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Legal Consequences of Making a Deed of Marriage Agreement by a Notary Who Has Not Been Registered

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Abstract

This research aims to discover the legal consequences of making a marriage agreement deed by a notary who has yet to be registered at the Office of Religious Affairs. This research method is normative legal research examining the legal consequences of making a marriage agreement deed by a notary who has yet registered at the Office of Religious Affairs. The research method used includes research on legal principles, systematic law analysis, and legal synchronization study. This research is focused on case studies of the East Jakarta Religious Court Decision Number 4855/Pdt.G/2019/Pa. It is related to doing a marriage agreement deed by a notary without registration at the Office of Religious Affairs. The results of this study analyze the legal implications of non-recording, both from the perspective of the validity of the marriage agreement certificate and its legal impact on the parties concerned. The novelty of this research is that administrative inaccuracies in making a marriage agreement can affect its legal validity and related rights. This research also seeks to provide recommendations for increasing awareness and compliance with applicable legal procedures to avoid potential conflicts and disputes in the future related to the marriage agreement deed.

Keywords: Legal Consequences; Marriage Agreement; Notary

1. INTRODUCTION

Marriage according to Article 1 of Law number 1 of 1974 concerning marriage. Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on Belief in One Almighty God. In Article 147 of the Civil Code which reads: [Indonesia, Civil Code.] "Under the threat of annulment, every marriage agreement must be drawn up with a notarial deed before the marriage takes place". The marriage agreement must be executed at the time or before the marriage, as stated in the first sentence of article 29 above. The same requirement is also emphasized in Article 147 of the Civil Code, which states that the marriage agreement must be made with a notarial deed and must be made before the marriage. if not before a notary, the marriage agreement is null and void by law.¹

Based on the Decision of the Constitutional Court Number 69/PUU-XIII/2015 regarding the implementation of the marriage agreement, currently it is not only limited to the period before or when the marriage takes place, but can also be carried out while in a marriage bond, provided that the husband and wife agree. Thus, in this case, the Constitutional Court prioritizes the application of progressive law to meet legal needs for phenomena that occur in society against risks that might arise from joint assets in marriage, both due to the work of the husband and wife which have consequences and responsibilities up to personal assets. Initially, the marriage agreement was focused on aspects of material wealth, but over time, requests to regulate non-property matters in the

¹ Daffa Alif Utama, Endah Pujiastuti, and Dian Septiandani, "Penerbitan Kartu Keluarga Bagi Pasangan Nikah Siri Dan Akibat Hukumnya Terhadap Para Pihak," *Jurnal USM Law Review* 5, no. 2 (2023), <https://doi.org/10.26623/julr.v5i2.5922>.

marriage agreement also emerged.² An example is to ensure that the principle of monogamy is maintained in a marriage relationship. On October 27 2016, the Constitutional Court issued Decision Number 69/PUU-XIII/2015. The decision focuses on the substance of the arrangement relating to the marriage agreement contained in Article 29 of Law Number 1 of 1974. The following are some of the changes that have occurred.

Prior to the Constitutional Court's decision, the ratification of the marriage agreement was carried out by an employee of the marriage registry, after the decision of the Constitutional Court, the ratification of the marriage agreement was carried out by an employee of the marriage registration or notary.³ Before the Constitutional Court's decision, the marriage agreement comes into force after the marriage takes place, after the Constitutional Court's decision, the marriage agreement comes into effect when the marriage takes place, or as long as it is otherwise specified in the marriage agreement. Before the Constitutional Court Ruling, the marriage agreement can only be changed with the consent of both parties as long as the change does not harm a third party, after the Constitutional Court Decision the marriage agreement can be changed or revoked with the consent of both parties as long as the change and revocation does not harm the third party.⁴

In the context of several modifications in the norms governing marriage agreements, several changes to the norms have been mentioned previously. Among these changes, there is one change in norms that has caught the attention of the author, which is related to the process of ratifying a marriage agreement. The Constitutional Court's decision provides an alternative in terms of ratifying the marriage agreement through the role of a Notary. According to Article 1 number 1 of Law Number 30 of 2004 concerning the position of a notary public, it states that "Notary is a public official authorized to make authentic deeds and other authorities as referred to in this law".⁵

