

## The Position of Joint Property Concerning The Existence of Unregistered Marriage Agreements

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**Abstract.** *This study aims to analyze the position of joint property in the presence of unregistered marriage agreements to the Civil Registration Office (Dukcapil) post-divorce based on Marriage Law Number 1 of 1974 and Circular Letter of the Ministry of Home Affairs Number 472.2/5876/DUKCAPIL in the case with verdict number 2772/Pdt.G/PA CBN, which stipulates the separation of movable and immovable property in the marriage agreement. However, the judge in the ruling did not grant the request of the party who owns movable assets in the marriage. This type of research is a normative juridical study derived from literature review. Regarding the results of this research analysis, marriage agreements that have never been recorded with the marriage registrar cannot be enforced against third parties related to the division of marital property despite the existence of a marriage agreement, but still apply between the two parties. As a result, assets acquired during the marriage period do not become joint property and remain the separate property of each spouse acquired during the marriage. Based on the analysis conducted, it is recommended that the government clarify Article 29 paragraph 1 of the Marriage Law to state that marriage agreements must be made in the form of a notarial deed and followed by registration with the marriage registrar to avoid doubts about the validity of the marriage agreement that has been made.*

**Keywords:** *Agreement; Assets; Marriage; Registration.*

### 1. INTRODUCTION

The bond of marriage fundamentally constitutes a unified relationship that is inseparable and is a legal act in which each action carries rights and responsibilities for those who bind themselves in marriage. The consequences of marriage under the law give rise to several relationships, not only between husband and wife, but also between parents and children, and regarding marital

property.<sup>1</sup> The emergence of joint property mixing in marriage is a legal consequence that inevitably occurs in Indonesia.<sup>2</sup> Regulations regarding joint property are stipulated in various regulations including the Civil Code (hereinafter referred to as the "Civil Code") in Chapter VII, and Marriage Law Number 1 of 1974.

Marital property essentially includes the assets brought in by each party during the marriage and assets acquired throughout the marriage.<sup>3</sup> Joint property in the Civil Code is regulated in Article 119, which implies that after a valid marriage, there is a legal merging of assets into joint property owned by both husband and wife as a whole. <sup>4</sup>Similarly, under Law Number 1 of 1974, there are 2 (two) types of assets, namely joint property in Article 35 which, by law, includes assets acquired and purchased during the marriage, and pre-marital assets of each party that are not mixed into this joint property. Except as provided by other regulations allowing separation of joint property before the marriage, which is stipulated in a marriage agreement.

The legal position of joint property after marriage can lead to legal issues in marriage when disputes arise leading to divorce. Thus, in today's era, and as mentioned in other provisions of the law, it is possible for prospective spouses to make prenuptial agreements as a preventive measure to avoid potential future issues and to protect their assets.

Generally, a prenuptial agreement is a written agreement between prospective spouses that discusses aspects of property and the consequences that arise when the marriage ends. In the provisions of the Civil Code, marriage agreements are regulated in Book I of personal law which is a closed system. This means that in a closed system, individuals cannot act beyond the provisions established in Book I of the Civil Code.

Regarding the requirements of this agreement, it follows the general requirements of agreements as stipulated in Article 1320 of the Civil Code:

1. agreement of the parties involved,
2. competence to make an agreement,
3. concerning a specific matter, and

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<sup>1</sup> Desak Putu Kania Pratiwi, I Nyoman Putu Budiarta, Desak Gde Dwi Arini, "Perjanjian Kawin Yang Tidak Didaftarkan Dalam Perkawinan Campuran" *Jurnal Konstruksi Hukum*, Vol.1 No. 2 (2020), p. 272.

<sup>2</sup> Muhammad Akbar Aulia Ramadhan, KN Sofyan Hasan dan Achmad Syarifudin, "Perjanjian Perkawinan Terhadap harta yang diperoleh selama perkawinan pasca perceraian", *Jurnal Ilmu Kenotariatan* Vol.6 No.2 (2017), p.158

<sup>3</sup> Wahyono Darmabrata, (2015), *Hukum Perkawinan dan Keluarga di Indonesia*, Jakarta: Rizkita, p.112.

