



LEGAL STRENGTH OF THE MARRIAGE AGREEMENT MADE BY THE PARTIES BEFORE THE NOTARY AFTER THE MARRIAGE IS IN CONSTRUCTION

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KEYWORDS

authentic deed, notary, marriage agreement.

ABSTRACT

Marriage as a legal action is an act that contains rights and obligations for the individuals who do it. The purpose of this study is to find out and analyze the Law of the Marriage Agreement on Property after the Marriage and, secondly, to analyze the legal force of the Marriage Agreement before a Notary after the Marriage takes place. Based on the results of research on the contents of Article 29 paragraph (1) of the Marriage Law, it limits the making of a marriage agreement for the separation of assets, but over time the Constitutional Court Decision No. 69/PUU-XII/2015, which has expanded the meaning of the marriage agreement where the marriage agreement is no longer interpreted only as an agreement made before Marriage but can also be made during the marriage bond. One of the public officials authorized by the state to do authentic deeds is a Notary. In the case of a marriage agreement based on the Constitutional Court Decision No. 69/PUU-XII/2015, the notary has the function of ratifying the marriage agreement. The ratification is in the form of an agreement made in a notarial deed. If the marriage agreement is made in a Notarial Deed, it can function as crucial evidence and have perfect evidentiary power. With the Constitutional Court Decision 69/2015, the marriage agreement is no longer interpreted only as an agreement made before Marriage (prenuptial agreement). However, it can also be made after the marriage (postnuptial agreement). Even though Constitutional Court Decision 69/2015 was requested by Indonesian citizens who are married to foreigners (mixed marriages), Constitutional Court Decision 69/2015 also applies to married couples of fellow Indonesian citizens.

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INTRODUCTION

Marriage is born from an agreement between prospective husband and wife, where the law stipulates that if they get married, all property acquired during the duration of the Marriage becomes joint property (Fitrianti, 2017). Marriage is a legal act, which in itself will undoubtedly have legal consequences, namely the existence of rights and obligations between the parties who enter into Marriage (Rorong, 2016). In other words, a marriage creates rights and obligations that must be fulfilled by the husband and wife bound by Marriage (August et al., 2022). The legal consequences arising from Marriage are significant, not only in terms of family relations but also in terms of assets (Van Bone, 2017).

As stated in Article 1 of Law Number 1 of 1974 concerning Marriage, it is stated that: "Marriage is a physical and spiritual bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on Belief in the One Supreme God.

A marriage agreement is an agreement made by a prospective husband or prospective wife to regulate the consequences of their Marriage on their assets (Hastuti, 2020). A lawful marriage will have the following legal consequences:

1. The emergence of the relationship between husband and wife
2. The emergence of property in Marriage
3. The emergence of a relationship between parents and children

A marriage agreement is made in written form or deed, either under the hand or in the form of an authentic deed drawn up by an authorized official. What is meant by deed is a signed letter, which. All events used as the basis of a right or engagement were made intentionally from the start for proof (Prastomo & Khisni, 2017).

The marriage agreement is regulated in Article 29 of Law Number 1 of 1974 concerning Marriage, which reads:

- 1) At the time or before the Marriage takes place, both parties, by mutual agreement, can enter into a written agreement that is legalized by the marriage registration officer, after which the contents also apply to third parties if the third party is involved;
- 2) The agreement cannot be ratified if it violates the boundaries of law, religion, and decency;
- 3) The agreement is valid since the Marriage took place,
- 4) The agreement cannot be changed if the marriage lasts unless both parties agree to change and the change does not harm the third party.

The stipulation of the Marriage Agreement in Article 29, paragraph (1) of the Marriage Law mentioned above creates restrictions in a marriage agreement that separate assets must be made before the Marriage takes place. However, with the Constitutional Court Decision 69/2015, the provisions of Article 29 paragraph (1) have been amended to become as follows: "At the time, before it is held or while in the marriage bond, the two parties with mutual consent can enter into a written agreement which the marriage registrar legalizes. Alternatively, a notary, after which the contents also apply to third parties as long as a third party is involved."

