

The Role of Notaries in Making Agreements for the Sharing of Joint Assets for Supplies who will Divorce without a Marriage Agreement

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Abstract. *Property as a life support for the bride and groom in the marriage bond. Where the property is obtained before the marriage (innate property) and obtained during the marriage (joint property). If the marriage bond is dissolved or broken, then each of them will defend their rights to the joint property so that the joint property is often a serious problem and often creates debate between the two parties (husband and wife). The research approach method used in this thesis is sociological juridical. This research specification uses descriptive analysis. The type of data used in this research is primary data which includes the 1945 Constitution; Act No. 2 of 2014 concerning the Position of a Notary; Act No. 16 of 2019 on the amendment to Act No. 1 of 1974 concerning Marriage; Code of Civil law; Compilation of Islamic Law, as well as secondary data containing books and other supporting documents. Collecting research data with interview techniques and study of documents or library materials. The data analysis method used is qualitative analysis. The results of the research and discussion that: First; the division of joint property for couples who are going to divorce in the concept of justice, namely dividing joint property equally or equally. This is in line with what has been regulated in the Marriage Law, the Civil Code and the compilation of Islamic Law which states that if there is a divorce, the joint assets are divided equally. Second; The role of a notary in making a deed of a joint property distribution agreement for a divorced couple without a marriage agreement, namely a notary as a public official who has the authority to make an authentic deed including a deed of a joint property distribution agreement based on the will of both parties who agree to share their assets in accordance with the law applicable.*

Keywords: Assets; Divorce; Share.

1. Introduction

Shared assets or what is often referred to as gono-gini assets are still taboo among the public. It seems that people are still looking down on this issue. Married couples usually only question the distribution of this joint property after a divorce decision is made by the court. In fact, in every court process there is often a dispute regarding the distribution of joint assets so that this condition complicates the divorce process between the two parties because each claims that "this and that" property is part of his or her rights.¹

This property issue cannot be considered by the prospective bride and groom who will marry. They only thought about getting married for good. That is, it did not occur to the couple that one day the divorce might happen. They only think about the property during the process or after the divorce. Thus, the discussion on this issue needs to be raised in public discourse. The community needs adequate knowledge about this issue which will actually open our knowledge, that joint property needs to be known from the beginning of marriage by a pair of prospective brides.²

Marriage institutions in Indonesia are known to the public for the mixing of marital assets. The bride and groom never argue about the property of each party. The principle of mutual trust and understanding of partners is used as the basis for the unification of marital property. Slowly foreign cultures known to be individualistic and materialistic entered Indonesia through the colonizers. After centuries their pattern of life has been passed down to generations of people.³

The marriage will have legal consequences, one of which is related to property in marriage. This property is the life support for the bride and groom. Where the property is obtained before the marriage (innate property) and obtained during the marriage (joint property). There is a sharp difference between the control of joint property and the control of inherited property, gift assets and/or inheritance during the marriage. Congenital assets, gift assets, inheritance are under the control of each husband and wife, meaning that the party who controls the property can freely do anything with the property, without requiring

¹ Susanto, H. (2008). *Pembagian Harta Gono-Gini Saat Terjadi Perceraian, Cet.ke-1*. Jakarta: Visimedia, p.37.

² *Ibid*, p.2

³ Surjanti. (2016). Perlindungan Hukum Terhadap Harta Dalam Perkawinan. *Jurnal Unita, Volume 2 No 1* February 2016, p.1. url: <https://journal.unita.ac.id/index.php/yustitia/article/download/125/117/> accessed on 10 May 2022, at 09.00 WIB

the approval of the other party. While the joint property is under the joint control of husband and wife, so that if one of the husband or wife If you want to take legal action on your property, such as selling, mortgaging, etc., you must obtain approval from other parties (Articles 35 and 36 of the Marriage Act No. 16 of 2019). This can happen during the marriage. If there is a problem or divorce, the innate property will be returned to each husband or wife. As for joint assets, the arrangement is left to their respective customary law or applicable law. Often with the ignorance of married couples when their household is in trouble, such as facing divorce, they come to a notary to make a deed of distribution of assets, they consider it a marriage agreement.