In principle, an authentic deed reflects officially the truth according to the information submitted by the appearers to the Notary. However, the Notary has the responsibility to state emphatically that the contents of the Notary's deed have been understood and are in accordance with the wishes of the parties. This is done by reading the contents of the Notary deed clearly, providing access to information including related laws and regulations, for the party signing the deed. The parties have the freedom to agree or disagree with the contents of the Notary deed they will sign.⁶

In fact, as a case study in this study, there is a marriage agreement that prior to the marriage, between the Plaintiff and the Defendant had made a marriage agreement/agreement which was recorded in the Notary Deed Number 1 dated May 1,

² Bamedika Kris Endira et al., "Kedudukan Dan Peran Organisasi Profesi Advokat Terhadap Advokat Yang Berhadapan Dengan Hukum," *Jurnal USM Law Review* 5, no. 1 (2022), <https://doi.org/10.26623/julr.v5i1.4841>.

³ Reva Siegel, "Same-Sex Marriage and Backlash: Consensus, Conflict, and Constitutional Culture," *SSRN Electronic Journal*, 2017, <https://doi.org/10.2139/ssrn.2914674>.

⁴ Semra Yilmaz, Fatma Akyuz, and Naheeda Mohamed Arslan, "Associated Factors of Legal Child Marriage in Turkey: Pregnancy and below-Average Intelligence," *Journal of Biosocial Science*, 2021, <https://doi.org/10.1017/S0021932021000584>.

⁵ Muhammad Habibi Miftakhul Marwa, "Model Penyelesaian Perselisihan Perkawinan Perspektif Hukum Adat Dan Hukum Islam," *Jurnal USM Law Review* 4, no. 2 (2021), <https://doi.org/10.26623/julr.v4i2.4059>.

⁶ Alif Utama, Pujiastuti, and Septiandani, "Penerbitan Kartu Keluarga Bagi Pasangan Nikah Siri Dan Akibat Hukumnya Terhadap Para Pihak."

2001, however, because the agreement had not been recorded in the register of the Office of Religious Affairs, Duren Sawit District, East Jakarta, the Plaintiff requested the Panel of Judges of the East Jakarta Religious Court who examined this case to ratify the marriage agreement. Whereas the Defendant expressed objection and strongly and firmly rejected the Plaintiff's request.

The results of other studies show that currently a marriage agreement is no longer defined only as an agreement that can only be made before the marriage (prenuptial agreement) takes place, but can also be carried out after the marriage takes place (postnuptial agreement), is legal in the eyes of the law.⁷ In contrast to the results of other studies, marriage agreements and the legal consequences of the marriage agreement made by each party—husband and wife, are binding. Therefore, if a violation occurs, each party can take legal action.⁸

Other research shows that the existence of a marriage agreement that explicitly separates the assets of husband and wife in marriage. By entering into a Marriage Agreement, the two prospective husband and wife are entitled to prepare some deviations from the laws and regulations regarding the association of assets, as long as the agreement does not violate good morals or general rules and as long as all provisions are respected.⁹ This study aims in reviewing and exploring issues related to the analysis legal consequences of making a deed of marriage agreement by a notary who has not been registered at the office of religious affairs.

2. METHOD

The research that will be used in this paper is normative legal research because it includes research on legal principles, research on legal systematics, and research on the level of legal synchronization.¹⁰ If associated with the title of this study, the normative legal research method is the most appropriate choice. The normative legal research method is legal research that places law as a building system of norms. The norm system in question is regarding principles, norms, rules, and laws and regulations, court decisions, agreements and doctrines (teachings). If related to the title raised in this study, normative legal research is the most appropriate method for this research because it is carried out by examining and analyzing principles, norms, laws and regulations, agreements and doctrines. The nature of prescriptive research is research that aims to provide an overview or formulate problems in accordance with existing circumstances or facts associated with existing standards or norms. The data collection technique used in this research is library research. Literature study is a data collection method by collecting documents, books, and other literature. Case study is decision of the East Jakarta Religious Court Number: 4855/Pdt.G/2019/Pa.Jt. In addition to being able to support the data obtained through

⁷ Renni Romauli and Dan Sukindar, "Juridical Review Concerning Marriage Agreements Made After Marriage," *Jurnal Legalitas* 6, no. 1 (2021).

⁸ Haerunnisa Yunus, Rusli Rusli, and Abidin Abidin, "The Concept of A Marriage Agreement in the Compilation of Islamic Law," *International Journal Of Contemporary Islamic Law And Society* 2, no. 2 (2020), <https://doi.org/10.24239/ijcils.vol2.iss2.20>.