However, on October 27, 2016, there was a Constitutional Court decision Number 69/PUU-XIII/2015 changing the contents of Article 29 Law Number 1 of 1974 concerning Marriage which stated as follows:

1. Article 29 paragraph (1) Law Number 1 of 1974 concerning Marriage does not have binding legal force if it does not mean "At the time, before it is held or while in the marriage bond, both parties with mutual consent can submit a written agreement which is legalized by the employee marriage registrar or notary, after which the contents also apply to the third party involved.
2. Article 29 paragraph (3) Law Number 1 of 1974 concerning Marriage does not have binding legal force if it does not mean "the agreement comes into effect from the time the marriage takes place unless otherwise specified in the marriage agreement."
3. Article 29 paragraph (4) of Law Number 1 of 1974 concerning Marriage does not have binding legal force as long as it is not interpreted as "during the marriage, the marriage agreement can be related to marital assets or other agreements, cannot be changed or revoked, except if both parties party has an agreement to change or revoke, and the change or revocation does not harm the third party" (Paramita, 2017).

The position of a notary is based on trust between a notary and those who use his services (Abdullah, 2017). A notary, as a public official, is given the authority by the state to declare the existence of a legal relationship between the parties in a deed that directly records the clauses of the

agreement of the parties who promised. The promise that has been stated in the deed is a reflection of the sincere will of the parties (Arliman, 2018).

A deed made before a notary is called a notarial deed or an authentic deed. As stated in Article 15, paragraph (1) of the UUJNP, it is stated that: "The notary has the authority to do authentic deeds regarding all actions, agreements, and stipulations required by laws and regulations and which are desired by interested parties to be stated in an authentic deed, guaranteeing the certainty of the date drawing up the deed, giving grosse, copying and quoting 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."

What is stated in the notarial deed must be considered trustworthy; it is the will of the parties which will provide perfect proof and have legal force. The power of law referred to here provides legal certainty and protection for related parties.

Based on the provisions mentioned above, the marriage agreement can be made before or after the Marriage takes place with mutual consent to make a written agreement ratified by a notary. However, in practice, a marriage agreement is made, which is carried out after Marriage is carried out by applying for determination to the District Court. The role of a notary in doing a marriage agreement deed is based on his authority as in Article 1 of the Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law Number 30 of 2004, namely: "A notary is a public official, authorized to do authentic deeds and has other authorities. Notaries must keep documents or client data confidential, and notaries are neutral by not taking sides with anyone. A notary's authority in a marriage agreement deed can provide legal certainty regarding the agreement's contents. In this case, the notary has obligations such as Article 1 number 10 of the Indonesian Notary Association (INI) Code of Ethics which states that: "Obligations are attitudes, behaviors, actions or actions that must be carried out by members of the Association or other people who assume and carry out the position of Notary, in order to maintain and maintain the image of the authority of the notary institution and uphold the nobility and dignity of the Notary's office." The notary's obligation in doing a marriage agreement deed is impartial. It safeguards the interests of the parties involved in the four agreements. As explained in Article 16 paragraph (1) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2014 concerning the Position of Notary Public, namely "Act trustworthy, honest, thorough, independent, impartial, and safeguard the interests of the parties involved in lawmaking."

Problems with the potential for punishment that often occur in the duties of a notary are (Elnizar, 2018) :

1. The deed is done with the condition that the parties do not face each other
2. Identity data from one of the parties in the deed is considered incorrect or is considered to provide false information
3. The data regarding the promised object is not following the facts
4. The data provided by one or both parties is incorrect, so the notarial deed issued is considered a fake deed
5. There are two outstanding deeds between the parties, which have the same number and date but different contents
6. The signature of one of the parties in the minutes is forged
7. The appeared uses someone else's identity

Based on the background description, this research aims to find out and analyze the Law of the Marriage Agreement on Property after Marriage and, secondly, to analyze the legal force of the Marriage Agreement before a Notary after the Marriage takes place. So that the benefits of this research are to help increase public awareness of the importance of making marriage agreements and managing

spouses' assets before Marriage, providing information to related parties, such as notaries and lawyers, about legal aspects related to marriage agreements and spouses' assets. Husband and wife and assisting jurists to develop their views on how the law of marriage contracts is applied in practice and assisting them in providing clients with more accurate legal advice.

METHODS

The research method used in this research is normative juridical research. This research emphasizes secondary data sources, namely obtained from library materials, in this case, primary legal materials, secondary legal materials, and tertiary legal materials (Moniung, 2015). As befits legal research, data is generally secondary.

RESULTS AND DISCUSSION

The Legal Consequences of the Marriage Agreement on Property after the Marriage.

