

## Legal Protection for Minors in Burdening Their Own Fixed Assets

Septya Purwiningsih<sup>1)</sup> & Nanang Sri Darmadi<sup>2)</sup>

<sup>1)</sup> Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, Indonesia, E-mail: [septyabsy25@gmail.com](mailto:septyabsy25@gmail.com)

<sup>2)</sup> Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, Indonesia, E-mail: [nanang@unissula.ac.id](mailto:nanang@unissula.ac.id)

**Abstract.** *This study aims to analyze: 1) The principle of legal protection that applies in cases of applications for the determination of a guardian to encumber immovable property owned by a minor child. 2) The judge's considerations in providing protection for minor children to encumber their immovable property. The approach method in this study is the statute approach. This type of research is included in the scope of normative legal research. The type and source of data in this study are secondary data. obtained from literature studies. The analysis in this study is prescriptive. The results of the study concluded: 1) The principle of legal protection that applies in cases of applications for the determination of a guardian to encumber immovable property owned by a minor child is intended so that the assets of the child under guardianship are not misused by the guardian and as a preventive measure for inheritance disputes. Where this aims to protect the management of assets that are the child's rights to be used for the best interests of the child and can be accounted for when the child is an adult. One form of legal protection is the existence of a supervising guardian. 2) The judge's consideration in providing protection for minors to burden their permanent assets in Determination Number 310/Pdt.P/2019/PN.Pwt. between a person's position as a legal subject and the capacity to act there is a very close relationship, but both are actually two different things. The position as a legal subject or Person is a quality that allows the person concerned to have rights and obligations, while the*

*problem of capacity to act is a problem of authority to exercise the rights and obligations that he has, as an effort to organize / fulfill his interests.*

**Keywords:** *Assets; Joint; Legal; Protection; Pupils.*

## 1. Introduction

The Republic of Indonesia, based on the 1945 Constitution, is a constitutional state that provides guarantees and protection for the rights of citizens. This is also reflected in Article 28G paragraph (1), which states that all individuals have the right to protection for themselves, their families, their honor, their dignity, and their property under their control, as well as the right to a sense of security and protection from the threat of fear to do or not do actions that are part of Human Rights.<sup>1</sup>

A person is said to be legally competent if the person is an adult and of sound mind. Children are the same legal subjects as adults. Children who are not yet 21 years old are considered not yet competent to carry out legal acts.<sup>2</sup> Minors cannot perform legal acts on their own without the assistance of their parents or guardians. On the other hand, parents have the right and obligation to represent their children in carrying out legal acts inside and outside the court, including control over their pupil's assets with certain provisions limited so as not to harm the child himself.

Article 51 paragraph 2 of Law Number 1 of 1974 concerning Marriage states that the guardian should be taken from the child's family or another person who is mature, of sound mind, just, honest and well-behaved. Guardianship over the child's personal self is in the form of managing the child's interests, starting from caring for, nurturing, and providing education and religious guidance. This guardianship also includes everything the child needs.<sup>3</sup> Meanwhile, guardianship of

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<sup>1</sup>Adrian Sutedi, 2018, *Transfer of Land Rights and Its Registration*, Sinar Grafika, Jakarta, p.1

<sup>2</sup>Sena Lingga Saputra, 2019, *Legal Status of Agreements in Online Purchases and Sales Conducted by Minors*, *Jurnal Wawasan Yuridika*, Volume 3 No. 2, p. 205.

