The formal requirements relate to the procedures for how the marriage is carried out, both those that must be fulfilled before the marriage or those that must be fulfilled during the marriage procession. Regulations related to these formal requirements can be seen in Article 12 of the Marriage Law, which refers to Articles 3 to 9 of Government Regulation Number 9 of 1975 concerning the Implementation of Act No. 1 of 1974 concerning marriage. Meanwhile, the material requirements are more directed to the requirements as a person who will enter into a marriage such as free consent, not in a marital status, the minimum age of a person to enter into a marriage which has now changed to 19 (nineteen) years.³ And there are still other material requirements, which are clearly regulated in Article 6 - Article 11 of the Marriage Law.

Once a marriage is entered into, there is the possibility of the marriage breaking up due to death or divorce. An action that will result in the dissolution of a marriage due to divorce must be considered very carefully, because it will not only affect the husband and wife but will also affect the fate of the children born from the marriage.⁴

In the case discussed in this research, a mother filed a petition to abolish the children's civil status with their father, due to a formal defect in their marriage certificate. So that the marriage certificate is canceled, the mother applies for the annulment of the marriage and also submits a request that the children resulting from the marriage only follow the civil relationship with their mother. Even though the child already had a valid birth certificate. The father also refused to terminate the civil relationship with the mother, because the child was his flesh and blood. This was the case in 1984, as stated in Supreme Court Decision Number 1919K/Pdt/1984.⁵ Now the child is an adult and the father has passed away, he is having difficulty handling his father's inheritance. With the previous judge's decision, the child was in danger of losing his father's inheritance. His stepmother is doing everything possible to deprive the children born from the annulled marriage of their inheritance rights. Even though until now the child's birth certificate is still validly recorded in the population department.

The author will compare with previous research, first, Sandjojo and Hernoko, in 2018. This research discusses existing regulations in Indonesia,

1 Subekti, *Pokok-Pokok Hukum Perdata*, Jakarta, Intermasa, 1996

2 Act No. 35 of 2014 concerning Amendments to Act No.23 of 2002 concerning Child Protection (n.d.). Article 1 paragraph (1).

3 Act No. 1 of 1974 Concerning Marriage (n.d.).

4 F.X. Suhardana, Hukum Perdata Buku Panduan Mahasiswa, in *Buku I*, Jakarta, Prenhallindo, 2001, page.91

5 Priskila Pratita Penasthika, Urgensi Akses Terhadap Apostille Convention Bagi Negara-Negara Anggota ASEAN Dalam Menyongsong Masyarakat Ekonomi ASEAN 2015, Perspektif Hukum Perdata Internasional Indonesia, *Supremasi Hukum*, Vol. 24, No. 2, 2015

doctrine, decisions and court decisions. The annulment of a birth certificate has considerable legal consequences for the child. "This has an impact on the status and position of the child, where in several examples of court decisions and decisions that produce legal consequences from legitimate children to unmarried children and unmarried children to legitimate children," he said.⁶

Second, Satria and friends in 2021. This research discusses the implementation of changes to birth certificates that can be made but are editorial in nature because there are errors such as recording (name, date and year only). "Changes to the birth certificate can be made directly if it has not reached a year if the certificate has been years and a change will be made then there must be a decision from the district court."⁷

Marriage registration is merely an administrative action and does not affect the validity of the marriage. An error in marriage registration should not necessarily affect the status of the child's position. Because after all, birth certificates are issued by the state to protect and provide legal certainty of the child's status. From the preliminary description above, the problems that will be the main focus of this research include the validity of marriages that lack formal requirements in their implementation and the cancellation of a birth certificate can result in violations of children's human rights.

If the answer to a problem is already known, there is no need for further research.⁸

B. RESEARCH METHODS

This research aims to provide an understanding of a decision to cancel a child's birth certificate that has the potential to violate children's human rights. To solve these problems, the author uses a typology of research with a prescriptive form and then normative juridical research methods with secondary data derived from laws and regulations relating to child protection.

