

The Position of Inheritance of Children from Marriages Which Not Recorded in the Conception of Legal Certainty

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Abstract. *This study aims to determine and analyze the inheritance position of children from marriages that are not registered in the conception of legal certainty, analyze legal protection for children from unregistered marriages and analyze examples of certificates of inheritance rights. The approach method in this research was a normative juridical approach, the research specification was descriptive analytical. The data required included secondary data taken by the literature study method. The data analysis method used descriptive qualitative analysis method. Based on the research, it is concluded that the position of inheritance of children from marriages that are not registered according to the Marriage Act is only obtained from the mother and her mother's family, on the position of inheritance if the child is recognized by the father as his biological parent then he is entitled to the position of inheritance. In principle, children from marriages are not registered with the decision of the Constitutional Court Number 46/PUU-VIII/2010, children from marriages are not registered to obtain legal certainty of their civil rights. Legal protection for children from marriages is not recorded. Legal efforts can be taken so that a child born from a marriage that is not registered obtains a position as a legal child for a Muslim couple by applying for Marriage Istbat to the Religious Court, so that the Religious Court legalizes the marriage, while for couples non-Muslims to register their marriage with the Civil Registry Office. So that they can issue a marriage certificate and the child from the marriage becomes a legal child and obtains legal protection.*

Keywords: *Certainty; Children; Inheritance; Marriages; Unregistered.*

1. Introduction

Marriage is one of the important events in human life. Marriage that occurs between a man and a woman has physical and spiritual consequences, both on the family of each community and also with the assets obtained between them both before and during the marriage. Social life in Indonesian society often causes unregistered marriages that are not registered at the Marriage Registration Office. Unregistered marriages can be said to be a form of marriage that is carried out only based on religious (law) rules and or customs, but is not announced to the general public, nor is it officially registered at the marriage registrar's office, namely the Office of Religious Affairs (KUA) for those who are Muslims and the Civil Registry Office (KCS) for non-Muslims.

The provisions of Article 28 B paragraph (1) of the 1945 Constitution have guaranteed the right of every citizen to form a family and continue offspring through legal marriage.¹Article 1 as amended by Act No. 16 of 2019 concerning Amendments to Act No. 1 of 1974 concerning Marriage which reads "Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a family (household) happy and eternal based on the One Godhead."

Prior to the enactment of the Marriage Law, regarding the provisions, records and validity of a marriage for Indonesians, in general, it was based on their respective religious and customary laws, religion / spirituality, inheritance. Legal regulations regarding marriage have applied equally to all citizens, therefore, every citizen must obey the law, both from the point of family law, property and the legal consequences of a marriage.

Article 2 paragraph (2) of the Marriage Law states: "every marriage is recorded according to the applicable laws and regulations". The validity of a marriage according to the Marriage Law is based on the law of each religion and belief, so that since the enactment of this Marriage Law, the marriage ceremony according to religious law is to determine whether or not it is legal to register the marriage. This has resulted in many people not registering their marriages.

The legal status of children in inheritance relationships is very important because children are descendants who will be the successors of both parents, besides that both parents also have the obligation to take care of and provide for their children, it should be if the child becomes the first party as heirs who However, with the difference in child status between legitimate children and recognized illegitimate children, it will also have a different impact on the distribution of inheritance between the two.

Inheritance rights are the rights of a person to obtain the property of an heir, a person who has this right of inheritance is called an heir, while the matter of

¹Wahyono Darmabrata. (1997). *Tinjauan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan Beserta Undang-Undang dan Peraturan Pelaksanaannya*, Ed.1. Jakarta: Fakultas Hukum Universitas Indonesia. p. 82.

inheritance is regulated in inheritance² (erfrecht) which is a set of norms and rules governing the transfer or transfer of the rights and obligations of property from a person. who dies (heirs) to people who are still alive (heirs) who are entitled to receive it or in other words the law of inheritance is a regulation that regulates the transfer of assets of a person who dies to one or several other people³.

The regulation regarding illegitimate children and the inheritance rights of illegitimate children according to state law is that according to the Marriage Law, illegitimate children only have a civil relationship with the mother and her mother's family, so for mutual inheritance relationships⁴ are also only with the mother and her mother's family.⁵ This is different from the provisions in the Civil Code which stipulates that the relationship of a child out of wedlock with his mother and his mother's family does not exist by itself, but must be acknowledged by his parents before the parents enter into marriage, which of these acknowledgments⁶.