⁹ Herni Widanarti and Kornelius Benuf, "Development of Rules Concerning Indonesian Marriage Agreements," *Politik Indonesia: Indonesian Political Science Review* 7, no. 2 (2022), <https://doi.org/10.15294/ipsr.v7i2.34640>.

¹⁰ Suteki dan Galang Taufani, "Metodologi Penelitian Hukum," *Metodologi Penelitian Hukum*, 2018.

library research. The discussion mainly refers to primary legal materials, in which the author will explore various products of legislation both directly related to the legal issues at hand and those that are not directly related and borrow ratio decidendi which directs judges to a decision. In legal research, there are 5 (five) kinds of approaches. With this approach the author will get information from various aspects regarding the issue being tried to find an answer.¹¹

3. RESULTS AND DISCUSSION

3.2 Legal Consequences of Making a Marriage Agreement

Deed by a Notary Who Has Not Been Registered at the Office of Religious Affairs. Before elaborating further on the legal consequences of making a marriage agreement deed by a notary who has not been registered with the Office of Religious Affairs, it should be noted that although marriage agreements are not very common in society, research shows that there are advantages to making marriage agreements. In the Civil Code, the principle of unanimous mixing (Algehele Gemeenschap Van Goederen), which means that the wealth brought into the marriage is mixed together. According to the Constitutional Court Decision Number 69/PUU-XIII/2015 concerning marriage agreements, husbands and wives must fulfill several requirements before the marriage agreement can be declared valid against a third party. The agreement must be made before a notary and registered at the Population and Civil Registry Service. Created and registered to meet publicity requirements. Talking about the legal consequences that will be experienced. As is well known, agreements usually have legal consequences for those who make them and interested third parties. This also applies to marriage agreements. Article 29 paragraph (1) of Law number 1 of 1974 concerning Marriage states that both parties to a collective agreement may enter into a written agreement which is legalized by the Marriage Registrar at the time or before the marriage takes place. The contents of the agreement also apply to third parties as long as the third party is involved. According to the article, the marriage agreement must be registered to be ratified by the Marriage Registrar. If not registered, there will be legal consequences/legal consequences. Legal consequences if the marriage agreement is not registered, namely: Legal consequences for the parties themselves. In Law number 1 of 1974 concerning Marriage, article 29 paragraph (1) which states that ". both parties to the collective agreement can enter into a written agreement which is legalized by the Marriage Registrar,. " According to that article, Law Number 1 of 1974 concerning Marriage stipulates that the marriage agreement must be made in writing. Thus, an agreement made in writing has strong evidence because it is made in writing. Meanwhile, regarding the principle of validity, Article 1338 of the Indonesian Civil Code (Burgerlijk Wetboek) which states that "all agreements made legally apply as laws for those who make them." This is because Law Number 1 of 1974 concerning Marriage does not stipulate that new marriage agreements can only be registered or ratified. In accordance with the principle of the birth of the agreement, namely the principle of consensualism which says that the agreement was born from the moment an agreement was reached between the parties, then the marriage

¹¹ Ahmad Tanzeh, *Metode Penelitian Kualitatif: Konsep, Prinsip, Dan Operasionalnya*, Akademia Pustaka, 2018.

agreement automatically binds the parties who made it when both agreed on the marriage agreement made. whether registered or not. Therefore, permanent marriage agreements, whether registered or not, have binding legal consequences for couples who agree to do so. In other words, the other partner remains bound by the agreement stated in the agreement.

Legal consequences related to third parties Unlike the legal consequences for the parties themselves who make a marriage agreement if it is not registered with a third party, if the marriage agreement is not registered or ratified by a marriage registrar, the marriage agreement does not have binding force against third parties. This is in accordance with what has been explained by the author in the previous sub-chapter regarding the requirements that make the marriage agreement binding on third parties, as well as the provisions contained in Article 29 paragraph (1) of Law number 1 of 1974 concerning Marriage, which states that "at the time or before the marriage takes place, both parties to the collective agreement can enter into a written agreement which is ratified by the Marriage Registrar, after which the contents also apply to third parties as long as a third party is involved." In addition, the same thing is stated in the Compilation of Islamic Law (KHI) in Article 50 which states that marriage agreements regarding assets are binding on the parties and third parties, starting from the date the marriage was held in the presence of a marriage registrar. Thus, because the marriage agreement has not been registered, a third party may assume that the marriage takes place with a joint marriage property union. If there is a debt between husband and wife, the debt will be settled by the joint property of the husband and wife. The absence of a marriage agreement automatically becomes joint property. Therefore, even though the marriage agreement is not recorded, it can still be binding on the husband and wife. It is different for third parties, because if the marriage agreement is not recorded, then it has no legal consequences and cannot be legally enforced.¹²

