

## Roles & Responsibilities of Notaries in Making Wills According to Civil Law & Islamic Law

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**Abstract.** *Based on the applicable legislation, the role and responsibility of a notary from the beginning to the end of the process of making a testament act is very necessary so that it has binding legal force. This writing aims to analyze the role and responsibilities of a notary for his will and protection of a notary from the perspective of the Civil Code and Islamic Law. The research method used in this thesis is a sociological juridical research method. The analytical knife used in this study uses the theory of responsibility, the theory of authority, and the theory of legal certainty. The results of the research and discussion show that the role of a Notary in making a will according to the Civil Code is in the form of: make a Superscriptie Deed relating to an explanation of a secret will and sign the deed and keep it, keep wills, keep a will in a state of war, people who sail, or those who are in places prohibited from contact with the outside world due to illness, make a deed of appointment of the executor of the will, and make a deed of appointment of the manager of the estate of the heir. The role of the Notary in making a will according to the Compilation of Islamic Law (KHI) is in the form of making a Will Deed and making a Deed of Revocation of Will. The notary's responsibility for the will, which includes moral responsibility, ethical responsibility, and moral responsibility. Protection of notaries on wills has been regulated and stated in Article 66 of the UUJN.*

*Keywords: Liability; Notary; Deed of Will.*

### 1. Introduction

Making a will (testament) is a legal act, a person determines what happens to his wealth after death. Inheritance property often causes various legal and social problems, therefore it requires regulation and settlement in an orderly and orderly manner in accordance with applicable legislation.<sup>1</sup>

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<sup>1</sup> Wahyu Azikin, "Hibah dan Wasiat dalam Perspektif Hukum Perdata (BW dan Kompilasi Hukum Islam)", *Meraja Journal*, Vol. 1 No. 3, November 2018, p. 86

A will (testament) is also a one-sided legal act. This is closely related to the "herroepelijkheid" (revocable) nature of the testament. This means that a will (testament) cannot be made by more than one person because it will cause difficulties if one of the makers will revoke it (testament).

The notary has the duty and obligation to keep and send the list of wills he has made to the *Balai Harta Peninggalan* (BHP) and the Central List of Wills (DPW).<sup>2</sup> Making a notary testament act has a very important role. Article 943 of the Civil Code stipulates that: "Every notary who keeps testament letters among the original documents, even if in any form, must after the heir dies, notify those who are interested."

In accordance with the applicable legislation, the assistance of a notary from the beginning to the end of the testament act is very necessary in order to obtain binding legal force. The responsibilities of a notary in making a testament act include the entirety of the duties, obligations and authorities of a notary in the matter of making a testament act, including protecting and storing authentic documents or deeds.<sup>3</sup>

Based on the background that the author has stated above, the authors need to do research in order to reveal matters relating to notaries, especially regarding "Roles & Responsibilities of Notaries in Making Wills According to Civil Law & Islamic Law".

The problems that will be studied in this paper include: how the roles and responsibilities of the notary for the will he made?; and How is the protection of the notary against the will he made in terms of the perspective of the Civil Code and Islamic Law?

## 2. Research Method

The research method used in this thesis is a sociological juridical research method. Sociological juridical research is legal research conducted by examining how reactions and interactions occur because legal expectations are often different from the reality that occurs in society, or it can be called a gap between *Das Sein* (facts/reality) and *Das Sollen* (norms/expectations). Methods of data collection were conducted through interviews, library research, and document studies. This writing is analyzed qualitatively by using the analytical knife of responsibility theory and legal certainty theory.

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<sup>2</sup>Hartono Soerjopratiknjo, *Hukum Waris Testamenter, Seksi Notariat Fakultas Hukum Universitas Gadjah Mada*, 1st Printing, Yogyakarta, 1982, p. iv

<sup>3</sup>G.H.S. Lumban Tobing, *Peraturan Jabatan Notaris*, Penerbit Erlangga, Jakarta, 1982, p. 237-238

