

The Legal Position of the Deed of Marriage Agreement Made by a Notary in the Division of Joint Assets in the Event of Divorce

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Abstract. *Marriage agreements are regulated in CHAPTER V of the Civil Code, Article 139, but after the issuance of Law Number 1 Number 29 of 1974, marriage agreements contained in the Civil Code are rarely used, in the Compilation of Islamic Law marriage agreements are also regulated in Article 47. Even though it is not stated in the Law Marriage, the aim and purpose of the marriage agreement is intended to concern the management of the marital assets of husband and wife in marriage, so it can be concluded by interpreting the terms of marriage agreement of the Civil Code in connection with Article 29 of Law Number 1 of 1974 as well as the marriage agreement according to the Compilation of Islamic Law that was previously in force. The role of a notary in making a marriage agreement is to explain the rights and obligations of each party and provide considerations regarding the merits of making a marriage agreement for entrepreneurs. In this case, the notary only facilitates the preparation of the marriage agreement deeds so that the content of the marriage agreement comes purely from the prospective husband and wife because there is a demand for the notary profession to be neutral. The basis of a Notary's authority in carrying out his duties and position as a notary to make authentic deeds, in this case the marriage agreement deed, is regulated in Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of a Notary Article 15. Position of a Notary is an official where someone can get advice that can be relied on. Everything he writes and stipulates is true, he is a strong document maker in a legal process, especially regarding legal certainty*

Keywords: Agreement; Marriage; Notary.

1. Introduction

Indonesia is a country consisting of various ethnicities, tribes, religions and groups. As one of the largest countries in the world, Indonesia is a complex and pluralistic country. However, Indonesia is known as a country that upholds

eastern customs that uphold customs, politeness, mutual cooperation and high family values.¹

Along with the development of the era that greatly influences human civilization, this can have an impact on the increasingly complex life of society. Humans as individual beings have a solitary soul life, but as social beings cannot be separated from society, this is because humans from birth, live and develop and then die are always in the community environment and it is human nature to always live side by side with fellow humans and try to continue their descendants by getting married.²

Marriage is an important event in the life of every human being. Marriage between a man and a woman will have physical and mental consequences for them, for society and also for their relationship with the wealth obtained between them before, during and after the marriage takes place.³

Marriage gives rise to the rights and obligations of husband and wife as regulated in Law No. 1 of 1974 concerning Marriage. A marriage can give rise to issues regarding property, namely regarding joint property of husband and wife as well as personal property and/or property brought into the marriage.⁴Law Number 1 of 1974 outlines that property acquired during marriage becomes joint property. Unless, both parties make a marriage agreement to avoid legal mixing of property. It is emphasized that property brought in and property obtained as a gift or inheritance are under the control of each party as long as the parties do not determine otherwise.⁵Therefore, the Marriage Agreement can determine whether the assets obtained belong to each party individually or whether they are mixed together.

A marriage contract is an agreement made by two people (a prospective husband and a prospective wife) before their marriage takes place, to regulate the consequences of marriage concerning property. A marriage contract can be interpreted as an agreement between a man and a woman who will enter into marriage with the aim of separating ownership of property and debts, and an agreement on a number of other important matters when sailing the ship of household. In Law Number 1 of 1974, the Marriage Contract is regulated in Article 29 paragraph 4 where the marriage contract that has been made may be changed as long as it does not harm a third party. Based on Article 29 paragraph

¹DMW Nasution, 2011, Available at repository.usu.ac.id/bitstream/.../4/Chapter%20I.pdf, accessed on February 14, 2023, at 00.35 WIB.

²Ian Gunawan Raharjo, 2012, Marriage in Indonesia, Guna Media Ilmu, Bandung, p. 11.

³Anto, 2012, Legal Review of Marriage Agreements (Pranuptial Agreements) and their Legal Consequences for the Actors in Connection with Islamic Law and the Marriage Law in Indonesia Available at https://www.facebook.com/permalink.php?story_fbid=465340400169023&id=435894869780243 accessed February 14, 2023, 00.51 WIB.

