

## LEGAL ASPECT OF A WILL MADE BEFORE A NOTARY BY DIVORCED PARENTS

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### ABSTRACT

This study aims to determine the legal aspects of a will made before a notary by divorced parents, with the formulation of the problem: What are the legal aspects of a will whose object is joint property made after the parent's divorce?; What is the legal protection for beneficiaries of wills made by divorced parents? This study uses a normative legal research method, using a literature study approach, also equipped with an analysis of laws and regulations related to bequests of joint property objects, as well as reviewing some of the literature, research results related to the topic of writing, opinions of competent experts and several scientific journals. Furthermore, the collected data was processed and analyzed qualitatively and then described descriptively. As for the research hypothesis, everyone who is going to make a will must first know and study the limits of his assets that he can bequeath to other people and must first issue the rights of heirs before bequeathing his inheritance to other parties. Regulations regarding the rights of the longest living partner have been explicitly and in detail contained in the BW, such as regarding Legitime Portie rights. Legal protection for the recipient of the will, when examined from article 1365 BW, the recipient of the will actually can experience material and immaterial losses. Material losses can be in the form of a joint price because the Notary is without the knowledge of the Treasure Hall and the reading and submission to the wrong party.

**Keywords:** *legal aspect, will, joint property*

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### INTRODUCTION

Humans are social creatures created by God to complement each other and live side by side between men and women. One way to establish a legal relationship is by marriage. Marriage is a physical and spiritual bond between a man and a woman as a husband and wife with the aim of forming a happy and eternal family based on the Belief in One Almighty God.

Building a family and continuing offspring through legal marriage is the right of every Indonesian citizen. When a marriage bond occurs between two different individuals, it is not only the family that joins into one but there are several rights that then arise as joint rights, for example regarding the arrangement of assets acquired during the course of a marriage or what is known in national law as joint property and is known as mutual property in the Compilation of Islamic Law (Nasution, 2019).

The Civil Code (Burgerlijk Wetboek), hereinafter referred to as BW, does not recognize inherited assets so that all husband and wife assets become joint property, meanwhile, Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, hereinafter abbreviated as the Marriage Law, hereinafter referred to as the Marriage Law stipulates that joint assets are all assets acquired during a marriage which will become joint assets, furthermore, the Marriage Law recognizes 2 types of assets. namely joint property and inherited property (Usanti & Anand, 2019). Regarding joint property, if there is a divorce, it must be divided equally between husband and wife.

Ideally, every couple hopes their marriage can last until death does them part, but humans can only plan and God decides. The end of a marriage has legal consequences, including having an impact on child custody, distribution of property, and marital status.

Article 38 of the Marriage Law stipulates that there are 3 reasons for a marriage to break up, namely:

1. Marriage ends because of death;
2. Marriage ends due to divorce;
3. The marriage ended due to a court decision.

The discussion in this paper focuses on the state of divorce due to death where apart from the rights of the longest surviving spouse it also includes the rights of heirs who are known in 4 (four) groups. As for regulations regarding property in marriage, they are contained in Chapter VII Article 35 of the Marriage Law (Hauzan SH, 2016). Article 35 paragraph (1) stipulates that property acquired during the marriage becomes joint property, while paragraph (2) stipulates that the assets each husband and wife receive as gifts or inheritance are under the control of each as long as the parties do not specify other matters.

The provisions of Article 35 of the Marriage Law have similarities with the provisions of Article 36 of Law number 39 of 1999 concerning Human Rights, therefore regarding paragraph (1) of the Marriage Law regulates joint assets during marriage, and paragraph (2) of Article 35 of the Marriage Law regulates the personal assets of each husband and wife. Based on this article regarding joint property rights as human rights, it must be strictly regulated so that there is no confusion and conflict between the two in terms of marital property (Parinussa et al., 2021).

BW distinguishes that if the heirs of the first class are still there, they will cover the rights of other family members in a straight line up or sideways. Likewise, groups with higher degrees cover those with lower degrees, meanwhile, heirs according to a will or in BW are called testaments, the number is not certain because this type of heir depends on the will of the maker of the will (Parinussa et al., 2021).

