

The Role of Notaries in Distributing Inheritance to Adopted Children According to the Civil Code and the Compilation of Islamic Law

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Abstract. *Islamic Law and Western Civil Law that apply in Indonesia in looking at the status of adopted children and their implications for inheritance matters are interesting things to research. This writing aims to find out what the position of adopted children is according to the Western Law system and Islamic Law, what are the provisions for dividing the inheritance of adopted children according to Western Law and Islamic Law, what is the role of the Notary in distributing inheritance to adopted children. The research method used in this research is qualitative research, the approach method in this research uses normative juridical methods, while the type and source of data in this research is qualitative, the data sources are primary data and secondary data, the data collection method is primary data. whose nature is to support secondary data by means of an interview method with secondary data through literature study, the analysis method is normative descriptive. The results of this research show that the position of adopted children according to the civil law code and Islamic law is different. The position of adopted children according to the civil law code is considered as a biological child, while the position of adopted children according to Islamic law is as an adopted child. The position of the adopted child will affect the inheritance rights of the adopted child. As for the provisions for dividing the inheritance of adopted children according to the civil law code, they receive the same share as biological children, as this inheritance share has been determined in a law called AB Instato, provisions for dividing the inheritance of adopted children according to Islamic law because their status as adopted children is therefore adopted children. According to Islamic law, adopted children receive 1/3 of the share (obligatory will). The role of a notary in distributing inheritance to adopted children is making a deed of inheritance statement and a certificate of inheritance rights and if the notary is asked to calculate the share of inheritance rights then a notary has the right to participate in distributing inheritance equally and according to the applicable laws and regulations.*

Keywords: *Children; Distribution; KHI; Notary.*

1. Introduction

Problems regarding wealth in society are one of the very vital factors. It is no wonder that disputes occur due to misunderstandings regarding the management of wealth. Regarding wealth itself, it can be a legal event, which we know as inheritance. The distribution of wealth is due to the death of the testator, where the wealth will fall to the rightful heirs. Wealth here is not only about inheritance, but all processes related to a person's wealth. In this case, an institution is formed which is known as a notary institution or we know as a Notary. As stated in Article 1 paragraph (1) of the Notary Law, a Notary is a public official who is authorized to make authentic deeds and other authorities as referred to in this Law.¹This understanding does not mean that the role of a Notary is only in making deeds, but if we look at the authority and obligations of a Notary as stated in Article 1 paragraph 1 of the Notary Law, we will understand that in the process the Notary plays an important role in every event or legal act desired by the parties to be made a deed by a Notary. Western Civil Law contained in the Civil Code is regulatory in nature or what is called "envullenrecht" this means that in fact there is no element of coercion that must be applied to the provisions contained in the Civil Code to be applied in inheritance problems in Indonesia, but if they want to use the Civil Code in resolving their inheritance, then it is permitted. Because in practice this is the case, the Author only limits the discussion of Inheritance Law other than Islam specifically to Inheritance Law according to the Civil Code as widely used in practice. The distribution of inheritance using a notarial deed is an alternative way of distributing inheritance other than using the court institution which is commonly used by the Indonesian people in the distribution of inheritance. Similar to court decisions, deeds made by notaries aim to explain the division of inheritance to anticipate problems that may arise in the future. Based on positive Indonesian law, there are several ways to obtain a determination of the division of inheritance. The first, as mentioned, is through a court decision, the second is through a notary through the division of a deed of separation and division of inheritance. Both have the same legal force, so that if one family already has only one or uses only one method, then its legal force is strong. Both methods have equally strong legal force. Article 15 paragraph (1) of the UUJN explains that one of the authorities of a Notary is to make deeds in general, with limitations as long as: (a) No exceptions to other officials determined by law. (b) The community of deeds that must be made or are authorized to make authentic deeds regarding all acts, agreements, and provisions required by legal regulations or desired by the person concerned. (c) Regarding the legal subject (person or legal entity) for whose benefit the deed is made or desired by the interested party. (d) Authorized regarding the place where the deed is made, this is in accordance with the domicile and area of office of the Notary. (e) Regarding the time of making the deed, in this case the Notary must guarantee the certainty of the

¹Law Number 2 of 2014 amending Law Number 30 of 2004 concerning the Position of Notary

time to appear before the parties listed in the deed. In this case, the Notary as one of the public officials who has the authority to make authentic deeds and other authorities as have been observed by the Law, So it also plays a role in the interests of every citizen who is interested in making a deed, not apart from the interests of Muslim citizens who want to manage their assets.