<sup>3</sup>Larasati and Siti Ummu Adillah, 2022, *Responsibilities of Guardians in the Transfer of Land Rights to Children Due to Wills*, *SANLAR: Sultan Agung Law Review*, Volume 4 Number 2, p.572

the child's assets takes the form of properly managing the child's assets, including recording the amount of assets when the guardianship begins, recording changes in the assets during the guardianship and returning them to the child when the guardianship period has ended because the child has become an adult and is able to take care of himself.<sup>4</sup>

The legal basis for guardianship in the Civil Code has been stated in Chapter XV in Articles 331 to 418. Article 330 of the Civil Code states that those who are considered minors are those who have not reached the full age of 21 years and have never been married.<sup>5</sup> Guardians after fulfilling certain requirements are authorized to take legal actions on the pupil's property. The authority to act lies with the guardian. To be appointed as a guardian, the guardian must be a person who is competent to act (Article 379 of the Civil Code). Provisions on Guardianship are also regulated in the Civil Code Articles 331 to 344 and Articles 50 to 54 of Law Number 1 of 1974 concerning Marriage. Guardianship is supervision of the person and management of the property of a minor child if the child is not in the hands of the parents' authority. So for children whose parents have divorced or if one or all of them have died, they are under guardianship. For children born out of wedlock, because there is no parental authority, this child is always under guardianship.<sup>6</sup>

Every guardianship, except as stipulated in Article 351 of the Civil Code and Article 361 of the Civil Code, has only one guardian (Article 331 of the Civil Code). If one of the two parents dies, then the guardianship of the minor child who is married, by law, is held by the parent who has lived the longest, unless released or dismissed from parental authority (Article 345 of the Civil Code). Each parent who exercises parental or guardianship authority for one or more children, has the right to appoint one or more guardians, has the right to appoint a guardian for the children, if the guardianship after death does not have to be carried out by the other parent (Article 335 of the Civil Code).<sup>7</sup>

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<sup>4</sup>Dani Ramdani, 2020, Execution of Child Custody Case Decisions with Certainty and Justice in Indonesia and Malaysia, Prenadamedia Group, Jakarta, p. 11.

<sup>5</sup>Djaja S. Meliala, 2007, Development of Civil Law Concerning Persons and Family Law, Nuansa Aulia, Bandung, p. 125

<sup>6</sup>Titik Triwulan Tutik, 2011, Civil Law in the National Legal System, Kencana, Jakarta, p. 88

<sup>7</sup>Hilman Hadikusuma, 1990, Indonesian Marriage Law, Mandar Maju, Bandung, p.149.

The implementation of the guardian's obligations based on Article 383 of the Civil Code can be concluded that the guardian's duties are as follows:<sup>8</sup>

1. Supervision of the pupil (person requiring guardianship). The guardian must provide for the care and education of the minor according to the minor's own wealth.
2. Representing students in carrying out all legal acts in the civil field.
3. Manage the property of his pupils as a good househusband (Article 385 of the Civil Code).

Parental authority is not only over the child, but also includes the child's property and wealth. Article 47 paragraph (2) of Law Number 1 of 1974 states that parents represent the child regarding all legal actions in and outside the court.<sup>9</sup> Legal protection for minors requires that the child's parents or siblings who will manage the child's assets become guardians based on a court order. Guardians appointed based on a court order can represent minors to carry out legal acts both inside and outside the court for the benefit of the minor.<sup>10</sup> The role of guardians for minors has profound implications for the protection and regulation of children's rights and interests. A legal issue that attracts attention is the application for the determination of a guardian that submits a burden or burden on fixed assets owned by minors.

## 2. Research Methods

The approach method in this study is the statute approach. This type of research is included in the scope of normative legal research. The type and source of data in this study are secondary data. obtained from literature studies. The analysis in this study is prescriptive.

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<sup>8</sup>Alisa Kamal, 2019, Guardianship of Inheritance Management of Minors According to Civil Law, JOM Faculty of Law, University of Riau, Volume VI Number 2, p.4

<sup>9</sup>Dian Intan and Akhmad Khisni, 2022, Legal Review of Guardianship Application in the Processing of Permit to Sell Assets of Minors at the Jepara District Court, Proceedings of the Unissula Student Scientific Constellation (KIMU) 7, Unissula, p.14

