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The Impact of Unauthorized Guardian Divorce on Shared Property from A Juridical And Sociological Perspective

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Abstract

This research aims to examine how divorce impacts unauthorized guardianship on shared property. Researchers use a juridical and sociological approach. By using the object of research in the Kediri City Religious Court. This study resulted in the conclusion that the settlement of shared property disputes sometimes uses Marriage Law no. 1 of 1974, where the result is that each of the husband and wife obtained half of the shared property. Besides, sometimes married couples use a mediation approach, whereas as a result, each spouse does not always get half of the shared property

Keywords: *Divorce, share property*

Abstrak

Penelitian ini bertujuan untuk meneliti bagaimana dampak perceraian (pembatalan pernikahan) akibat wali yang tidak sah terhadap harta bersama. Peneliti menggunakan pendekatan yuridis dan sosiologis. Dengan menggunakan obyek penelitian di Pengadilan Agama Kota Kediri. penelitian ini menghasilkan kesimpulan bahwa penyelesaian sengketa harta bersama adakalanya menggunakan UU Perkawinan no 1 tahun 1974, dimana hasilnya adalah masing-masing dari suami istri memperoleh seperdua dari harta bersama. Selain itu, kadangkala pasangan suami istri menggunakan pendekatan mediasi, dimana hasilnya setiap pasangan tidak selalu mendapatkan seperdua dari harta bersama, tetapi tergantung dengan adat dan kebiasaan yang berlaku

Kata Kunci: perceraian, harta bersama

Introduction

Marriage is an inner birth bond between a man and a woman as a husband and wife to form a happy and eternal family.¹ The purpose of marriage is to create a *sakinah*, *mawaddah*, and *rahmah* marriage.² These goals need to be set with certain conditions and harmony, for the goals of marriage to be achieved.³

A marriage will be achieved if the marriage meets several rules (conditions), namely those that have been stipulated in Islamic law applicable in a country, including Indonesia.⁴ In Islamic law to be able to perform marriage legally, of course, there needs to be between the terms and pillars of marriage governed by Islamic law itself, among the conditions for marriage is the presence of a prospective husband, a prospective wife, a guardian of marriage, two witnesses, and promise of marriage (*ijab qobul*). Without the fulfillment of these pillars and conditions, the marriage is said to be null and void.⁵

Void is the corruption of the law that is stipulated against the practice of a person because of ineligibility and harmony laid down by *shara'*. So the annulment of marriage is a broken or invalid marriage because it does not meet any of the conditions of marriage.⁶ Law of the Republic of Indonesia Number 1/1974 on Marriage states that: marriage can be annulled if the parties do not meet the conditions of marriage to perform the marriage.⁷ This means that both parties have entered into marriage, but it is contrary to the pillars and conditions of marriage.⁸ Thus the annulment of marriage means a court ruling stating that the marriage performed is invalid. As for the legal consequences of annulment of the marriage is that the marriage becomes broken and for the parties who are married to return to their original status because the marriage is considered to never exist and the parties no longer have legal relations with relatives and ex-husbands or wives.

¹ Subekti, *KUHP Edisi Revisi Dengan Tambahan UUPA Dan Undanng-Undang Perkawinan*, 1995.

² Tim Media, *Kompilasi Hukum Islam*, n.d.

³ Ahmad Rofiq, *Hukum Islam Indonesia* (Jakarta: Rajagrafindo, 2003).

⁴ *UU Perkawinan No 1 Tahun 1974*, n.d.

⁵ Muhammad Idris Ramulyo, *Hukum Perkawinan Islam Dan Kompilasi Hukum Islam* (Jakarta: Bumi Aksara, 1996).

⁶ Tihami, *Fikih Munakahat: Kajian Fikih Nikah Lengkap* (Jakarta: Rajawali Press, 2010).

⁷ *UU Perkawinan No 1 Tahun 1974*.

⁸ Beni Ahmad Saebani, *Fiqh Munakahat (Buku II)* (Bandung: Pustaka Setia, 2010).

