

Legal Force of Power of Attorney Agreement to Sell Joint Property after The Existence of a Marriage Agreement Deed made after The Marriage

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Abstract. *A Notary is an official who has the authority to make authentic deeds based on the Law on the Position of Notary, the Notary Code of Ethics and other provisions related to the Notary profession. In his authority to make authentic deeds, an example of a deed that can be made by a Notary is a Deed of Power of Attorney for Sale Agreement. In addition to these deeds, a Notary is also blessed to make a Deed of Separation of Property Marriage Agreement which Based on the Decision of the Constitutional Court dated October 27, 2016 Number 69 / PUU-XIII / 2015, a marriage agreement can be made during the marriage and does not harm the interests of the third party involved. And this provision does not apply retroactively, so that assets obtained after marriage and before the separation of property marriage agreement is made remain joint assets. Based on the above, this study aims to determine and analyze the position of marital assets obtained before the deed of separation of assets is made, and to determine and analyze the legal force of the Deed of Power of Attorney to Sell Joint Assets after the making of the Marriage Agreement Deed. The problem is analyzed using the theory of legal certainty. The research approach method used by the author is normative legal research, using qualitative data types and using secondary data sources, which data the author obtained through the data collection process through library research. The data analysis method uses a qualitative analysis method in which the data obtained is arranged systematically and then analyzed qualitatively in order to obtain clarity on the problems to be discussed.*

Keywords: *Authentic Deed; Notary; Power of Approval; Separation of Property Marriage Agreement.*

1. Introduction

A notary is an official authorized to create authentic deeds, guided by the Law on the Office of Notaries, the Notary Code of Ethics, and other provisions pertaining to the notary profession. This prevents legal disputes between parties and the notary, which could impact the authenticity of the notary's deeds.¹In his authority to make authentic deeds, examples of deeds that can be made by a Notary include Power of Attorney Deeds and also Marriage Agreement Deeds for Separation of Property.

Based on Law No. 1 of 1974, Articles 1 and 2 concerning marriage, what is meant by marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Almighty God. The definition of joint property regulated in Article 35 paragraph (1) of Law No. 1 of 1974 concerning Marriage, reads: "property acquired during marriage becomes joint property."

Article 1313 of the Civil Code states that an agreement is an act by which one or more people bind themselves to one or more other people. As explained in Article 1338 of the Civil Code, all agreements made legally apply as law for those who make them. However, sometimes the assets in a marriage belong to each party and are not mixed together, if the parties make or make a separate marriage agreement made before or after the marriage.

Based on the background presented above, the author took the research title, namely the Legal Force of the Deed of Power of Attorney for the Sale of Joint Property Following the Existence of a Marriage Agreement Deed Made After the Marriage.

2. Research Methods

Research methods are systematic approaches used by researchers to collect, analyze, and interpret data to answer research questions or test hypotheses. These methods serve as an essential foundation for ensuring the validity and reliability of research results.

1. Research Approach Method

The approach used in this research is a normative legal approach. Normative legal research that examines norms as the main problem relies heavily on approach and data. A qualitative approach is required in normative legal research because the

¹Nurizkha Arlina, "Pengangkatan Notaris Pengganti Dari Notaris Yang Berstatus Terpidana (Studi Penetapan Pengadilan Negeri Surabaya No. 728/Pdt/P/2020/Pn. Sby)," *Jurnal Pendidikan* 4, no. 4 (2020): 2

focus of the problem is norms (including norm gaps, norm ambiguity, and norm conflict). The benefits of theory in normative legal research are in establishing a research framework and its implementation at each stage of the research.

2. Data Types and Sources

The type of data in this study uses qualitative data. Meanwhile, the data sources used in this study use secondary data sources. Secondary legal materials are documents or legal materials that provide explanations of primary laws. The secondary legal materials used in this study are books, articles, journals, research results, papers and so on that are relevant to the problem being studied. Secondary data is used as a theoretical basis in the author's research to base the author on analyzing the main problems in this study which are sourced from the literature (library research).

a. Primary legal materials

Primary legal materials, which include: the 1945 Constitution of the Republic of Indonesia, Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, Constitutional Court Decisions, Civil Code, Compilation of Islamic Law (KHI) Book 1 concerning Marriage.

b. Secondary legal materials

Secondary legal materials in this research indirectly support the primary legal materials. The legal materials used in this research include several references from relevant literature, research findings, journals, and scientific works, as well as other articles from websites related to this research.

c. Tertiary legal materials

These are legal materials used in addition to primary and secondary legal materials, which serve as supplements and provide additional guidance or explanations to the primary and secondary legal materials. These tertiary legal materials include legal dictionaries and encyclopedias.