### 3. Results and Discussion

#### 3.1. The Role and Responsibilities of a Notary For His Willing Deed

1. The Role of Notaries in Making Wills According to the Civil Code
  - a. Making a Superscriptie Deed is related to the explanation of the secret will and signing the deed and keeping it.
  - b. Keep the wills among the original documents, in any form, after the death of the testator, and must notify the people concerned.
  - c. Keep a will in a state of war, people who sail, or those who are in places that are prohibited from contact with the outside world because of illness.
  - d. Make a deed of appointment of the executor of the will
  - e. Make a deed of appointment of the manager of the estate of the heir.<sup>4</sup>
2. The Role of Notaries in Making Wills According to UUJN
  - a. Article 16 UUJN Paragraph 1 letter h: Notaries are required to make a list of deeds that are related to the will according to the order in which the deed is made every month.
  - b. The obligations regulated in this provision are important to guarantee the protection of the interests of the heirs, which at any time can be traced or traced to the truth of a will that has been made before a notary.
  - c. Article 16 UUJN Paragraph 1 letter i: Notaries are obligated to send a list of deeds as referred to in letter h or a list of nothing related to wills to the Central List of Departmental Wills whose duties and responsibilities are in the notary field within 5 (five) days on the first week of every month next;

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<sup>4</sup>Hanatasia Angelina Sunarto and Ni Luh Gede Astariyani, "Peranan Notaris Dalam Pembuatan Keterangan Hak Waris Bagi Golongan Tionghoa (Studi Kasus : Kantor Notaris Denpasar)", *Jurnal Kertha Semaya*, Vol.01, No.10, October 2013, p. 3  
<http://ojs.unud.ac.id/index.php/kerthasemaya/article/view/6814/5148>

- d. Article 16 UUIIN Paragraph 1 letter j: Notaries are required to record in the repertoire the date of sending the list of wills at the end of each month;
  - e. Recording in the repertoire is carried out on the day of delivery, this is important to prove that the obligations of the Notary as referred to in letter f and letter g have been carried out.
3. The Role of Notaries in Making Wills According to the Compilation of Islamic Law
- a. Article 195 KHI: Making a Will
    - (1) A will is made orally before two witnesses, or in writing before two witnesses, or before a notary.
    - (2) A will is only allowed as much as one third of the inheritance unless all the heirs agree.
    - (3) The will to the heirs is valid if it is approved by all the heirs.
    - (4) The statement of approval in Paragraphs (2) and (3) of this Article is made orally before two witnesses or in writing before two witnesses before a Notary.
  - b. Article 199 KHI: Making a Deed of Revocation of Will
    - (1) The testator can revoke his will as long as the prospective beneficiary has not stated his consent or after expressing his consent but then withdraws.
    - (2) The revocation of a will can be done orally in the presence of two witnesses or in writing in the presence of two witnesses or based on a notary deed if the previous will was made orally.
    - (3) If a will is made in writing, it can only be revoked in writing in the presence of two witnesses or based on a notary deed.

(4) If a will is made based on a notary deed, it can only be revoked based on a notary deed.<sup>5</sup>

c. Article 203-204 KHI: Making a Deed

Article 203

(1) If the will is closed, it must be kept at the place of the Notary who made it or in another place, including related documents.

(2) If a will is revoked in accordance with Article 199, the revoked will is returned to the testator.

Article 204

(1) If the testator dies, the closed will is kept with a notary, opened by him in the presence of the heirs, witnessed by two witnesses and by making an official report on the opening of the will.

(2) If a closed will is not kept with a Notary, the custodian must submit it to the local Notary or the local Religious Affairs Office and then the Notary or Religious Affairs Office opens it as specified in Paragraph (1) of this Article.

(3) After all the contents and purposes of the will are known, the Notary or the Office of Religious Affairs is handed over to the beneficiary for further settlement.

In carrying out his duties, a notary is obliged to carry it out with full responsibility. The Notary's responsibilities in making this will include:

1. Moral Responsibility

A notary in carrying out his duties must be in accordance with the demands of the law and the interests of the community, must not conflict with public order or decency. Regulations related to public order are directly related to the public interest, both regulations that are a mixture of civil law and public law, while regulations

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<sup>5</sup>Moh. Syamsul Mu'arif, "Perbandingan Wasiat dalam Perspektif Kompilasi Hukum Islam (KHI) dan Burgerlijk Wetboek (BW)", *Jurnal Penelitian dan Kajian Kelslaman: Tafaqquh*, Vol. 3 No. 2, December 2015, p. 96-98

regarding good decency are those that have a relationship with the prevailing morals in the social life of the community. In this case, as long as it involves actions that are considered to be contrary to public order and morality, the notary can refuse to provide assistance.