A marriage can be annulled if: first, a husband commits polygamy without the permission of the Court of Religion. Second, the woman who was married was later known to still be the wife of another man who *mafqud* (missing unknown news). Third, the married woman is still in the 'iddah period of another husband. Fourth, marriages that violate the marriage age limit, as stipulated in Marriage Law Number 1/1974. Fifth, marriages that are performed without a guardian or performed by an unauthorized guardian. Sixth, marriage is done by force.⁹

Who can handle and decide the case of annulment of marriage is the Court. An annulment can only be done by the court using filing for an annulment of marriage as stipulated in the Compilation of Islamic Law (Kompilasi Hukum Islam) :

- (1) The application for annulment of marriage may be submitted to the Religious Court which occupies the residence of the husband or wife or the place where the marriage is held
- (2) The annulment of a marriage shall commence after the decision of the Court of Religion shall have a fixed and valid legal force from the moment of the marriage

As the contract has legal consequences, the annulment of marriage also causes legal consequences, both for the husband and wife itself and against all things resulting from the marriage. The annulment of marriage begins after the decision of the Court of Religion has a fixed legal force and applies from the moment of the marriage.¹⁰

Annulment of marriage gives the impression that the marriage has previously taken place and it could be that there is a child born in the marriage bond and there is also a shared property obtained during the marriage. Annulment of marriages causes some legal consequences including those relating to children and shared property. Marriage Law Number 1/1974 mentioned that shared property is property obtained by the husband and wife during the marriage bond, outside of gifts or inheritance. This means that the common property is all the wealth obtained during the match without any matter which of the husbands and wives is looking for it.

⁹ Media, *Kompilasi Hukum Islam*.

¹⁰ Media.

The annulment of the marriage resulted in the husband and wife's relationship ending and the ownership of each husband and wife's personal property did not change and remained his. Shared wealth is divided according to Islamic law. Compilation of Islamic Law (KHI) explains that ex-husbands and ex-wives are entitled to a second of the shared property, or in other words, ex-husbands and wives get a portion of the shared property.

Yusnidar Rachman researched the annulment of marriage because of the falsification of identity from one of the parties. In the marriage, it is known that the married husband is known to still be in the legal marriage bond of another woman. Yusnidar Also writes about the legal consequences of the property obtained during the marriage.¹¹

The case of annulment of marriage was written by Satria Efendi M. Zein, in a book entitled *Problematica Of Contemporary Islamic Family Law*. He wrote about the applicant's attempt to annul the marriage between his grandfather and his second wife. The request for annulment of the marriage only emerged from the granddaughter of the first wife after 64 years of marriage. The reason for the annulment of his marriage was because of the lack of one of the requirements in the marriage. The annulment of the marriage relates to his grandfather's inheritance which can fall to the applicant and the descendants of the second wife. Prof Satria also wrote, there is a possibility of a marriage that is canceled due to several factors, such as ignorance, confusion. Both of them are convinced of the validity of the relationship because of the marriage contract. In the study of Islamic law, as long as the husband and wife are not aware of any defects that invalidate their marriage, the validity of their offspring remains valid in case of annulment of marriage.¹²

Method

This research is qualitative in which the author examines matters related to the annulment of marriage caused by an actual guardian (invalid). While the approach used in this study is juridical normative and sociological. A juridical

¹¹ Y Rachman, "Pembatalan Perkawinan Serta Akibat Hrachman, Y. 'Pembatalan Perkawinan Serta Akibat Hukumnya Di Pengadilan Agama Slawi,' 2006. [Http://Eprints.Undip.Ac.Id/15976/Ukumnya Di Pengadilan Agama Slawi,](http://Eprints.Undip.Ac.Id/15976/Ukumnya%20Di%20Pengadilan%20Agama%20Slawi)" 2006, <http://eprints.undip.ac.id/15976/>.

¹² Satria Effendi, *Problematika Hukum Keluarga Islam Kontemporer* (Jakarta: Kencana, 2010).

approach is used to analyze various laws and regulations in order to obtain secondary data in the field of law. The sociological approach is used to analyze the extent to which the resolution of disputes about shared assets is resolved outside the applicable legislation. This study used research objects in the Kediri City Religious Court as a primary data source and various literature as secondary data sources.

