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Notary's Responsibility for Making Wills Regarding Donation of Body Organs Made Before Him

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Abstract. *This study aims to determine and analyze the procedures for making a will for the donation of body organs, to determine and analyze the responsibility of the Notary for making a will for the donation of body organs made before him. The method of approach to the problem used in this study is the Normative legal approach. The research specifications used in this study are descriptive analytical. The type of research used in this study is Normative legal research using secondary data consisting of primary legal materials including: Law No. 2 of 2014, Civil Code Law, LawLaw Number 36 of 2009 concerning Health, Compilation of Islamic Law; secondary legal materials include literature, scientific journals and other supporting documents. Collection of research data using interview techniques and library material studies. The data analysis method used in this study is qualitative data analysis. The results of the study indicate that the procedures for making a will for the donation of body organs have not been explicitly regulated in the laws and regulations. In terms of making it, it still refers to Article 1320 of the Civil Code where the will for the donation of body organs can be implemented as long as it is in accordance with the valid conditions of the agreement. Because there are no specific rules that regulate it, the procedures will be the same as making a will in general, only the difference in this case is that all Heirs will be present as the approving party and as the implementing party if the testator has died. A Notary in carrying out his/her position must have sufficient legal skills based on a sense of responsibility for appreciating the nobility and dignity of his/her position, values and ethics as stated in the Notary Position Law which is a guideline for Notaries in carrying out their position.*

Keywords: *Notary; Organ; Responsibility; Will.*

1. Introduction

Indonesia has a fairly high population in the world, the population in 2022 has reached 275 million people. The increasingly rapid development has implications for the way people view or viewpoints towards a better direction, especially in viewing a life that is beneficial to humanity. Humans as wise creatures will gradually continue to move towards a better civilization than the previous civilization. Not only in living their lives but also in the world of medicine, it is generally believed that every disease has a cure, there is simple medication and there are also complicated ones, such as organ transplants. Organ transplantation is one way to save a patient's life from the threat of death by moving organs from one's body to the patient's body.[1]

Indonesia is a country of law as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD 1945). Efforts to realize Indonesia as a country of law certainly require the provision of legal certainty for all Indonesian people. All components of the nation, especially law enforcement officers, should place and uphold the law in order to provide guaranteed protection for the community. One of the legal professions that is highly expected to realize this is Notary. The Notary profession is indeed a mainstay for the realization of legal certainty that is expected by the community, considering that Notaries are given the authority as state officials who organize the making of authentic deeds which are very important in nature to guarantee legal protection. Many aspects of legal practice related to Notaries are related to authentic deeds and their use in the proof process.[2]The challenge to carry out the position well and professionally is increasingly felt to be important, because Notaries deal directly with the interests of the community in providing assistance or services. So that Notaries are required to be able to take appropriate steps to problems that occur in society, especially for problems that do not yet have a legal umbrella while still complying with applicable legal principles. Notaries are required to be able to understand the extent of their role in dealing with problems in society because life in society is always developing with all its problems. Especially for the current problem, namely the desire to utilize human organs for the benefit of humanity (organ wills), because organ wills are different wills in general, then Notaries are required to uphold the principle of caution which is indeed the most important principle for Notaries in carrying out their position because every act and action taken in the context of making an

[1]"Endy Astiwara, 2021, Contemporary Medical Jurisprudence, Gramedia, South Tangerang, p. 3.
[2]Tan Thong Kie, 2007, Study Notary & All About Notary Practice, Ichtiar Baru Van Hoeve, Jakarta, p. 627

authentic deed must be based on the applicable Laws and Regulations so that it can be legally accounted for.

