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The Notary's Authority in Making Authentic Deeds Relating to *Wajibah* Wills for the Inheritance Rights of Adopted Children

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Abstract

Wasiat wajibah will is a special form of will determined by a judge to deal with certain conditions. One aspect related to *wasiat wajibah* wills is related to inheritance rights for adopted children. The existence of inheritance rights for adopted children through *wasiat wajibah* will actually requires the role of a Notary, especially with regard to making will deeds. This research specifically analyzes the authority of a Notary in making authentic deeds relating to *wasiat wajibah* wills for the inheritance rights of adopted children. This research is normative legal research by prioritizing conceptual, statutory and conceptual approaches. The results of the research confirm that the legal position of inheritance rights for adopted children carried out through *wasiat wajibah* wills has actually been firmly confirmed in Article 209 KHI and also confirmed in the jurisprudence of Supreme Court Decision No. 368 K/Ag/1999 along with subsequent court decisions. The guarantee of inheritance rights for adopted children carried out through a *Wasiat wajibah* will has implications for the need for the authority of a Notary to participate in making *wasiat wajibah* will deeds relating to inheritance rights for adopted children. The authority of a Notary in making authentic deeds related to *Wasiat wajibah* wills for the inheritance rights of adopted children must actually refer to the ten principles relating to the function of Notaries, which include the principles of equality, trust, legal certainty, authenticity of deeds, justification, prohibition of abuse of position, prudence, proportionality , professionalism, and the principle of presumptio iustae causa. Apart from referring to these ten principles, a Notary in making an authentic deed regarding a *wasiat wajibah* will for the inheritance rights of an adopted child must also understand Islamic law, especially regarding *wasiat wajibah* and testaments.

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INTRODUCTION

Wills (in Indonesian: *wasiat*) in Islamic law are actually related to the transfer of assets from one party to another (Ainun et al., 2022). As a transfer of assets, a will in Islamic law must be implemented in accordance with the provisions and must also guarantee aspects

of legal certainty. Wills are not only viewed in the private dimension, namely the relationship between one party and another party, but the state, through special institutions, is obliged to accommodate the private dimension in the form of wills to ensure legal certainty and justice. (Mahmud, 2021). One of the professions that is given the authority to accommodate the practice of wills in society is a notary. This is as regulated in Article 16 paragraph (1) letter h of Law no. 30 of 2004 concerning the Position of a Notary which confirms that one of the obligations of a Notary is to make and inventory deeds relating to wills(Triwahyuni, 2022).

A Notary's obligations regarding wills are actually one of orientation to ensure legal certainty and legal protection for parties related to wills. It is hoped that the existence of a deed of will made by a Notary will provide a sense of security for the parties so that the will made by the parties can be carried out as desired by the parties.(Niam, Khoirun, 2023). The important role of the Notary in making a testamentary deed is actually relevant to the authority of the Notary as a public official who is given the authority to make an authentic deed.

One important aspect of a will that requires the role of a Notary in making a will is related to *wajibah wills* (in Indonesian: wasiat *wajibah*) for the inheritance rights of adopted children. In general, *wajibah wills* is a will that is special in nature because it is given to heirs who do not actually receive inheritance due to obstacles related to sharia' in obtaining inheritance. (Ersoy, 2019). *Wajibah wills* expressive verbis is facilitated in the Compilation of Islamic Law (hereinafter referred to as KHI), especially in Article 209 KHI which discusses the distribution of inheritance for adopted children. This confirms that as part of the will, it should be *wajibah wills* especially related to the deed through the role of the Notary. This research specifically analyzes the authority of a Notary in making authentic deeds relating to *wajibah will*s for the inheritance rights of adopted children.

Research that discusses the authority of Notaries in making authentic deeds has actually been carried out by three previous researchers, namely: (i) Juliantika (2023) which specifically analyzes the authority of Notaries in making deeds for parties whose domiciles are outside the Notary's position (Juliantika, 2023). The novelty of Juliantika's (2023) research is that the principle of caution must be the main orientation for Notaries so that when making various authentic deeds they do not violate the law and are in accordance with the Notary's Code of Ethics. Further research was carried out by (ii) Alfared and Ayunda (2023)

who focused their analysis on Notary efforts related to solving land certificates which were the result of inheritance.(Alfared & Ayunda, 2023). The novelty of Alfared and Ayunda's (2023) research is understanding PP no. 24 of 1997 concerning Land Registration is needed as the main means for splitting land certificates that are the result of inheritance. Further research was conducted by (iii) Sintya (2024) who analyzed the role of Notaries in the process of transferring land rights(Sintya, 2024). The novelty of Sintya's (2024) research is that notaries need to pay attention to aspects of formal and material truth related to making gift deeds for the parties. This is necessary because errors related to formal and material truth can be the basis for holding the Notary accountable.