3.2.2 Authority of a Notary in Making a Deed of Marriage Agreement

Authority is the right and power to act, while authority is the right and power to do something, according to the Big Indonesian Dictionary. amendment to Law Number 30 of 2004 concerning the position of notary public (UUJN P). According to Article 1, number 1, of the law, a notary is a public official who has the authority to make authentic deeds and other authorities as referred to in the law. Based on the contents of the article, it can be analogized that the authority of a notary is the same as that of a public official who makes authentic deeds, which are general in nature and have other powers. In other words, the authority to make authentic deeds is not given to officials other than those stipulated by law. Regarding the Authority of a Notary is regulated in the provisions of Article 15 UUJN P which is stated as follows: "The Notary has the authority to make authentic deeds regarding all actions, agreements and provisions required by laws and regulations and or that are desired by interested parties stated in an authentic deed,

¹² Festiana Lasena, Lisda Van Gobel, and Agus Pariono, "The Effectiveness of the Mobile Service Program by the Population and Civil Registry Office of Bolaang Mongondow Utara Regency," *Formosa Journal of Applied Sciences* 1, no. 6 (2022), <https://doi.org/10.55927/fjas.v1i6.1810>.

guarantee certainty of the date of making the deed, save the deed, provide grosse, copy of the deed and quote the deed, The notary has other authorities as regulated in the laws and regulations. In UUJN P, the provisions of Article 15 paragraphs 1 and 2 have been amended so that they read as follows: "The notary has the authority to make authentic deeds regarding all actions, agreements that are required by law and/or what is desired by interested parties to be stated in authentic deeds, guarantee certainty of the date of making the deed, save the deed, provide groose, copies and quotations of the deed, all of that as long as the making of the deed is not also assigned or excluded to other officials or other people determined by law. In addition to the authority referred to in paragraph 1, the notary also has the authority to: "The notary has the authority to make authentic deeds regarding all actions, agreements that are required by laws and regulations and/or that are desired by interested parties to be stated in authentic deeds, guarantee the certainty of the date of making the deed, keep the deed, provide groose, copies and excerpts of the deed, all of that as long as the making of the deed is not also assigned or excluded to other officials or other people determined by law. In addition to the authority referred to in paragraph 1, the notary also has the authority to: "The notary has the authority to make authentic deeds regarding all actions, agreements that are required by laws and regulations and/or that are desired by interested parties to be stated in authentic deeds, guarantee the certainty of the date of making the deed, keep the deed, provide groose, copies and excerpts of the deed, all of that as long as the making of the deed is not also assigned or excluded to other officials or other people determined by law. In addition to the authority referred to in paragraph 1, the notary also has the authority to: all of that as long as the making of the deed is not also assigned or excluded to other officials or other people determined by law. In addition to the authority referred to in paragraph 1, the notary also has the authority to: all of that as long as the making of the deed is not also assigned or excluded to other officials or other people determined by law. In addition to the authority referred to in paragraph 1, the notary also has the authority to:

Validate signatures and determine the certainty of the date of private documents by registering them in a special book; Book private documents by registering them in a special book; Make copies of the original private letters in the form of copies that make the description as written and described in the letter concerned. Perform validation of compatibility of photocopies with the original letters; Provide legal counseling regarding the making of deeds; Make deeds related to land; or Make a deed of minutes of auction. In addition to the authority referred to in paragraphs 1 and 2, a notary has other powers regulated by laws and regulations. As mentioned above, a notary has the responsibility of being a public official and has the authority to make authentic deeds. An authentic deed is a deed whose form is determined by law and is made by or before a public employee who is authorized to do so at the place where it is made. As regulated in Article 38 to Article 65 A UUJN P, a notarial deed is an authentic deed stipulated by law. One of the main tasks of a notary is to make authentic deeds, such as wills, minutes of meetings, limited liability companies, limited liability companies, and so on. Apart from making authentic deeds, notaries and other appointed officials can also make other types of deeds, such as