The position of marital assets in the family is inseparable from the marriage agreement between husband and wife at the time of Marriage. In a formal sense, a marriage agreement is any agreement that is carried out in accordance with the provisions of the law between prospective husband and wife/husband and wife regarding their Marriage; it does not matter what the contents are (Sanger, 2015). Various forms of marriage agreements concerning property, namely:

1. Wealth Separation Marriage Agreement

Marriage Agreement Separation of Wealth Assets are assets acquired during Marriage owned by each (Masri & Wahyuni, 2021). In Marriage, there are two assets, namely, the husband's property and the wife's property. The rights and obligations acquired before or after Marriage are the responsibility of each. In a marriage agreement containing the separation of marital assets, each party (husband and wife) remains the owner of the items they bring into the Marriage.

2. Profit and Loss Union Marriage Agreement (*Gemeenschap Van Winst En Verlies*)

The profit and loss mix agreement, namely that all income received by the husband and wife which is obtained free of charge (grant or inheritance) and the income they receive will become the joint property, and all losses or expenses will be shared responsibility. This form of marriage agreement means that there is no unanimous union between husband and wife. However, they promise a limited union, namely a union of profit and loss only. With such a union, profits and losses become the rights and responsibilities of the husband and wife together.

3. Proceeds Union Marriage Agreement (*Gemeenschap Van Vruchten En Inkomsten*) and Income

The income union agreement that occurs in this agreement is only an income union. Income received by each party becomes joint property, but each party bears expenses or losses earned. A profit and loss union is another form of marital assets that are not in the form of separation of assets as a whole, nor is it a profit and loss union. The profit and loss union is, in principle, almost the same as the profit and loss union; it is just that this form of union is restricted so that debts that exceed the assets of the profit and loss union (outside the union) of these debts will be the personal responsibility of the debtor.

The position of marital assets in the family is inseparable from the marriage agreement between husband and wife at the time of Marriage. In a formal sense, a marriage agreement is any agreement carried out following the provisions of the law between prospective husband and wife/husband and wife regarding their Marriage; it does not matter what the contents are (Bagenda, 2021).

The parties to the Marriage are free to determine the contents of the marriage agreement. They can discuss issues of assets acquired during the Marriage or matters deemed essential to be discussed

in the marriage agreement which is feared to cause conflict during the Marriage or after the breakup of the Marriage, as long as it does not conflict with legal regulations -law, law, religion, and decency or honor. Article 139 of the Civil Code also states that prospective husbands and wives are free to determine the contents of the marriage agreement they make (Arief, 2016). However, this freedom is limited by several restrictions that must be considered by the prospective husband and wife who will make a marriage agreement. The Civil Code provides several prohibitions regarding the contents of the marriage agreement, namely:

- a. The agreement may not contradict decency or public order (Article 139 of the Civil Code).
- b. The agreement must stay within the powers that the Civil Code gives to the husband as the head of the household; for example, it cannot be promised that the wife will have her residence (Article 140 paragraph (1) of the Civil Code).
- c. In this agreement, the husband and wife may not give up their right to inherit their children's inheritance (Article 141 of the Civil Code).
- d. The agreement should not state that one of the parties will bear a debt more significant than his share in profits (Article 142 of the Civil Code).
- e. This agreement may not generally refer to regulations that apply in a foreign country (Article 143 of the Civil Code). This prohibition is intended to ensure legal certainty regarding the rights of husband and wife, especially for the interests of third parties who may not master the laws of the designated foreign country.
- f. The promise cannot be made in general words that their position will be regulated by customary law and so on (Article 143 of the Civil Code).

The assets acquired during the Marriage become joint property. Assets in Marriage According to the Civil Code and the Marriage Law, as stated in Article 119 of the Civil Code, it is stated: "From the time the Marriage took place, according to the law, there is the entire joint property between the husband and wife, insofar as there are no other provisions in the marriage agreement. The joint property, as long as the Marriage is running, may not be abolished or changed by an agreement between the husband and wife.

Then based on Article 35 of the Marriage Law, it is regulated regarding property in Marriage, namely:

1. Property acquired during Marriage becomes joint property.
2. Inheritance of each husband and wife and assets obtained by each as a gift or inheritance are under the supervision of each if the parties do not specify otherwise.

