

Implementation of the Division of Joint Assets Based on a Notarial Deed Due to Divorce

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Abstract. *This research aims to find out and analyze the implementation of knowing and analyzing the implementation of the distribution of joint assets based on notarial assets resulting from divorce and the basis of the judge's consideration in deciding cases regarding the distribution of joint assets due to divorce as well as analyzing the relationship between the notary's deed and the judge's decision which has decided on the division of joint assets due to divorce. In researching and preparing this thesis, the author used normative juridical research methods. The Normative Judicial Approach is research that refers to existing literature studies or secondary data. Meanwhile, Normative is Legal Research which aims to obtain Normative Knowledge about the Relationship between one Regulation and another Regulation and its Application in Practice. The type of data used secondary types, namely data obtained from or originating from library materials, secondary data collected in this research includes primary legal materials, secondary legal materials and tertiary legal materials. There are no similarities or differences between the distribution of joint property determined by a Notary and the Religious Court Judge's Decision, but rather similarities, because the deed made by the notary has definite legal force and the deed used as evidence is an authentic deed, which provides evidence that perfect regarding what is contained therein. Because the court makes a reference or basis for making decisions so that disputes or problems do not occur in the future.*

Keywords: *Collective; Courts; Notaries; Religious; Rights.*

1. Introduction

According to Sajuti Talib, marriage is a sacred agreement to form a family between a man and a woman. 3 The element of "agreement" here is to show the intentional aspect of marriage and make it visible to the general public, while "sacred" is a religious view of a marriage. . Al-Qur'an Surah An-Nisa' verse 21 emphasizes that the essence of marriage is a very strong agreement which is

called "*miitsaaghan ghaliizhan*". Marriage as a very strong agreement or *miitsaaghan ghaliizhan* is also confirmed in the juridical meaning of marriage according to Article 2 of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law in Indonesia (hereinafter referred to as KHI),

This marriage agreement has/contains three special characters, namely:¹1.) Marriage cannot be entered into without a voluntary element from both parties; 2.) Both parties (man and woman) entering into a marriage agreement have each other the right to terminate the agreement based on existing legal provisions; 3.) The marriage agreement regulates the legal boundaries regarding the rights and obligations of each party.²

The Marriage Law does not adhere to the concept of a complete unity of assets between husband and wife as a result of marriage as per the rules contained in BW. Default. What is meant by Joint Assets is property acquired during the period between the time of marriage until the marriage breaks up, either due to death or divorce. Meanwhile, inherited assets are assets inherited from each husband and wife and assets obtained by each as a gift or inheritance which are under the control of each husband and wife as long as the husband and wife do not determine otherwise.

Divorce also causes marital assets to cease and the time comes for separation and division. If there is a marriage agreement, then the distribution of assets must be in accordance with the marriage agreement or in other words, things that happened before that apply, among other things, as stated in the marriage agreement. Regarding joint assets, according to Article 37 of Law Number 1 of 1974, it is stipulated that if a marriage breaks up due to divorce, joint assets are regulated according to their respective laws. The explanation of Article 37 stipulates that if a marriage breaks down, joint assets are regulated according to their respective laws, namely religious law, customary law and other laws.

As stated in Law Number 2 of 2014 concerning the Position of Notary in the preamble section b, it is stated that to guarantee legal certainty, order and legal protection, authentic written evidence is needed regarding conditions, events or legal actions carried out through certain positions. So a Notary has the authority to make an authentic deed.

According to Sudikno Mertokusumo, a deed is a signed document containing events that form the basis of a right or obligation, which is made intentionally for proof. 12 An authentic deed according to Article 1868 of the Civil Code is a deed made in a form determined by law. - Invited by or before the public official

¹Soemiyati, 2016, Islamic Marriage Law and Marriage Law, Yogyakarta, Liberty, p.8

²Soemiyati, Ibid, p.10

authorized to do so in the place where the deed was made. Then it is regulated in Article 165 Herziene Indonesisch Reglemen (HIR) or Indonesian Civil Procedure Law, an authentic deed is divided into 2 (two) types, namely an authentic deed made by an official and an authentic deed made in the presence of the parties. An authentic deed made in the presence of the parties is a deed made by an authorized official on the initiative of the interested parties.