From the three previous studies above, it can be concluded that the research which specifically discusses the authority of Notaries in making authentic deeds relating to *wajibah wills* for the inheritance rights of adopted children is original research because the three previous studies have not focused their research on this aspect.

RESEARCH METHODS

This research, which discusses the authority of Notaries in making authentic deeds relating to *wajibah wills* for the inheritance rights of adopted children, is normative legal research that puts forward legal theories, concepts and principles in answering legal problems.(Diantha, 2017)(Eka N.A.M. Sihombing, 2022). Primary legal materials in this research include: Law no. 30 of 2004 concerning the Position of Notary (hereinafter referred to as UU JN) along with its amendments, namely Law no. 2 of 2014 (hereinafter referred to as UU JN II), KHI, as well as Supreme Court Decision No. 368 K/Ag/1999 relates to Supreme Court jurisprudence which discusses *wajibah wills* for the inheritance rights of adopted children. Secondary legal materials in this research are journal articles, books, and research results that discuss the authority of notaries and *wajibah wills*. Non-legal materials are language dictionaries. The approaches used are conceptual, statutory and case approaches.

DISCUSSION

The Status of Inheritance Rights for Adopted Children Through a Wajibah Will

The Indonesian Dictionary provides the definition of a will into three aspects, namely: (i) a will as the last message from a person who will die to be conveyed to the heirs, (ii) a will refers to the transfer and distribution of assets to the heirs which is carried out through a

certain deed by a Notary , and (iii) the will is associated with several things that are kept secret and covered by a sealed envelope which is generally a special message from the person who will die to be conveyed to the heirs(Pusat Bahasa Departemen Pendidikan Nasional, 2008). Referring to the Indonesian Dictionary regarding wills above, Article 171 letter f KHI provides a definition that wills relate to the transfer and gift of an object from the testator to a certain person and/or entity after the testator dies. From the definition related to wills in the KHI above, there are actually three elements in a will, namely: first, a will is the transfer and gift of an object. Objects here are interpreted broadly as not only objects in physical form, but everything that has economic value so that it can be given and transferred to other parties.(Sinaga, 2020). Second, the will is made by the testator, that is, the person or party who owns the property and will or has passed away so that the property must be distributed to the heirs. (Jamaluddin, 2019). Third, the will also emphasizes that the party addressed by a will made by the testator is the body and/or person specifically specified in the will. If we refer to the definition of a will as confirmed in Article 171 letter f KHI, then the definition of a will is relevant to the view of wills in the Indonesian Dictionary, especially in the second meaning related to wills which confirms that a will is the transfer and distribution of assets to heirs which is carried out through a deed. specified by a Notary.

Article 194 KHI actually provides several conditions for a will which include: (Azmi et al., 2022): (i) a will can be made by a person who is at least 21 years old, of sound mind, and done voluntarily and there is no coercion in the formulation of a will, (ii) in a will, the bequeathed property must be the property of the heir, and (iii) a will can only be executed when the testator has died. Related to the procedure for the execution of a will, it is regulated in detail in Article 195 KHI, namely that (Suwarti et al., 2022): Firstly, a will can be executed in three variations, namely orally in the presence of two witnesses, in writing in the presence of two witnesses, and executed in the presence of a Notary. Second, a limited will can only be executed, only allowing a maximum of 1/3 of the inherited assets. However, this can be excluded if all the heirs agree regarding a will in which the distribution of assets exceeds 1/3 of the inherited assets. Third, the important thing in a will is that the party or institution appointed in a will must be clear to ensure legal certainty while minimizing confusion in the practice of wills.

Wills are generally the domain of the testator where the testator has the right to determine the substance of the will as long as it does not conflict with the provisions of the

statutory regulations. Several limitations related to the substance of a will so that a will is not considered invalid include:(Jamaluddin, 2019): (i) the recipient of the will is not accused of having committed murder or attempted murder of the testator, (ii) the recipient of the will has not committed a crime of slander against the testator regarding a report that the testator has committed a crime which is subject to a minimum prison sentence of five years or more, (iii) the recipient of the will is not blamed for threats and/or violence that the testator makes changes or revocations to the will relating to the interests of the testator, and (iv) the recipient of the will is not blamed for attempts to falsify, destroy or embezzle a will. The four limitations above confirm that if the four limitations above are met then the will will be valid and conversely if the four wills above are not fulfilled then the will is considered void.