A will often contains the appointment of a person or several heirs who will receive all or part of the inheritance, however, like heirs according to law or in BW referred to as *ab intestato*, heirs according to a will obtain all rights and all obligations from the heir (Rosita et al., 2022). Referring to the individualistic principle, this principle gives the right to the heirs to claim the distribution of inheritance. As for the rights granted to the heirs, namely *Hereditatis Petition* rights, these rights are the rights of the heirs to file lawsuits in connection with their position as heirs to third parties, both those who are also heirs and those who do not control part of the inheritance without rights (Pratitis, 2019).

Basically, in making a will, each person is given the right to designate who will be the heir and what part of his property he will give, but the problem is if the property still has other people's rights in it, for example, if the object of the will is part of the joint property as stipulated in the Marriage Law Article 35 paragraph (1) which in essence, joint property is part of the property of the husband and wife during marriage, which means that the use of the joint property must be based on the agreement of both parties and from both types of heirs, namely between the *ab intestate* heirs and the heirs according to will. In the above case, it is clear that the husband and wife have been separated physically for a long time and do not even know

each other's conditions, which then the husband feels that his rights still rest with his wife, so the reverse should also apply that his wife also still has rights that are under the control of her husband (Djaja S. Meliala, 2007). Not to mention, the status of the assets obtained by each party during their separation. Therefore, actually related to the scope of joint property still needs to be specifically researched and explained considering that there are also many similar problems with this decision that occur in the community.

A will can be carried out when there is death and no one can change it except for the one who made it or it has been proven that the will violates the legitime portie, which according to BW, legitimacy consists of ascending and descending lineage, not including the oldest living partner (Aminuddin et al., 2022). This research will focus on wills related to joint assets which are also the rights of spouses. However, the Marriage Law does not mention or regulate clearly related to the management of joint assets in the event of the bequest of joint property objects in a state of divorce and death specifically. It is only mentioned in relation to the definition but does not mention the scope, so if problems occur as described above the community still needs an explanation.

## **METHOD**

This study uses a normative legal research method, using a literature study approach, also equipped with an analysis of laws and regulations related to bequests of joint property objects, as well as reviewing some of the literature, research results related to the topic of writing, opinions of competent experts and several scientific journals. Furthermore, the collected data was processed and analyzed qualitatively and then described descriptively.

## **RESULTS AND DISCUSSION**

### **Legal Aspects of a Will Whose Object is Joint Property Created After the Parent's Divorce**

Marriage agreements are regulated in Article 29 of the Marriage Law and Articles 139 to 154 BW. The marriage agreement is an agreement made by the prospective husband and wife, which can be made before or at the time the marriage takes place to regulate the consequences of the marriage on their assets. The marriage agreement must be drawn up in the form of a notarial deed with the aim of:

- a. Marriage validity;
- b. Prevent acts of haste because of the consequences of the marriage for a lifetime;
- c. For the sake of legal certainty;
- d. Legal evidence;
- e. Prevent legal smuggling.

Besides being regulated in the Law on Marriage and BW, marriage agreements are also regulated in Articles 45 to Article 51 of Presidential Instruction Number 1 of 1991, these provisions regulate, among other things:

- a. The marriage agreement can be made at the time or before the marriage takes place;
- b. The form of the marriage agreement is in the form of ta'lik talak and other agreements that do not conflict with Islamic law. Usually, another form of agreement is in writing and ratified by the Marriage Registrar regarding the position of assets in marriage;

- c. The contents of the marriage agreement include the mixing of personal assets, which include all assets, both those brought by each during the marriage and those obtained by each during the marriage; separation of treasures. With this separation, the husband's obligation to meet household needs does not disappear;
- d. The authority of each party to charge for mortgages or mortgages on personal property and joint property or union assets.