Discussion

The marriage law states that shared property is property obtained by the husband and wife during the marriage bond, outside of gifts or inheritance.¹³ This means that the common property is the property obtained during the marriage without questioning which of the husbands or wives who seek it and in whose name the property is listed. While personal property is property brought by husband and wife before marriage, or property obtained from husband or wife as a gift or inheritance while the marriage is still going on.¹⁴

Shared property in marriage is a husband and wife's property obtained during the marriage bond, either individually or jointly without questioning in whose name the property is listed. Therefore, all the wealth obtained during marriage belongs to the husband and wife.¹⁵ Wasman argues that shared property is an asset obtained or obtained during marriage as long as there is no agreement on the status of the property at the time of marriage.¹⁶

Islamic law entitles to each husband and wife to own property individually, where such rights cannot be interfered with by the other party. The husband who receives gifts, inheritance, and so on has the right to take full control of the property he has received. The wife who receives gifts, inheritance, dowry, etc. is entitled to take full control of her property. Whatever they have before marriage is theirs.¹⁷

Not all Islamic countries have problems with shared property between husband and wife. Such problems are only possible in communities that recognize the existence of shared property. In the beginning, shared property in

¹³ UU Perkawinan No 1 Tahun 1974.

¹⁴ UU Perkawinan No 1 Tahun 1974; Subekti, *KUHP Edisi Revisi Dengan Tambahan UUPA Dan Undang-Undang Perkawinan*,.

¹⁵ Muhammad Zain, *Membangun Keluarga Humanis* (Jakarta: Graha Cipta, 2005).

¹⁶ Wasman, *Hukum Perkawinan Islam Indonesia* (Yogyakarta: Teras, 2011).

¹⁷ Ahmad Azhar Basyir, *Hukum Perkawinan Islam* (Yogyakarta: UII Press, 1999).

the marriage was based on *'urf* or customs that did not separate between the property of husband and wife. Shared wealth is not found in Islamic societies whose customs separate between husband's property and wife's property in the marriage. In Islamic societies like this, the rights and obligations in the marriage especially those related to spending are strictly regulated. For example, in return for a wife who has taken care of the house, her husband and children are entitled to a living from the husband according to their ability. The property of the husband's income during the marriage bond is the husband's property, not considered as share property. The wife is only obliged to take good care of the husband's property. If the wife has her income, then the proceeds of her business are not mixed with her husband's property but kept alone separately. If a husband has difficulty in financing one day, and the husband uses the property from the wife's business, then the husband is in debt to the wife and must reimburse her for another day.¹⁸

Islamic society that mixes the husband's income with the property of the wife's business considers that the marriage contract contains a *syirkah/covenant*, so all the property obtained during the marriage bond is considered property with the husband and wife. This concept does not question the efforts of who is the most in obtaining the property. In indigenous Indonesian communities, provisions on the shared property can be found in almost all regions. For example in Aceh area the common treasure is called *hareuta sihareukat*, in Gayo area called *pohroh* treasure, in Java called *gono gini* treasure, in Sunda called *guna kaya* treasure, in Bali called *druwegabro*, in Kalimantan called *barang papantangan*, in Minangkabau called *harta suarang nan babagi*, in Madura called *ghuna ghana*.¹⁹

The shared property is *shirkah abdan*, as most of the married couples in Indonesia work. Also, the mutual property is *shirkah mufawwadah* because the nature of cooperation between husband and wife is not limited, both in terms of time, and efforts did.²⁰

¹⁸ Effendi, *Problematika Hukum Keluarga Islam Kontemporer*.

¹⁹ Idris Ramulyo, *Hukum Perkawinan, Hukum Kewarisan, Hukum Acara Peradilan Agama, Dan Zakat Menurut Hukum Islam* (Jakarta: Sinar Grafika, 2006).

²⁰ Wasman, *Hukum Perkawinan Islam Indonesia*.