<sup>10</sup>Zulfa Salsabila Alfarobi, Mujiono Hafidh Prasetyo, 2019, Determination of Child Guardianship Related to Parental Liability for Selling Minors' Property Due to Inheritance, Master of Notary Study Program, Faculty of Law, Diponegoro University, Notarius Journal Vol 12, p. 301

### 3. Results and Discussion

#### 3.1. Principles of Legal Protection Applicable in Cases of Applications for the Appointment of a Guardian to Encumber Fixed Assets Belonging to Minors

A child has rights and authority as a legal subject. Rights and authority arise from before he is born until he is born, so the role of other people is very much needed in various matters relating to his physical and spiritual, as well as supervising all matters that are his property rights so that they can be maintained and developed later. Authority has two meanings, namely legal authority and authority to act. Legal authority aims to exercise his rights and obligations to receive, while the authority to act is influenced by several factors such as age factors, status of being married or not, status as an heir, and others.<sup>11</sup>

Every child must receive legal protection. Child protection activities have legal consequences, both in relation to written and unwritten law. The law is a guarantee for child protection activities. Legal certainty needs to be sought for the continuity of child protection activities and to prevent irregularities that lead to undesirable negative consequences in the implementation of child protection.<sup>12</sup>

One concrete example of child protection that is legal in nature in the civil field is in the scope of guardianship. Indonesian law defines guardianship as the authority to carry out certain legal acts for the interests and rights of children whose biological parents have died or is also interpreted as legal protection given to a child who is not yet an adult or has never been married who is not under the authority of both parents.<sup>13</sup>

Talking about guardianship of a child, it cannot be separated from the discussion of children and the age limit of a child, this is important because knowing when a child is placed under guardianship and can be held responsible for his actions. Regarding guardianship in the

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<sup>11</sup>Dian Intan and Akhmad Khisni, 2022, Legal Review of Guardianship Application in the Processing of Permit to Sell Assets of Minors at the Jepara District Court, Proceedings of the Unissula Student Scientific Constellation (KIMU) 7, Sultan Agung Islamic University Semarang, p.13

<sup>12</sup>Arif Gosita in Maidin Gultom, 2003, Legal Protection for Children in the Juvenile Criminal Justice System in Indonesia, Refika Aditama, Bandung, p. 33

<sup>13</sup>Wahyono Darmabrata and Surini Ahlan Sjarif, 2004, Marriage and Family Law in Indonesia, Faculty of Law, University of Indonesia, Jakarta, p. 147

Civil Code is regulated in Chapter XV (Articles 330-418a) starting from the definition of minors to the Estate Office. In addition, there is also Chapter XVI which regulates minors becoming adults. Article 330 of the Civil Code states that those who are said to be minors are those who have not reached the full age of 21 years and have never been married. If their marriage ends before the age of 21, then those who have been married do not return to being minors, those who are minors and are not under the authority of their parents are under guardianship on the basis and in the manner as regulated in the chapter.<sup>14</sup>

The provisions on Guardianship are regulated in the Civil Code Articles 331 to 344 and Articles 50 to 54 of Law Number 1 of 1974 concerning Marriage. Guardianship is the supervision of the person and management of the assets of a minor child if the child is not in the hands of parental authority. So for children whose parents have divorced or if one or all of them have died, they are under guardianship. For children born out of wedlock, because there is no parental authority, this child is always under guardianship.<sup>15</sup>

Guardians in carrying out their duties are required to care for the child under their guardianship and also manage the child's property as well as possible by respecting the child's religion and beliefs. In addition, guardians are required to care for all of the child's property when starting their position as a guardian and are also required to record all changes to the child's property.<sup>16</sup>

Legal protection for minors requires that the child's parents or siblings who will manage the child's assets become guardians based on a court order. Guardians appointed based on a court order can represent minors to carry out legal acts both inside and outside the court for the benefit of the minor.<sup>17</sup>In this case, it is regulated in Article 33 and Article 34 of Law Number 23 of 2002 as amended by

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<sup>14</sup>Hilman Hadikusuma, 1990, Indonesian Marriage Law, Mandar Maju, Bandung, p. 149.