The existence of search assets and inherited assets in marriage will become a problem in the future, if the husband and wife do not make a marriage agreement, regardless of which side of the husband or wife earns the most. Therefore, it is different if the husband and wife have made a marriage agreement, then the assets may be controlled by each party or combined according to their intentions.

2. Research Methods

In researching and preparing this thesis, the author used normative juridical research methods where research refers to existing literature studies or secondary data. Meanwhile, Normative is Legal Research which aims to obtain Normative Knowledge about the Relationship between one Regulation and another Regulation and its Application in Practice. The research specification that the author uses is Descriptive Analytical, namely research that describes or describes the reality regarding the culture of a society phenomenologically and as it is in the context of an integral whole.

3. Results and Discussion

3.1. Can the division of joint assets as a result of divorce be made before a notary?

Joint assets or what are often called *gono-gini* assets are still among the people. It seems that people still underestimate this problem. Married couples usually only question the division of joint assets after a divorce decision has been issued by the court. In fact, in every court process there are often disputes regarding the division of joint assets so that this condition complicates the divorce process between two parties because each of them claims that "this and that" property is part of their rights.

The provisions regarding the division of joint assets are based on the conditions that accompany a marriage relationship.³ If a husband and wife are separated due to a divorce between them, the division of joint assets is regulated based on

³Sultan Agung Islamic University, Division of Joint Assets Due to Divorce, Vol 1, (2014)

their respective laws. These provisions are regulated in Article 37 of the Marriage Law, which is meant by each law to include religious law, customary law, and so on. For Muslims, while for adherents of other religions it is regulated in the Civil Code. For Muslims, the distribution of joint assets in the category of divorce based on Article 97 of the Compilation of Islamic Law states: "Widows or widowers who are divorced are each entitled to half of the joint assets as long as it is not specified otherwise in the marriage agreement." This means that in the case of divorce if there is no marriage agreement, settlement in the division of joint assets is carried out based on the provisions in Article 97 of the Compilation of Islamic Law. Meanwhile, the division of joint assets for adherents of religions other than Islam is based on Article 128 of the Civil Code which states: "after the dissolution of the union, the unitary assets are divided in half between the husband and wife, or their respective heirs, without regard to from which party the goods were obtained". With this provision, if a husband and wife divorce, their joint assets are divided in half (50:50). This provision is no different from the provisions of Article 97 of the Compilation of Islamic Law. If you look closely, basically the legal sources, both the Compilation of Islamic Law and the Code of Civil Code, both regulate that in the event of a divorce, joint assets are divided in half, each getting a share (50:50). This division of joint assets can be filed together with a contested divorce,

One of the powers of a Notary is to make a deed of distribution of joint assets. But the issue of wealth in married life is a very important factor. Disputes that often occur between the two parties are because before or after the divorce, each party will fight over the assets by claiming that "such and such" assets are theirs. In relation to this, the role of other parties as mediators is needed to provide input and legal advice to both parties.⁴

The role of a Notary in Indonesia is very necessary considering that a Notary is a public official who has the authority to make authentic deeds including making deeds of agreements for the division of joint assets. A notary as a public official has the authority to make a deed of joint property sharing agreement based on the wishes of both parties who agree to divide their property fairly through a joint property sharing agreement in accordance with the applicable law. The deed of agreement for the division of assets is made before the divorce occurs, because in the divorce process in court the divorcing couple no longer discusses the issue of dividing assets mutually. However, there is a possibility that if the divorced couple does not reach an agreement on the division of joint assets,⁵

⁴Sultan Agung Islamic University, Legal Protection of Control of Inherited and Joint Assets, Vol 2, (2015)