The provisions contained in Article 832 of the Civil Code that the position of each heir must be based on a legal family relationship or outside marriage. In Article 863-873 of the Civil Code, so that children who are entitled to inherit are children outside of marriage who can be recognized or children who are legalized when the marriage between father and mother takes place. Based on this description, this thesis will discuss about marriages that are carried out without being recorded. This is of course contrary to the Marriage Law, especially regarding the legal requirements of a marriage.

2. Research Methods

The approach method used in this research was a normative juridical approach. The specification of this research was descriptive analysis. Data collection method was by using literature study. Data analysis used in this research was qualitative data analysis.

² Deen, Thaufiq., Ong Argo Victoria & Sumain. (2018). *Public Notary Services In Malaysia*. JURNAL AKTA: Vol. 5, No. 4, 1017-1026. Retrieved from <http://jurnal.unissula.ac.id/index.php/akta/article/view/4135>

³ Ong Argo Victoria, Ade Riusma Ariyana, Devina Arifani. (2020). *Code of Ethics and Position of Notary in Indonesia*. Sultan Agung Notary Law Review 2 (4), 397-407, <http://lppm-unissula.com/jurnal.unissula.ac.id/index.php/SANLaR/article/view/13536>

⁴ Yaya Kareng, Ong Argo Victoria, R. Juli Moertiyono. (2019). How Notary's Service in Thailand. Sultan Agung Notary Law Review, 1 (1), 46-56, <http://jurnal.unissula.ac.id/index.php/SANLaR/article/view/4435>

⁵ Amir Syarifudin. (2000). *Hukum Kewarisan Islam*. Jakarta: Kencana. p.34.

⁶ Chuasanga A., Ong Argo Victoria. (2019). *Legal Principles Under Criminal Law in Indonesia and Thailand*, Jurnal Daulat Hukum, Vol 2, No 1 (2019) <http://jurnal.unissula.ac.id/index.php/RH/article/view/4218>

3. Results and Discussion

3.1 Position of Inheritance of Children from Marriages Which Not Recorded in the Conception of Legal Certainty

Children as a result of a marriage are a very important part of their position in a family. Inheritance law is defined as the law that regulates the position of a person's assets after the testator dies, and the ways in which the assets are transferred to other people or heirs.

A legal child according to the law is the result of a legal marriage. This is stated in Act No.1 of 1974 concerning Marriage, Article 42 Paragraph 1: Legitimate children are children born in or as a result of legal marriages. Children born from unregistered marriages in this case are illegitimate children because the child was born from a marriage that is not registered in the state administration in accordance with the provisions of the applicable laws and regulations, namely Act No. 1 of 1974 concerning Marriage.

There is a difference between children born in a marriage called "legitimate children" and children born outside of marriage or "children out of wedlock". Children out of wedlock in the UUP (which occurs without a legal marriage as defined in western civil law) do not have a civil relationship with their father and as a result, children out of wedlock do not get the same rights from their fathers as legal children.⁷

The Civil Code has determined that to become an heir there are the following conditions:

- Based on Article 832 of the Civil Code to be able to become an heir, one must have a blood relationship, whether legal or out of wedlock. If you become an heir through giving through a will as regulated in Article 974 of the Civil Code.
- Based on Article 836 of the Civil Code as heirs must exist when the testator dies. However, this provision is ruled out by Article 2 of the Civil Code which states that a child in a woman's womb is considered to have been born, if the interests of the child so desire.

Gustav Radbruch suggests 4 (four) basic things related to the meaning of legal certainty, namely that the law is positive, based on facts, these facts must be formulated in a clear way, and positive law should not be easily changed. Based on this opinion, it can be concluded that normative legal certainty is when a statutory regulation is made and promulgated with certainty, because it regulates

⁷Muhammad Sidiq & Akhmad Khisni. "Peran Notaris Dalam Pembagian Warisan Kepada Anak Hasil Luar Kawin Ditinjau Dari Hukum Harta Kekayaan Dan Pewarisan Serta Hukum Waris Barat". *Jurnal Akta*. Vol.4. No.2. 2017.

clearly and logically, so that it will not cause doubt because of the existence of multiple interpretations that can clash or cause conflicting norms.