Article 38 of the Marriage Law stipulates that there are three reasons why a marriage can break up:

- a. Death
- b. Divorce
- c. Court ruling

Marriage has broad consequences in the legal relationship between husband and wife, namely the emergence of a bond that contains rights and obligations, for example, the obligation to have the same residence, be loyal to each other, the obligation to provide household expenses, inheritance rights, and so on. Marriage also has a major influence on the position of the husband and wife's assets, as well as the legal ties that occur between them and the children born from the marriage. For third parties, marriage plays an important role because it is necessary to pay attention to the marriage agreement between husband and wife, in relation to debts (Sholeh, 2021).

Arrangements for property in marriage can be found in Chapter VII Article 35 of the Marriage Law, then grants or inheritance are inherited assets where control is based on the individual rights of both husband and wife as long as the parties do not specify otherwise (Retnowulandari, 2020). Another agreement is the implementation of the marriage agreement on joint assets, both inherited assets obtained before marriage and all assets acquired by the husband and wife during the marriage as stipulated in Chapter VII Articles 35 and 36 of the Marriage Law which are in opposition to the articles contained in BW.

Arrangements for marital property in the Marriage Law are only regulated in three articles, namely in Article 35 to Article 37. Arrangements for marital property in BW have different legal provisions from the Marriage Law, in the Marriage Law assets obtained free of charge due to inheritance by will and as a gift cannot be considered joint property unless otherwise agreed. As the provisions of Article 120 BW stipulate that with regard to matters of profit, the joint property includes movable and immovable property of the husband and wife, both existing and those that will exist, as well as goods that they receive free of charge unless in this last case, the person who inherits determines otherwise.

The limitation of marital assets includes all assets and liabilities, both acquired by the husband and wife before or during their marriage, which includes capital, interest, and even debts resulting from an act that violates the law. Mutual assets in the marriage are joint property rights that are bound, namely joint property that occurs due to a bond between the owners. This bound joint property right is different from free shared property right, which is a form of property right, but between the owners, there is no legal relationship unless they are joint

owners. Husband and wife have the right to their respective assets, they cannot make mistakes or irregularities on their part (Luh Putu Diah puspayanthi, 2022).

Marriage results in a bond of rights and obligations, a form of life together from the parties who carry out the marriage relationship. One of the legal consequences of a valid marriage is the creation of marital property.

As for the form of assets of husband and wife, in the Marriage Law, there are two types of assets, namely:

a. Innate treasure

Innate assets are assets acquired by each husband and wife prior to the marriage bond. In marriage, both husband and wife, each has the right to own property acquired before the marriage took place (Mutiamas Salamoru et al., 2020). If the husband who obtains the property is then brought into the marriage, then he himself becomes the owner, and his wife, according to the marriage law, has no right to the property. However, the wife as a family member can enjoy the benefits of the assets, and vice versa. Meanwhile, when conducting transactions with this property, it is necessary to first reach an agreement between the two parties the husband and wife (Azria Putri & Mekka Putra, 2022).

Innate remains the property of the husband or wife, as well as debt. Each husband and wife have the full right to take legal action against the inherited property in accordance with the contents of Article 36 paragraph (2) of the Marriage Law which stipulates:

"Regarding the inheritance of each husband and wife have the full right to carry out legal actions regarding their property".

Property obtained as a gift or inheritance, the owner is the husband or wife who received the gift or inheritance. In accordance with what is stated in Article 35 paragraph 2 of the Marriage Law:

"the inherited assets of each husband and wife and the assets obtained by each as a gift or inheritance are under the control of each as long as the parties do not specify otherwise".

Specifically regarding innate assets and assets acquired while in a marriage bond as a gift or inheritance, for the control of which the husband and wife can enter into an agreement, for example, the control will be handed over to the husband. Thus, both the assets obtained by the husband and the assets obtained by the wife from gifts or inheritance are up to the agreement of both parties for the management of their assets.

b. Shared property

Joint property is property acquired either by the husband or wife during the marriage bond for the benefit of the family so that the goods obtained in the marriage become joint assets (Pratama, 2018).