The provisions for adoption of children are regulated in Staatsblad 1917 Number 129 in conjunction with 1919 Number 81, 1942 Number 557, 1925 Number 93 concerning provisions for all of Indonesia concerning Civil Law and Commercial Law for the Chinese group (Bepalingen voor geheel Indonesia betreffende het burgerlijk van de chineezers) in the second chapter. This Staatsblad applies to the Chinese population.

2. Research Methods

The research used in this study is a qualitative research type, the approach method in this study uses a normative juridical method, while the type and source of data in this study is a qualitative data type, the data sources are primary data and secondary data, the method of collecting data in primary data which is supportive of secondary data by means of interview methods with secondary data through literature studies, the analysis method is normative descriptive.

3. Results And Discussion

3.1. The Position of Adopted Children According to the Civil Code and Islamic Law

The position of adopted children according to the civil code system for adoption of children which formally applies to all adoptions of children in Indonesia without distinguishing between population groups, also without distinguishing between domestic adoption or intra-country adoption is stated in Government Regulation Number 54 of 2007 concerning the implementation of adoption of children (PP on adoption of children). According to PP No. 54 of 2007, adoption of children is a legal act that transfers a child from the sphere of authority of parents, legal guardians or other persons responsible for the care, education and raising of the child into the environment of the adoptive parents' family (Article 1 point 2). Adoption of children is thus a legal act of transferring a child from an environment (original) to the environment of the adoptive parents' family. The Government Regulation on adoption of children was made in order to implement Law No. 23 of 2002 concerning child protection, but the Child Protection Law itself does not formulate the definition of "adoption of children". The Child Protection Law only formulates the definition of adopted children, in Article 1 point 9 it explains that adopted children are children who are only transferred from the environment of the authority of the parents' family, legal guardian, or other person responsible for the care, education and release of the child, to the environment of their adoptive parents based on a court decision.

According to Staatsblad 1917 No. 129, namely, adoption in Western Law results in the transfer of the family from the biological parents to the adoptive parents, and the status of the child is as if he were a child born from the legal marriage of the two adoptive parents.²As a result of this, the civil relationship between the adopted child and his biological parents is severed so that the adopted child receives inheritance rights to the inheritance of his adoptive parents.

The legal system in Indonesia is different at this time, such as in inheritance, which basically still recognizes the existence of customary law, Islamic law and Dutch law as stated in the Civil Code. The Chinese community, which based on Article 163 of the Indische Staatsregeling (IS) is part of the Foreign Eastern Group, applies Civil Law (Burgerlijk Wetboek).

The basis for inheritance as regulated in Article 830 BW states that inheritance only occurs due to death. A person who has died leaving behind assets as his heirs in this case automatically has the right to obtain the assets left by the heir.

Class I (first) heirs consist of the children or descendants of the heir and the husband or wife who lived the longest. In this case, the children or descendants of the heir legally, based on their own rights or position, become heirs to the inheritance by obtaining equal shares between the heirs. This heir, because of his position, gives him the right to inherit, not to replace the rights of others.

The position of an adopted child according to Islamic law is an act of a person transferring a child from the sphere of authority of the parents, legal guardian, or other person responsible for the care, education and raising of the child, into the environment of the adoptive parent's family. The practice of adoption has been widely carried out and has become a necessity in society, especially for married couples who have been married for a long time but do not yet have children. Indonesian society consists of various tribes, religions and ethnicities which cause various procedures for adoption carried out by each tribe, religion and ethnicity.³

According to Islamic law, adopted children are not recognized as a basis and reason for inheritance, because the main principle in inheritance is blood relations or *arhaam*. Adoption in Islam does not recognize the adoption of children who are given the status of their own biological children. Adoption according to Islam emphasizes the aspect of love, provision of sustenance, education and fulfilling all their needs. According to the term adoption in Dutch, it is *adoptie* which means the adoption of a child to be used as their own biological child. While in terms of terminology in the Indonesian dictionary, it is someone else's child who is taken and equated with their own child. The general encyclopedia states that adoption is a way to establish a relationship between parents and children that is regulated by statutory regulations. Meanwhile, according to Dr. Mahmud Syaltut, who was quoted briefly by Drs. Fachtur