Regulations regarding inheritance law in Indonesia are still diverse due to the pluralistic nature of the application of three inheritance law systems, namely the customary inheritance law, Islamic inheritance law, and civil inheritance law. In Indonesia, there is no law that specifically regulates inheritance, so based on the provisions of Article 66 of Act No. 1 of 1974 which says: "For marriage and everything related to marriage based on this Law, then with the enactment of this Law, the provisions stipulated in the Civil Code (*Burgelijk Wetboek*)", the Indonesian Christian Marriage Ordinance (*Huwelijk Ordonnantie Christen Indonesiers S.1933 No.74*), Mixed Marriage Regulations (*Regeling op de gemengde Huwelijken S. 1898 No. 158*),

Regarding the issue of inheritance for children from unregistered marriages, Indonesian law provides a solution so that the child can obtain an inheritance position from his father, namely by recognizing the child by his father. Child acknowledgment is an acknowledgment made by the father of a child born outside a legal marriage according to law. Basically, child recognition can be done by both the mother and the father, but because it is based on Article 43 of Act No. 1 of 1974 which states "Children born outside of marriage only have a civil relationship with their mother and their mother's family", then to obtain a civil relationship with their father a father can make child confession:

- Voluntary confession

Voluntary child acknowledgment in doctrine is formulated as a statement containing an acknowledgment that the person concerned is the father or mother of a child out of wedlock recognized by him. Voluntary acknowledgment is a statement made by a person in accordance with the methods determined by law that he is the father and mother of a child born out of wedlock.

- Forced confession

Recognition by force is regulated in Articles 287-289 of the Civil Code. This can happen if the judge with a court decision in a case claiming the position of a child, on the basis of suspicion, that a man is the father of the child in question.

The legally recognized illegitimate child is one of the heirs.⁸ According to the law regulated in the Civil Code based on Article 280 in conjunction with Article 863 of the Civil Code. Out-of-wedlock children who are entitled to inherit are illegitimate

⁸Rio Satria, (2005). *Tinjauan Tentang Kedudukan Anak Luar Kawin Dalam Sistem Hukum Perkawinan Indonesia*. Bandung: Citra Aditya Bhankti.p.77.

children in a narrow sense, considering the doctrine of classifying illegitimate children into 3 (three) groups, namely illegitimate children, adulterous children, and discordant children. In accordance with the mention given by law in Article 272 jo 283 of the Civil Code (regarding adulterous children and discordant children). Out of wedlock children who have the right to inherit are in accordance with the regulations in Article 280 of the Civil Code.

Out-of-wedlock children in a narrow sense are children born from a relationship between a man and a woman, both of whom are not bound by marriage to another person and there is no prohibition against marrying each other, such children can be legally recognized by his father. With the recognition of a child out of wedlock, a civil relationship is born between the child and his father or mother. The position of children out of wedlock in the inheritance of the Civil Code in terms of inheritance is regulated according to the Civil Code, the child's share of marriage is not recorded depending on who the rights of the illegitimate child inherit, only children who have been recognized and legalized by their parents get the inheritance, the size of the portion of children out of wedlock that is recognized as legal is:

- Out of wedlock children inherit together with group I including children or all of their descendants (Article 852 of the Civil Code) and or the husband or wife lives longer (Article 852 A of the Civil Code) then the child's share out of wedlock 1/3 of the property left behind.
- Out of wedlock children inherit together with group II and III heirs (Article 863 of the Civil Code) states: if the heir does not leave offspring or husband and wife, but leaves blood relatives or brothers or sisters or descendants of relatives child out of wedlock is to receive 1/2 of the inheritance.
- Out of wedlock children inherit with group IV heirs, including relatives in a more distant degree, then the amount of rights of children outside wedlock is 3/4, based on Article 863 paragraph 1 of the Civil Code.
- Children out of wedlock inherit with family heirs who are related by blood in another degree, then the amount of the rights of children out of wedlock according to Article 863 Paragraph (2) of the Civil Code is calculated by looking at the closest family relationship with the heir, in this case is third class so that children out of wedlock receive share (Article 863 Paragraph (1) second part of the Civil Code)
- The illegitimate child as the only heir, if the illegitimate child has been recognized by his parents as the sole heir, then the illegitimate child gets the entire inheritance (Article 856 of the Civil Code).

Embodiment of Legal Certainty through the Constitutional Court Decision No. 46/PUU-VIII/2010 concerning the review of Article 43 of the Marriage Act No. 1 of 1974. As in the previous explanation, that a child born outside a legal marriage

only has a civil relationship with his mother and his mother's family. This is in accordance with the provisions of Act No. 1 of 1974 Article 43 paragraph (1).