According to Islamic law, the property that is obtained by the husband and wife because of his efforts is joint, whether both work or only the husband who works. And when they are bound by the covenant of marriage, then all are united, both wealth and children.²¹

There is no separation between the husband's property and the wife's. The husband's wealth is mixed with the wife's property. In the marriage, a sense of togetherness takes precedence. Thus, all the property obtained after the marriage contract in a marriage is considered as a common property regardless of who is more in the effort to obtain the property. This concept does not diminish the role of the husband as ahead of the marriage.²²

Yuridical Perspective of Share Property Settlement

Basically, in Islamic law, there is no known existence of shared property. The wife's property remains the property of the wife and is fully controlled by the wife. The husband's property remains the property of the husband and is fully controlled by the husband. However, with marriage, there is an alliance between husband and wife in living a married life. If in the marriage the wealth has been obtained, then the wealth is seen as shared property. Thus, there are personal treasures and there are also shared treasures.

The common property referred to herein is property obtained during the marriage. This must be made clear because Islam does not recognize the mixture of husband and wife's property caused by marriage. This is stated in the Compilation of Islamic Law Article 86 paragraph (1). And the property of the wife shall be overpowered by it, and the husband's property is the right of the husband and is fully controlled by the husband.²³ And if they bring their property before marriage, it will be theirs, unless there is a marriage agreement between them.

If there is a debt, it is detailed, whether it is a husband's debt or a wife's debt. This is because the liability for the debt is charged to each husband and wife. If the debt is a family debt, then the liability is charged to the shared

²¹ Ramulyo, *Hukum Perkawinan, Hukum Kewarisan, Hukum Acara Peradilan Agama, Dan Zakat Menurut Hukum Islam*.

²² Satria Effendi, *Problematika Hukum Keluarga Islam Kontemporer*, (Jakarta: Prenada Media, 2004).

²³ Media, *Kompilasi Hukum Islam*.

property. If the shared property is not sufficient to pay the debt, it is charged to the husband. If it is not sufficient, then the debt is charged to the wife.²⁴

The distribution of shared property due to the annulment of marriage caused by unauthorized guardians is equated with the division of shared property due to divorce. The division is entitled to one-half of the shared property as long as there is no marriage agreement. In the event of divorce, half of the shared property belongs to a living spouse.²⁵

The issue of property that existed before marriage and after the annulment of marriage due to unauthorized guardianship, is a matter that needs to gain a deep understanding because it concerns the protection of the rights and obligations of the parties. The Compilation of Islamic Law in Article 75 states that: "the decision to annul the marriage does not apply retroactively to:

- 1) Marriage that is annulled because of one of the husbands or wives apostates.
- 2) Children born to the couple.
- 3) Third parties as long as they obtain rights in good faith before the decision of annulment of marriage has a fixed legal force.

But before discussing the wealth of husband and wife in marriage, we must look at the position of wealth in general. When viewed from its origin, husband and wife's property can be classified into three groups, namely:

- 1) The property of each husband and wife owned before they marry, whether derived from their inheritance, grant, or business, or can be referred to as innate property.
- 2) The property of each husband and wife that is owned after they are in a marital relationship, but obtained not from their efforts either one-on-one or together, but is a grant, will, or inheritance for each.
- 3) Wealth acquired after they are in a marital relationship for the efforts of both of them or the efforts of one of them or called a livelihood.²⁶

In the beginning, the husband's property and the wife's property were separated, either their property or property obtained by one of the husbands on their own or a grant obtained by one of them because of gifts or grants or

²⁴ Media.

²⁵ Media.

²⁶ Sayuti Thalib, *Hukum Kekeluargaan Indonesia : Berlaku Bagi Umat Islam* (Jakarta: UI Press, 1986).

inheritance after they were bound in a marital relationship.²⁷ However, *shirkah* is likely to occur on the property of the husband and wife officially and in certain ways. Thus, the husband and wife can perform *shirkah* or a mixture of.²⁸

Article 35 paragraph (1) of Law of the Republic of Indonesia Number 1/1974 on Marriage explains that property obtained during the marriage becomes shared property. Therefore, the mutual property is all the wealth obtained after marriage, without question who earns more in the effort to obtain it. Because of marriage, shared property is formed between husband and wife by not questioning who is looking, nor does it question on whose behalf the property is listed. Also, husband and wife can act to benefit and account for the property. This indicates that, due to marriage, the property is automatically merged into one as long as the parties do not specify another. So if a marriage is annulled then the property obtained during the marriage is shared property and the parties have the right to it.