As stated in Article 35 Paragraph (1) of the Marriage Law:

"property acquired during the marriage becomes joint property"

In the case of this joint property, both husband and wife can use it with the consent of one of the parties. In accordance with the contents of Article 39 Paragraph (1) of the Marriage Law which stipulates:

"Regarding joint property, husband or wife can act with the agreement of both parties"

If a husband and wife have debts during marriage, then they are responsible for the property together. If the debt is the husband's debt, then the husband is responsible for his innate assets and joint property. The wife's innate assets are not accounted for for the husband's debts, while

those relating to the debts of the husband or wife after the divorce, the husband or wife are responsible for their own assets.

The division of marital property can be found in Indonesian positive law which consists of 3 legal systems, including:

1) According to Customary Law

Marital assets according to customary law are all assets controlled by the husband and wife as long as they are bound by marriage, both family assets that are controlled, as well as individual assets originating from inheritance, grants, self-inheritance, livelihoods with husband and wife, and gift items.

Separation of inheritance between family assets and relatives' assets cannot be done just like that because there are indigenous peoples who are based on kinship (family harmony), fatherhood, motherhood, and fatherhood.

2) According to the Compilation of Islamic Law

Based on Article 1 letter (f) KHI, defines joint assets as assets that are acquired either individually or jointly while the marriage bond lasts and does not question whose property it is. Article 85 KHI stipulates that joint property in marriage does not rule out the possibility of the property of each husband and wife, that what is meant by assets includes tangible and intangible objects, tangible joint assets include movable and immovable objects as well as securities, while intangible joint assets are rights and obligations (Agustin et al., 2022).

3) According to BW

Article 119 of BW states that from the moment the marriage takes place, a unanimous union between the assets of the husband and wife applies. Thus, marriage causes the melting of the husband and wife's assets as union assets. All the assets of each husband and wife, both those they brought before the marriage and those they acquired during the marriage, are mixed into one joint property of the husband and wife. The unanimous union of the husband and wife's wealth throughout the marriage may not be abolished and changed by an agreement between the husband and wife.

4) According to the Marriage Law

Joint assets are all assets acquired during the marriage while the inherited assets remain the property of each husband and wife and are under the control of each party during the marriage.

### **Legal Protection for Beneficiaries of Wills Made by Divorced Parents**

Marriage is ideally expected to last until death do them part, the occurrence of marital ties means that there are legal events that occur which give rise to legal consequences for the husband and wife which then arise rights and obligations between them. Meanwhile, a marriage can break up due to several things, including death or divorce, then legal consequences arising from the breakup of a marriage include loss of marital status, as well as regarding the management of joint assets during marriage which can be determined according to their respective laws.

The law of inheritance only occurs because someone dies. In BW there are two ways to obtain assets, namely: as an heir according to the provisions of the law (ab intestate) and because someone is appointed in a will (testamentary). What is meant by a will or testamentary itself according to Article 875 BW is a deed containing a person's statement about what he

wants to happen after he dies, and which he can revoke. In general, people make a will (testament) before a Notary (Ekel, 2019).

Inheritance can only take place if there is death, this is confirmed in Article 830 BW, then in Article 832 BW confirms that those who have the right to become heirs are blood relatives, both legal and out of wedlock, and the husband or wife who has lived the longest. Judging from these two articles, inheritance occurs due to death, and determining who the heirs are is only based on two ties, namely blood relations and marital relations, but a stipulation can also be made regarding other heirs.

In Indonesia, arrangements for the transfer of the assets of a person who has died and the consequences for their heirs are regulated by inheritance law, while the inheritance law for Chinese groups is regulated in BW called civil inheritance law while for Islamic groups it is regulated in KHI.

In civil inheritance law, there are two ways of obtaining inheritance. First, referring to Article 832 BW, a person can become an heir based on the provisions of the law or *ab intestato* where the heir is based on family ties and blood relations with the heir. Second, it is stated in Article 899 BW that inheritance can be based on a stipulation made by the heir before he dies, the stipulation in question is a will or testament, a person can become an heir and can inherit a person's property and receive a share of the inheritance of a person who is not related by blood to him, by being appointed or determined as an heir by someone contained in a valid testament (Ai Pitri Nurpadilah et al., 2022).