<sup>4</sup> Civil Law, Article 119

#### 4. a lawful cause.<sup>5</sup>

The requirements for a valid agreement are clearly stipulated in Article 1320 of the Civil Code. However, regarding the content of marriage agreements, the Marriage Law does not yet regulate explanations regarding the content and form of the marriage agreement itself. Therefore, concerning the content and form of the marriage agreement, reference is made to Article 66 of the Marriage Law, which states that everything related to marriage is governed by Marriage Law number 1 of 1974, and provisions outside of the Marriage Law are considered invalid.

A prenuptial agreement can be classified as a bilateral legal act (involving two parties) because it occurs based on the consent of both parties.<sup>6</sup> Theoretically, resolving joint property issues post-divorce seems easy to implement, but in practice, it often becomes a problem that remains unresolved between the divorcing parties, leading to disputes, especially when one party feels unfairly treated.<sup>7</sup>

A prenuptial agreement, as defined by R. Subekti in his book, is an agreement discussing the assets of the husband and wife during their marriage made to deviate from the principles established by the law.<sup>8</sup> The scope of a prenuptial agreement can cover various agreed-upon matters, within the boundaries of societal norms, law, and religion.<sup>9</sup> As long as the contents of the prenuptial agreement involve their property, it is supported and permitted by the law. Relevant regulations are stipulated in the related articles. Other relevant matters can be included in the agreement as needed. However, in practice, many couples still do not fully understand the procedures required when making a marital agreement.<sup>10</sup>

Regulation of prenuptial agreements is stipulated in Articles 139 to 157 of the Civil Code, which states that it must be made in a notarial form and authenticated by the marriage registrar to involve or bind third parties, and cannot be altered in any way. Meanwhile, in the Marriage Law, it is regulated in Article 29 that it must be made before the marriage, and authenticated by the marriage registrar to bind third parties in the agreement, without specifying that it must be drawn up by a notary.<sup>11</sup>

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<sup>5</sup> Civil Law, Article 1320

<sup>6</sup> Aditya P. Manjorang. (2015). *The Law Of Love*. Jakarta : Visimedia, p. 32.

<sup>7</sup> Ida Ayu Putu Kristanty Mahadewi Dan Dewa Nyoman Rai Asmara Putra, "Akibat Hukum Serta Penyelesaian Terhadap Harta Bersama Berdasarkan Hukum Perkawinan" *Jurnal Kertha Semaya* Vol. 9 No. 1 (2020), p. 112-120

<sup>8</sup> .M. Anshary, (2014). *Kedudukan Anak Dalam Hukum Islam Dan Nasional*, Bandung: Cv Mandar Maju, p.190.

<sup>9</sup> Benny Djaja, (2020), *Perjanjian Kawin Sebelum, Saat Dan Sepanjang Perkawinan*, Depok: Pt Rajagrafindo Persada, p.11.

<sup>10</sup> Gita Ramadhanti, Nurul Elmiyah, dan Lauditta Humaira, "Kepastian Hukum Perjanjian Perkawinan yang Tidak Didaftarkan" *Lex Patrimonium* Vol 2. No.1 (2023), p.3.

<sup>11</sup> Marriage Law, Article 29

Efforts to perfect a prenuptial agreement are followed by registration with the marriage registrar. However, there are clauses in the law that make prenuptial agreements, which have been made and then followed by registration with the marriage registrar, to fulfill their publicity element in involving third parties. The Civil Code in Article 152 explains about the registration done by the parties to the local court where the marriage will take place. Then, the enactment of the Marriage Law does not explicitly state that prenuptial agreements must be registered with the court, but rather authenticated by the marriage registrar. In practice, with the issuance of the Circular Letter from the Director-General of Population and Civil Registration of the Ministry of Home Affairs Number: 472.2/5876/DUKCAPIL regarding the Recording Reporting of Marriage Agreements, prenuptial agreements are recorded with Dukcapil as a requirement for publicity by the parties intending to marry, following the specified procedures and conditions.

Referring to a case that occurred in Indonesia, there is a case in verdict number 2772/Pdt.G/PA CBN where Parties P and T were former husband and wife who divorced on March 10, 2021, based on divorce certificate number 1296/AC/2021/PA. Cbn In their marriage, there was separation of property in the marriage agreement deed number 01 dated March 1, 2010, made before Notary Rony Saputra, S.H but was never recorded. In this case, Party P filed a lawsuit regarding their marital property, consisting of movable and immovable property. Then, the Defendant filed a counterclaim regarding ownership of the marital property. There were several disputed properties including 1 (one) Deed of Sale number 702/2014, and 2 (two) car units. From these assets, T requested P to hand over the vehicle registration certificate of a Mazda car that was in P's possession, which T claimed to be their property. The marriage agreement only addressed the separation of immovable property and not of movable property.