In carrying out his duties, a notary may not distinguish between people whose economic condition is weak and those whose economic condition is strong. This is in accordance with Article 37 of the UUJN which reads: "Notaries are obliged to provide legal services in the notarial field for free to people who cannot afford it." Evidence stating that a person is incapable and an order from a court judge to a notary to make a deed free of charge or at half the rate, are attached to the minutes of the deed in question. The minutes of the deed in this case do not have to mean the minutes stored in the notary protocol, but what is meant is the original of the deed. So that in this moral responsibility, a notary in carrying out his duties must be responsible to the community.

## 2. Ethical Responsibility

A notary in carrying out his position must have sufficient legal skills based on a sense of responsibility for the appreciation of the nobility, dignity of his position, values and ethics. For notaries, these requirements are not only required by law but also based on the trust given to them by the Law, namely Law Number 30 of 2004 concerning the Position of a Notary, both from the nature of the notary's position itself as well as the nobility and dignity of the position the existence of responsibility and personality as well as high legal ethics. In this case, a notary is responsible for the Notary's code of ethics.

## 3. Legal Liability

### a. Formal aspect

According to Article 39 Paragraph (2) UUJN states that: "The appearer must be known by a notary or introduced to him by 2 (two) identifying witnesses who are at least 18 years old or have married and are capable of carrying out legal actions, or introduced by 2 (two) other contenders."

The appearers are those who come before the notary for the making of the deed, not those who are represented in the

deed, whether represented orally or in writing or in position or position.

b. Material aspect

The provisions in Article 58 Paragraph (1) of the UUJN state that: "Notaries make a list of deeds, a list of legalized documents, a list of registered letters, and a list of other documents required by this law."

It is the obligation of a notary if he knows of someone who has died, or information about the absence of the testator, to notify the interested parties quickly about the existence of a will that is stored in a notary protocol.

With respect to the testament act made before him, the notary is responsible for reading it before the witnesses. After that, the notary will notify the testament act to the Central List of Wills, the Directorate of Civil Affairs, the Directorate General of General Legal Administration, the Ministry of Law and Human Rights and the *Balai Harta Peninggalan* (BHP). So the responsibility of the notary ends with the notification of the will (testament act). However, if there is an error in the making of a testament act and the error is the fault of the notary, the notary must be held accountable before the court. In the event of such an error, The Central List of Wills (DPW) and the Heritage Center (BHP) are not responsible because the Central List of Wills (DPW) and the Heritage Center (BHP) only accept reports from a notary regarding a will (testament act). If possible, the Notary will notify the heirs if there is a will or testament.<sup>6</sup>

One of the responsibilities of a Notary in managing the making of a will is to be responsible for the reporting of a will. The following is the procedure for reporting wills based on Permenkumham Number 60 of 2016:

1. Notaries are obligated to make a Register of Deeds or a List of Nil relating to a Will.
2. The Deed List or the Zero List must be reported to the Central List of Wills.

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<sup>6</sup>Indah Sari, "Pembagian Hak Waris Kepada Ahli Waris *Ab Intestato dan Testamentair* Menurut Hukum Perdata Barat (BW)", *Jurnal Ilmiah Hukum Dirgantara*, Vol. 5 No. 1, 2014, p. 6

3. Reporting on the Register of Deeds or List of Nil is done electronically through the official website of the Directorate General of General Legal Administration of the Ministry of Law and Human Rights.
4. Reporting on the Register of Deeds or List of Nil shall be submitted within a period of no later than 5 (five) days in the first week of each following month. (every 5th of every month)

Reporting the List of Deeds includes:

- a. General will
  - b. Olographic will;
  - c. Will Grants;
  - d. Secret or secret will; or
  - e. Revocation of Will.
5. The Notary is responsible for the correctness of the data in the Register of Deeds or the Zero List which is reported to the Central Register
  6. Reporting the Register of Deeds is subject to a fee in accordance with the provisions of the legislation in the field of Non-Tax State Revenue applicable to the Ministry of Law and Human Rights.
  7. No fees are charged for Zero List reporting.
  8. List of Deeds or List of Nil that have been reported by a Notary electronically is stored in the Central List of Wills database.
  9. Notaries are required to keep evidence of electronic reporting on the Register of Deeds or the Zero List; and proof of payment of non-tax state revenues.
  10. Electronic reporting evidence is submitted to the local Notary Regional Supervisory Council (MPDN) every month.

The Notary's responsibility in carrying out his duties and authorities makes the deed must be considered by a Notary. The theory of responsibility presented by Hans Kelsen states that a person is legally



responsible for a certain act or that he bears legal responsibility, the subject means that he is responsible for a sanction in the event of a conflicting act.

