

## The Role of Notaries in Making Wills Regarding the Distribution of Inheritance according to Islamic Compilation Law

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**Abstract.** *This research aims to know and analyzing the role of a notary in making a will regarding the distribution of inheritance according to Islamic law. Analyzing the role of a Notary in making a will based on the provisions of the laws and regulations in force in Indonesia as well as the compilation of Islamic law as well as the obstacles and solutions of a notary in making a will regarding the distribution of inheritance according to Islamic law. This research is a type of legal research with a focus on the study of sociological juridical approach (Sociology Legal Research). Juridically by reviewing the applicable laws and regulations in accordance with the compilation of Islamic law and the Civil Code to achieve the final goal. The results of a sociological juridical study on the role of the role of a notary in making a will regarding the distribution of inheritance according to Islamic law is the role of a Notary in making a will before a Notary refers to the provisions of Article 1 point 1 UUJN which states, "Notaries are public officials who are authorized to make authentic deeds and have other authorities as referred to in this law or based on other laws", where each will or testament must be in the form of a deed in order to obtain legal certainty as a binding authentic deed. Inheritance assets often cause various legal and social problems, the obstacles that are often faced by notaries are very complex in their implementation, including: the notary lacks control and does not understand all the provisions of the inheritance certificate, the notary is not careful enough to check and ensure the completeness of the documents, the difficulty of the notary to ensure that the witnesses presented must really know about the family of the deceased heir, it is still often encountered witnesses or heirs who are dishonest in*

*providing information and there is no legal unification regarding the regulation of the implementation of the certificate of inheritance in Indonesia. From the above constraints, the researcher draws conclusions in the form of solutions including: notaries have a role to educate to become professional and reliable notaries, namely by carrying out scientific activities such as seminars about notaries, notaries in taking an action must be prepared and based on rules applicable law, a notary must be able to observe the actual facts in the reality.*

*Keywords: Compilation; Islamic; Role.*

## **1. Introduction**

In today's life, which is instant and fast, people really need services that can simplify their affairs. Today, there are many service sectors that help simplify the affairs of the community. One of them is the legal sector. In principle, the basic principle in law has a function for order, peace, tranquility, harmony and providing legal certainty in society, in human relations with one another. This is in accordance with Article 1 paragraph (3) of the 1945 Constitution which states "The State of Indonesia is a State of Law".<sup>1</sup>This means that all actions of community members must be based on the law. The legal sector is further divided into advocacy and notary services. If you look at the phenomena that exist in society, the notarial sector is currently the most needed service in any transaction, especially in the sale and purchase of services. Notaries have a very important role for the validity of the buying and selling process or the transfer of rights. One of the roles of a notary is the making of a will on the death of a person to regulate the rights and obligations of the second and third parties as regulated in inheritance law.

Inheritance law according to Mr. A Pitlo is a series of provisions in which, related to the death of a person, the consequences in the material sector are regulated, namely: as a result of the transfer of inheritance from someone who dies, to the heirs, either in a relationship between themselves or the other party.<sup>2</sup> While the Civil Code itself does not have a specific article that provides an understanding of inheritance law, only Article 830 states that "inheritance only takes place because of death". So the new inheritance is open to be inherited if the testator has died (Article 830 of the Civil Code) and the heir must be alive when the inheritance is open to be inherited (Article 836 of the Civil Code).

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<sup>1</sup> 1945 Constitution

<sup>2</sup>Afandi, Ali, (1986), *Hukum Waris Hukum Keluarga Hukum pembuktian*, Jakarta: Bina Aksara, p. 7.

The meaning of will according to Article 875 of the Civil Code is "a deed containing a statement of a person about what he wants will happen after he dies, and by which it can be revoked again".

In general, wills are made with the aim that the heirs cannot find out whether the inheritance left by the will is passed on to their heirs, or even passed on to other parties who are not heirs at all until the time for reading the will.

In Act No. 2 of 2014 concerning the Position of a Notary, in Article 1 Paragraph what is meant by a notary is a public official who is authorized to make an authentic deed and has other authorities as referred to in this Law or based on other laws. In this regard, pursuant to article 943 of the UUJN, it is determined that a Notary who keeps wills among the original documents, in whatever form, after the death of the testator, must notify the people concerned.<sup>3</sup>

The provisions of a Notary in his authority to make an authentic deed have been regulated in Act No. 30 of 2004 concerning the Position of Notary as amended by Act No. 2 of 2014 UUJN. In Article 1 point 1 UUJN, it has been stated that a Notary is a public official who is authorized to make an authentic deed and has other authorities as referred to in this Law or based on other laws. Regarding the authority of a Notary, Article 15 paragraph (1) of the UUJN has provided a description, that the Notary in his position is authorized to make authentic deeds regarding all actions, agreements, and stipulations required by legislation and/or desired by the interested parties to be declared in an authentic deed, guaranteeing the certainty of the date of the deed, keeping the deed.<sup>4</sup>