⁴Elisabeth Nurhaini Butarbutar, 2012, Property Law According to the Civil Code Systematics and Its Development, PT. Refika Aditama, Bandung, p. 22

⁵Article 35 paragraphs 1 and 2 of Law Number 1 of 1974 concerning Marriage

4 above, the marriage contract made between husband and wife is a written agreement except for ta'lik talak which is ratified by the Marriage Registrar, whatever is agreed upon as long as it does not violate the boundaries of law, religion and morality, and if the marriage contract is not ratified by the Marriage Registrar then the agreement cannot be said to be a marriage contract but rather an ordinary agreement that applies generally.⁶

Marriage Agreements in Islamic Law in Article 45 paragraph 2 emphasizes that marriage agreements do not conflict with religious beliefs as stated in Article 47 paragraph 1 of the Compilation of Islamic Law, which states:

"At the time or before the marriage takes place, the prospective bride and groom can make a written agreement that is ratified by the Marriage Registrar regarding the position of assets in the marriage."⁷

The marriage agreement must be made before the marriage takes place, because the marriage agreement is able to provide legal consequences for the parties who make it where the party who feels disadvantaged can claim compensation or demand the implementation of the agreement. The making of a marriage agreement is carried out either in written form or in a deed, either privately or in the form of an authentic deed made by an authorized official. What is meant by a deed is a signed document, which contains all the events that are used as the basis for a right or obligation, and was made from the start intentionally for proof.⁸

In relation to authentic deeds and the authority of a notary as a public official who is authorized to make authentic deeds, this can be seen in Law No. 30 of 2004 concerning the Position of Notary, Article 15, which can provide perfect evidentiary power in court and is certainly binding on prospective husband and wife who enter into a marriage agreement.

In relation to legal relations, a marriage contract is part of the law of agreements bound by the conditions for the validity of an agreement as regulated in Article 1320 of the Civil Code, namely that four conditions are required for the validity of agreements:

1. Agreed those who bind themselves;
2. Ability to make an agreement;
3. Something specific;
4. Something for a lawful reason.

The marriage agreement must be made on the basis of good faith and mutual trust that enhances each other, is one of the principles in this agreement law to achieve one side of the legal objective, namely the side of justice to achieve the

⁶H. A Damanhuri, 2007, *Legal Aspects of Joint Property Marriage Agreements*, Mandar Maju, Bandung, page 11

⁷Compilation of Islamic Law 1991

⁸Sudikno Mertokusumo, 1986, *Civil Procedure Law in Indonesia*, Liberty, Yogyakarta, p. 106

side of legal certainty. Therefore, the side of legal certainty can be achieved if the contents of the agreement can be implemented firmly and fairly.⁹

Article 35 paragraph 1 of Law Number 1 of 1974 concerning Marriage regulates joint property, stating that property acquired during a marriage becomes joint property, and Article 35 paragraph 2 states that property brought by each husband and wife and property acquired by each as a gift or inheritance is under the control of each recipient, as long as the parties do not determine otherwise.

Joint property exists at the time of marriage while the property brought in is obtained before the marriage takes place, but in reality, in families in Indonesia, many do not record the joint property they own. In a new marriage, the separation of the property brought in and the joint property is still clear, but in an old marriage, the property brought in and the joint property are difficult to explain in detail one by one.¹⁰

As a legal event, marriage will bring consequences for each party, such as the relationship between husband and wife who are the actors in the household, the relationship between parents and children, and no less important is regarding property in marriage which has a great influence on household harmony.¹¹

Every married couple who have been bound in a marriage, hopes that the marriage can last happily and forever, but sometimes in living the household there are conflicts or problems that result in the breaking of the marriage bond or called divorce. Article 37 paragraph 1 states that if the marriage ends due to divorce, then the joint property is regulated according to their respective laws. In the explanation of Article 37 paragraph 1, it is emphasized that the respective laws are religious law, customary law, and other laws related to the division of joint property.¹²