### 3.2. Protection of the Notary for the Will He Made From the Perspective of the Civil Code and Islamic Law

In carrying out his position a notary is never separated from the obligations that must be fulfilled and to maximize its performance. The obligations of a Notary as referred to in Article 16 UUJN-P, namely that a Notary must act honestly, thoroughly, independently, impartially, and protect the interests of the parties involved in legal actions. In addition, a notary is also required to make a deed in the form of a minutes of deed and save it as part of the notary protocol.<sup>7</sup>

Legal protection for Notaries in carrying out their duties and authorities for the implementation of service functions and achieving legal certainty in providing services to the community, has been regulated and stated in Article 66 of the UUJNP.

Authentic deeds made by a Notary are often disputed by one party or by another party because they are considered detrimental to their interests, whether it is the incompatibility of the form of the deed, the denial of the contents of the deed, the signature or the presence of the party before the Notary, and even allegations in the authentic deed false information was found. In connection with the legal protection of the Notary against the deeds he made related to the civil liability of the Notary, with the carelessness and seriousness of the Notary, the Notary actually has brought himself to an act which by law must be accounted for. If an error made by a Notary can be proven, the Notary may be subject to sanctions in the form of threats as determined by law.

1. Maintain the dignity of his position, including when giving testimony and proceeding in examinations and trials;
2. Keep the deed information confidential in order to protect the interests of the parties involved in the deed;
3. Maintain the minutes or letters attached to the minutes of the deed, as well as the Notary protocol in its storage.

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<sup>7</sup>Abdulkadir Muhammad, 2006, *Etika Profesi Hukum*, Bandung, Citra Aditya Bakti, p. 56.

UUJN has regulated forms of legal protection that can be given to Notaries in carrying out their duties as public officials, this is reflected in Article 66 Paragraph (1) of the UUJN which states that for the purposes of the judicial process, investigators, public prosecutors, or judges with the approval of the Honorary Council Notary (MKN) is authorized to:

1. Take a photocopy of the minutes of the deed and/or the letters attached to the minutes of the deed or the protocol of the notary in the notary's depository, and;
2. Calling the notary to be present in the examination related to the notary deed or protocol that is in the notary's storage.

In understanding the legal protection of notaries as stated in Article 66 of the UUJN, it must include a substitute notary, temporary notary official and notary emeritus or *werda* notary, because in practice there are still frequent summons (examination) to notaries who have stopped serving as notaries to be examined. by investigators related to deeds that he had made while still serving as a notary. It is hoped that with the existence of this UUJN the existence of MKN can provide legal protection for all people who (have) carried out their duties as a notary. UUJN has regulated the legal protection of Notary Positions carried out by MKN, as regulated in Article 66 Paragraph (1) of the UUJN, which states that for the purposes of the judicial process, namely investigators, Public prosecutors and judges who wish to summon a notary must obtain prior approval from the MKN. If there is a case related to the alleged malpractice carried out by a Notary in the process of making an authentic deed that causes harm to one of the parties in the deed he made, then in this case there are several steps that must be obeyed by both investigators and MKN, in order to guarantee certainty and legal protection for the parties involved.

The legal protection given to the Notary (Position) is regulated in Article 66 of the UUJNP. Article 66 of the UUJNP regulates the establishment of a Notary Honorary Council (hereinafter referred to as MKN) consisting of representatives of Notaries, the government and academics, which functions as a legal protection institution for the Notary Position related to the deed made by or before it.

The existence of this MKN is expected to provide an optimal legal contribution for Notary institutions in carrying out their duties as legal protection institutions. Regarding the regulation of the position and form

of legal protection from the MKN, it has not been explicitly regulated in the UUJN or in other forms of legislation.<sup>8</sup>

The position of MKN in providing legal protection for Notaries is an independent institution, because in this case the existence of MKN is not a sub part of the government that appointed it. MKN in exercising its authority to issue a decision is not influenced by other parties or institutions, so that in this case the decisions made by MKN cannot be contested.<sup>9</sup>

If it is associated with Islam, the existence of this notary is very much needed. Referring to the argument of the Qur'an *surah Al-Baqarah* (2) Verse 282 which reads:<sup>10</sup>