The distribution of shared property in the case of annulment of marriage because the guardian is not regulated by the division of shared property due to divorce, as stipulated in article 37 Law No. 1 of 1974 which states that, "If the marriage breaks up due to divorce, the shared property is regulated according to their respective laws". Because the article states that the settlement of shared property is regulated according to their respective laws, the Religious Court uses Islamic Law in resolving the case. One of the efforts to settle is that each party is entitled to one-half of the shared property as long as it is not specified otherwise in the marriage agreement.²⁹

Sociological Perspective of Shared property Settlement

Sociologically, the discussion of the function of law in society is directed at the fact of whether the law applies or not. The validity of the law in legal theories is usually distinguished into three kinds, namely:

- 1) The rule of law applies juridically: if the determination is based on a higher rule of degree, or if the form is by the established, or if it shows a mandatory relationship between a condition and its consequences
- 2) The rule of law applies sociologically: if the rule is effective. That is, the rule can be imposed by the ruler even if it is not accepted by the citizens

²⁷ Media, *Kompilasi Hukum Islam*.

²⁸ Ramulyo, *Hukum Perkawinan Islam Dan Kompilasi Hukum Islam*.

²⁹ Media, *Kompilasi Hukum Islam*.

(the theory of power), or the rule applies because it is accepted and recognized by the public (theory of recognition)

- 3) The rule of law applies philosophically: That is, following the ideals of the law as the highest positive value.³⁰

A rule of law cannot be said either if it meets philosophical or ideological and juridical requirements only. The regulation is only considered good if sociologically apply effectively to the community that is obliged to implement it. However, if there are violations of the law, it is not appropriate to conclude that the regulation is sociologically not applicable in the community.

Legal effectiveness is a process that aims to make the law effective that can be reviewed from factors that may affect it. These factors are as follows:

- 1) The legal factors themselves
- 2) Law enforcement factors, namely those who form and who apply the law
- 3) Factors of facilities or facilities that support law enforcement
- 4) Community factors, i.e. the environment in which the law applies
- 5) Cultural factors, namely as the result of work, copyright, and taste based on the human initiative in the association of life.

The connection of these theories with the settlement of shared property in the case of annulment of marriage caused by the guardian is not a symptom in the Islamic society in Indonesia that has not done the settlement of the property through the institution of the court. Consequently, not least the results of the Court's decision that triggered the emergence of new problems.

The above symptoms are inseparable from the function of law as social control (social control) and the means to change society (social engineering). The law serves as a means of social control, meaning the law is seen as a means to maintain social stability. The law serves as a means to change society, meaning the law is seen as a means to change the social structure, that is, if social change is late from the change of law, then the law with all its equipment plays a role to bring the community into a new order that is considered better and beneficial to the life of the community itself.³¹ On this basis, both legal

³⁰ Mustafa Abdullah Soerjono Soekanto, *Sosiologi Hukum Dalam Masyarakat* (Jakarta: Rajawali Press, 1987).

³¹ Satjipto Rahardjo, *Hukum Dan Perubahan Sosiologi: Suatu Tatanan Teoritis Serta Pengalaman-Pengalaman Di Indonesia* (Yogyakarta: Genta Publishing, 2009).

functions can be used to see how the judge of the Kediri Religious Court in handling the case of annulment of marriage due to the actual guardian.

From this comes the next question is: has the public awareness of the good law grown and lived? Or does the dynamics of society show progress in sentencing or not? The results showed that the actions of the community by conducting family deliberations, in addition to being profitable, also contain its weaknesses, namely not having the force of law that is coercive and binding. Therefore, to maintain the adverse things that often occur in the mechanism of sharing of property together, of course, there must be clarity and mutual agreement that is more concrete, such as a certificate from a notary public. Considering that the marriage has been born as a fruit of love, but the decision to annul the marriage does not apply retroactively to the children who were born.

This brings us to another perspective of legal sociology, namely how the law serves as a means of social engineering (social engineering) or able to realize society for the better. In this case, the law should be a powerful tool to make social change even indirectly.³²

Thus, from a sociological perspective, the settlement of the above-shared property is considered valid for the cultured community. Because appropriate values according to a community is a manifestation of the conscience of the community in the context of environmental conditions that cover the culture and customary law that develops.