Recognition of children from unregistered marriages with their biological fathers will certainly result in a child's right to inherit property, the position of children from unregistered marriages being equal to children born from legal marriages, with the decision of the Constitutional Court no. 46/PUU-VIII/2010, the relationship between a child from an unregistered marriage and his father is a blood relationship in a biological sense which is confirmed based on a legal process. That is related to legal certainty regarding the legal position of children out of wedlock, that the existence of the Constitutional Court's decision provides legal certainty regarding civil rights, especially in terms of inheritance.

3.2 Legal Protection for Children from Unregistered Marriages

Legal protection for children in Indonesia has been regulated in various laws and regulations, but specifically regulated in Act No. 35 of 2014 amendments to Act No. 23 of 2002 on Child Protection. According to article 1 number 2, it is stated that child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and protection from violence and discrimination.

Definition of legal protection is a description of the workings of legal functions to realize legal goals, namely justice, expediency and legal certainty. The protection provided by law is also related to the rights and obligations, in this case that is owned by humans as legal subjects in their interactions with fellow humans and their environment. As legal subjects, humans have the right and obligation to take legal action.⁹

Marriage registration is one of the principles of national marriage law which is based on Act No. 16 of 2019 concerning amendments to Act No. 1 of 1974 concerning Marriage. In the marriage laws and regulations in Indonesia, the existence of the principle of marriage registration is related to and determines the validity of a marriage, meaning that in addition to following the provisions of each religious law or religious belief, it is also a condition for the validity of a marriage. In connection with the registration of this marriage, for those who are subject to the provisions of Islamic law, there are arrangements that need to be observed. Article 7 paragraph (1) of the Compilation of Islamic Law, states that: "A marriage can only be proven by a marriage certificate made by a marriage registrar".

Without a marriage registration, the marriage that is carried out legally does not have definite legal force. Therefore it cannot be legally accounted for. Act No. 1

⁹Phillipus M. Hadjon. (1987). *Perlindungan Hukum bagi Rakyat Indonesia*. Surabaya: Bina Ilmu, p. 2.

of 1974 concerning Marriage regulates the position of children, which is contained in Chapter IX from Article 42 to Article 47. Article 42 of the Marriage Law states that:

"Legal children are children born in or as a result of a legal marriage."

Meanwhile, a legal marriage is a marriage carried out according to the terms and conditions stipulated in Act No. 16 of 2019 concerning amendments to Law 1 of 1974 concerning Marriage. Article 2 of the UUP explains that marriage is legal if it is carried out according to the law of each religion and belief and each marriage is recorded according to the applicable laws and regulations.

The stipulation of children's rights in Act No. 35 of 2014 concerning amendments to Act No. 23 of 2002 on Child Protection which has the principle of non-discrimination, does not differentiate between children born to parents whose marriages are registered or unregistered because with this distinction the rights of children are not obtained, especially the right to obtain an identity as a legitimate child from the marriage of their parents. The law must provide fair legal protection and certainty for the status of a child who is born and the rights that exist in him, including for children born even though the legality of the marriage of his parents is still not recognized by law.

Child protection is an effort to provide conditions and situations that allow the implementation of children's rights and obligations in a positive human manner which is also the embodiment of justice in a society. Thus, child protection must be sought in various fields of life and state life, community and family based on law, for the sake of right, fair treatment and the welfare of children.¹⁰

The statement explains that legal protection is closely related to the realization of justice, because in essence every legal rule is created with the initial aim of realizing legal protection and the ultimate goal of realizing justice. The forms of legal protection provided to the public by the government are in the form of preventive and repressive protection:

- Preventive legal protection, in preventive legal protection, legal subjects are given the opportunity to submit objections or opinions before a government decision gets a definitive form, the aim is to prevent disputes from occurring.
- Repressive legal protection, in repressive legal protection aims to resolve disputes. The handling of legal protection by the General Courts and Administrative Courts in Indonesia belongs to this legal category.
- Legal efforts that can be made so that a child born from an unregistered marriage obtains a position as a legal child for a Muslim couple in practice is often carried out by following the references in Article 7 of the Compilation of Islamic Law, namely:

¹⁰Moch Faisal Salam, (2005). *Hukum Acara Peradilan Anak di Indonesia*, Bandung: Mandar Maju, p. 2.