يا ايها الذين امنوا اذا تداينتم بدين الى اجل مسمى فاكتبوه وليكتب بينكم كاتب بالعدل ولا  
ياب كاتب ان يكتب كما علمه الله فليكتب وليملل الذي عليه الحق وليتق الله ربه ولا  
يبخس منه شيئا فان كان الذي عليه الحق سفيها او ضعيفا او لا يستطيع ان يمل هو فليملل  
وليه بالعدل واستشهدوا شهيدين من رجالكم فان لم يكونا رجلين فرجل وامراتن ممن  
ترضون من الشهداء ان تضل احدهما فتذكر احدهما الاخرى ولا ياب الشهداء اذا ما دعوا  
ولا تسماوا ان تكتبوه صغيرا او كبيرا الى اجله ذلكم اقسط عند الله واقوم للشهادة وادنى الا  
ترتابوا الا ان تكون تجارة حاضرة تديرونها بينكم فليس عليكم جناح الا تكتبوها واشهدوا اذا  
تبايعتم ولا يضار كاتب ولا شهيد ه وان تفعلوا فانه فسوق بكم واتقوا الله ويعلمكم الله والله  
بكل شيء عليم

*It means: "O you who believe (are âmenû)! When you deal with each other in contracting a debt for a fixed time, then write it down. Let a scribe write it down between you with fairness; and the scribe should not flinch to write as Allah has taught him, so he should write exactly the way it is; and let him who owes the debt dictate. And let him have piety (takwâ) towards Allah, his Lord, (and let him guard himself against His Orders) and let him not diminish anything from it; but if he who owes the debt is unsound in understanding, or weak or (if) he is not able to dictate himself, let his guardian dictate in justice (with fairness); and call in to witness from among your men two witnesses; but if there are not two men, then one man and two women of such as you approve as witnesses, so that if one of the two (women) forgets, the other (woman) may remind her; and the witnesses*

<sup>8</sup>Irene Dwi Enggarwati, 2015, Pertanggungjawaban Pidana Dan Perlindungan Hukum Bagi Notaris Yang Diperiksa Oleh Penyidik Dalam Tindak Pidana Keterangan Palsu Pada Akta Otentik, Tesis, Master of Notary, Faculty of Law, Universitas Brawijaya, Malang, p. 17

<sup>9</sup>Ibid., p. 18.

<sup>10</sup>QS. Al-Baarah Verse 282

*should not refuse when they are summoned; do not become weary to write it (your contract) (whether it is) small or large, together with the date of payment. This is more equitable in the Sight of Allah and assures greater accuracy in testimony and the nearest (way) to prevent doubts among yourselves, except when it is ready merchandise which you give and take (cash in-cash out) among yourselves from hand to hand, then there is no sin on you if you do not write it down. But take witnesses whenever you buy-sell with one another, and let no harm be done to the scribe or to the witness; and if you do (it), then surely it will be wickedness (Fisq=going out of the Way of Allah or falling out of the path of Allah) for you. Have piety (takwâ) towards Allah and Allah teaches you, and Allah is the All-Knowing of all things.”*

The implementation of the duties of a Notary's office has been regulated in its entirety in the UUJN, including those related to legal protection for Notaries in carrying out their duties. This shows that the Notary has obtained legal certainty for the protection given to him. According to Soerjono Soekanto, legal certainty requires the creation of general regulations or generally accepted rules, in order to create a safe and peaceful atmosphere in society.

#### **4. Closing**

The role of a Notary in making a will according to the Civil Code is in the form of: making a Superscriptie Deed relating to an explanation of a secret will and signing the deed and keeping it, storing wills, keeping a will in a state of war, people who sail, or those who are in places where a place that is prohibited from having contact with the outside world due to illness, making a deed of appointment of the executor of the will, and making a deed of appointment of the manager of the estate of the heir. The role of the Notary in making a will according to the Compilation of Islamic Law (KHI) is in the form of making a Will Deed and making a Deed of Revocation of Will. The notary's responsibility for the will, which includes moral responsibility, ethical responsibility, and moral responsibility. Besides that, Notaries are also responsible for registering wills and reporting wills. Protection of notaries on wills has been regulated and stated in Article 66 of the UUJNP. In understanding the legal protection of notaries as stated in Article 66 of the UUJN, it must include a substitute notary, temporary notary official and notary emeritus or werda notary, because in practice there are still frequent summons (examination) to notaries who have stopped serving as notaries to be examined by investigators related to deeds that he had made while still

serving as a notary. A notary in carrying out his duties, especially in terms of making a testament act, pays more attention to the conditions that must be met so that a testament act can be validly valid as an authentic deed. A notary must be better able to understand his obligations and responsibilities in making a testament act made before him so that it does not harm the testator or the notary himself.

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