The cancellation of a will can also occur if, first, if the recipient of the will does not know of the existence of the will until he dies before the testator dies. Second, the recipient of the will knows the existence of the will but rejects the substance of the will. Third, the testator knows of the existence of a will but does not accept or reject the will until the testator dies before the death of the testator. Fourth, the invalidity of the will is also due to the bequeathed property being destroyed or destroyed(Margolang et al., 2023). This confirms that understanding things that have the potential to invalidate a will is necessary so that the will can be carried out optimally without any legal status that makes the will invalid.

In the development of the practice of wills, there are wills that are implemented specifically to deal with a particular case, known as *wajibah will*s. The *wajibah will* itself is actually part of a product of the development of Islamic law which develops based on specific cases so that the practice of *wajibah will*s is a form of discovery of Islamic law. The discovery of Islamic law is the result of ijtihad by Islamic legal experts (especially judges) to formulate a legal prescription or solution to a particular problem.(Dhuhri, 2019). The formulation of the concept of *wajibah will* as part of the discovery of Islamic law is intended to fill the void in Islamic law while ensuring justice for the parties in a particular case. (Muspitasari, 2021).

Wajibah will theoretically, it is understood as a form of intervention from the ruler (holder of sovereignty) or a judge who is a state legal apparatus to give and enforce a certain mandatory decision relating to a will for a person who has died to a certain party under special conditions.(Susilo et al., 2021). As part of the discovery of Islamic law, the practice of

wajibah will may differ from one country to another. In Indonesia, *wajibah will* are regulated in Article 209 KHI which confirms that there are several aspects related to *wajibah will*, which include: first, the legal subject of *wajibah will* is limited only in relation to adopted children and adoptive parents.(Mandei, 2021). This has the implication that apart from adopted children and adoptive parents, the *wajibah will* cannot be enforced. Second, *wajibah will* are given by the state or a judge through a decision so that *wajibah will* are not given or declared directly by the will giver. Third, the limitation on the amount of assets that can be given in a *wajibah will* is limited to a maximum of only 1/3 of the inherited assets of the adopted child or adoptive parents. Of the three aspects above, the important aspect in a *wajibah will* is related to the judge's discretion. Achmad Ali is of the view that a judge's discretion is the most important element in a court decision because the judge does not only focus on implementing regulations in concreto but also explores legal facts including legal values and principles in abstracto optimally and maximally.(Ali, 2017). This has the implication that the practice of *wajibah will* can develop in accordance with developments in legal facts and depends on the judge's discretion (Nur Hidayat, 2021).

Developments related to the practice of *wajibah will* became increasingly visible when, in a limited manner, Article 209 KHI only emphasized that *wajibah will* could only be given to parents and/or adopted children. Even so, in its development the practice of *wajibah will* has become more comprehensive by prioritizing the wisdom of judges, one of which is Supreme Court jurisprudence through Supreme Court Decision No. 368 K/Aug/1999(Trinanda et al., 2022). In general, Supreme Court Decision no. 368 K/Ag/1999 determines the rule that limiting the practice of mandatory bequests to parents and/or adopted children is considered inappropriate, but can also be given to non-Muslim heirs.(Ahmad Baihaki, 2021). The discovery of Islamic law with changes related to the practice of *wajibah will* that accommodate non-Muslim heirs is actually a form of discovery of Islamic law by judges to realize justice.(Saujan et al., 2022). Supreme Court Decision No. 368 K/Ag/1999 which relates to the practice of *wajibah will* that accommodate non-Muslim heirs can be seen in two aspects, namely: first, Supreme Court Decision No. 368 K/Ag/1999 actually makes a legal discovery by providing a way out that the limitative provisions in the KHI have the potential to cause injustice, especially for non-Muslim heirs(Putra & Fathony, 2023). Apart from the religious aspect, determining an heir must also be seen in the heir's attitude and contribution to the heir. This can lead to injustice if there are non-Muslim heirs but they play

an important role in the heir's life. Therefore, Supreme Court Decision No. 368 K/Ag/1999 can be said to be a form of legal breakthrough aimed at realizing justice. Second, Supreme Court Decision no. 368 K/Ag/1999 which formulates special rules and at the same time changes the substance of Article 209 KHI making Supreme Court Decision No. 368 K/Ag/1999 becomes jurisprudence or a court decision which is the basis for other courts in similar cases to refer to this decision(Shalehah, 2020). Although jurisprudence generally develops in common law countries, legal developments in the modern era have also developed in countries with civil law legal systems where court decisions can complement or add to the rules of positive law to realize justice.(Ramadhan, 2018)(Rais & Muyassar, 2022).