The practice, Making a will is a common thing done by a Notary, especially those related to objects, both assets or property, all the wishes of the testator will be stated in writing in the form of an authentic deed by a Notary so that it has legal force and can be used as strong evidence. Even though the will is made underhand, the authentication process needs to be carried out by a Notary, this is to provide legal certainty and legal protection for the testator and his heirs. However, it will be different if the will requested by the testator is a will whose object is a human organ. While in Indonesian society, human organ transplantation is still a debate because it is considered unusual. There are some opinions in society that state that when a person dies, they must be buried intact, meaning that the organ cannot be used for any purpose. Another opinion states that organs can be used as long as there is no commercial element in it and only for humanitarian purposes so that it can provide benefits to others. The desire of humans to be useful when they have died is usually stated in a will (testament). The will itself can be either oral or written, depending on how the testator wishes it. Making a written will can be done in 2 ways, namely a will made privately and a will made before a Notary.

Basically, a will (testament) is a person's statement about what he wants after he dies. A will must meet the requirements for making a will that have been determined by the Laws and Regulations, so that there is no legal defect. However, because there are no rules yetin a waynormative that regulates the procedure for making a will of body organs, then the role of a Notary is very much needed in this case. The role and responsibility of a Notary are things that must be considered in the process of making a will of giving body organs, considering that in carrying out his position, a Notary is guided by the Notary Law, so the Notary is obliged to implement the provisions contained in the Law properly, especially regarding the making of a will of giving body organs made before him.

2. Research Methods

The research approach method used in this study is the Normative legal approach. The Normative legal approach is a study that is reviewed from analyzing secondary data. The research specifications used in this study are analytical descriptive, namely a form of research that aims to describe the applicable laws and regulations, associated with legal theories and practices of implementing positive law, which will then be associated with the problems studied. The data source comes from primary legal material data and secondary

legal material. Data collection methods includeinterviews and library material studies. The data analysis method used in analyzing the data isQualitative data analysis is a description of data analyzed based on statutory regulations and according to expert opinions, then presented in sentences that have been previously analyzed, interpreted and conclusions drawn according to the problems discussed and are the answers to the problems.

3. Results and Discussion

3.1. Procedures for Making a Will for Donating Body Organs

The Republic of Indonesia does not yet have a clear legal provision that regulates that a person has the right to use his/her organs through a will after death to another person. In carrying out organ transplants, the community is guided by Article 64 paragraph (1) of Law Number 36 of 2009 concerning Health (hereinafter referred to as the Health Law) which states that healing of diseases and restoration of health can be done through organ and/or body tissue transplants, implants, drugs and/or medical devices, and plastic surgery. The transplant method is carried out to save the patient's life from the threat of death by moving organs from one person's body to another. In health science, transplants are carried out with the aim of replacing damaged or non-functioning recipient organs with new organs.[3]

In Indonesia, the use of organs through a will from a donor for transplantation in Indonesia was carried out by Budi Setiawan, in 2003 in Malang, East Java, he made a will before a notary public Pramuharyono since 1987, he stated that he would bequeath his body after he died to the anatomy laboratory of the Faculty of Medicine, Brawijaya University, Malang so that his body could continue to be useful, especially for the world of medical education and for society in general, and donate his corneas to patients who were blind. Budi died due to heart swelling, after being laid out for three days at the Panca Budi funeral home, Malang, according to Budi's will, his body was handed over for the benefit of science by being handed over from the family to the University.[4]

A will of any object or benefit such as fruit from a tree is valid, as long as the object or benefit can be handed over to the person who receives the will when the person who made the will dies.[5]This opinion is in line with the opinion of the

[3]Veisy Anathasya Pontoh, 2023, "Legal Analysis of the Use of Body Organs as Will Objects Associated with Health Legislation", Jurnal Lex Privatum, Vol. XI No.5, p.2
[4]Taruna Ikrar, Modern Medicine with Organ Transplantation, in http//:kabarinews/pengobatan-modern-transplantasiorgan/35143, accessed on February 5, 2024
[5]Ingrid Ingka Prameswari, 2014, "Utilization of Human Organs Through Wills Based on Islamic Law", Premise Law Journal, No.3, p.15

majority of Islamic legal experts, who state that benefits can be categorized as objects, therefore bequeathing benefits is permissible.