<sup>15</sup>Titik Triwulan Tutik, 2011, Civil Law in the National Legal System, Kencana, Jakarta, p. 88.

<sup>16</sup>Yulita Dwi, 2019, Harmonization of Protection of Children's Wealth in Guardianship through Strengthening the Role of Supervisory Guardians, Suara Hukum Journal, Volume 1, Number 1, p. 62

<sup>17</sup>Zulfa Salsabila Alfarobi, Mujiono Hafidh Prasetyo, 2019, Determination of Child Guardianship Related to Parental Liability for Selling Minors' Property Due to Inheritance, Master of Notary Study Program, Faculty of Law, Diponegoro University, Notarius Journal Volume 12, p. 301

Law Number 35 of 2014 concerning Child Protection. Paragraph (2) and paragraph (3) stipulate that the guardian has an obligation to manage the child's assets for the benefit of the minor.

The case of the application for guardianship of his property management based on the determination of civil case Number 310/Pdt.P/2019/PN.Pwt. it is known that Waluyo, Place/date of birth in Banyumas, December 31, 1977, Occupation Private Employee, Domicile address in Kutasari Village RT 004 RW 003, Baturaden District, Banyumas Regency, hereinafter referred to as the Applicant. The Applicant submitted a letter of application dated December 2, 2019 to the Purwokerto District Court where the Applicant needed capital for business and daily living, and for that the Applicant wanted to pledge joint property in the form of SHM Number: SHM Number: 00631 located in Karangpule Village, Padamara District, Purbalingga Regency, with Measurement Letter Number 00016/Karangpule/2013, dated September 5, 2013, covering an area of 84 m<sup>2</sup> in the name of Sri Lestari (Applicant's Wife). Because the Applicant has two children, each of whom is still a minor or not yet an adult, a guardian is required to represent the legal act of pledging the joint property.

This application to become a guardian is based on the applicant's desire to carry out a legal act of pledging joint property. Guardianship is the supervision of a person as regulated by law, and the management of the goods of a minor (pupil).<sup>18</sup>The scope of guardianship is basically the protection and management of the child's personality and property. The child's personality is related to the fulfillment of obtaining education, clothing, food, physical and spiritual health, and a sense of security. The guardian appointed based on the Court's Decision can represent the child to carry out legal acts, both inside and outside the court for the best interests of the child as stated in Article 33 and 34 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection.

Legal protection is all actions taken to provide safe, comfortable and legal certainty for legal subjects, whether individuals or legal

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<sup>18</sup>Vollmar, 1997, Introduction to the Study of Civil Law, Rajawali Pers Jakarta, p. 150

entities.<sup>19</sup>Meanwhile, child protection is all forms of efforts made with the aim of guaranteeing children's rights in all aspects of life.<sup>20</sup>The purpose of child protection itself is stated in the provisions of Article 3 of the Child Protection Law which states that:

“Child protection aims to ensure that children's rights are fulfilled so that they can live, grow, develop, and participate optimally in accordance with human dignity and honor, and receive protection from violence and discrimination, in order to realize Indonesian children who are qualified, have noble morals, and are prosperous.”

Legal protection is a universal concept of a state of law. Legal protection is the goal of a law. Legal protection law is an activity to protect individuals by harmonizing the relationship between values or rules that are manifested in attitudes and actions in creating order in social interactions between fellow human beings.<sup>21</sup>

The principle of legal protection that applies in cases of requests for the determination of a guardian to charge immovable property belonging to a minor child aims to prevent the assets of the child under guardianship from being misused by the guardian and as a preventive measure against inheritance disputes. Where this aims to protect the management of assets that are the child's rights to be used for the best interests of the child and can be accounted for when the child is an adult. One form of legal protection is the existence of a supervising guardian. Article 366 of the Civil Code states that in every guardianship ordered in Indonesia, the Estates Office is obliged to carry out duties as a supervising guardian. The Estates Office (BHP) as a supervising guardian has the obligation to represent the interests of a minor child, if there are interests of the child that conflict with the interests of the guardian, without reducing the special obligations, this supervision is charged to the BHP in the event that the supervising guardianship is ordered to him.<sup>22</sup>

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<sup>19</sup>Andy Chandra Tjong, et.al, 2021, Legal Protection for Mothers and Children Under Guardianship, JUSTITIA: Journal of Law and Humanities, Volume 8 Number 6, p. 1876.