3. Method of collecting data

The data collection method to support this research is a literature study or library research, where the author analyzes based on data from literature, laws and regulations, theories, expert opinions and other matters related to the Marriage Agreement on Separation of Property and Laws, which are related to the research title.

4. Data Analysis Methods

Data analysis techniques are the process of systematically collecting data by the author in order to obtain the final results or conclusions of this research. All data in this research were analyzed qualitatively. At this stage, the collected data were processed, examined, and determined from the research results. The data were selected and compiled systematically so that they could be used as a reference in conducting the analysis. Next, the author compiled the research results into a study that was in accordance with the main problem, then processed, analyzed qualitatively and presented descriptively, namely by telling and describing as it is according to the problem being studied. From these results, a conclusion was then drawn that is the answer to the problem raised in this research.

3. Results and Discussion

3.1. The position of the Marital Assets Obtained before The Deed of Property Separation Agreement was Made.

Based on Law No. 1 of 1974, Article 1 (one) and 2 (two) concerning marriage, what is meant by marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Almighty God. The definition of joint property regulated in Article 35 paragraph (1) of Law No. 1 of 1974 concerning Marriage, reads: "property acquired during marriage becomes joint property."²The article explains that joint property is property acquired throughout the marriage, from the time the marriage begins until it ends or is dissolved due to divorce, death, or a court decision. The amount of joint property for both husband and wife is the same, namely each husband and wife is entitled to $\frac{1}{2}$ (half) of the joint property.

However, sometimes the assets in a marriage belong to each party and are not combined, if the parties make or create a separate property agreement made before or after the marriage. By definition, a separate property agreement is an agreement between husband and wife regarding the ownership of property during the marriage. With this agreement, both parties agree to separate their respective assets. According to Article 29 of Law No. 1 of 1974, a marriage agreement is a written agreement except for ta'lik talak, which has been determined by the Marriage Registration Officer. Anything that has been agreed upon by the parties is legally, religiously, and morally valid as long as it does not violate the law.³

²The definition of joint property as regulated in Article 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage

³Article 29 of Law No. 1 of 1974

Previously, the agreement on separation of assets was regulated in the Civil Code and Article 29 of Law No. 1 of 1974 concerning marriage. Based on Article 2 paragraph (1) which reads: "at the time or before the marriage takes place, both parties with mutual consent can make a written agreement that is ratified by the Marriage Registration Officer, after which the contents also apply to third parties as long as the third party is involved."⁴ According to this article, a prenuptial agreement must be executed before marriage. Furthermore, based on the Constitutional Court Decision No. 69/PUU-XIII/2015 dated October 27, 2016, a prenuptial agreement can be made during the marriage and must not harm the interests of any third parties. This provision is not retroactive, so assets acquired after marriage and before a separate prenuptial agreement is made remain joint property.⁵

3.2. Legal Force of the Deed of Power of Attorney for Agreement to Sell Joint Property after making the Marriage Agreement Deed.

Article 1313 of the Civil Code states that an agreement is an act by which one or more people bind themselves to one or more other people.⁶ As explained in Article 1338 of the Civil Code, all legally made agreements are valid as law for those who make them. These agreements cannot be revoked except by mutual agreement of both parties, or for reasons stated by law as sufficient. These agreements must be carried out in good faith.⁷

Power of attorney is the authority to represent and carry out legal actions in the interests and on behalf of the grantor in the form of unilateral legal actions. This means that the obligation to carry out the obligations rests solely with one party, namely the grantee of the power of attorney.⁸ The use of power of attorney in signing a deed has become increasingly complex. In practice, it often happens that the seller cannot be present to sign the deed. This certainly creates new problems, considering that in carrying out a legal act in an authentic deed, the parties must be present in person to sign. This Power of Attorney Deed then becomes a solution within the scope of Notaries and PPAT. Sellers who cannot be present can create a Power of Attorney Deed by stating their intention to have it made in the form of an authentic deed.