The dissolution of a marriage that has legal consequences for joint property during the marriage can be seen when the dissolution of the marriage has occurred. Can the laws and regulations in the Republic of Indonesia and based on Islamic law in particular, be implemented properly and well in a society or are these legal regulations only released as written regulations? Although the division of joint property after a divorce has been regulated in the provisions above, there are often difficulties in its implementation. So that it can cause disputes between the two parties. This is because usually the ex-husband gets a larger share of the property because he considers the ex-husband to have worked hard to meet the needs of his household and the ex-wife usually gets a smaller share because the ex-wife is considered to have earned the least income and only takes care of the household. It is also not uncommon for the ex-husband to control the joint property and not share it with the ex-wife. From this

⁹Soejonio Dirdjosisworo, 2002, *The Mystery Behind Problematic Contracts*, CV. Mandar Maju, Bandung, p. 10

¹⁰H. A Damanhuri, *Op.Cit*, p. 12

¹¹*Ibid*, p. 14

¹²*Ibid*, p. 20

situation arises a sense of dissatisfaction or injustice which will ultimately cause disputes between the ex-husband and wife.¹³

Violations can occur due to acts of default and unlawful acts by one of the parties to the agreement, including in a marriage agreement, and cause losses, then it can be agreed upon by means of a settlement through mutual consensus and if there is no result from the mutual consensus settlement, it can be taken through legal channels in court.¹⁴

2. Research methods

In the research and preparation of this thesis, the author uses a normative legal research method. The use of the normative legal approach method is by exploring various sources of literature and using the applicable Legislation approach and the Laws that regulate the case that the author raised, as well as primary and secondary legal sources from various journals and books and scientific papers that discuss the chapter on law. After that the author will analyze using descriptive analysis techniques that are studied systematically.

This research goes through the stages of literature study. Literature study is by conducting research on materials in the form of secondary data through a review of laws and regulations, literature, writings of legal experts, scientific papers, newspapers, and journals related to the title of this research.

3. Results and Discussion

3.1 The role of a notary in the process of making a marriage contract deed

The marriage agreement is regulated in Chapter V of the Civil Code, Article 139, but after the issuance of Law Number 1 Number 29 of 1974, the marriage agreement in the Civil Code was rarely used. In the Compilation of Islamic Law, the marriage agreement is also regulated in Article 47. Although not stated in the Marriage Law, the intent and purpose of the marriage agreement is intended regarding the management of the marital assets of the husband and wife in marriage, so it can be concluded by interpreting the term marriage agreement in the Civil Code in connection with Article 29 of Law Number 1 of 1974 and the marriage agreement according to the Compilation of Islamic Law that was previously in effect.

In making a marriage agreement can be done with a notarial deed. The basis of the notary's authority in carrying out his duties and office as a notary to make an authentic deed in this case a marriage agreement deed is regulated in the Republic of Indonesia Law Number 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the position of a notary.¹⁵

Until now, notaries still have the authority to make marriage agreements. However, he said that he had never made a marriage agreement after the

¹³Ibid, p. 11

¹⁴Salim, 2006, Development of Contract Law Outside the Civil Code Book I, PT. Raja Grafindo Persada, Jakarta, p. 72

¹⁵Martiman Prodjohamidjojo, Indonesian Marriage Law, Indonesia Legal Center Publishing, Jakarta, 2002, pp. 49-50.

Constitutional Court Decision Number 69/PUU-XIII/2015. He argued that the relevant time to make a marriage agreement is before the marriage. This is to anticipate irresponsible parties who can carry out legal smuggling and possibly cause losses to third parties involved. However, he stated his attitude that he respects the Constitutional Court Decision Number 69/PUU-XIII/2015, because this decision is a jurisprudence which is one of the sources of law. Jurisprudence is a decision that has permanent legal force (*inkracht van gewijsde*) and the decision of the Constitutional Court is final and binding. In the implementation of the making of a marriage agreement deed in the field, a Notary may use the provisions contained in the Civil Code or follow the provisions contained in the Constitutional Court Decision Number 69/PUU-XIII/2015 concerning amendments to Article 29 of Law Number 1 of 1974 which allows a marriage agreement to be made before, during and after the marriage as long as it is still within the marriage period. A marriage agreement is made with an authentic deed, referring to Article 39 of the Law on the position of notary concerning the provisions for appearing, that the procedure for making a marriage agreement marriage agreement at the Notary's office before the Constitutional Court Decision Number 69/PUU-XIII/2015 is as follows.¹⁶

