

Giving Mandatory Wills for Adopted Children as a Legal Protection Based on Justice Value

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ABSTRACT--*The position of adopted children who do not inherit in practice raises legal issues regarding the inheritance of adoptive parents. Islamic law provides a solution by giving the mandatory wills to the adopted child. Mandatory wills between adopted children and adoptive parents can prevent or avoid disputes between adopted children and the families of adoptive parents who are supposed to be the heirs of adoptive parents who are still living with adopted children.*

It can be concluded that based on the description above it can be concluded that the provision of mandatory wills as a safeguard for the lives of adopted children is based on the values of justice and benefit that grow and develop in the midst of Indonesian Muslim society.

Keywords: *mandatory wills, adopted children, legal protection, justice value*

I. INTRODUCTION

Marriage is a god-chosen way as a way for men to multiply and preserve its life. The implementation of the marriage in Indonesia is governed by Law No. 1 year 1974 on marriage. Marriage pursuant to article 1 of the Republic of Indonesia No. 1 of 1974 on marriage is the inner birth bond between a man and woman as husband and wife with the intention of forming a happy and eternal family or household Based on The Almighty God.

One of the purposes of marriage is to continue posterity for the married couple, but in fact not every marriage is blessed with a child. Some of the married couple who have no children for a long period of time will look for alternatives by adopting a child. A factual adoption of the child has become part of the customary customs of Muslim society in Indonesia and has penetrated in practice through religious judicial institutions.

Adopted child according to article 171 letter H on Compilation of Islamic law, is a child who in terms of maintenance for his daily life, education costs and so on to change his responsibilities from the original parents to his adoptive parents based on the verdict Court. The definition of adopted children can also be seen in article 1 Figure 9 of Law No. 23 of 2002 on child protection as amended by law Number 35 of 2014 stating that adopted child is a child whose right to be transferred from The family power environment, legal guardian, or other person responsible for the care, education, and raising of the child, into the family environment of his or her adoptive parents based on judgment or determination of the court.

The child's appointment must be done by legal process through a court decision. The child's appointment in Islamic law does not alter the position of the adopted child in inheritance. Adopted child in Islamic law is still considered as a child who is not a biological child, so that when the parent dies, according to the inheritance law of Islam adopted child does not have the right to justify the inheritance of the adoptive parents. The position of adopted children who do not lead in practice raises legal problems against the legacy of adoptive parents. Adopted child on one side needs to get guaranteed for his survival when left by his adoptive parents, but on the side of the adopted child does not acquire the right of the order because it is not a child. Possession of relics by the adopted child or by the child or by the siblings of the heir has raised the problem for the life assurance of adopted children. Disputes or concerns about the inheritance may occur among fellow adopted children, because the parents have no children and have raised more than one adopted child.

According to Zakaria Ahmad Al-Barry regarding the impact of the child's rapture, the presence of adopted children sometimes troubled the family of adoptive parents, because he sometimes wanted to master all the treasures of inheritance without giving a part of the heir that should be entitled According to Islamic law.[14]

With regards to the assurance of survival for adopted children, Islamic law provides a solution by providing a testament to the adopted child. A testament of the face between adopted children and adoptive parents can prevent or avoid disputes between adopted children and families of adopted parents who are supposed to be heirs of living adoptive parents with adopted children.

According to David Ali, there may be a difference in the resolution of a testament to the problem of the opinion of the jurisprudence. The differences in the books of fiqh allow the occurrence of "other judges also the opinion of its verdict about the same thing." (different judge different sentence), which can lead to legal inuncertainty.[7]

Based on the explanation above, it is interesting to raise the problem of the basis of the provision of the will of the face of law as a legal protection effort for adopted children.

II. DISCUSSION

a. An Overview of the Will And Its Legal Basis

Mandatory wills are etymologically derived and the root word *al-wwasiyyah* means a person's promise to others. Mandatory wills can also mean [1] "One's message or promise to others to do a good deed when the person who wills is still alive or after death. *Washiyat/Wishayat* is sometimes referred to as the area or *al-Ahdiyah* (Message order), and the person who receives the mandate is called *Al-Washi al-Mukhtar*, or the recipient of the chosen mandate.