However, it is often a problem when someone makes a will in which the object of the will still has other people's rights in it, in this case, the will contains objects of joint property that have not been separated as long as the heir is still alive, which becomes a question of what the legal consequences of a will containing joint property objects.

The rules regarding bed separation are contained in Article 233 to Article 249 BW. Bed separation is a separation between husband and wife in which the marriage is not dissolved but they are only released from the obligation to live in the same place. While the Marriage Law does not regulate bed separation, Article 66 of the Marriage Law stipulates that:

"For marriage and everything related to marriage based on this Law, with the coming into force of this Law the provisions stipulated in the Civil Code (*Burgerlijk Wetboek*), the Indonesian Christian Marriage Ordinance (*Huwelijks Ordonantie Christen Indonesiers S. 1933 No. 74*), Mixed Marriage Regulations (*Regeling op de gemengde Huwelijken S. 1898 No. 158*), and other regulations governing marriage insofar as they have been regulated in this Law shall be declared null and void."

Thus, all the rules regarding marriage that are regulated other than those regulated in the Marriage Law are no longer valid. Meanwhile, after the Marriage Law, there was no separation of beds. Referring to Article 38 of the Marriage Law that there are only three reasons a marriage can break up, namely:

- a. Death, where one party dies while the marriage is still in progress;
- b. Divorce, if one of the husband or wife parties submits a request for divorce to the court and is granted by the panel of judges;
- c. Court decision, if one of the parties leaves the joint residence so that steps need to be taken against the marriage for the benefit of those left behind.

Separation of beds cannot be said to be an official divorce, but it is a physical and spiritual separation and is not a divorce before there is a divorce certificate and a sincere court decision. Then the assets acquired during the separation of residence are still objects of joint property. Thus a legal divorce according to applicable law when there has been a court decision stipulating that the husband and wife have been officially divorced, referring to Article 35 of the Marriage Law which stipulates that all property acquired during the marriage becomes joint property, then the assets they acquire during separation are still included in the scope of joint property even though they have separated their residence because there has not been a court decision stipulating that they have officially separated.

As stated in Article 874 BW, when discussing someone's property rights to an asset that he owns, that person has the power, discretion, and freedom to do whatever he wants with the property he owns. In addition, he also has the right to determine whom he will give his property to after he dies, other than the heirs who have been determined by law. Thus, inheritance based on the will is considered important and must be considered first because it contains the final will of the heir and the will must be carried out. However, Article 913 BW emphasizes that the heir is not allowed to determine an inheritance either in the form of a grant between people who are still alive or as a testament, which means that a will may not violate the legal rights of the heirs.

Legitime portie, hereinafter referred to as LP, is an absolute right in the form of a part of the inheritance which must be given to the heirs in a straight line according to law. Basically, those who are entitled to become heirs are those who have blood relations and family relations as well as the husband/wife who has lived the longest and is still legally married to the heir when the heir dies.

The main principle of inheritance distribution based on civil inheritance law is that the heirs are divided into 4 (four) groups, including:

a. Class I heirs (husband/wife and children)

The heirs of this class are the husband/wife who has lived the longest and the children. Each gets an equal share. If the child of the heir dies and the child has offspring, for example, a child (grandson of the heir), then the share of the heirs of the deceased child will fall to the heirs (grandchildren of the heir) or known as inheriting stake by stake.

b. 2. Class II heirs (parents and siblings)

- 1) 2 parents (father and mother) and 1 sibling then each gets 1/3 share.
- 2) 2 parents (father and mother) and 2 or more siblings, each gets 1/4 share and the rest goes to all siblings.
- 3) 1 parent (father/mother) and 1 sibling then each get 1/2 share.
- 4) 1 parent (father/mother) and 3 siblings/more than 1/4 share for parents and the remainder for all siblings.

c. Class III heirs (grandparents)

The heirs of this class are the grandparents of the heir, both from the mother's side and from the father's side, provided that:

- 1) The inheritance (boedel waris) is divided in half first for the grandfather and/or grandmother from the father's and mother's side, each party gets 1/2 part (cloving).