Therefore, the event of the sharing of shared property that is resolved by customary legal mechanisms or familiarly mediated by mediators is a separate part of the law that applies in the community. The community prefers the settlement of shared property like this to achieve peace among the parties concerned. From the perspective of Islamic law, the settlement of the case of the sharing of property together above is not much different from *as-sulh*, which is an agreement aimed at ending disputes or disputes.³³ By way of *al-sulh*, it may be that the husband gets 50% and the wife 50%, or the husband gets 40% and the wife 60%, and it can also be shared with another percentage as far as each party includes its services and efforts in generating property. All

³² Soerjono Soekanto, *Pokok-Pokok Sosiologi Hukum* (Jakarta: Rajawali Press, 2011).

³³ Hendi Suhendi, *Fiqh Mu'amalah* (Jakarta: Rajawali Press, 2010).

of them are justified by Islamic law, as long as it is the result of peace that has been pursued based on each party's willingness.

Indeed, in the KHI applied in the Religious Judiciary, the shared property between husband and wife is divided where each party gets 50%. Article 97 of the KHI states that widows or divorced widowers are entitled to one-half of the shared property as long as it is not specified otherwise in the marriage agreement. However, the provisions in this KHI are not a patented legal ruling. If the husband and wife have agreed to divide the property by a certain percentage, then their agreement and willingness take precedence.

On the other hand, the settlement of the above shared property is also supported by a rule of the proposal, namely *al-'adah al-muhakkamah*. In the perspective of *al-'adah al-muhakkamah*, the sharing of property together can be seen as a result of social construction, so in this case, Islamic law views the practice as *al-'adah* that occurs after one particular society. In this context Islamic law is seen as a law that flows and has veined its roots in the culture of society, so that Islamic law is classified as a law that lives in society (the living law). Not only because Islamic law is a religious entity embraced by the majority of Indonesians, but Islamic law has also become part of the tradition (custom) of the community.³⁴ Thus, the sharing of property together like this is considered valid for the community that cultivates it, because the appropriate values according to society are a manifestation of the conscience of the community.

The character of the Islamic law that is accommodating to *al-'adah* or adat is very by the function of Islam as a universal religion. In this context, of course, *al-'adah* means a good tradition, by the guidance of revelation and acceptable to the community.

Conclusion

Annulment of marriage can occur due to the unfulfillment of harmony and conditions in marriage. One of the consequences of the annulment of marriage results in a shared property. Article 37 of Marriage Law No. 1 of 1974 states that if the marriage breaks up due to divorce, then the shared property is

³⁴ Bani Syarif Maula, *Sosiologi Hukum Islam Di Indoensia : Studi Tentang Realitas Hukum Islam Dalam Konfigurasi Sosial Dan Politik*. (Yogyakarta: Aditya Media Publishing, 2010).

regulated according to their respective laws. Considering that in the article the settlement of shared property is regulated according to their respective laws, the Court of Religion which is an institute to handle the case of Muslims using Islamic Law in resolving the case. One of the efforts to resolve it, as formulated in article 97 of the KHI, is that each party is entitled to one-half of the shared property as long as it is not specified otherwise in the marriage agreement.

While in the context of sociology, the sharing of share assets is resolved by the mechanism of customary law or familiarly by being mediated by mediators. From the perspective of Islamic law, the settlement of the case of the sharing of property together above is not much different from *as-sulh*, which is an agreement aimed at ending disputes or disputes. By way of *al-sulh*, it may be that the husband gets 50% and the wife 50%, or the husband gets 40% and the wife 60%, and it can also be shared with another percentage as far as each party includes its services and efforts in generating property.

Problem solving as above is a part of the law that applies in the community. The community prefers the settlement of shared property like this to achieve peace among the parties concerned. Thus, based on the social glasses of the settlement of shared property above can be considered valid for the community that cultivates it. Because appropriate values according to a community is a manifestation of the conscience of the community in the context of environmental conditions that cover the culture and customary law that develops.

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