<sup>20</sup>Ratri Novita Erdianti, 2020, Child Protection Law in Indonesia, UMM Press, Malang, p.16

<sup>21</sup>Setiono, 2004, Rule of Law (Supremacy of Law), Master of Law, Postgraduate Program, Sebelas Maret University, Surakarta, p. 3

<sup>22</sup>Ibid., p.63



The supervising guardian is obliged to enforce the guardian on the threat of losses and interest where the guardian is given a penalty to replace the costs, and make an inventory or details of the goods of the inheritance in all inheritances that fall to the minor child. Guardians often neglect the provisions of Article 368 of the Civil Code, which requires the guardian to notify the BHP. This is because the determination of guardianship by the District Court minimally includes the guardian's obligation to report to the BHP as the supervising guardian. In the case of guardianship that provides protection for the child and the child's assets, the guardian must first ask for permission and carry out his legal actions before the supervising guardian.

### **3.2. Judge's Considerations in Providing Protection for Minors to Encumber Their Fixed Assets**

Justice in Indonesia depicted in Pancasila as the foundation of the state, namely social justice for all Indonesian people. The five principles contain values that are the goals of living together. This justice is based on and inspired by the essence of human justice, namely justice in the relationship between humans and themselves, humans and other humans, humans and society, nation, and state, and the relationship between humans and their God.<sup>23</sup>

According to Radbruch, the law must be able to combine three legal objectives, namely justice, benefit and legal certainty. Where the main priority is legal justice, followed by legal benefit and finally legal certainty. In practice, if legal certainty is associated with justice, then it will often be inconsistent with each other. This is because on the one hand, legal certainty often ignores the principles of justice and vice versa, justice often ignores the principles of legal certainty. Then, if in practice there is a conflict between legal certainty and justice, then justice must be prioritized. The reason is that justice is generally born from the conscience of the giver of justice while legal certainty is born from something concrete.

Judges to decide or determine a case provide legal considerations by combining the provisions of existing laws and regulations, facts in court and laws that are still alive in society. Because judges are the

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<sup>23</sup>M. Agus Santoso, 2014, Law, Morals and Justice: A Study of Legal Philosophy, Kencana, Jakarta, p.85

most important element in upholding the law who are able to interpret, strengthen and consider existing regulations in accordance with the development of community needs, in order to create legal justice in society and in this case the judge's accountability for what he decides becomes a very important point.

The role of the judge is needed to decide a dispute that occurs between the parties involved. The decision made by the judge to decide a case is expected to fulfill a sense of justice for both parties to the dispute, even though there are parties who feel dissatisfied with the judge's decision, the judge must still decide based on testimonial evidence and so on to provide a sense of justice.

The judge's duty is to try or decide a case submitted to him. A judge cannot take the initiative on his own, therefore without a case to rely on, a judge cannot do anything even if he personally knows a lot about a problem. When trying a civil case, the judge will rely on the evidence submitted to him. According to the provisions of Article 27 of Law Number 14 of 1970 concerning the Main Provisions of Judicial Power, a judge as an enforcer of law and justice must explore, follow and understand the legal values that live in society, this means that in a society that recognizes unwritten law (customary law), the judge explores the legal values that live in society and formulates them through his decisions. For this reason, the judge must go into the midst of society to know, feel and dive into the sense of law and sense of justice that lives in society.