- 2) If the grandparents of one of the parties (father or mother) are no longer there, then the entire portion becomes the right of the surviving grandfather and/or grandmother.

d. Class IV heirs (uncles and aunts)

The heirs of this class are uncles' and aunts' heirs from both the father's and mother's sides (including their descendants) up to the sixth degree.

Based on the rules regarding probate and joint assets, it is clear that in fact the husband/wife of the longest living partner does not have LP rights because the provisions on LP are only intended for heirs in straight downward or upward descent while the longest living partner is not a descendant of the heir but the husband and wife are classified as heirs because they are bound by a legal marriage relationship in which a legal family relationship occurs according to law. The longest living partner in law can inherit and is placed in class I ab intestato heirs.

Discussing the legal protection of a will for objects of joint property made before a notary, of course, we must first pay attention to what are the limits on inheritance that can be willed by someone when he has died. Inheritance BW recognizes unanimous union assets between husband and wife assets as long as there is no marriage agreement since the marriage took place, but the Marriage Law does not recognize unanimous union between husband/wife but this law stipulates that in the event of a divorce, marital assets consist of two, namely congenital assets and joint assets. It is contained in Article 903 BW, it is not permissible to make a testamentary grant stipulation whose amount exceeds the heir's rights in the joint property.

"Husband/wife may only bequeath joint goods and assets, only that these items include their respective shares in the joint property. However, if an item and joint property are bequeathed, the beneficiary of the will cannot claim the item in its form, if the item is not handed over by the testator to the heir as their share. In that case, the beneficiary of the will must be compensated, which is taken from the share of the joint property that is distributed to the heirs of the heir, not sufficient, taken from the personal belongings of the heirs.

This is clearly contradictory in the case of a person making a will where the object of the will is still joint property that has not been separated. Basically joint property is property in which there are 2 different people namely husband and wife who both have the right to the property, even though Article 118 BW allows a wife to make a will without her husband's permission. However, what if there is a violation of the rights in the will which violates the rights of the longest living partner, then if a wife wants to act on joint property, the wife must discuss it first and must obtain approval from the husband, because in joint property there are the rights of the wife and the rights of the husband.

Based on the description above, it is known that a will is a statement of a person's will before he dies, which generally regulates the inheritance of the heir's inheritance. However, not all of the wishes in the will can be carried out. The heir may make a will or give a grant to someone, but in making a will there are limitations, apart from that making a will must also pay attention to the limitations of assets that can be inherited, such gifts may not violate the rights of the longest living partner as heir under the law as well as those who have rights to the joint property, against which a person who has passed away may not stipulate something, either as a gift between people who are still alive or as a testament, but if the heirs do not file a claim for reduced inheritance rights, then the grant or the will remains valid.

An open will when the heir dies, which means that the inheritance can be carried out, referring to Article 852 letter a BW, if the will takes part, then the will is declared null and void because it is against the law, which means that in the will there are still other people's rights in it. Inheritance has a limit on assets that can be bequeathed, namely 1/3 of the inheritance boedel, so if the inherited property is half of the estate or all of it, it will be null and void because it violates the provisions that have been determined. Then if the will still wants to be maintained, the will must be corrected, which must first be issued as part of the heirs.

## CONCLUSION

Everyone who is going to make a will must first know and study the limits of his assets that he can bequeath to other people and must first issue the rights of the heirs before bequeathing his inheritance to another party. Regulations regarding the rights of the longest living partner have been explicitly and in detail contained in the BW, such as regarding Legitime Portie rights.

Legal protection for the recipient of the will, when examined from article 1365 BW, the recipient of the will can actually experience material and immaterial losses. Material losses can be in the form of a joint price because the Notary is without the knowledge of the Treasure Hall and the reading and submission to the wrong party.

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