The division of joint property, in which many parties are involved, one of which is a notary. Notary is a public official who is authorized to make authentic deeds and other authorities, as referred to in this Law (Article 1 point 1 of the Law on Notary Positions). Then Article 1868 of the Civil Code states that an authentic deed is a deed made in the form determined by law, by/in front of a public official authorized for that at the place where the deed was made. Thus from these two provisions it is known that a Notary is a public official. A public official is a position that is carried or given to those who are authorized by the rule of law in making authentic deeds. So a notary as a public official is given the authority to make an authentic deed.⁴

Article 15 point 1 of Act No. 2 of 2014 on the amendment to Act No. 30 of 2014 concerning the Position of a Notary states: "Notaries have the authority to make authentic deeds regarding all acts, agreements, and provisions required by laws and/or regulations. required by the interested party to be stated in an authentic deed, guaranteeing the certainty of the date of making the deed, keeping the deed, providing grosse, copies and keeping the deed, all of this as long as the making of the deed is not assigned or excluded to other officials or other persons stipulated by law". Meanwhile, Article 15 point 2 also states that a notary is also authorized to ratify signatures and determine the certainty of the date of the letter under the hand by registering it in a special book. book private letters by registering in a special book, make copies of the original underhand letters in the form of copies containing descriptions as written and described in the letter in question, validate the suitability of photocopies with the original letters, provide

⁴ Naja, D. (2019). *Notaris Syariah Islamisasi Transaksi, Cet.ke-1*. Jawa Timur: Uwais Inspirasi Indonesia, p.59-60

legal counseling in connection with making a deed, making a deed related to land; or make a deed of auction minutes.⁵

Notaries have a "role in making the deed of distribution of joint assets after the termination of the marriage based on the decision of the Religious Court and the deed of distribution is the desire of both parties, either ex-husband or ex-wife. It is clear that the presence of a notary is to meet the needs of the community who require legal documents in the field of civil law, so that notaries have a responsibility to serve the community at large.⁶

With regard to joint property, the implementation is certainly not as simple as one might imagine, there are legal provisions for joint property and this is different from the legal position with innate property which is the full right of each party (husband or wife) concerned, both in its management and utilization. "In joint property, all assets obtained after the marriage bond takes place will become joint property and are categorized as joint property, regardless of whether the property is produced individually by the husband or wife or jointly. This means that joint property cannot be controlled by one party during the marriage, but both husband and wife will get a share of the joint property if the marriage bond is dissolved or broken.

2. Research Methods

The research approach method used was sociological juridical, namely examining the applicable legal provisions and what is happening in reality in society. This research was carried out on the actual situation that occurs in society with the intention of knowing and finding the facts.⁷ The research specification used was descriptive analysis, which was a method that serves to provide an overview of the object under study through existing data and draw conclusions from the problems discussed. Sources of data include primary data and secondary data. Data collection methods used were interview studies and literature studies. The data analysis method used in this study was qualitative data analysis, because this research refers to the legal norms contained in legislation and court decisions as well as norms that live and develop in society.

⁵ Article 15 of Act No. 2 of 2014 concerning the Position of a Notary

⁶ Wiratama, A. (2020). AKTA PEMBAGIAN HAK BERSAMA YANG DIBUAT NOTARIS BERDASARKAN SURAT KETERANGAN WARIS PALSU ATAU DIPALSUKAN STUDI KASUS PUTUSAN MAHKAMAH AGUNG NOMOR 688 K/PID/2017. *Jurnal Hukum Adigma*, Volume 3 No 2 Desember 2020, p. 1095-1096. url: <https://journal.untar.ac.id/index.php/adigama/article/viewFile/10606/6780> accessed on 10 May 2022, at 10.00 WIB

⁷ Amiruddin. (2012). *Pengantar Metode Penelitian Hukum*. Jakarta: PT. Raja Grafindo Persada. p.24.