Medical wills in PP No. 53 of 2021 Article 4 paragraph (4) explains that a medical will is a special form provided by health care facilities, especially hospitals, to inpatients containing a statement about what will or may be done to them if they experience an emergency, including willingness to donate organs or body tissue. The preparation of a medical will is facilitated by health care facilities for prospective donors who are still alive at the time of mobilization but are willing to become brain stem donors or brain death donors. In the procedure for making a will regarding body organs, the prospective donor's statement letter must be filled out and signed at the hospital so that it has binding legal force and must be made in the form of an authentic deed, namely made before a notary.

*Testament*or can be called a will is regulated in the Civil Code book II concerning property Chapter XII. Namely in Article 875 of the Civil Code and Article 876 of the Civil Code concerning provisions with a will.

Making a will in Islamic law can be done orally or in writing. A will that is spoken orally is also valid, as long as it is spoken in front of two witnesses or a notary. This is regulated in Article 195 paragraph 1 of the Compilation of Islamic Law (KHI). Ideally, every legal act must be proven by evidence recognized by law, so the legal act of a will should also be made in writing before a notary.[6]

The conditions that must be fulfilled by the client in making a will deed so that it can be valid as an authentic deed are as follows:[7]

1. The person making the will must have reached the age of 18 years or have married before reaching that age, as stipulated in Article 897 of the Civil Code.
2. The person who makes the inheritance must be of sound mind, as stipulated in Article 895 of the Civil Code.
3. Must comply with the procedures stipulated by law, namely the client must be competent and able to carry out legal acts.

Article 1320 of the Civil Code states that for an agreement to be valid, 4 (four) conditions are required, namely the agreement of those who bind themselves, the capacity to make a contract, a certain thing and a lawful cause.
The process of making a will deed (testament acte), a person who will make a will comes to a notary, and he must pay attention to special formalities so that the

[6]Suhrawadi K. Lubis and Komis Simanjuntak, 2008, Islamic Inheritance Law, Jakarta, Sinar Grafika, p.47.
[7]Results of an interview with Yongky Irawan SH M.kn, in Seruyan Regency, Central Kalimantan, on October 10, 2023

will is valid as an authentic deed. This is stipulated in Articles 938 and 939 of the Civil Code.

The formalities that a notary must pay attention to in the process of making a will in general are:

1. The last will, which the testator conveys directly to a notary, must be written by the notary in clear words.
2. In the presence of witnesses. The notary himself must read the deed to the will maker and after the reading, the notary must ask him whether what was read really contains his will.
3. The deed must be signed by the testator, notary, and witnesses. This is in accordance with the provisions contained in Article 939 of the Civil Code.
4. If the testator states that he/she cannot sign or is prevented from signing the deed, the statement of the testator and the obstacles stated must be written expressly in the deed by the notary concerned. This is in accordance with the provisions contained in Article 949 of the Civil Code.
5. The language written in the will (testament acte) must be the same as the language used by the testator when stating his last will.
6. After the will has been made, each notary within the first five days of each month is required to report the will deed he made to the Central List of Wills (DPW) at the Department of Law and Human Rights.

Basically, the regulation on wills has been regulated in the legislation, but regarding the provision of body organs, this is not a specific regulation, but can refer to Article 1320 of the Civil Code where the will to provide body organs can be implemented as long as it is in accordance with the valid requirements of the agreement. Because there have been no cases and no specific regulations that regulate it, the procedures will be the same as making a will in general, only in this case all Heirs will be present as the approving party and as the implementing party if the testator has died.[8]

The procedures for making a will for organs have not been explicitly regulated in the laws and regulations. In terms of making it, it still refers to the making of a will in general. According to Gustav Radbruch, legal certainty or recht sicherkeit, security, rechts-zekerheid is something new since the law was written, made positive, and became public. The procedures or procedures for making a will for the gift of organs when analyzed and associated with the theory of legal certainty where according to Gustav Radbruch legal certainty or recht sicherkeit, security, rechts-zekerheid is something new since the law was written, made positive and