⁴Civil Code and Article 29 of Law No. 1 of 1974 concerning marriage

⁵Constitutional Court Decision dated 10-27-2016 Number 69/PUU-XIII/ 2015

⁶ R.Subekti & R. Tjitrosudibio, (1985). *Kitab Undang-Undang Hukum Perdata*, (Jakarta : Pradnya Paramita), p.304

⁷ *Ibid*, p. 307

⁸Budiono, Herlien. (2016), *Perwakilan, Kuasa dan Pemberian Kuasa*. Majalah Renvoi. p. 68.

Article 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage, states: "property acquired during marriage becomes joint property."⁹ The article explains that joint property is property acquired throughout the marriage, from the time the marriage takes place until the marriage ends or the marriage is dissolved due to divorce, death, or a court decision. Then based on the Constitutional Court Decision dated October 27, 2016 Number 69/PUU-XIII/2015, a prenuptial agreement can be made during the marriage and does not harm the interests of the third party involved. And this provision does not apply retroactively, so that property acquired after the marriage and before the prenuptial agreement is made remains joint property.¹⁰

The validity of an agreement is when the agreement fulfills the elements contained in Article 1320 of the Civil Code, namely:

- a. there is an agreement for those who bind themselves;
- b. the capacity of the parties to make a contract;
- c. a certain thing; and
- d. a lawful cause.¹¹

From the explanation above, we can see that the valid conditions for an agreement must fulfill the contents of Article 1320 of the Civil Code. If one of the 4 (four) requirements is not fulfilled, it can cause the agreement made to be void by law (nieteg, null and avoid, void ab initio) or the agreement can be cancelled (vernietigbaar, voidable).¹² Based on the provisions of the validity of the agreement, namely the existence of an agreement between the parties, the agreement of the husband or wife as the seller is also classified as an agreement that occurs to be able to carry out the sale and purchase of land.

Based on the explanation above, when a husband and wife wish to sell assets of their joint property obtained before the deed of Separation of Property Marriage agreement is made, they must obtain the consent of their marriage partner. If one of the marriage partners is unable to attend when signing the Sale and Purchase deed, the other spouse can give their consent through a Deed of Sale Agreement signed by the party who is unable to attend. This deed is made before a Notary in the same area as the party who is unable to attend the signing of the Sale and Purchase Deed. This is also related to legal certainty according to Van Apeldorn in

⁹The definition of joint property as regulated in Article 35 paragraph (1) of Law Number 1 of 1974 concerning Marriage

¹⁰Constitutional Court Decision dated 10-27-2016 Number 69/PUU-XIII/ 2015

¹¹Civil Code (KUHPperdata). Article 1320

¹²Panggabean, R. M. (2010). Keabsahan Perjanjian dengan Klausul Baku. *Jurnal Hukum IUS QUIA IUSTUM*, 17(4), 651-667, p.4

Peter Mahmud Marzuki, namely that "legal certainty is also interpreted as legal protection to protect parties from arbitrariness".¹³

Based on the explanation above, the Deed of Power of Attorney for Sale Agreement made after the Deed of Marriage Agreement for Separation of Property has been made still has definite legal force as long as it fulfills the requirements contained in Article 1320 of the Civil Code and remains valid as long as the person making the Deed of Power of Attorney does not cancel his/her Power of Attorney.

4. Conclusion

Based on the explanation above, it can be concluded that joint assets obtained during the marriage and before the Deed of Separation of Property Marriage Agreement is made remain joint assets of both married couples, and therefore to sell assets that are still joint assets requires the consent of the married couple. Which consent can be authorized to the married couple which is stated in a Notarial deed called a Deed of Power of Attorney to Sell which has definite legal force as long as it meets the requirements in Article 1320 of the Civil Code and remains valid as long as the person who gives and makes the power of attorney does not revoke the power of attorney.

5. References

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Regulation:

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- Constitutional Court Decision dated 10-27-2016 Number 69/PUU-XIII/ 2015
- Constitutional Court Decision dated 10-27-2016 Number 69/PUU-XIII/ 2015

¹³Peter Mahmud Marzuki, *Op.Cit*, p.59.

The definition of joint property as regulated in Article 35 paragraph (1) of Law
Number 1 of 1974 concerning Marriage

The definition of joint property as regulated in Article 35 paragraph (1) of Law
Number 1 of 1974 concerning Marriage