Supreme Court Decision No. 368 K/Ag/1999, which is jurisprudence, must be seen in relation to the general requirements that a court decision can be considered as jurisprudence which includes: first, a court decision can be considered as jurisprudence if a court decision can fill legal gaps, including making legal discoveries in certain cases.(Siti Maryam et al., 2022). Second, a court decision can be considered as jurisprudence if a court decision regulates or formulates certain rules that can be applied by judges in similar cases.(Atherton, 2022). Third, a court decision can be considered as jurisprudence if it is followed and used as a reference by subsequent judges in adjudicating similar cases. (Hazmi et al., 2021). In terms of the first and second conditions, in fact Supreme Court Decision No. 368 K/Ag/1999 has absolutely fulfilled the provisions as jurisprudence. In the third condition, there are differences in views from legal experts regarding the standards followed and used as a reference by subsequent judges when adjudicating similar cases, in this case whether it is sufficient to follow and use as a reference by one subsequent judge can be called jurisprudence or not.(Adiasa, 2023). Even so, referring to Supreme Court Decision no. 368 K/Ag/1999, in fact there is a subsequent court decision which follows and refers to Supreme Court Decision No. 368 K/Ag/1999 which includes several decisions, namely: Supreme Court Decision No. 16/K/AG/2010, Supreme Court Decision No. 218/K/AG/2016, Supreme Court Decision No. 331/K/AG/2018, to the Decision of the Kabanjahe Religious Court, North Sumatra No. 2/Pdt.G/2011/PA- Kbj(Hazmi et al., 2022). This confirms that Supreme Court Decision no. 368 K/Ag/1999 is jurisprudential because it has been followed by more than one court decision afterwards.

From the description above, it can be concluded that the legal position of inheritance rights for adopted children carried out through a *wajibah will* has actually been firmly

confirmed in Article 209 KHI and also confirmed in the jurisprudence of Supreme Court Decision No. 368 K/Ag/1999 along with subsequent court decisions. The importance of inheritance rights for adopted children is carried out through a *wajibah will* because even though adopted children are not biological children, adopted children are considered to be as close to their adoptive parents as their own children. Although adopted children also receive guaranteed inheritance rights through a compulsory will, the amount of inheritance that can be given to adopted children is certainly different from the amount of inheritance that can be given to biological children. Guaranteeing the existence of inheritance rights for adopted children, which is carried out through a *wajibah will*, has implications for the need for the authority of a Notary to participate in making *wajibah will* deeds relating to inheritance rights for adopted children..

Notary's Authority to Make Authentic Deeds Regarding *Wajibah will*s for the Inheritance Rights of Adopted Children

Article 16 paragraph (1) letter h of the UU JN confirms that one of the obligations of a Notary is to make and inventory deeds related to wills. This provision is also emphasized that in the explanation of Article 16 paragraph (1) letter i related to UU JN II emphasizes that the Notary's authority to make and record will deeds is actually aimed at providing legal protection to the maker of the will, including to the parties affected by the substance of the will.(Ubaidillah, 2022)(Eriyanti & Ridwan, 2022). Legal protection for parties related to the existence of a will is aimed at protecting the interests of the heirs, including the role of the Notary to help trace or track the validity of a will that has been made.(Hanifuddin & Fauzi, 2021). This Notary's authority shows that in relation to testamentary deeds, the position of a Notary is very important to ensure legal certainty and prevent disputes for the parties..

Notaries in exercising their authority, including making deeds related to wills, also need to pay attention to various principles relating to the duties and authority of Notaries, which include: first, the principle of equality. This principle of equality means that in providing services, Notaries must not discriminate against clients(Abdillah, 2023). Notaries must be fair and prioritize the legal rights and needs of clients. Second, the principle of trust. In connection with this principle, Notaries are emphasized that they must be able to maintain trust while also being able to protect various confidential information from clients and parties related to the deed made as long as it is in line with the law.(Sri Hasrina, Muhammad Said

Karim, 2021). Third, the principle of legal certainty, namely the principle which emphasizes that Notaries are required to pay attention to their authority as stated in positive law. This is intended so that the Notary can act carefully while prioritizing his authority in providing optimal services for clients(Mulyawan & Dewi, 2022).