Submitted by Al-Qurtubi, as Al-Washiyah quoted by the body of Abu Al-Ainaini and requoted by Ahmad Kamil and Fauzan that the testament according to language was originally a term for everything ordered to do and execute it in a lifetime or after death, then "*Urf*" or the tradition of its use in order or the message that the implementation is carried out after the mandate of death.[3]

Terminologically A Will is a voluntary submission of property from one person to another who is in effect after the deceased person, whether the property is material or in form of merit.[1] A Hanafi defines a will with one's message to set aside some of his possessions for the person he has defined and his execution occurs after he dies.[6]

The understanding or definition of a will includes all forms of wills, such as possession, the liberation of one of its debts, the division of property for abandoned heirs, of wills in the form of benefits, and includes a testament of message to Carry out obligations that are still stuck on the abandoned property. Wills, even though the will was made when the people of the wills were still alive, but could only be realized after the man who wills died. Prior to that, the testament will not have any legal consequences in terms of the transfer of proprietary rights to the person who is given a testament.

Wills have a strong foundation in Islamic sharia, which is sourced from:

1. The evidence found in the Quran

Surah al-Baqarah verse 282 in Quran reads: "Prescribed for you when death approaches [any] one of you if he leaves wealth [is that he should make] a bequest for the parents and near relatives according to what is acceptable - a duty upon the righteous."

Surah Al-Nisa verse 11 and 12: ".. after any bequest which was made or debt.."

2. The legal basis of wills in the Sunnah of Rasulullah SAW

Rasulullah (SAW): "The Spirit of Allah is charity to you when you will face death (for Wills) one third and your treasure, in addition to your practices" (hadist narrated by al-Bukhari and Muslim and five companions, Abu Hurayrah, Abu Ad-Darda, Mu'az ibn Jabal, Abu Bakr as-Siddiq, and Khalid ibn Ubayid).

In another history it is said that Sa'ad ibn Abi Waqqas had only one woman who would inherit his treasure. Then he wanted to save some of the two-thirds

of his wealth. Then the prophet, said to Sa'ad ibn Abi Waqqas: "A third; A third is also a lot (to be wasified). Indeed leave the heirs in rich state better than to let them begging to others "(hadist narrated by al-Jamaah of the majority of hadith scholars)

3. Wills from Ijmaa

Cleric have already agreed on the justification of wills in Islam. According to Mustafa al-Shiba'i as noted by Ahmad Kamil and Fauzan [3] There is no history of the cleric who deny the existence of the testament.

4. Logically

Wills are human needs in order to draw closer to God and to do good to our fellowmen, for people always have a tendency to do to our fellowmen. Testament is one solution for human beings to manifest all desires of doing the good.

b. Child Adoption In The Perspective Of Islamic Law

The term "child adoption" develops in Indonesia as a translation and English "adoption" which means adopt a child, meaning "to raise another child to serve as a child himself and have the same rights as the child.[10]

At the time of Islam delivered by the Prophet Muhammad SAW, the adoption of the child has become a tradition among the majority of the Arab community known as Tabanni meaning "take the adopted child.[9]

Etymologically the word tabanni means "to take a child", whereas in the Indonesian Great Dictionary The term adoption of the child is also called the term "adoption" which means Taking (Adopt) that the child is legally a child of the person's own.[8]

The term "Tabanni" can thus be interpreted as a person raising another child as a child, and it is true to it all the provisions of the law that apply to the children of the adopted parents and such an understanding has An identical sense to the term "adoption".

Tabanni by terminologically According to the Wahbah al-Zuhaili as quoted by Andi Syamsu Alam and M. Fauzi is "The taking of a child who is done by a person against a child who is obviously the man, then the child is granted to him. Tabanni in another sense is a person both male and female who intentionally invite a child to himself when the child has had a clear lineage in his biological parents.[4] The adoption of the child in such a sense is contrary to Islamic law, so that the element of a child's parent should be cancelled.

Mahmud Syaltut as quoted as A. Aziz Dahlan, suggests that there are at least two understandings of the first "child adoption", taking the children of others to be cared for and educated with care and affection, without being given the status of a "child" He was treated by his adoptive parents as his own children. Secondly, he took another son as his own child, and he was given a status as a "child", so he was entitled to use a hereditary name (*Nasab*) of his adoptive parents and inherit relics, and

other rights as a result of the law between the children and his adoptive parents are.[6]

The adopted child in the first sense is more based on the feeling of a person who is a foster parent to help the parents and their adoptive child or for a married couple who is not blessed with offspring, so that the adopted child can be educated or be schooled, so hopefully later the child can be independent and can improve the status of his life in the future. The adopted child may someday be a righteous child who wants to care for his adoptive parents in the sick, and pray when the adoptive parents have died. The Act of such child adoption is acceptable as part of a righteous charity that is strongly encouraged by Islam, so the first form of adoption as defined by Mamud Syaltut is clearly not contradicting With the principle of Islamic law, even affirmed in QS al-Ma'idah, Verses (2) and verses (32), and QS. Al-Insan, Verse (8).