- a. Prospective husband and wife who wish to make a marriage contract must appear to make a marriage contract deed;
- b. The notary writes down the wishes or contents of the marriage agreement that they want;
- c. After the marriage agreement deed is made, it is then registered at the Office of Religious Affairs (KUA) for Muslims and the Population and Civil Registry Service (Dukcapil) for non-Muslims;
- d. After the prospective husband and wife have carried out the marriage contract and the marriage agreement has been legalized by the marriage registrar, the contents of the marriage agreement will be written in the marriage book of both parties.

Constitutional Court Decision No. 69/PUU-XIII/2015 states that the basis of a notary's authority in carrying out his duties and position as a notary to make authentic deeds, in this case marriage agreement deeds, is regulated in the Republic of Indonesia Law Number 2 of 2014 concerning amendments to Law Number 30 of 2004 concerning the Position of Notary, Article 15.

The explanation in this Article provides a clear picture of the authority of a Notary in carrying out the task of making authentic deeds for the parties, be it a marriage agreement deed or other authentic deeds. After the Constitutional Court Decision No. 69/PUU-XIII/2015 Concerning the Basis for Making Marriage Agreements that can be made before, during and after the marriage. The explanation in this Article provides a clear picture of the authority of a notary in

¹⁶Constitutional Court of the Republic of Indonesia (1), Decision Number 69/PUU-XIII/2015, p. 157

carrying out the task of making authentic deeds for the parties. Be it a marriage agreement deed or other authentic deeds.¹⁷

3.2 The legal position of a notary's marriage agreement deed in the division of joint property in the event of a divorce

The presence of a Notary as a Public Official or General Official is the answer to the community's need for legal certainty for every obligation they make, of course an obligation that is bound by daily life and also trade. A Notary is the only official who is given general authority to make a deed of obligation, as long as there is no law that regulates the making of certain deeds with special officials outside of a Notary. The position of a Notary as an official where someone can get reliable advice. Everything that is written and determined is true, he is a strong document maker in a legal process, especially concerning legal certainty. Paying attention to the various provisions of laws and regulations related to the existence of a Notary as a General Official, the duties and work of a Notary can be known, which include providing public services to make authentic deeds, registering and validating (waarmerken and legaliseren) letters or deeds made privately.¹⁸

The Government of the Republic of Indonesia issued Law Number 33 of 1954 concerning Deputy Notaries and Temporary Deputy Notaries. Article 2 paragraph (1) of the law states: "In the event that there is no Notary, the Minister of Justice may appoint someone who is required to carry out the Notary's work". Then Article 1 letter c and Article 8 of the law state: "Those who are appointed with the obligations as referred to in this article are referred to as Temporary Deputy Notaries". Those referred to as Notaries are those who are appointed based on the provisions of Article 2 paragraph (1) stbl.1860:3 in conjunction with Article 1 letter a of Law Number 33 of 1954. Then in 2004, precisely on October 6, 2004, Law Number 30 of 2004 concerning the Position of Notary was enacted as amended by Law Number 2 of 2014 concerning the Position of Notary.¹⁹

The presence of a Notary as a Public Official or General Official is the answer to the community's need for legal certainty for every obligation they make, of course an obligation that is bound by daily life and also trade. A Notary is the only official who is given general authority to make a deed of obligation, as long as there is no law that regulates the making of certain deeds with special officials outside of a Notary. The position of a Notary as an official where someone can get reliable advice. Everything that is written and determined is true, he is a strong document maker in a legal process, especially concerning legal certainty. Paying attention to the various provisions of laws and regulations related to the existence of a Notary as a General Official, the duties and work of a Notary can be known, which include providing public services to make authentic deeds,