Fourth, the principle of authenticity of the deed. In connection with this principle, Notaries are expected to understand the preparations including the procedures required to make a deed in accordance with the provisions of positive law (Yustyawan et al., 2018). Fifth, the principle of justification. In this principle, the Notary emphasizes that in making a deed, he must have strong legal reasons and arguments, including having to put forward precise legal considerations that can be explained to clients regarding the deed being made. Sixth, the principle that Notaries can only provide services in accordance with the authority granted by statutory regulations and must not abuse their position. Seventh, the principle of prudence is the principle where the Notary must be able to make a decision as to whether or not a legal act can be formulated into a deed.(Al mulia et al., 2022). This emphasizes the important role of a Notary in examining a legal act precisely and comprehensively and ensuring that a legal act complies with legal provisions.

Eighth, the principle of proportionality. This principle emphasizes that the Notary must be proportionally able to see the balance between rights and obligations both for the Notary and specifically for the client. Ninth, the principle of professionalism, namely the principle where in carrying out their authority a Notary must refer to the laws and regulations and the code of ethics that applies to Notaries. Tenth, namely the principle of presumption of validity. The principle of presumptive validity, which is commonly referred to as *presumptio iustae causa*, states that an authentic deed made by a Notary is valid until it can be legally proven otherwise.(Cindy Octabriel Sirait, Janus Sidabalok, 2022). The principle of *presumptio iustae causa* for Notaries is actually relevant to the general explanation in the UU JN that as a public official, the deed made by a Notary must be considered valid and acceptable.(Narsudin, 2023). This confirms that if there is a party who denies the deed made by the Notary, then the parties must prove otherwise at a trial held in court. In Habib Adjie's view, one of the exceptions to the application of the principle of *presumptio iustae causa* for Notaries is related to deeds that are null and void because the deed is legally considered to have never been made and has no legal consequences.(Emala Sari, Djoni Sumardi Gozali, 2024). The application of the principle of *presumptio iustae causa* for Notaries can only be

carried out for Notarial actions that contain elements of defects, such as: the Notary's lack of authority in making a deed, the presence of formal or material defects, and the Notarial deed that is made is not in accordance with legal provisions.(Sembiring et al., 2022).

Referring to the ten principles above which must be used as guidelines by Notaries in exercising their authority, when making authentic deeds related to *wajibah will* for the inheritance rights of adopted children they must also refer to the ten principles above. The authority of a Notary in making authentic deeds related to *wajibah will* for the inheritance rights of adopted children in general, apart from paying attention to the ten principles above, they are also required to have knowledge of Islamic law, especially related to will cases. A Notary's understanding of Islamic law, especially those relating to *wajibah will,* is needed to improve the professional aspect of the Notary in carrying out his authority. The aspect of professionalism for Notaries is not just adhering to the code of ethics for Notaries, but also includes a deeper understanding of the notarial deeds that are made and related to mandatory testamentary deeds for the inheritance rights of adopted children, so Notaries must also have an understanding of Islamic law, especially related to *wajibah will.*

CLOSING

The legal status of inheritance rights for adopted children carried out through a *wajibah will* has actually been firmly confirmed in Article 209 KHI and also confirmed in the jurisprudence of Supreme Court Decision No. 368 K/Ag/1999 along with subsequent court decisions. The importance of inheritance rights for adopted children is carried out through a *wajibah will* because even though adopted children are not biological children, adopted children are considered to be as close to their adoptive parents as their own children. Although adopted children also receive guaranteed inheritance rights through a compulsory will, the amount of inheritance that can be given to adopted children is certainly different from the amount of inheritance that can be given to biological children. Guaranteeing the existence of inheritance rights for adopted children, which is carried out through a *wajibah will,* has implications for the need for the authority of a Notary to participate in making *wajibah will* deeds relating to inheritance rights for adopted children.

The authority of a Notary in making authentic deeds related to *wajibah will*s for the inheritance rights of adopted children must actually refer to the ten principles relating to the function of Notaries, which include the principles of equality, trust, legal certainty, authenticity of deeds, justification, prohibition of abuse of position, prudence, proportionality , professionalism, and the principle of presumptio iustae causa. Apart from referring to these ten principles, a Notary in making an authentic deed regarding a *wajibah will* for the inheritance rights of an adopted child must also understand Islamic law, especially regarding *wajibah will*s and testaments..

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