Adopted children in the second sense have long been known and developed in the sharing of the country, including in Indonesia itself, as applied by the District Court to the application for the appointment of children asked by the Indonesian citizen of Chinese descent and for those who are self-proposing to the law. The child's rapture in the second sense is clearly forbidden by Islam and contrary to the Word of God QS. Al-Ahzab, verses (4), (5), and (21)).

C. The Provision of the Will of The Face as a Protection Effort For The Life of Adopted *Children*

The Fiqh scholars agree that the Islamic law does not recognize the adoption agency of children who have a legal consequences such as those that have been practiced the Gentiles, in the sense that adopted children regardless of the legal kinship of his parents and the inclusion of adopted children into the law of his adoptive parents. Islamic law only admits, even advocating, the adoption of the child in the sense of the collection and maintenance of the child, in the sense of status of his kinis remain outside the family environment of his adoptive parents and by itself has no legal consequences. He remained a child of his biological parents, following all the consequences.

Prohibition of child adoption in the sense is actually made of children based on the word of Allah SWT in Sura al-Ahzab (QS 33 verses 4-5) meaning "... He does not make the children of your host as a child (himself), which is just your word in your mouth alone. And God tells the truth and he shows the way (which is true). Call them (the adopted children) with the name of their fathers, that is fairer to the side of God, and if you do not know their fathers, then, (call them a) your brethren and your Maula.... "

If there are children who were left dead because of wars or other disasters such as war that happened in early Islamic period, then Islam gives a different way to get out of the child's appointment. For example, by the way the widow married her husband who was left with another man. This was meant for the widows' children to no longer be displaced. The Status of the child is not an

adopted child but a stepson and if the stepson is a female, then the stepchild becomes his creature, in the sense that there is a prohibition of marriage between the stepson and his stepfather, if the mother has been a dukhul of his stepson (or if there is a relationship between the foster father with his mother).

Islamic law prohibits the practice of adopting children who have juridical implications such as the adoption of a child known by Western Law/Secular law and the practice of the Gentiles, i.e. the removal of the child that makes the adopted child a child. The adopted child is disconnected from the legal relationship with his biological parents, the adoptive parents become the absolute guardian of the child in the sense of the obligation to provide daily living, educate, nurture, and others. In the context of worship to Allah SWT.

Islamic law has outlined that the legal relationship between adoptive parents and the limited adoptive child as a relationship between foster parents and an expanded foster child is in no way an nasab relationship. Consequently the juridical of the adoption of the child in Islam is only a relationship of love and compassion and a relationship of responsibility as a fellow human being. Because there is no nasab relationship, the other juridical consequences are adopted parents with adopted children should keep the mahram, and because there is no nasab relationship, then both can be married.[11]

Muhammad Ali As-Shabuni as quoted by Andi Syamsu Alam and M. Fauzi said as Islam has cancelled Zihar, so it is with "Tabanni" Islamic Sharia has banned the tabanni that has a foster child to Who is not his father, and it includes a great sin that requires the culprit to get the wrath and curse of Allah SWT.[12]

Expressed in the words of Rasulullah SAW as mentioned in the hadith narrated by al-Bukhaari which means: Whoever calls himself as the son of a person who is not his father, then to him is given to God, the angels and All mankind. Then on the day of the Resurrection God did not receive his amalan-amalannya and testimony.

Such circumstances can be seen in the hadith narrated by the Muslim priest, and also by Imam Bukhari, the Prophet once stated that: No one acknowledges (pride himself) on not the real father, knowing that It was not his father, but he had kufur. And whosoever is not among us (among the Muslims), and should he himself prepare his own place in the fire of Hell.