²Journal of Law Dictum, Volume 14, Number 2, December 2016: 183 - 200

³Andi Syamsu and M. Fauzan, Op. Cit., p. 3

Rahman in his book on inheritance, he distinguishes two kinds of meanings of adopted children, namely: First, the unification of a person with a child who he knows is someone else's child into his family. He is treated as a child in terms of love, provision of sustenance, education and service in all his needs, not treated as his own bloodline child. Second, it is understood from the word "tabanni" (absolutely adopting a child) according to the customary law that applies to humans. According to the Compilation of Islamic Law Article 171 letter h concerning adoption, it states that "an adopted child is a child whose responsibility in terms of maintenance for his daily life, education costs and so on is transferred from his original parents to his adoptive parents based on a court decision.

Adoption as stated by KHI (Compilation of Islamic Law) is treating as a child in terms of love, provision of sustenance, education and services in all his needs which is not treating as his own "lineage" child. So, according to the perspective of Islamic Law, adopting a child is Mubah or "allowed". Adoption that is prohibited according to the provisions of Islamic law is as in the original meaning, namely adopting absolutely, in this case is including another person's child into his family who has no lineage ties to him as his own child, such as the right to receive inheritance after his death and the prohibition of marrying into his family.

3.2. Provisions for the Distribution of Inheritance of Adopted Children According to the Civil Code and Islamic Law

In the law there are two ways to obtain an inheritance, namely as follows:

a. Ab Intestato

(heirs according to the Law in Article 832 of the Civil Code) According to the provisions of the law, those who are entitled to receive a portion of the inheritance are blood relatives, both legal and illegitimate, and the husband and wife who have lived the longest. Blood relatives who are heirs are divided into four groups, each of which is the first, second, third and fourth group of heirs. Regarding these groups of heirs, further explanation will be given in the discussion of the method of dividing heir rights according to the Ab Intestato method.

According to this provision, those entitled to receive a share of the inheritance (heirs) are blood relatives, whether legal or illegitimate, and the husband or wife who has lived the longest. The blood family who are the heirs are divided into four groups, each of which is the first, second, third and fourth group of heirs. Regarding this group of heirs, the author will explain as follows along with how much share each heir receives from the heir:

b. Testamentarily

(heirs because they are appointed in a will or testament) this is regulated in article 899 of the Civil Code. According to this provision, those who are entitled

to receive a portion of the inheritance (heirs) are blood relatives, both legal and illegitimate, and the husband or wife who lives the longest.

The distribution of inheritance rights to heirs by testamentary means a distribution by means of a Will, where before the testator dies he makes a will and determines in his will who he wants to be the heir. A will in western civil inheritance law must be made in writing by the testator. Why must it be written? This is to guarantee legal certainty in the distribution of inheritance according to western civil law. Then also for definite and clear evidence if later there are parties who are not satisfied with the distribution of the inheritance and can also be used as evidence in court.

In appointing heirs in his will, the testator must still refer to the Civil Code, which stipulates that before determining heirs in his will, the testator must provide an absolute portion (Ligitieme Portie) to the legitimate (heirs who are blood relatives of the testator in a vertical line).

3.3. The Role of Notaries in the Distribution of Inheritance to Adopted Children

Before the enactment of Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption, notaries played a role in making child adoption agreements, where before the enactment of the regulation, child adoption could only occur with a notarial deed. The birth of Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption, of course, will raise new problems in society regarding the legal force of the adoption deeds they made before the enactment of this government regulation, in addition to the polemics that arose in society regarding the legal certainty of the adoption deeds they had made, so that it would make society confused and restless regarding the status of their adopted children.⁴

The problems raised in this study are the legal consequences in the case of child adoption based on positive legal rules, the legal force of child adoption deeds made before a notary after the enactment of Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption, and the role of a notary in making child adoption deeds after the enactment of Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption. To find the answer to the problem, this study uses a type of normative legal research that is descriptive analytical, where this normative legal research uses secondary data as the main data by using data collection techniques carried out by means of library research, and data analysis using qualitative data analysis methods.⁵

This data analysis is intended based on the description, the facts obtained will be analyzed to answer the problem. The legal consequences in the case of child adoption based on positive legal rules for adopted children and also the parents

⁴Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption.