Based on the case outlined above, this research focuses on examining the position of joint property concerning the existence of prenuptial agreements that have never been registered with the civil registry office.

## **2. RESEARCH METHODS**

In this research, a normative juridical research method is employed. This method examines and investigates law as norms, legal principles, legal theories, and other literature that will be examined to obtain answers to a legal issue under study. <sup>12</sup>This research examines law conceived as norms or rules applicable in society.

The nature of this research is descriptive, aiming to obtain a comprehensive overview of juridical phenomena existing within society. <sup>13</sup>In this study, the author will analyze the position of joint property in marriage after the existence of a prenuptial agreement that is not registered with the Civil Registration Office.

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<sup>12</sup> Muhaimin, (2020), *Metode Penelitian Hukum*, Mataram: Mataram University Press, p. 46.

<sup>13</sup> *Ibid*, p. 26.

Therefore, this research utilizes secondary data, obtained through literature review referring to the normative nature of this research, which encompasses legislation, official documents, books, and previous research findings.<sup>14</sup>

Ideally, in a normative research utilizing secondary data, there are two types of categorizations: the use of legal materials consisting of primary legal materials such as the Civil Code, Marriage Law, and secondary legal materials, including books, scientific journals, and opinions of experts related to and aligned with this research, as well as conducting searches through the internet<sup>15</sup>. Data processing is carried out using qualitative analysis methods, providing descriptions with words aimed at the secondary data collected to obtain answers to the main issues examined in this research.

The research method used is doctrinal. This research method can be said to be library research, or documentary studies. The normative method is a doctrinal method that is carried out by analyzing legal issues and reviewing from the aspect of legal norms that have prevailed in society.<sup>16</sup>

### **3. RESULT AND DISCUSSION**

#### **3.1. Position of Joint Property in Marriage**

The establishment of legal relations resulting from marriage between husband and wife gives rise to rights and obligations in managing household life as well as social responsibilities towards society. It not only creates a relationship between parents and children but also establishes a relationship with joint property in marriage as a necessary aspect of family life. <sup>17</sup>Marital property encompasses assets acquired before and during marriage, which is regulated in several provisions such as the Civil Code, Marriage Law Number 1 of 1974, and Compilation of Islamic Law (KHI), each providing different positions for property. However, this research will focus on discussing the position of property in marriage referring to the Civil Code and the Marriage Law.

The regulation in the Civil Code is elaborated in Article 119, which essentially explains that since the marriage takes place, there is a legal merging of wealth between the husband and wife, except if other provisions were agreed upon before marriage. The meaning of joint property in this regulation is the unity of all wealth entirely becoming joint ownership, without exception, whether active or passive. In this case, active assets are tangible wealth, while passive assets consist of debts.

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<sup>14</sup> Muhdar, Muhamad. (2019), *Penelitian Doctrinal dan Non-Doctrinal Pendekatan Aplikatif dalam Penelitian Hukum*, ed. 1. Samarinda: Mulawarman University Press, p. 6.

<sup>15</sup> Soerjono Soekanto, (2006), *Pengantar Penelitian Hukum*, Jakarta: UI Press, p. 12.

<sup>16</sup> Muhammad, Abdulkadir. (2014), *Hukum dan Penelitian Hukum*. Bandung, PT Citra Aditya Bakti, 115.

<sup>17</sup> Sonny Dewi Judiasih, (2015), *Kajian Terhadap Kesetaraan Hak dan Kedudukan Suami dan Istri atas Kepemilikan Harta Dalam Perkawinan*, Bandung: PT Refika Aditama, p. 23

Meanwhile, in the Marriage Law, it is detailed in Article 35, which consists of the pre-marital assets of prospective husbands and wives, including personal assets, and joint assets. Joint assets refer to all assets acquired and purchased during the marriage, granting equal rights of ownership to both spouses. Pre-marital assets are assets owned by each party before marriage, such as inheritance, gifts, or donations, which will not be mingled in marriage because the ownership of these assets belongs to each spouse individually.<sup>18</sup>

The position of joint property in Indonesian law applies according to its respective laws when the marriage ends due to divorce. This involves joint property, based on Article 37 of the Marriage Law, leaving it to the parties to decide which law to use in the division of joint property upon divorce. The law guarantees the positions of the parties in joint property rights will not become ongoing issues, with protection provided through the attachment of joint property guarantees to prevent unfair actions that may harm one party.