C. RESULTS AND DISCUSSION

1. Marriage legalization in Indonesia

Prior to the enactment of Act No. 1 of 1974 concerning marriage, in Indonesia there were several kinds of regulations governing marriage, including:⁹

- a. The Civil Code, especially in Book I, which regulates persons;
- b. Gemengde Huwelijke Reglement Staatblad 1898 Number 158, which regulates mixed marriages.

6 Natasya Immanuel Sandjojo dan Agus Yudha Hernoko, Akibat Hukum Pembatalan Akta Kelahiran Terhadap Anak, *Jurnal Perspektif*, Vol. 23, No. 2, 2018, page.91

7 Indah Satria, Okta Ainita, Agung Prayitno.,Analisis Perubahan Dokumen Akta Kelahiran Yang Disebabkan Kesalahan Pencatatan, *PALAR*, Vol. 7, No. 1, 2021, page.188

8 Jonaedi Efendi, Johnny Ibrahim, *Metode Penelitian Hukum: Normatif Dan Empiris*, Jakarta, Kencana, 2018, page.12

9 Wahyono Darmabratra dan Surini Ahlan Sjarif, *Hukum Perkawinan Dan Keluarga Di Indonesia*, in *Cetakan II*, Jakarta, Badan Penerbit FH UI, 2004, page.1

- c. HOCI (Huwelijke Ordonantie Christen Indonesiers, Stb 1933 Number 74 or the Indonesian Christian Marriage Ordinance, which regulates marriage for those who are Christian.

The Civil Code sees a valid marriage only in terms of civil law, so whether or not a marriage is valid is only seen from the registration of the marriage by the official authorized to record the marriage. The Civil Code does not make marriage under religious law a must, this is expressly stated in Article 81 of the Civil Code which prohibits religious ceremonies from being carried out if there is no marriage before the civil registry. In contrast, Marriage Act No. 1 of 1974 states that a valid marriage is one that is conducted according to the laws of each religion and then recorded according to the applicable laws and regulations.

The requirements for marriage consist of material and formal requirements, each of which is then divided again. The material requirements are divided into 2 (two), namely general material requirements and special material requirements, the general material requirements of a marriage, among others:

- a. The consent of the prospective bride and groom to enter into marriage;
- b. Fulfill the age limit for entering into marriage, which is 19 (Nineteen) years;
- c. Not in a marital status with another person;
- d. The validity of the waiting period, so that if a divorced woman cannot immediately get married but must wait for the waiting time.

As for the specific material requirements of a marriage, among others:

- a. Has obtained permission to enter into marriage, which is required for prospective brides and grooms who are not yet 21 (twenty-one) years of age as stipulated in Article 6 paragraph (2) of the Marriage Law. The granting of this permission can also be made by notarial deed.
- b. Not being subject to a marriage prohibition, if the prospective husband and or prospective wife are subject to one of the prohibitions to enter into a marriage as specified in the Marriage Law, they cannot enter into the marriage.¹⁰

The formal requirement is a procedure related to the implementation of marriage that must be fulfilled. If the conditions of marriage are not carried out, the marriage can be annulled. The formal conditions of marriage include:

- a. Notification, in the Government Regulation on the implementation of the law requires notification to the marriage registrar at least 10 (ten) days before the marriage takes place;

¹⁰ Alwesius, Hukum Orang Dan Kekeluargaan Serta Pembuatan Akta Terkait.

- b. Research, research activities here are carried out by the marriage registrar who receives the notification with the aim of checking whether the conditions for marriage have been fulfilled and whether there are no obstacles to marriage.¹¹;
- c. Announcement, after the procedures and requirements for notification have been fulfilled and there are no obstacles to holding a marriage, the Marriage Registration Officer makes an announcement of the notification of the intention to hold a marriage by affixing an announcement letter in accordance with the form determined at the Marriage Registration Office at a place determined by the registration office and easily read by the public.¹²;
- d. The implementation of marriage, in accordance with the religious laws and beliefs of the prospective bride and groom, is carried out in front of a marriage registration officer and is attended by 2 (two) witnesses;
- e. The signing of the marriage certificate, after the implementation of the marriage, the bride and groom must sign the marriage certificate that has been prepared by the Marriage Registrar, then it is also signed by the witnesses to the marriage, the marriage registrar and if the bride and groom are Muslim, it is also signed by the marriage guardian or his representative.