[8]Results of an interview with Notary & PPAT Yongky Irawan SH M.kn, in Seruyan Regency, Central Kalimantan, on October 10, 2023

became public, then the procedures or procedures for making a will for organs do not yet meet the theory of legal certainty as explained by Gustav Radbruch because there are no written rules that specifically regulate the procedures for making a will for the gift of organs so that it is not yet binding and cannot be applied generally or specifically. So that the procedures or procedures for making a will for the gift of organs do not yet have legal certainty.

3.2. Notary's Responsibility for Making Wills Regarding Donation of Body Organs Made Before a Notary as Reviewed from the Notary Law

Notaries are required to carry out their duties with full responsibility. The responsibilities of a notary in making a will include:

1. Moral Responsibility

A notary in carrying out his duties must comply with legal demands and the interests of society, and must not conflict with public order or morality.

In carrying out his duties, a notary may not differentiate between people whose economic circumstances are weak and people whose economic circumstances are strong. This is in accordance with Article 37 of the UUJN.

2. Ethical Responsibility

A notary in carrying out his/her position must have sufficient legal skills based on a sense of responsibility for the appreciation of the nobility, dignity of his/her position, values and ethics. For notaries, these requirements are not only demanded by law but also based on the trust given to him/her by the Law, namely the Notary Position Law, both from the nature of the notary's position itself and the nobility and dignity of the position requires 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 Responsibility

a. Formal aspects (as stated in Article 39 Paragraph (2) UUJN)

b. Material Aspect(as stated inArticle 58 (1) UUJN)

For the will deed (testament acte) made in his presence, the notary is responsible for reading it in front of witnesses. After that, the notary notifies the will deed (testament acte) to the Central Will Registration Section, Civil Directorate, Directorate General of General Legal Administration, Department of Law and Human Rights and to the Estate Office (BHP). So that the notary's responsibility ends with the notification of the will deed (testament acte). However, if there is an error in making the will deed (testament acte) and the error is the notary's

fault, then the notary is obliged to be responsible for it in court. In the event of such an error, the Central Will Registration (DPW) and the Estate Office (BHP) are not jointly responsible because the Central Will Registration (DPW) and the Estate Office (BHP) only receive reports from notaries regarding wills (testament acte). If possible, the Notary notifies the heirs if there is a will or testament.

The responsibility of a Notary in making a will must also be considered so that there are no mistakes or losses for the will maker. The following is the author's explanation of the Notary's responsibility in making a will:

1. Notary's Responsibilities for the Will Making Process

A notary is an official who is authorized according to the provisions of the Law to make an authentic deed that records what is requested to be included in it by the interested party, as regulated in Article 15 Paragraph 1 of the UUJN.

Notaries are not allowed to refuse when asked for assistance related to their profession, unless there is a good reason to refuse. This is in accordance with the provisions of Article 16 Paragraph (1) letter d UUJN.

The rules regarding the procedure for making a will must be carried out properly, otherwise the will will be void according to Article 953 of the Civil Code and for that reason a Notary who makes the will can be held accountable.

2. Notary's Responsibility for the Contents of a Will

A will is a description of the legal recognition of human freedom, especially regarding his property, but the law imposes the following restrictions on this freedom:[9]

a. General prohibitions
b. Special prohibitions

In addition to the above limitations, the contents of the will deed must also not violate the provisions regarding Absolute Rights (Article 913 BW). A will deed is a party deed, so the contents of the will deed (or everything agreed upon by the parties in the deed) and all its legal consequences are not the responsibility of the Notary because the Notary only standardizes the information/will of the parties and puts it into a deed.[10]

[9]J. Satrio, 2007, Inheritance Law, Citra Aditya Bakti, Bandung, pp. 210-234
[10]GHS Lumban Tobing, Op. Cit, p.51

3. Notary's Responsibilities to the Maker of a Will

The responsibility of a Notary is not only towards the procedure of making a will and the contents of the will, but also towards the maker of the will. The Notary must pay attention to whether the maker of the will has fulfilled the requirements for making a will.