3. Results and Discussion

3.1. Distribution of joint assets for couples who will divorce without a marriage agreement in the conception of justice

Joint assets in the Indonesian Dictionary mean jointly acquired assets in marriage. Joint property is a legal concept that belongs to the realm of marriage law. This understanding is in line with the meaning of joint property in Article 35 paragraph (1) of Act No. 16 of 2019 regarding the amendment of Act No. 1 of 1974 concerning marriage that joint property is property acquired during marriage. It should be emphasized that the meaning of joint property does not only include acquired property, but also includes debts that arise during marriage. This aims to balance the rights and obligations of husband and wife against joint debts that arise during marriage.⁸

Mixing of assets occurs after the marriage, then at that time the joint property association exists and binds husband and wife. Even if the mixing of assets occurs according to the law, it does not mean that the situation cannot be avoided or excluded. Marriage law (positive law) provides a way out, namely by making a marriage agreement that explicitly separates the assets of husband and wife in marriage. The existence of a marriage agreement is confirmed in Article 29 of the Marriage Law. Marriage agreements are made before the prospective husband and wife are married and are recorded (recorded) before the marriage registrar. Regarding the object or designation of the marriage agreement, it is implicitly stated in Article 35 paragraph (2) of the Marriage Law, namely "as long as the parties do not determine otherwise".⁹

The provisions regarding the distribution of joint property are based on the conditions that accompany the relationship of a marriage. If a husband and wife are disconnected due to a divorce between them, the distribution of joint property is regulated according to their respective laws. This provision is regulated in Article 37 of the Marriage Law, which is meant by the respective laws covering religious law, customary law and so on. For Muslims, the provisions for the distribution of joint assets are regulated in the Compilation of Islamic Law, while for adherents of other religions it is regulated in the Civil Code. For Muslims, the distribution of joint property in the category of divorced based on Article 97 of the Compilation of Islamic Law states: "Each widow or widower is

⁸ Asnawi, M. (2020). *Hukum Harta Bersama: Kajian Perbandingan Hukum, Telaah Norma, Yurisprudensi, dan Pembaharuan hukum, Cet.Ke-1*. Jakarta: Kencana, p.33

⁹ *Ibid*,p.49

entitled to one-half of the joint property as long as it is not stipulated otherwise in the marriage agreement". That is, in the case of divorce if there is no marriage agreement, the settlement in the distribution of joint property is taken based on the provisions in Article 97 of the Compilation of Islamic Law. While the distribution of joint assets for adherents of religions other than Islam is based on Article 128 of the Civil Code which states: "After the dissolution of the union, the unitary property is divided between husband and wife, or their respective heirs, regardless of the question of which party the goods were obtained from. With this provision, if a husband and wife divorce, their joint property is divided in two (50:50). This provision is no different from the provisions in Article 97 of the Compilation of Islamic Law. If you look closely at these two sources, Both the Compilation of Islamic Law and the Civil Code stipulate that in the event of a divorce, the joint property is divided in two, each receiving a 50:50 share. This division of joint property can be filed together with a divorce suit, without having to wait for the court's divorce decision first.¹⁰

Justice has been a serious topic of discussion since the beginning of Greek philosophy until today. Justice itself has a broad scope, ranging from ethical, philosophical, legal, to social justice. Several prominent figures gave their views on the concept of justice according to them, one of them was Aristotle. Aristotle's view of justice can be found in his work *nichomachean ethics*, *politics*, and *rhetoric*. Specifically seen in the book *nicomachean ethics*, the book is entirely devoted to justice, which, based on Aristotle's legal philosophy, should be considered as the core of his legal philosophy, "because law can only be established in relation to justice". According to Aristotle, justice is divided into two things, namely:

- Distributive Justice

Distributive justice is justice that requires each party to get what is their right proportionally.