Unfulfilled marriage conditions cause a marriage to be annulled. However, it should be noted that the annulment of a marriage does not apply retroactively to the children born from the marriage, of course this is in accordance with humanity. Children born from an annulled marriage should not bear the burden of their parents' mistakes. Thus, the children born from the annulled marriage have a clear legal status and are officially the children of their parents.¹³

Apart from being regulated in Article 28 paragraph (1) of the Marriage Law, this is also regulated in Article 95 of the Civil Code which has the same view. A child born from an annulled marriage is a legitimate child, so that the child can inherit from the father or mother and also have a family relationship with the father's family.¹⁴

The function of marriage registration cannot be separated from a guarantee of legal protection for the married couple and children from the results of the marriage in relation to their rights and obligations, especially if there are events related to inheritance. Even so, a marriage that has been carried out only religiously, can have the opportunity to legalize the marriage so that the marriage is considered a valid marriage according to religion and the state. The method of legalizing a marriage is also differentiated according to the religion.

11 *Ibid.*

12 *Ibid.*

13 Wahyono Darmabrata dan Surini Ahlan Sjarif, Hukum Perkawinan Dan Keluarga Di Indonesia, page.65

14 Djaja S. Meliala, *Perkembangan Hukum Perdata Tentang Orang Dan Hukum Keluarga*, in *Cetakan V*, Bandung, Nuansa Aulia, 2015, page.63.

In Islam, it is known as *Itsbat Nikah*, which is a marriage validation for Muslim communities carried out by a religious court or sharia court in accordance with applicable regulations.¹⁵ Article 7 paragraph (3) KHI mentions *Itsbat Nikah* which can be submitted to the Religious Court with regard to :

- a. The existence of a marriage in the context of a divorce settlement;
- b. Loss of marriage certificate;
- c. There is doubt about the validity or otherwise of one of the conditions of marriage;
- d. The existence of a marriage that occurred before the enactment of Act No. 1 Year 1974 concerning Marriage;
- e. Marriages conducted by those who do not have Marriage impediments according to Act No. 1 of 1974 concerning Marriage.

The application for *Itsbat Nikah* can be made by the husband and wife or one of the husband and wife, but it can also be submitted by children, marriage guardians and other parties with an interest in the marriage. The application is filed at the Religious Court in the jurisdiction where the applicant resides, accompanied by clear and concrete reasons and interests. If in Islam *Itsbat Nikah* is known for the validation of marriage, for non-Muslims an application can be submitted to the District Court. This is as stated in Article 36 of Act No. 23/2006 that if a marriage cannot be proven by a marriage certificate, it is also possible to apply for marriage validation if the marriage partner has died. So basically the state has done its best to protect the rights of its citizens.

Further arrangements regarding marriage registration are regulated in Presidential Regulation No. 96/2018 concerning Requirements and Procedures for Population Registration and Civil Registration. Submission of an application for marriage validation must be accompanied by evidence that a marriage has occurred, such as a certificate from a religious leader that a marriage has occurred which must also be accompanied by documents such as the electronic identity card of the husband and wife, family card, if the married couple has died accompanied by a death certificate and if they are divorced, attach a divorce certificate.¹⁶

It can be seen that the state has carried out its obligation to protect and recognize the determination of legal status at important events experienced by the Indonesian population, in this case the event of marriage. Marriage itself has the aim of forming a happy and eternal family based on the Almighty God.¹⁷ To be able to form a happy family, of course, every right and obligation of all family members must be

15 Peraturan Mahkamah Agung Nomor 1 Tahun 2015 Tentang Pelayanan Terpadu Sidang Keliling Pengadilan Negeri Dan Pengadilan Agama/Mahkamah Syar'iah Dalam Rangka Penerbitan Akta Perkawinan, Buku Nikah, Dan Akta Kelahiran (n.d.).

16 Peraturan Presiden Nomor 96 Tahun 2018 Tentang Persyaratan Dan Tata Cara Pendaftaran Penduduk Dan Pencatatan Sipil (n.d.). Pasal 37.