⁵ibid

who adopt them are recognized and guaranteed and protected all rights inherent in the child adoption process, while the legal consequences that occur against child adoption in the case of not being in accordance with positive legal rules, then the adoption of the child that occurs can be requested to be canceled to the local religious court or district court. The legal force regarding deeds made by a notary before the enactment of Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption, is valid and the deed remains valid and continues to have binding legal force for the parties who agree to make it before a notary, this is as stated in the transitional rules which state that at the time this government regulation comes into effect, all laws and regulations relating to the implementation of child adoption remain in effect as long as they do not conflict with this government regulation.

The role of notaries in making deeds of adoption after the enactment of Government Regulation Number 54 of 2007 concerning the Implementation of Adoption, namely notaries can play a role in providing guidance on the implementation of adoption through counseling, consultation to the parties related to the adoption, this is done so that the community, especially the parties in the legal act of adoption, get information and understand the requirements, procedures and methods of adoption, because in counseling and consultation regarding the legal act to be carried out by the parties, notaries must refer to the laws and regulations related to the legal act.⁶

4. Conclusion

The results of this study indicate that the position of adopted children according to the civil code and Islamic law is different, the position of adopted children according to the civil code is considered as biological children while the position of adopted children according to Islamic law is as adopted children. The position of adopted children will affect the inheritance rights of adopted children. The provisions for the distribution of inheritance of adopted children according to the civil code receive the same share as biological children as this inheritance share has been determined in a law called AB Instato provisions for the distribution of inheritance of adopted children according to Islamic law because of their status as adopted children, then adopted children according to the compilation of Islamic law, adopted children receive 1/3 of the share (wajib will). The role of a notary in the distribution of inheritance for adopted children is to make a deed of inheritance statement and a certificate of inheritance rights and if the notary is asked to calculate the share of inheritance rights, a notary has the right to participate in distributing the inheritance fairly and according to applicable laws and regulations.

⁶Salim Hs, Techniques for Making a Deed (Theoretical Concept, Notary Authority, Form and Minutes of the Deed, (Jakarta: PT. Raja Grafindo Persada, 2015), p. 33

5. References

- Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption.
- I Gede Purwaka, Statement of Inheritance Rights Made by a Notary Based on the Provisions of the Civil Law Act, Jakarta: Notary and Land Specialist Program, Faculty of Law, University of Indonesia, 1999.
- Idris Ramulyo, Mohd., Several Problems in the Implementation of Western Civil Inheritance Law (Burgelijke Wetboek), Sinar Grafika, Jakarta, 1993.
- Imam Gunawan, Qualitative Research Methods: Theory and Practice, Jakarta: Bumi Aksara, 2015.
- Journal of Law Dictum, Volume 14, Number 2, December 2016: 183 - 200
- Law Number 2 of 2014 amending Law Number 30 of 2004 concerning the Position of Notary
- Nur Cahyanti, Sri Endah Wahyuningsih, Sanctions Against Notaries Who Commit Criminal Acts According to the Laws and Regulations in Indonesia, Jurnal Akta, Unissula, 2018
- Salim Hs, Techniques for Making a Deed (Theoretical Concept, Notary Authority, Form and Minutes of the Deed, (Jakarta: PT. Raja Grafindo Persada, 2015), p. 33
- Umi Setyawati, Antonius Iwan Murdianto, Amin Purnawan, Deed of Confirmation of Heir Certificate as a Substitute for Heir Certificate in the Process of Transferring Heir Names at the Semarang City Land Office, Jurnal Akta, Vol 5 No 1 January 2018, Unissula, Semarang
- Umi Setyawati, Antonius Iwan Murdianto, Amin Purnawan, Deed of Confirmation of Heir Certificate as a Substitute for Heir Certificate in the Process of Transferring Heir Names at the Semarang City Land Office, Jurnal Akta, Vol 5 No 1 January 2018, Unissula, Semarang, p.40