The primary purpose of a marriage agreement is to separate joint assets acquired by husband and wife when they are still in a marriage bond (Rohman, 2017). By making this agreement, there is clarity regarding the ownership of the assets of each husband and wife. The advantages and goals that can be obtained by both parties such as (Friends, 2019) :

1. Clarity on the separation of the property of each husband and wife so that in the event of a divorce, the distribution of assets is more accessible and can minimize conflict.
 2. We are separating the responsibilities of each party for debts made during the marriage period.
 3. If one party wants to sell assets, then there is no need to seek approval from the partner (husband or wife)
 4. Indonesian citizens who are married to foreigners have the right to own land with ownership certificates because of the separation of assets.
 5. The needs of children are guaranteed because the debt of one party (husband or wife) does not affect the other party, so if one party goes bankrupt, the other party is not affected.
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Over time, the issuance of the Constitutional Court Decision No. 69/PUU-XIII/2015 of 2015 (“MK Decision 69/2015”). With the Constitutional Court Decision 69/2015, the provisions in Article 29 of the Marriage Law have changed to be as follows:

- 1) At the time, before it is held, or while in the marriage bond, both parties, with mutual consent, can submit a written agreement that is legalized by the marriage registrar or notary, after which the contents also apply to third parties if the third party is involved.
- 2) The agreement cannot be ratified if it violates the boundaries of law, religion, and decency.
- 3) The agreement occurs when the Marriage takes place unless otherwise specified in the Agreement.
- 4) If the Marriage is in progress, the marriage agreement can be related to marital assets or other agreements; it cannot be changed or revoked, except if both parties agree to change or revoke, and the change or revocation does not harm third parties.

A marriage agreement made after a notarized marriage has the force of law as an authentic deed.

Article 147 of the Civil Code states, "A marriage agreement must be made with a notarial deed before the marriage takes place, and will become void if it is not made in this way." Likewise, it is also regulated in Article 15 paragraph (1) of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Office of a Notary Public, which states that a Notary has the authority to do authentic deeds regarding all actions, agreements, and provisions required by law. Legislation and what is desired by interested parties to be stated in an authentic deed, guarantee the certainty of the date of doing the deed, keep the deed, provide Grosse, copies, and quotations of the deed, all of that if the making of the deed is not also assigned or excluded to other officials or other person determined by law.

Therefore, even though the marriage agreement is carried out after the marriage, it does not reduce the essence of the notary's authority as a public official in doing a marriage agreement deed. Before the Constitutional Court Decision 69/2015, the terms of the marriage agreement were regulated in Article 29 of Law Number 1 in the Year 1974. Concerning Marriage, a marriage agreement must be made with a notarial deed and a written agreement ratified by the Marriage Registrar before the Marriage takes place or on when the Marriage took place. The marriage agreement came into force since the Marriage took place and can only be changed if both parties agree to change and the changes do not harm third parties. If the registration of the agreement at the Registrar's Office at the District Court has not yet been carried out and has not been recorded in the Civil Registry Marriage Certificate, then the third parties may assume that the husband and wife are married in a mixture of assets.

So, prior to the Constitutional Court Decision 69/2015 regarding the validity of the marriage agreement, it must be followed up with registration by a Civil Servant. With the Constitutional Court Decision 69/2015, the notary has the function of legalizing the marriage agreement. The ratification is in the form of an agreement made in a notarial deed.

Legal Consequences for Marriage Agreements Made After the Marriage takes place to regulate the cause and effect of marital assets after the Marriage occurs when some assets are not equal or greater on one side of the wife or husband. Therefore, the Marriage Agreement after Marriage is always related to the issue of assets in Marriage. Making a marriage agreement after Marriage aims to:

- a. Separation of assets between the husband and wife so that their assets do not mix. Therefore, if one day they get divorced, the assets of each party are protected, and there will be no fighting over shared assets/gono-gono-gono.
- b. For the debts of each party that they make in their Marriage, each will be responsible separately.
- c. If one of the parties wants to sell their assets, there is no need to ask permission from their spouse.

- d. Likewise, with the credit facilities they will apply for, they no longer have to ask permission from their married friends to guarantee assets registered in one of them.