17 Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan. Pasal 1.

considered, not only the husband or wife but also the rights of children must be properly maintained.

2. Children's Rights According to Act No. 2 of 2002 on Child Protection

Children who are still minors certainly cannot defend their own interests, therefore the role of parents is very important to prioritize the interests and protect their children. In addition to parents, a child also has the right to be protected by the family, community and state, so in this case if parents cannot protect their children, the state is obliged to protect the child.¹⁸ The obligation to protect children is reaffirmed in the Child Protection Law which states that the State, Central Government, Local Government, community, family, Parents, or Guardians have the obligation and responsibility for the implementation of child protection.¹⁹

Since 1989, the United Nations Convention has established the rights of children, and this convention has 4 (four) general principles in order to realize the welfare of children, which are then ratified into article 2 of the Child Protection Law, including:

- a. Non-discrimination;
- b. Best interest of the child;
- c. The right to life, survival, and development; and
- d. Respect for the child's opinion.

Children's rights are part of human rights, which must be guaranteed, protected and fulfilled by parents, families and communities. The issue of human rights violations is always related to the obligations of the state or parties who legally have the obligation to protect and respect, international human rights norms.²⁰ Therefore, these four principles should be of particular concern to parents, families, communities and the government.

Non-discrimination means that all children have rights regardless of ethnicity, race, gender, religion, social position and so on. The rights referred to here include the right to welfare, the right to care and protection, the right to obtain an identity, the right to worship according to their religion, and many more. There are about 31 (thirty-one) children's rights contained in the Child Protection Law, including one of them is the right of children to know their parents. All of these rights are children's rights that must be obtained by all children without any discrimination.

The principle of the best interests of the child is explained in the Child Protection Law. Which in its explanation emphasizes that in all actions concerning children carried out by the government, society, legislative bodies, and judicial bodies must prioritize the interests of children. Prioritizing here is not solely related to the present, but the

18 *Act No. 39 of 1999 Concerning Human Rights* (n.d.), Chapter 52.

19 *Act No. 35 of 2014 concerning Amendments to Act No. 23 of 2002 concerning Child Protection*, Chapter 20.

20 Andrey Sujatmoko, *Hukum HAM Dan Hukum Humaniter*, Jakarta, Raja Grafindo Persada, 2015.

interests of children in the future. Therefore, any action related to children that does not prioritize the interests of the child can be interpreted as violating children's human rights.

The right to life, survival and development is the right most closely related to the survival of the child. Efforts to protect a child must be made as early as possible, namely from the womb until the age of 18 (eighteen) years. Not only not to be killed, but also to fulfill all the needs for their development and survival.

Respect for children's opinions is also one of the general principles for creating child welfare. Even though they are minors, every child has the right to express their opinions about what they want, what they like, and what they dislike. As adults, we can be more thoughtful in responding to a child's opinion. But unfortunately, this right to have an opinion is often violated by parents and adults who are in the child's environment. A child's opinion is not valued as it should be, even if it is related to the child's happiness.

3. Annulment of Birth Certificates and the Impact on Children's Civil Status

A child's right to an identity is protected by law. The identity of every child must be given immediately after their birth. The child's identity is in the form of a birth certificate and currently a Child Identity Card (KIA) has also been issued. A birth certificate is a document that serves as evidence and information material for the birth of a child in the form of a printed piece of paper. A birth certificate is a proof of a child's identity which is the first protection that can be provided by the state, this birth certificate document is closely related to legal certainty and the position of the child in a family tree which affects inheritance rights in the future.²¹ Meanwhile, the Child Identity Card (KIA) is also a child's official identity as proof of a child who is less than 17 (seventeen) years old and unmarried, issued by the District / City population and civil registration office.²²

The creation of these identities is the responsibility of the government. The right to identity is a basic right inherent in every child that the state must provide.²³ It is in the birth certificate that later contains the name and name of the child's parents. There are differences in the writing of birth certificates between legal children and children outside marriage, on the birth certificate of children born in marriage there are the names of the father and mother in it but for children born outside marriage there is only the mother's name as the parent. In addition, the name of the parents on the birth certificate is closely related to the civil status of the child, which will also be the basis for the

21 Natasya Immanuela Sandjojo dan Agus Yudha Hernoko, *Akibat Hukum Pembatalan Akta Kelahiran Terhadap Anak*

22 Regulation of the Minister of Home Affairs Number 2 of 2016 concerning Child Identity Cards" (n.d.) Article 1 paragraph (7).