deeds of recognition of unmarried children (Article 281 of the Civil Code) which can be made by Civil Registry Employees (Articles 1227, 1405, 1406, the Civil Code and article 14 3b Juncto 210 KUH). Besides that, There are types of authentic deed that cannot be made by a notary but only by other authorized officials, such as deed on the civil registry (burgerlijke stand), deed on the registration of the transfer of land rights, and ship registration deed. Based on the Notary Office Act (UUJN), notaries as public officials are given authority by attribution. This authority was born and granted by UUJN itself. According to Article 15 UUJN P, the authority of a notary can be divided into 3 (three) categories, namely: General Authority One of the duties of a notary, according to Article 15 Paragraph 1 UUJN P, is to make a deed. According to Lubbers Opinion, as quoted by Tan Thong Kie, the notary not only records (in the form of a deed), but also records and maintains, meaning that recording is not enough, it should also be considered that the deed must be useful at a later date in case of special circumstances. Based on this regulation, this authority is referred to as the General Authority of a Notary with the following limitations: Not excluded from other officials as determined by law; Concerning deeds that must be made or authorized to make authentic deeds Regarding all actions, agreements and stipulations required by law or desired by the person concerned; Regarding the legal subject (person or legal entity for whose benefit the deed is made or desired by the interested party. The main authority of a notary is to make authentic deed. The authenticity of the deed is guided by Article 1 point 7 UUJN P which states that "Notary deeds, hereinafter referred to as Deeds, are authentic deeds drawn up by or before a Notary in the form and procedure stipulated in this Law." In Article 1868 of the Civil Code which states that "An authentic deed is a deed in which the form is determined by law, made by or in the presence of public officials who have the authority for that at the place where the deed was made." Based on the description of the article above, the authority of a notary is to make a deed. If you look at the provisions in the Civil Code, Criminal Code, and other rules, there are also several types of authentic deeds that are the authority of a notary and also the authority of other officials or agencies, such as: "In Article 1868 of the Civil Code which states that "An authentic deed is a deed in which the form determined by law is made by or in the presence of public officials who are authorized to do so at the place where the deed was made." Based on the description of the article above, the authority of a notary is to make a deed. If you look at the provisions in the Civil Code, Criminal Code, and other rules, there are also several types of authentic deeds that are the authority of a notary and also the authority of other officials or agencies, such as:

Deed of acknowledgment of a child out of wedlock (Article 281 of the Civil Code)

Deed of minutes of negligence by the mortgage depositor (Article 1227 of the Civil Code). Provisions regarding mortgages were declared no longer valid following the promulgation of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects related to Land.

Witnesses and notaries as outlined in the Minutes and provide a note about this in the minutes of the original deed by stating the date and number of the Deed of Rectification and a copy of the Deed of the Minutes which must be submitted to the parties. Authority to be determined Then in article 15 paragraph (3) UUJN P states that in addition to the authority referred to in paragraphs (1) and (2) the Notary has other authorities regulated in laws and regulations. The authority in this matter can be seen in terms of the Notary's position as a Land Deed Making Officer (PPAT), as a Class II Auction Officer, as a Cooperative Deed Making Officer (NPAK), and as a Capital Market Notary, all of which are positions and have their respective authorities which are obtained and regulated by law. Notaries can be considered acting outside their legal authority. As a result, the notary deed cannot be legally binding or enforceable, and the party who feels disadvantaged can sue the notary civilly to the District Court.¹³

4. CONCLUSION

The legal consequences of making a marriage agreement deed by a notary who has yet to be registered at the Office of Religious Affairs If registration is not carried out, then the marriage agreement only applies to the parties who have made it, namely the husband and wife. This provision is in accordance with articles 1313, 1314 and 1340 of the Civil Code which states that agreements are only binding for the parties involved in their making. In addition, the marriage agreement has binding legal force on third parties, the agreement must be recorded at the civil registration office. The legal consequence is, if the marriage agreement is not registered at the civil registration office, will still apply and have legal consequences for both parties, namely the husband and wife involved in the agreement. In addition, the procedure for recording marriage agreements for Muslim couples, which in essence, religious courts or district courts do not have the authority to ratify marriage agreements.

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¹³ Noorhasanah Zainuddin et al., "It Governance Evaluation at the Population and Civil Registry Office in Kolaka District Using COBIT 5 Framework," *Register: Jurnal Ilmiah Teknologi Sistem Informasi* 6, no. 2 (2020), <https://doi.org/10.26594/register.v6i2.1728>.

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