Notaries as public officials are given the authority to make all agreements and deeds as desired by the interested parties. This is in accordance with the provisions in 16 paragraphs (1) to paragraphs (13) of the UUJN. One of the powers of a Notary is to be able to make a will as mandated in the UUJN, including making a will before witnesses as regulated in Article 939 paragraph (4) The Civil Code and the making of wills outside of witnesses as regulated in Article 939 paragraph (2) of the Civil Code. A Notary in carrying out a legal action must always act carefully so that the Notary before making a deed must examine all relevant facts in his consideration based on the applicable laws and regulations<sup>5</sup>.

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<sup>3</sup> Kusuma, Ragil, Diah and Chali, Munsharif, Abdul. (2018). *Peran Notaris/PPAT Dalam Pembuatan Akta Pembagian Harta Warisan Terhadap Ahli Waris Yang Berbeda Agama*. Semarang Unissula: Jurnal Akta. p. 107.

<sup>4</sup> R. Soegondo Notodisoerjo, op.cit., p. 55.

<sup>5</sup> Wood, David. (1993). Forests to fields. Restoring tropical lands to agriculture. *Land use policy*. 10. 91-107. 10.1016/0264-8377(93)90001-Q, [https://www.researchgate.net/publication/11109790\\_Forests\\_to\\_fields\\_Restoring\\_tropical\\_land\\_to\\_agriculture/citation/download](https://www.researchgate.net/publication/11109790_Forests_to_fields_Restoring_tropical_land_to_agriculture/citation/download)

In practice, the making of a will by a Notary must pay attention to all the provisions stipulated or determined in the provisions of the legislation governing the implementation of a will. So that in the future nothing happens that can harm the parties which can then also harm the Notary who made the will. In relation to the duties and responsibilities of a Notary, the researcher is interested in conducting research on the role of a Notary in the Making of a Will on the Distribution of Inheritance according to Islamic Law<sup>6</sup>.

## 2. Research Methods

The research approach method used in this thesis is with a focus on the study of the Sociological Juridical approach (Sociology Legal Research). Juridically by reviewing the applicable laws and regulations in accordance with the Compilation of Islamic Law and the Civil Code to achieve the final goal. Sociologically, by looking at the reality in the field related to the problems to be studied, it is seen from the point of view of the application of the law and the provisions of the applicable legislation.<sup>7</sup>

The research data used in this study are distinguished into two ways, namely: Primary Data and Secondary Data. Primary data is obtained from research in the field directly, Secondary data is data obtained from research related to relevant empirical data and provides an explanation of primary legal materials. Data processing according to Abdulkadir Muhammad<sup>8</sup>, which was collected from this research literature and field research and then processed with the steps of the stages of data inspection, data marking, data reconstruction, and data systematization<sup>9</sup>.

## 3. Results and Discussion

### 3.1. The Role of Notaries in Making Wills Regarding the Distribution of Inheritance According to Islamic Law Based on Legal Certainty

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<sup>6</sup> Harnita, dkk. "Tanggung Jawab PPAT dalam Penetapan Nilai Transaksi Jual Beli Tanah dan Bangunan di Kota Banda Aceh", *Udayana Master Law Journal*, Vol. 8 No. 3 September 2019, p. 354-370.

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<sup>7</sup> Sunggono, Bambang. (2003). *Metode Penelitian Hukum (Suatu Pengantar)*. PT Raja Grafindo Persada: Jakarta. p.34.

<sup>8</sup> Ngani, Nico. (2002). *Metode Penelitian Dan Penulisan Hukum*. Yogyakarta:Pustaka Yustisia, p.180.

<sup>9</sup> Ngadenan, Eksekusi Hak Tanggungan Sebagai Konsekuensi Jaminan Kredit Untuk Perlindungan Hukum Bagi Kepentingan Kreditur Di Mungkid, *Jurnal Law Reform*, Vol 5 No. 1 April 2010

Notary comes from the Latin word *notariaat*, while the notary from *notarius* (*notarui*), is a person who carries out writing work.<sup>10</sup> The position of a notary in society is still respected today. Notary as an official who is a place for someone to get trusted advice. Everything that is written and determined (constant) is true, it is a strong document in a legal event. The role of a notary is very important in helping to create legal certainty and protection of the community, because a notary as a public official is authorized to perform an authentication behavior, as long as there is no authentication behavior.