⁵http://repository.unissula.ac.id/27122/2/21302000119_fullpdf.pdf

The implementation of the distribution of joint assets so far has been in accordance with the agreement of the former husband and wife, and in accordance with applicable laws and regulations number 16 of 2019 regarding amendments to law number 1 of 1974 concerning marriage which states that assets revert to each of the parties involved. bringing assets and joint assets are shared between movable and immovable objects that have proof of ownership certificate, then the notary uses his PPAT position in completing the division of joint assets. Of course, the conditions that must be fulfilled by the parties in making this deed are the documents that support the making of the deed, such as Population Identification Card, Family Card, Marriage Certificate and Proof of property ownership. If these conditions are not met,⁶

The conclusion from the results of the analysis above is that the role of the Notary in making a deed of agreement on the distribution of joint assets is very important, because the notary as a public official makes a deed of agreement on the distribution of joint assets based on the wishes of the parties who have agreed to divide the joint assets fairly and the Notary must ensure that the conditions - the conditions stipulated by law for the validity of a deed are met by the parties and also regarding the origin of the ownership of the assets of the parties, whether the assets are assets obtained during marriage or inheritance from parents, gifts or gifts, this must be proven with the original ownership of the property. If the parties cannot attach proof of ownership of the origin of the property, then there will be problems in making a deed for the division of joint property. You cannot make the deed if there is no basis for it. Furthermore, the distribution of joint assets is based on agreement between the parties and is carried out in accordance with applicable laws and regulations, namely law number 16 of 2019 regarding amendments to law number 1 of 1974 concerning marriage.

3.2. What is the legal comparison between the implementation of the distribution of joint assets due to divorce between the notary and the court

Settlement of joint property, which is now under the authority of the religious court and is settled only in the religious court, is important for the ex-wife and ex-husband concerned. Also for the principles of simple, fast and low-cost justice. The reason is that the resolution of joint property issues in the religious court means that the problem between the ex-husband and his ex-wife is resolved at once. Settlement of joint assets is carried out by the court either due to divorce or at the request of interested parties outside of the dispute. In Article 66 paragraph (5) of Law Number 7 of 1989 in conjunction with Law Number 3 of 2006 concerning Religious Courts, it is stated that "Applications regarding control

⁶Op Cit. pg 178

of children, child support, wife's support, and joint assets of husband and wife can be submitted together with application for divorce, divorce or after the vow of divorce has been pronounced."

And Article 86 paragraph (1) of the Religious Courts Law states "Claims regarding control of children, child support, wife's support, and joint assets of husband and wife can be filed together with a divorce lawsuit or after the divorce decision has obtained permanent legal force."

Article 37 of the Marriage Law only states that if the marriage is dissolved due to divorce, joint property is regulated according to respective laws. This respective legal understanding confirms that the division of assets can use religious law, customary law or other laws that apply to the marriage, this can be seen in the Explanation of Article 37 of the Marriage Law. However, based on the description of the provisions of Article 37 of the Marriage Law, there may be differences in interpretation regarding post-divorce joint assets and there may be conflicts or contradictions in the application of one of these laws. However, based on jurisprudence on court decisions regarding the division of joint assets resulting from divorce due to divorce,⁷

The validity of a Notary as a public official also comes from Article 1868 of the Civil Code which states that, "a notarial deed is a form of agreement which is set out in writing and is binding between the two parties entering into an agreement". Apart from that, the legal force of a notarial deed is also a perfect means of proof in the eyes of the law. Based on article 38 paragraph 2 of the Law on the Position of Notaries (UUJN), it is stated that at the beginning or head of the deed it must contain the full name and place of residence of the notary and in Article 44 paragraph 1 UUJN at the end of the deed it is mandatory to include the name and signature of the notary.