23 Hari Harjanto Setiawan, *Akta Kelahiran Sebagai Hak Identitas Diri Kewarganegaraan Anak*, *Sosio Informa*, Vol. 3, No. 1, 2017, page.2

inheritance rights of a child. With a birth certificate that contains the name of the father and mother, no further evidence is needed to determine whether the child is included in the group of heirs of a testator, unlike a child whose father's name is not listed on his birth certificate. When an inheritance event occurs, the child must provide other evidence showing that he has a blood relationship with his father.

Not only from a legal perspective, but from a psychological perspective a birth certificate that does not have the father's name on it also has a psychological impact on the child., " *There must be, because the older the child will ask because the birth certificate is an important letter that sooner or later the child will read so that it will have an impact on the child feeling that he is not recognized by his father, and we know that if the father figure is lost from the child, the leadership side, courage, the side of daring to say no to negative things, visionary, fighting spirit taken from the father disappears which will then have a big impact later on, especially in adulthood and will be a long debate between mother and child.*"²⁴

Still in the interview Intan Erlita, M.Psi, as a Psychologist said" *When viewed from the psychological side, of course the interests of the child must come first, and if the parents apply for marriage legalization, of course this is better because there is no cancellation of the child's birth certificate. Do not let hatred and anger finally make the couple try to eliminate the father or mother of the child because after all the child needs to know who his parental figure is even though the figure can be replaced but it will be much better if he gets full love from his biological father and mother.*".

A birth certificate containing both the father's and mother's names has more positives than a birth certificate with only the mother's name. The positive things can be seen in terms of legal and psychological science, when viewed from the legal side, the existence of the names of both parents in the certificate can provide positive things, namely that the child can have a civil relationship with his father and mother, so that the child can get full rights and affection from his father and mother, besides that the child also has the right to inherit from the family of his father and mother. Then the positive thing for the child's psychology is that the child will not feel different from his friends because he has a birth certificate with the names of both parents, the child will not feel abandoned or discarded by his biological parents in the future, and will not have bad questions about his parents.

In the case of Supreme Court Decision No. 1919K/Pdt/1984 a father appealed against a High Court decision that annulled his marriage and also annulled the birth certificates of his children which then ruled that the children only had a civil relationship with their mother. In this case, it appears that the father did not want to sever his civil relationship with his children, so he filed an appeal, but unfortunately it was rejected

24 Intan Erlita, *Wawancara Dengan Psikolog Melalui Media Zoom Meeting*, 2023.

by the judge. If the judge had applied the principle of the best interests of the child, then the judge should not have rejected the appeal.

In the author's view, the cassation appeal is a form of a father's responsibility towards his children. The judge's consideration at that time was that there were marriage requirements that had not been completed. Even though at that time the marriage had been going on for more than 10 (ten) years, which should have deprived the right to cancel the marriage, even more so to cancel the child's birth certificate. Moreover, the law already regulates that the annulment of marriage does not apply retroactively to the status of children born in the marriage.

D. CONCLUSION

A marriage that does not meet the formal requirements results in the marriage being annulled. Whether or not the marriage is annulled is the choice of the married couple, because it is also possible to validate the marriage in the event that there is doubt about the validity of one of the conditions of marriage. The annulment of the birth certificate should be done if there is a refusal from the father or it can be proven scientifically that the child is not the biological child of the father or mother as stated in the birth certificate. A marriage that is legally defective would be wise to legalize the marriage. Because however in this case, the child cannot defend his own interests, therefore the judge, who in this case is an extension of the state, should be able to protect the rights of children by not immediately granting the annulment of the child's birth certificate on the grounds of a legally defective marriage.

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