Legal certainty and protection can be seen through the authentic deed he made as perfect evidence in court. The evidence is perfect because the authentic deed has three powers of proof, namely the power of outward proof (*uitwendige bewijskracht*), the power of formal proof (*formele bewijskracht*) and the strength of material proof (*materialele bewijskracht*).<sup>11</sup>

A notary is a form or embodiment and is the personification of the law of justice, truth, and is even a guarantee of legal certainty for the community. The position of a notary as a functionary in society is still respected today. A notary is usually considered an official from whom one can obtain reliable advice. Everything that is written and specified is true. It will be a problem for the parties if later one of the parties who agree reneges on the agreement and a dispute is born that can harm many parties. This risk can occur due to differences in the interests of each individual, unclear identity and denial of an achievement which ultimately leads to conflict between individuals.<sup>12</sup>

Given that a notary is considered an important profession because it has a responsibility to serve the interests of the community. An honorary degree gives a burden and responsibility to every notary to maintain the good name and honor of the notary profession. The reputation and honor of a notary must be maintained in carrying out his function as a public servant, because it contains rules that regulate, limit, and guide notaries in carrying out their functions<sup>13</sup>.

Philosophically, the notary has a very important role in helping to create legal certainty and protection for the community, because the notary as a public official is authorized to make an authentic deed, as long as the making of the authentic deed is not reserved for other public officials. This legal certainty and protection can be seen through the authentic deed he made as perfect evidence in court. The evidence is perfect because the authentic deed has three powers of

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<sup>10</sup> R. Soegondo Notodisoerjo, Op.cit, p. 82.

<sup>11</sup>Ibid.

<sup>12</sup> Ira Koesoemawati & Yunirman Rijan, (2009), *Kenotarlatan*, Jakarta : Raih Asa Sukses, p.6.

<sup>13</sup> Anang Ade Irawan, Pertanggungjawaban Ahli Waris Notaris sebagai Pejabat Umum atas Akta Notaris yang Menimbulkan Kerugian Para Pihak, *Jurnal Lentera Hukum*, Volume 5 Issue 2 2018

proof, namely the power of outward proof (*uitwendige bewijskracht*), the power of formal proof (*formele bewijskracht*) and the strength of material proof (*materialele bewijskracht*).

Given that a notary is considered an honorable profession because it serves the interests of the general public. An honorable position places a burden and responsibility on every notary to maintain the prestige and honor of the notary profession. The prestige and honor of the notary profession in carrying out his duties as a public official must be maintained, because it requires rules that regulate, limit and serve as guidelines for notaries in carrying out their positions and behaving.

The position of a notary is a position of trust, it must be in such a way as to regulate the obligations of a notary carefully and in depth. In carrying out his position, notaries are obliged to always base themselves on high ethical standards, both those determined by law and the code of ethics of the notary organization. The making of a mandatory will for an adopted child is a form of deed made before (*ten overstaan*) a notary or called a "partij deed" (*partij akten*)<sup>14</sup>.

### **3.2. Constraints and Solutions Faced by Notaries in Making Wills Regarding the Distribution of Inheritance Based on Islamic Law**

Inheritance property often causes various legal and social problems, therefore it requires regulation and settlement in an orderly and orderly manner in accordance with applicable laws and regulations. Making a will is a legal act, someone who determines what happens to property after death. The making of a will is bound by a certain form and method if it is ignored, it can result in the cancellation of the testament.

What is meant by execution of a will is a statement of the giving and receiving of a will by a person or persons appointed by the person who will leave the inheritance, who is tasked with supervising that the will is actually executed according to the will of the deceased.

In the context of today's era, regarding the implementation of wills, it is very necessary because there is legal certainty in the transfer of assets through this will. This is important because the implementation of this will is very influential on the implementation of the permanent transfer of one's property rights to

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<sup>14</sup> Eko Puji Hartono, Akhmad Khisni, "The Role of PPAT in Making the Deed of Transfer of Rights to Land and/or Buildings Formerly of Customary Ownership Related to the Payment of Duty on the Acquisition of Rights to Land and/or Buildings", *Jurnal Akta* VOL. 5, No. 1, March 2018.

another person, which requires legal certainty, justice and benefits to the parties involved in the implementation of the will.

Certificate of Inheritance is made with the aim of proving who is the heir to the inheritance that has been opened according to law from several portions or parts of each heir to the inheritance that has been opened. Inheritance Certificate is a proof of inheritance, namely a letter that proves that those mentioned in the Inheritance Certificate are heirs and also heirs. Certificate of Inheritance is also used to transfer the name of the inheritance received, and on behalf of the testator becomes on behalf of all heirs.