- Commutative Justice

Commutative Justice is the determination of rights between various parties, both physically and non-physically. This principle of justice concerns a person's property rights, whether previously owned or obtained through legal means.¹¹

¹⁰Happy Susanto, Op. Cit., p.40

¹¹ Apeldoorn, V. (1996). *Pengantar Ilmu Hukum*. Jakarta: Pradya Paramita. p.11-12

Based on the analysis carried out, both in terms of the positive law that applies in Indonesia and the existing concept of justice, that the distribution of joint property to couples who are going to divorce can be done in many ways, if during the marriage but not accompanied by a marriage agreement, in the event of a divorce the inherited assets automatically become the rights of each husband or wife and the joint property will be divided equally between the two. This is in line with what is explained in the theory of justice, both distributively and mutably, but if there is a marriage agreement, then the distribution of assets is carried out based on the provisions in the agreement. This is certainly not much different from the provisions stipulated in the Civil Code and the Marriage Law, where property is divided equally or 50:50 percent for each party.

3.2. The Role of a Notary in Making a Deed of Agreement on the Distribution of Joint Assets for a Spouse Who Will Divorce Without a Marriage Agreement According to the Marriage Law Based on the Theory of Authority

Notary is a public official who is authorized to make authentic deeds and other authorities, as referred to in this Law (Article 1 point 1 of the Notary Position Act). 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/in the presence of a public official authorized to do so at the place where the deed was made. Thus, from these two provisions it is known that a Notary is a public official, which is a position that is carried or given to those who are authorized by the rule of law in making authentic deeds. Notaries as public officials are given the authority to make authentic deeds. The authority of a notary as has been regulated in Article 15 of the Law on Notary Positions, namely:

- Notaries are authorized to make authentic deeds regarding all actions, agreements, and stipulations required by laws and regulations and/or desired by the interested parties to be stated in an authentic deed, guaranteeing the certainty of the date of making the deed, storing the deed, providing grosse, copies and quotations of the deed. , all of that as long as the making of the deeds is not also confirmed or excluded to other officials or other people stipulated by law.
- Notaries are also authorized to:
 - Validate the signature and determine the certainty of the date of the letter under the hand by registering it in a special book;
 - Putting letters under the hand by registering in a special book;

- Make copies of the original letters under the hand in the form of copies containing descriptions as written and described in the letter concerned;
- Validating the compatibility of the photocopy with the original letter;
- Provide legal counseling in connection with the making of the deed;
- Make a deed related to land; and
- Make a deed of auction minutes.

The authority that exists in the notary, of course, one of the notary's authority is to make a deed of distribution of joint assets. The problem of wealth 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 property by claiming that "this and that" property is his. In this regard, the role of the other party is needed as a mediator who provides input and legal advice to both parties. The role of the other party that is meant in this case is the role of the Notary. In relation that the role of the Notary with the needs of the community is very important, considering that a Notary is an official who has the authority to make an authentic deed and in this case, the role of a Notary is to calculate the distribution of assets and make a deed of agreement on the distribution of joint assets for both parties who agree to share their assets. In this case, Philipus M. Hadjon argued that authority was obtained through three sources, namely attribution, delegation and mandate. Attribution authority is usually outlined through the division of state power by the Constitution, delegation and mandate authority are powers that come from delegation. The difference in delegation authority is the transfer or transfer of existing authority, or in other words the transfer of attribution to subordinate officials accompanied by the transfer of responsibility.¹²

Based on this theory, the notary's authority is included in the attribution authority, because the authority possessed by the notary comes from a statutory regulation, in this case the notary's authority comes from the Notary Position Act. Notaries have their own authority, because every authority must have a legal basis. So the authority of an official must be clearly and firmly regulated in the laws and regulations governing the position. so that if there is an act outside the authority of an official, it is called an act that violates the law. Therefore, an authority does not arise from the results of discussions or opinions from legislative institutions. The authority of a notary is regulated in Article 15 of the Law on Notary Positions as mentioned above.