The basis for the judge's consideration in the application for the determination of a guardian to burden his permanent assets in Determination Number 310/Pdt.P/2019/PN.Pwt. between a person's position as a legal subject and the capacity to act there is a very close relationship, but both are actually two different things. The position as a legal subject or Person is a quality that allows the person concerned to have rights and obligations, while the problem of capacity to act is a problem of authority to exercise the rights and obligations that he has, as an effort to organize / fulfill his interests.

Every person can have rights and obligations, can have legal authority (*rechtsbevoegheid*), but not every person is capable of acting within the law (*handelings bekwaamheid*). In principle, in principle, every adult is capable of acting, unless the law determines otherwise. Specifically in the Law of Agreements, the legislator departs from the

assumption that every adult is competent to make an agreement, unless the law stipulates otherwise (Article 1329 of the Civil Code), then the law determines who is not competent to make an agreement, namely :

1. Immature person
2. Those who are placed under guardianship
3. Wives in cases stipulated in law
4. Other people who are prohibited by law from entering into agreements

Capacity to act (*handelings bekwaanheid*) is the general authority to take actions within the law, while the authority to act (*handelings bevoegheid*) is the authority to act in special events. So people who have the authority to act must be people who have the capacity to act. Children who are regulated under guardianship cannot take legal action themselves. The one who has the authority to take legal action for them is their guardian. The guardian, after fulfilling certain requirements, has the authority to take legal actions on the pupil's property. The authority to act lies with the guardian. In order to be appointed as a guardian, the guardian must be a person who is capable of acting (Article 379 of the Civil Code). In the event that one of the husbands or wives dies, the husband or wife who survives longer by law becomes the guardian of their minor children as stated in Article 345 of the Civil Code. Law Number 1 of 1974 does not state this explicitly, but considering that children who are not under the authority of their parents are under guardianship, while the parents are no longer present if one of the husband or wife dies, then we can interpret that the father or mother who is still alive by law has the obligation of guardianship.

The applicant can act on behalf of his child to carry out legal acts, guardianship itself has a function for oneself and all that has not been obtained such as maintenance, care, and education for children who are still minors. In this case, the legal action taken by the guardian is to guarantee joint property. Likewise, the decision-making made by the judge becomes jurisprudence in the application of the age limit of a person's adulthood. Various regulations regarding the age limit

of adulthood that exist cause there to be no legal certainty so that its application is adjusted to what will be done in the legal act.

The role of judges as judicial apparatus in principle is none other than to carry out judicial functions in accordance with the provisions of applicable laws and regulations. The authority of judges in making a policy in deciding a case is regulated in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, which stipulates that judges and constitutional judges are required to explore, follow and understand the legal values and sense of justice that live in society. This article provides the meaning that every judge's decision must be in accordance with applicable law and have a sense of justice in society.

The judge's consideration is one of the most important aspects in determining the realization of the value of a judge's decision that contains justice (*ex aequo et bono*) and contains legal certainty, in addition to also containing benefits for the parties concerned so that the judge's consideration must be addressed carefully, well, and carefully. If the judge's consideration is not careful, good, and careful, then the judge's decision derived from the judge's consideration will be canceled by the High Court/Supreme Court.

#### **4. Conclusion**

The principle of legal protection that applies in cases of requests for the determination of a guardian to encumber immovable property belonging to a minor child is intended so that the assets of the child under guardianship are not misused by the guardian and as a preventive measure against inheritance disputes. Where this aims to protect the management of assets that are the child's rights to be used for the best interests of the child and can be accounted for when the child is an adult. One form of legal protection is the existence of a supervising guardian. Article 366 of the Civil Code states that in every guardianship ordered in Indonesia, the Estate Management Office is obliged to carry out its duties as a supervising guardian. The judge's consideration in providing protection for minor children to encumber their immovable property in Determination Number 310 / Pdt.P / 2019 / PN.Pwt. between a person's position as a legal subject and the ability to act there is a very close relationship, but the two

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