- "Marriage can only be proven by a Marriage Certificate made by a Marriage Registrar"
 - In the event that the marriage cannot be proven by a marriage certificate, the *Itsbat Nikah* can be submitted to the Religious Court
 - *Itsbat* Marriage that can be submitted to the Religious Courts is limited to matters relating to:
 - ❖ The existence of a marriage in the context of a divorce settlement
 - ❖ Loss of marriage certificate
 - ❖ There are doubts about whether or not one of the conditions of marriage is valid
 - ❖ The existence of a marriage that occurred before the enactment of Law 1974
 - ❖ Marriages carried out by those who do not have marital barriers according to Act No. 1 of 1974
 - Those entitled to apply for a marriage certificate are husband or wife, their children, marriage guardians and parties with an interest in the marriage.¹¹

The stipulations of *Itsbat Nikah* are motivated by the fact that the marriage is not performed before or under the supervision of the Marriage Registrar, so that it is not recorded and cannot be proven by means of a marriage certificate. The stipulation is also motivated by the need for a Marriage Certificate to take care of the Child's Birth Certificate. Proof of a legitimate child based on descent can be proven by a birth certificate. Proof of a legitimate child based on descent can be proven by a birth certificate. The birth certificate or certificate does prove that a child whose name is mentioned there is the child of the person named in the birth certificate concerned, at least from the woman who gave birth to the child, whose name is mentioned there. The birth certificate also states that the child in question was born on a certain day and date. The time of birth is linked to the marital status of the woman who gave birth to the child, determining the relationship of the child to the husband of the child's mother. Article 55 paragraphs (1) and (2) of the Marriage Law states that: The time of birth is linked to the marital status of the woman who gave birth to the child, determining the relationship of the child to the husband of the child's mother. Article 55 paragraphs (1) and (2) of the Marriage Law states that: The time of birth is linked to the marital status of the woman who gave birth to the child, determining the relationship of the child to the husband of the child's mother. Article 55 paragraphs (1) and (2) of the Marriage Law states that:

¹¹Liza Elfitri. Dasar Hukum Pengajuan *Itsbat Nikah* Bagi Pasangan Kawin Siri. <https://www.hukumonline.com/klinik/a/dasar-hukum-pengajuan-itsbat-nikah-bagi-pasangan-kawin-siri-lt50a1e91040231>. accessed on January 8, 2022 at 20.00 WIB.

- The origin of a child can only be proven by an authentic birth certificate, which is issued by an authorized official.
- It is stated that if the birth certificate referred to in paragraph (1) of this Article does not exist, the court may issue a determination regarding the origin of a child after a thorough examination is conducted based on the evidence that meets the requirements.

Marriage registration is one of the principles of national marriage law which is based on Act No. 16 of 2019 concerning amendments to Act No. 1 of 1974 concerning Marriage. In the marriage laws and regulations in Indonesia, the existence of the principle of marriage registration is related to and determines the validity of a marriage, meaning that in addition to following the provisions of each religious law or religious belief, it is also a condition for the validity of a marriage.¹² Meanwhile, for marriages for non-Muslim couples whose registration is carried out at the civil registry office, the efforts that can be made if the marriage is only carried out according to religion and is not registered in the civil office, the child born from the marriage can only be recognized by means of ratification of the child so that the child becomes a legitimate child. The ratification of a child so that the child becomes a legal child can only be done if the parents register their marriage at the Civil Registry Office first, while before the marriage is registered, the child can only get a birth certificate by including the mother's name only or also referred to as a child out of wedlock. After the legal action is taken, the marriage certificate is issued and the child's birth certificate is issued. Every marriage that has been held religiously must be registered because from the registration of the marriage a marriage certificate will be issued which will be proof that the marriage has occurred. Thus, children born from unregistered marriages receive legal protection and their position as legal children.

4. Closing

The position of inheritance of children from unregistered marriages does not have inheritance rights. This child can get his inheritance rights if he gets recognition from his biological father, so that the child's status is recognized as legitimate. Thus, after the process of recognizing children from unregistered marriages, a civil relationship between the child and his father was born. The legal protection that can be done so that a child born from a marriage that is not registered, to obtain the status of a legal child for a Muslim couple is to submit an application for *Itsbat Nikah* to the Religious Court, so that the Religious Court shall determine the ratification of the marriage. Meanwhile, for couples who are non-Muslim, their parents must register their marriage at the Civil Registry Office. Marriage that has

¹²Rachmadi Usman. The Meaning of Marriage Registration in Indonesian Marriage Laws and Regulations. Indonesian Legislation Journal. Vol.14. No.3. 2017.

been registered and a marriage certificate has been issued. So that children born from marriages that have been registered have a birth certificate as evidence that the child has legal protection.

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