¹² Yamin, A. (2022). *Buku Ajar: Hukum Administrasi Negara*. Surabaya: CV. Jakad Media Publishing, p.32

The results of the interview I also conducted with Notary Indah Permata Sari, SH., M.Kn Notary/PPAT, that the role of a notary in Indonesia, it is very necessary considering that a notary is a public official who is authorized to make an authentic deed including making a deed of agreement on the distribution of joint assets. Notary Public is a public official who is authorized to make a deed of agreement on the distribution of joint assets based on the will of both parties who agree to share their assets fairly through a joint property distribution agreement in accordance with applicable laws. The making of the deed of agreement on the distribution of assets is carried out before the divorce, because in the divorce process in court, the couple who will be divorced no longer discuss the issue of the distribution of assets. like this. However, it is possible if the divorced couple does not reach an agreement in the distribution of their assets, then the parties will submit the distribution of the joint property to the Religious Court along with the divorce suit.¹³

According to Notary Akmaluddin, SH, so far the implementation of the distribution of assets is in accordance with the agreement of the former husband and wife, and in accordance with the applicable laws and regulations Number 16 of 2019 regarding the amendment to Act No. 1 of 1974 concerning Marriage which states that the property is returned to each other. the parties who bring property and joint property are shared with movable and immovable objects that have proof of ownership of the certificate, the notary uses his PPAT position in completing the distribution of the joint property. Of course there are conditions that must be met by the parties in making this deed, namely the supporting documents in making the deed, such as Identity Card, Family Card, Marriage Certificate, and Proof of ownership of property.¹⁴

The results of the analysis above, that the role of the notary in making the deed of the agreement on the distribution of joint property is very important, because the notary as a public official who makes the deed of the agreement on the distribution of joint property based on the will of both parties who agree to divide the joint property fairly and the notary must ensure that the conditions that have been determined by law for the validity of the deed have been fulfilled by the parties and also regarding the origin of property ownership of the parties whether the property is property obtained during the marriage or parental inheritance, grant or gift, it must be proven by ownership of the origin of the property. If the parties cannot attach proof of ownership of the origin of the

¹³Interview with Indah Permata Sari, SH., M.Kn Notary/PPAT, Musi Rawas Utara Regency. On May 30, 2022, at 13:20 WIB.

¹⁴ Interview with Akmaluddin, SH Notary/PPAT Lubuk Linggau City, On 27 May 2022 at 10.00 WIB

property, it will be constrained in making the deed or the deed cannot be made if there is no basis. Furthermore, the implementation of the distribution of assets based on the agreement of the parties and carried out in accordance with the applicable laws and regulations, namely Act No. 16 of 2019 on the amendment of Act No. 1 of 1974 concerning Marriage.

4. Conclusion

The distribution of joint property to couples who are going to divorce can be done in many ways, if during the course of the marriage, however, not accompanied by a marriage agreement, in the event of a divorce the inherited assets automatically become the rights of each husband or wife and the joint property will be divided equally between the two. This is in line with what is explained in the theory of justice, both distributively and mutably, but if there is a marriage agreement, then the distribution of assets is carried out based on the provisions in the agreement. This is certainly not much different from the provisions stipulated in the Civil Code and the Marriage Law, where property is divided equally or 50:50 percent for each party. And the role of a notary in the making of a deed of agreement on the distribution of joint assets for a divorced couple without a marriage agreement according to the marriage law based on the theory of authority that the authority that exists in a notary includes attribution authority, because the notary's authority is based on and granted by law. In relation to the role of a notary, a notary as a public official who is authorized to make an authentic deed, including making a deed of an agreement on the distribution of joint assets based on the will of both parties who agreed to divide the joint assets fairly in accordance with the applicable law, namely Act No. 16 of 2019 on the amendment of Act No. 1 of 1974 concerning Marriage.

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