¹⁷Wira Dharma Pratiwi, Syahrudin Nawi and Hasbuddin Khalid, "The Authority of Notaries in the Validation of Marriage Agreements", *Journal of Lex Theory (JLT)*, Vol. 2, No. 1, June 2021, p. 82

¹⁸Daeng Naja, 2020, *Fiqh of Notary Contracts*, East Java: Uwais Inspirasi Indonesia, p. 3

¹⁹Ibid, pp. 6-7

registering and validating (waarmerken and legaliseren) letters or deeds made privately.²⁰

A notary is a public official who is authorized to make authentic deeds and other authorities, as referred to in this Law (Article 1 number 1 of the Notary Law). Then in Article 1868 of the Civil Code it is stated that an authentic deed is a deed made in the form determined by law, by or before a public official who is authorized for that purpose at the place where the deed is made. Thus, from the head of this provision it is known that a Notary is a public official, which is a position held or given to those who are authorized by legal regulations in making authentic deeds. Notaries as public officials are given the authority to make authentic deeds.²¹

The authority of a notary as regulated in Article 15 of the Notary Law, namely:²²

1. Notaries have the authority to make authentic deeds regarding all acts, agreements and stipulations that are required by statutory regulations and/or that are desired by interested parties to be stated in authentic deeds, guarantee the certainty of the date of making the deed, store the deed, provide grosse, copy and quote of the deed, all this as long as the making of the deeds is not confirmed or excluded by other officials or other people as determined by law.
2. Notaries are also authorized;
 - a. Validate signatures and determine the certainty of the date of private letters by registering them in a special book;
 - b. Signing letters under hand by registering them in a special book;
 - c. Make copies of the original private letters in the form of copies containing descriptions as written and described in the letter in question;
 - d. Checking the photocopy to ensure it matches the original letter;
 - e. Providing legal advice regarding the preparation of deeds;
 - f. Making deeds related to land; and
 - g. Making a deed of auction minutes.

One of the authorities of a Notary is to make a deed of division of joint assets. However, the issue of assets 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 "this" and "that" assets are theirs. In relation to this, the role of another party is needed as a mediator who provides input and legal advice to both parties.

The role of the other party referred to in this case is the role of the Notary. In relation to the role of the Notary with the needs of the community is very important, considering that the Notary is an official who has the authority to

²⁰Ibid, p. 8

²¹Ibid, p. 10

²²Article 15 Law on Notary Positions

make authentic deeds and in this case, the role of the Notary is to make a deed of agreement on the division of joint assets for both parties based on the results of the calculation of the division of assets that have been agreed upon by both parties. Thus, the authority of the notary in making a deed of division of joint assets if a divorce has occurred, then the notary does not have the right to interfere in the division and the notary's authority is limited to making statements of the parties. Then the results of the agreement of the two parties, whatever the results obtained for each party, will later be stated in the deed made by the notary.²³

4. Conclusion

The role of a notary in making a marriage agreement deed is to explain the rights and obligations of each party and provide considerations about the goodness of making a marriage agreement for entrepreneurs. In this case, the notary only facilitates the making of the marriage agreement deed so that the contents of the marriage agreement come purely from the prospective husband and wife because of the demands for the notary profession to be neutral. In the process of making a marriage agreement deed, the notary also explains to the parties, namely the husband and wife, about general matters in the marriage agreement, provisions of the marriage agreement that cannot be made underhand and must be made before a notary. The marriage agreement is made with the aim of benefiting both parties and after being ratified will have legal consequences for the parties. The contents of the agreement in the marriage agreement deed include regulations regarding the mixing of assets, ownership of assets before and during marriage, household expenses, rights to use assets and ownership of goods, both registered/unregistered goods, jewelry and movable goods.

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²³Ahmad Yamin, Op.Cit, p. 32

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