A Notary must first check and examine the truth of every document and letter from the parties who appear and if it turns out that someone has given incorrect or false information, then that person must be held accountable according to the law. If it can be proven that the information of the identifying witnesses is incorrect, then it will result in the deed not having authentic force, as regulated in Article 1877 of the Civil Code. In such a case, the Notary is released from all responsibility as long as the error is not from the Notary. This becomes the responsibility of the Notary, if the Notary has known that the information is incorrect and still makes the deed based on false information, it means that the Notary is at fault and can be sued.

Then, the Notary's responsibility towards the will maker does not stop there but also includes registering the will deed to the BHP. The responsibility of a Notary who does not register and report the will deed in accordance with the UUJN is a job responsibility where the Notary does not register and report the will deed which is a violation of the obligations stated in the Indonesian Notary Code of Ethics that the Notary is obliged to have attitudes, behaviors, actions, or actions that must or are required to hold and carry out the position of Notary in order to maintain the image and authority of the notary institution and the nobility of the dignity and honor of the position of Notary.[11]

One of the responsibilities of a notary in managing the making of a will is being responsible for reporting the will.Notaries must fully understand the procedures for registering wills and the procedures for reporting wills because these are the Notary's responsibilities. In the event that a Notary does not report the List of Deeds or the Nil List to the Central List of Wills; or is late in submitting the List of Deeds or the Nil List according to the specified time period, all legal consequences arising in connection with the Reporting of Wills are the responsibility of the Notary concerned. Notaries who do not report the List of Deeds or the Nil List will be subject to sanctions in accordance with the provisions of laws and regulations.

[11]Mahalia Nola Pohan, 2011, "A Review of the Cancellation of Notarial Deeds Signed in a Detention Center", Thesis, Master of Notary, University of North Sumatra, p. 11

In Hans Kelsen's theoryregarding legal responsibility “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 contrary act. Furthermore, Hans Kelsen stated that: “Failure to exercise the care required by law is called negligence; and negligence is usually viewed as another type of error (culpa), although not as severe as the error that is fulfilled because of anticipating and intending, with or without malicious intent, harmful consequences.” If analyzed and associated with Hans Kelsen's theory of legal responsibility, then a Notary in carrying out his position is obliged to uphold the principle of caution which is indeed the most important principle for a Notary in carrying out his position and is full of responsibility, especially for matters that do not yet have a legal umbrella, then a Notary is required to be able totake the right steps so as not to experience errors or losses for the will maker or for the Notary himself. Because if there are errors and or mistakes made by the Notary in carrying out his position, the Notary is obliged to be responsible for the violations he has committed.

4. Conclusion

The procedure for making a will regarding body organs has not been explicitly regulated in the legislation. In terms of making it, it still refers to Article 1320 of the Civil Code where the will for the provision of body organs can be executed as long as it is in accordance with the valid conditions of the agreement. Because there are no specific rules that regulate it, the procedure will be the same as making a will in general, only the difference in this case is that all Heirs will be present as the approving party and as the implementing party if the testator has died. An important requirement that must be met in making a will regarding body organs is that permission or approval from the family of the testator is very important because it will be the liaison who will officially hand over the testator's body organs to the recipient of the will, after the testator dies. When associated with the theory of legal certainty, according to Gustav Radbruch, legal certainty or recht sicherkeit, security, rechts-zekerheid is something new since the law was written, made positive and became public, then the procedure for making a will for body organs does not yet fulfill the theory of legal certainty as explained by Gustav Radbruch because there are no written rules that specifically regulate the procedure for making a will for the donation of body organs so that it is not yet binding and cannot be applied generally or specifically.

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Legislation

Compilation of Islamic Law

Civil Code

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