In the case, the distribution of joint property where the former husband purchased the white Mazda car is an asset acquired by the former husband during the marriage. Based on Article 35 paragraph 2 and supported by the prenuptial agreement before marriage, this asset is the former husband's personal property and should rightfully be returned to the rightful owner. This is clear from the content of the agreement, which also specifies the separation of movable and immovable property, with ownership rights falling to each individual, in this case, the former husband.<sup>19</sup>

### **3.2. Legal Consequences of Non-Registration of Marriage Agreement to Dukcapil**

The registration of marriage agreements is crucial as it plays a pivotal role for both parties in maintaining harmony in the household. When conflicts arise in the household, such as disputes leading to divorce, the marriage agreement serves as a means of settlement regarding property arrangements, child custody, and the responsibilities of each party.<sup>20</sup> The absence of a marriage agreement before or during marriage can lead to disputes over joint property between husband and wife. Moreover, if one party fails to comply with or violates the terms of the marriage agreement, the other party or third parties involved may have the right to file a lawsuit, either concerning the agreement's content or claims for compensation.

The registration of marriage agreements, initially determined in the Civil Code in Article 152 together with Article 147, mandates the creation of a marriage agreement notarially followed by registration with the district court before the

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<sup>18</sup> Abdurrahman dan Riduan Syahrani, (1978), *Masalah-masalah Hukum Perkawinan di Indonesia*, Alumni, Bandung

<sup>19</sup> Liky Faizal, "Harta Bersama Dalam Perkawinan", *Itjima'iyya*, Vol. 8 No. 2 (2015), p. 95

<sup>20</sup> Desak Putu Kania Pratiwi, I Nyoman Putu Budiarta, Desak Gde Dwi Arini, "PERJANJIAN KAWIN YANG TIDAK DIDAFTARKAN DALAM PERKAWINAN CAMPURAN" *Jurnal Konstruksi Hukum*, Vol. 1 No.2, (2020), p. 273

marriage takes place. However, after the enactment of the Marriage Law, there is no explicit regulation regarding registration in its articles. Instead, it must be made in writing and authenticated by the marriage registrar, with no further clarification on which institution has the authority to authenticate it. With the issuance of the Circular Letter from the Director-General of Population and Civil Registration of the Ministry of Home Affairs Number: 472.2/5876/DUKCAPIL regarding the Recording Reporting of Marriage Agreements, the registration of the marriage agreement made by a notary must be followed by registration with Dukcapil as the executing agency or its technical unit (UPT) both before or after the marriage to make a marginal note in the register of deeds and an excerpt in the marriage certificate.

The legal consequences of not registering the marriage agreement according to the provisions of the Civil Code or the Marriage Law do not specify the obligation to register the marriage agreement itself. Essentially, the purpose of this registration is to maintain population administration order by recording significant events made before marriage and to fulfill the principle of publicity to involve third parties bound by and subject to the contents of the marriage agreement if legal actions involving marital assets occur in the future. Therefore, if the marriage agreement is not registered with Dukcapil, it does not invalidate the content of the marriage agreement as it is considered valid between husband and wife, having met the subjective and objective requirements in Article 1320 of the Civil Code.

#### **4. CONCLUSION**

Based on the analysis of the data described, the conclusion that can be drawn regarding the position of joint property in marriage with the existence of an unregistered prenuptial agreement does not invalidate the contents of the agreement. As long as the requirements for making the prenuptial agreement have met the criteria in Article 1320 of the Civil Code. Therefore, the failure to register the prenuptial agreement with Dukcapil does not diminish the validity of the contents of the prenuptial agreement and still applies between the two parties, namely the husband and wife. Therefore, the position of joint property in marriage remains the right of each husband and wife based on the existence of the prenuptial agreement made before marriage. However, the prenuptial agreement is considered not binding on third parties, and third parties do not have to comply with the terms of the prenuptial agreement made by the husband and wife.

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