Making a Certificate of Inheritance carried out by a Notary of course cannot be separated from various obstacles. Good Luck<sup>15</sup> states that these obstacles can be in the form of:

- The first obstacle can be from the Notary himself, where the Notary does not master and does not understand all the provisions of the Certificate of Inheritance in Indonesia, an example of a case that has been encountered is that there is a Notary who makes a Certificate of Inheritance in the form of a partij deed which should be a ambetelek deed.
- Lack of thoroughness of the Notary in checking and ensuring the completeness of the documents required for the preparation of the Certificate of Inheritance.
- It is difficult for the Notary to ensure that the witnesses presented must really know about the family of the deceased heir, for example the witness really knows the number of the heir's children, so that there are no heirs whose names are not included in the Inheritance Certificate.
- There are still often witnesses or heirs who are dishonest in giving statements.
- There is no legal unification regarding the implementation of the Certificate of Inheritance in Indonesia.

Based on the views above, based on the views above, it is emphasized that so that there are no obstacles in notary in making a will regarding the distribution of inheritance then the rule of law must be applied, implemented, strictly enforced for every person and event so that there should be no deviation by taking into account the values of justice to obtain legal certainty. This means that this step is an effort to fulfill the rights proportionally.

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<sup>15</sup>Ibid, p. 28



### **3.3. Solution ShareNotary in Making Will Deed Regarding the Distribution of Inheritance Based on Islamic Law**

The implementation of a good Notary position is known for several principles, one of which is the principle of accuracy. Notaries in taking an action must be prepared and based on the applicable legal rules. Examining all evidence shown to the Notary and listening to statements or statements of the parties must be carried out as the basic material to be stated in the deed.

This principle of accuracy is the application of Article 16 paragraph (1) letter a, among others, in carrying out the duties of his position, he is obliged to act carefully. In essence, a Notary as a public official only establishes or relates or records in writing and authentically the legal actions of the parties concerned. Notaries are not in it, Notaries are outside parties, those who carry out legal actions are interested parties. The initiative to make a Notary deed or authentic deed rests with the parties. Therefore, a Notary deed or authentic deed does not guarantee that the parties "say the truth" but what is guaranteed by the authentic deed are the parties who "true to say" as contained in the deed.

According to Muhammad Firdauz Ibn Pamungkas, the truth of the words of the heirs in the process of making a Certificate of Inheritance before a Notary as contained in the deed is not the responsibility of the Notary, on the contrary the Notary states that the parties or the heirs are right in saying so, whether what is said in the Certificate The inheritance submitted to the Notary contains the truth or lies, this is not the responsibility of the Notary.

Making proof of heir is a civil right of every citizen, not a gift from a Notary or the state/government or from anyone. Until now, there has been no legal unification (a form of formality of letters and officials or institutions that should or are the only ones to make evidence as the heir. According to the author, the absence of legal unification is what needs to be a concern for the government and associations as well as lawmakers in Indonesia). this country to be a concern and made a regulation.

Notaries must actively participate in implementing the values of independence in a real action. Notaries must be ready to become agents of renewal and the only official authorized to make proof of heirs in (formal) form, namely a Certificate of Inheritance for all Indonesian citizens, regardless of class/ethnicity/ethnicity/or religion. From the description above, the researcher concludes that the solution to the problems faced by a notary in making a will regarding the distribution of inheritance based on Islamic law is as follows:



- Notaries have a role to educate to become professional and reliable notaries, namely by carrying out scientific activities such as seminars about notaries.
- Notaries in taking an action must be prepared and based on the applicable legal rules.
- Notaries must be able to observe the real facts.
- Notaries must actively participate in implementing the values of independence in a real action.
- Notary must always prioritize Islamic values in the implementation of inheritance distribution.

Thus the Notary is able to position himself as an official who is present to serve the interests of the community. Notaries are not good servants, if we still carry the colonial vision and mission, that is, they still want to make, maintain and take discriminatory legal actions, especially the making of proof of heirs. Therefore, it is hoped that the Notary will position himself as a Notary to be a good public servant, one way that must be done is to implement the Notary's authority as an official authorized to make proof of heir for all Indonesian people, not based on ethnicity and any class in the form of a party deed.

#### **4. Conclusion**

The role of a Notary in making a will before a Notary refers to the provisions of Article 1 point 1 UUJN which states, "Notaries are public officials who are authorized to make authentic deeds and have other authorities as referred to in this law or based on other laws", where each will or testament must be in the form of a deed in order to obtain legal certainty as a binding authentic deed.

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