CONCLUSION

Before the Constitutional Court Decision 69/2015 regarding the validity of the marriage agreement, it had to be followed up with registration by a Civil Servant. With the Constitutional Court Decision 69/2015, the notary has the function of legalizing the marriage agreement. The ratification is in the form of an agreement made in a notarial deed. With the Constitutional Court Decision 69/2015, the marriage agreement is no longer interpreted only as an agreement made before Marriage (prenuptial agreement). However, it can also be made after the marriage (postnuptial agreement). Even though Constitutional Court Decision 69/2015 was requested by Indonesian citizens who are married to foreigners (mixed marriages), Constitutional Court Decision 69/2015 also applies to married couples of fellow Indonesian citizens. Legal Consequences for Marriage Agreements Made After the Marriage takes place to regulate the cause and effect of marital assets after the Marriage occurs when several assets are not equal or greater on one side of the wife or husband. Therefore, the Marriage Agreement after Marriage is always related to the issue of assets in Marriage. So, by making a marriage agreement after Marriage, the aim is to: Separate the assets between the husband and wife so that their assets are not mixed. Therefore, if one day they get divorced, the assets of each party are protected, and there will be no fighting over shared assets/gono-gono-gono. For the debts of each party that they make in their Marriage, each will be responsible separately. If one of the parties wants to sell their assets, there is no need to ask permission from their spouse. Likewise, with the credit facilities they will apply for, they no longer must ask permission from their married friends to guarantee assets registered in one of them.

REFERENCES

- Abdullah, N. (2017). Position and Authority of a Notary in Doing Authentic Deeds. *Journal of Deeds*, 4 (4), 655–664.
- Arief, H. (2016). Juridical Implementation of Marriage Agreements in the Positive Legal System in Indonesia. *Sharia: Journal of Law and Thought*, 15 (2).
- Arliman, L. (2018). Politics of Notary Law After the Amendment to the Law on Notary Office for Notaries in Carrying Out Their Positions. *Dialogia Iuridica*, 9 (2).
- August, KJ, Wismar, A., & Markey, CHBT-RM in N. and BP (2022). *Marriage, romantic relationships, and health*. Elsevier. <https://doi.org/https://doi.org/10.1016/B978-0-323-91497-0.00026-6>
- Bagenda, C. (2021). Overview of the Marriage Agreement in the View of National Law. *Ganaya: Journal of Social Sciences and Humanities*, 4 (1), 258–268.
- Elnizar, NE (2018). *Beware of Criminal Prosecutions That May Be Faced by a Notary while on Duty*. Hukumonline.Com. <https://www.Hukumonline.com/berita/a/waspadai-tuntutan-pidana-yang-may-dihadapi-notaris-dalam-berjib-lt5a7ae033bc871>
- Fitrianti, D. (2017). Joint Assets in a Polygamous Marriage According to Law Number 1 of 1974 and Islamic Law. *Journal of Intellectuality: Islam, Social and Science*, 6 (1), 83–102.
- Hastuti, I. (2020). Legal Protection for Husbands and Wives in Implementing Marriage Agreements According to Islamic Law. *Scientific Journal of Law and Community Dynamics*, 18 (1), 62–69.
- Masri, E., & Wahyuni, S. (2021). Implementation of Marriage Agreement Before, During, and After Marriage. *Journal of Scientific Studies*, 21 (1).
- Morning, AH (2015). Community Participation in Forming Regional Regulations Based on Law Number 12 of 2011 concerning the Formation of Legislation. *Lex Et Societatis*, 3 (8).
- Paramita, E. (2017). *The Legal Consequences of a Marriage Agreement Not Legalized by a Marriage Registrar*. UNS (Eleven March University).
- Prastomo, DA, & Khisni, A. (2017). Legal Consequences of Deed Under Hand Legalized by Notary. *Journal of Deeds*, 4 (4), 727–738.
- Peers, PDB and. (2019). *Separation of Assets in the Marriage Agreement*. Fellowship of Doni Budiono and Partners. <https://pdb-lawfirm.id/pemisahan-harta-dalam-perjanjan-kawin/>
- Rohman, M. (2017). Implications of the Constitutional Court decision number 69/PUU/XIII/2015 concerning marriage agreements for Marriage. *Al-Daulah: Journal of Islamic Law and Legislation*, 7 (1), 1–27.
- Rorong, MA (2016). The legitimacy of a Marriage According to Law Number 1 of 1974 Concerning Marriage. *Lex Et Societatis*, 4 (5).
- Sanger, JP (2015). Legal Consequences of Legal Marriage Based on Article 2 of Law. Number 1 of 1974 concerning Marriage. *Lex Administratum*, 3 (6).
- Van Bone, A. (2017). Settlement of Disputes on Joint Assets with the Status of Collateral in Divorce Cases at the District Court. *Lex Administratum*, 5 (5).



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