Article 15 paragraph (1) UUJN concerning authentic deeds states the role of the notary regarding the division of joint assets, namely deeds of agreement and division of joint assets, in this case the notary must ensure that the status of the joint assets which will be the object in the deed of the parties is clear in order to create certainty and legal protection for the parties, because the notary as a public official has the authority to make authentic deeds, as long as the making of authentic deeds is not reserved for other public officials. Legal certainty and protection can be seen through the authentic deed he made as perfect evidence in court. Evidence is perfect because an authentic deed has three powers of proof, namely the power of external proof (*uitwendige bewijsmacht*),

⁷Ibid, p. 149

Based on the description above, the legal comparison between the implementation of the distribution of joint assets between Notaries and the Religious Courts is very different, because the implementation of the distribution of joint assets carried out by the Religious Courts is based on a compilation of Islamic law, because the parties who distribute joint assets are people who are Muslim, and many also the considerations of the court, in this case the judge who decides a case, takes into account the applicable legal rules or norms, especially the compilation of Islamic law and the stages in the process of implementing the distribution of joint assets, which takes quite a long time because the implementation of the distribution of joint assets can take place through two ways, namely the division of joint assets which is carried out jointly in the divorce process or you can also file a joint property lawsuit in a party manner after the divorce process is complete.

Meanwhile, the implementation of the distribution of joint assets which is carried out before a Notary, is based on the statements of the parties, as long as the statements of the parties do not violate statutory regulations or provide information that is factual or in accordance with what occurred in carrying out the legal action and must fulfill the requirements of the specified deed. in Article 1868 of the Civil Code which states "the deed must be made by or before a public official or authorized official and the deed must be made in the form determined by law. In accordance with the theory of comparative law put forward by legal experts, in this case Rudolf B. Schlesinger said that comparative law is a method of investigation with the aim of gaining deeper knowledge about certain legal materials.

3.3. Similarities or Differences Between the Division of Joint Assets Determined by the Notary and the Decision of the Religious Court Judge

Article 15 paragraph (1) UUJN concerning authentic deeds states the role of the notary regarding the division of joint assets, namely deeds of agreement and division of joint assets, in this case the notary must ensure that the status of the joint assets which will be the object of the deed between the parties is clear in order to create certainty and legal protection for the parties, because the notary as a public official has the authority to make authentic deeds, as long as the making of authentic deeds is not reserved for other public officials. Legal certainty and protection can be seen through the authentic deed he made as perfect evidence in court. Evidence is perfect because an authentic deed has three powers of proof, namely the power of external proof (*uitwendige bewijsmacht*),

Meanwhile, the court's decision in this case acting in the distribution of joint assets is based on the facts of the ongoing trial which are the basis for the distribution carried out by the court, which listens to and invites witnesses who strengthen the arguments of the parties so that it will be used as a basis. later in giving the divorce decision as well as the division of joint assets. Apart from the statements from the parties and witnesses presented in court, the court, in this case the panel of judges, asked for authentic evidence that had a strong legal basis, one of which was a deed of distribution of joint rights executed before a Notary so that the court could religion, in this case the panel of judges can provide a fair and legally binding decision.

So, based on the description above, there is no difference in the distribution of joint assets carried out before a notary, but rather similarities, because the deed made by the notary has definite legal force and the deed used as evidence is an authentic deed, which provides perfect evidence of what contained therein.⁸

4. Conclusion

The results of this research can be concluded that the division of joint assets as a result of divorce can be made before a Notary who must ensure that the conditions determined by law for the validity of a deed are met by the person present. The legal comparison between the distribution of joint assets due to divorce between the court and the Notary's office is that the implementation of the distribution of joint assets carried out by the Religious Courts is very different based on the compilation of Islamic law, while the implementation of the distribution of joint assets carried out before a Notary, based on the statements of the parties, as long as the statements of the parties do not violate statutory regulations or provide information that is factual or appropriate to what occurred in carrying out the legal action and must fulfill the deed requirements specified in Article 1868 of the Civil Code. There are no similarities or differences between the distribution of joint assets determined by a Notary and the Religious Court Judge's Decision, but rather similarities, because the deed made by the notary has definite legal force and the deed used as evidence is an authentic deed, which provides evidence that perfect regarding what is contained therein.

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