Submitted by Al-Imam Al-Lausi quoted by Andi Syamsu Alam and M. Fauzi that when someone calls a child with his son's call "Ibni" showing one's affection to the called son, then it does not Banned. The deliberate element of a person who is a father who is not his father knowing his true father, is the cause of the deed, and that it happens in the child's adopting agency (Tabanni) in the sense Unlimited.[12]

There are two forms of child adoption (Tabanni) understood in the perspective of Islamic law, namely:

1. First, the form of removal of the child (Tabanni) which is prohibited as the appointment of children practiced by the public through secular civil law, which makes adopted children as a child who resulted

in the disconnection of the legal relationship with people Old-born, then meniseven his biological father with his adoptive father.

2. Second is the appointment of children (Tabanni) is recommended, namely the appointment of children who are motivated by the motivation to worship God SWT, by bearing the daily living, the cost of maintenance education and others without having to break the relationship Law with his biological parents.

Taking children and caring for a displaced child without having to disassociate his or her biological parents is mandatory. It contains the notion that the picking, nurturing, nurturing and medidik of children who are displaced for the sake of and the children's welfare by not deciding the birth of their biological parents is a praiseworthy and recommended by the law Islam.

There are differences in the principle of law in the adoption of children according to religious courts with state courts:

1. Aspects of the *Nasab* relationship

The establishment of the District Court stated that the abdication of the adopted child with his parents and siblings, and their legal consequences. Lineage the adopted son turned into the lineage of the adoptive parents and his brother and children with all the consequences of his law and the adopted son is called by the son of his adoptive parents.

The determination of the Court of Religion states that the adoption of the adopted child is not interrupted by the lineage of his biological parents and his siblings, who move from adoptive children to his adoptive parents is the responsibility of their maintenance, living, education and other responsibilities. Where the adopted child is still called by Bin/Binti his biological parents.

2. On the trust aspect

The establishment of the District Court stipulates that the parents appoint a full guardian against themselves, property, legal action and the marriage guardian of his or her adoptive child.

The determination of the Court of Religion states that the adoptive parents are only limited to themselves, property, legal acts and not including the Guardians.

3. Aspects of Mahrom relations

The establishment of the District Court stated that the adopted child shall not be married by his adoptive parents and also may not be married by a child or adopted child of the adopted parent.

The determination of the Court of Religion states that adopted children may be married to their adoptive parents, and may be married to a child or other adopted child of his or her adoptive parents.

4. On the birthright aspects

The establishment of the District Court stated that the adopted child could become heir to the inheritance of his adoptive parents, just as the rights of the children.

The determination of the Court of Religion stated that the adopted child should not be the heir to his

adoptive parents, but the adopted son will have a testament of his adoptive parents.

In connection with the will of the face of the same, according to Suparman Usman is defined as a testament whose implementation is not influenced or not dependent on the person who passed away. This will still be performed, either pronounced, or desired or not by the person who died duania. Thus the execution of the will does not require evidence that the will is pronounced, written or desired, but its implementation is based on legal reasons confirming that the will should be implemented.[13]

The will of the face is a testament that is destined for heirs or relatives who do not acquire the inheritance of the deceased person, due to a barrier of Syara, such as a wills to a non-Muslim mother or father. Because different religions become barriers for a person to receive inheritance, or grandchildren who do not get inherited treasures caused hindered by the existence of their uncle, adopted children who do not belong to heirs but services and their existence is very means for the heir.

The term "wills" can be found in the compilation of Islamic law, mentioned in article 209 paragraph (1) and paragraph (2) as follows: [2]

1. The inheritance of adopted children is divided according to article 176 up to section 193, while the adoptive parents who do not accept wills will be given a more than 1/3 of the estate of the inheritance of his adoptive child;
2. to the adopted child who does not receive a will will be given a testament to a wealth of 1/3 from the inheritance of his adoptive parents.

Based on the sound content of article 209 paragraph (1) and (2) above, it can be understood that the will of the face referred to by the compilation of Islamic law is a will which is compulsory under the provisions of the legislation allocated for adopted child or otherwise his 1/3 or her parents who have not been given a previous testament by his adoptive parents.

The meaning of the will of the face as stated above is equal and aligned with the meaning of the will of the face in the Egyptian law. The formulation of the will of the face in the compilation of Islamic law may follow the meaning of the testament of the face in the Egyptian Testament Act.

Submitted by Muhammad Daud Ali that the granting of the right to the adopted child by the compilation of Islamic law was conducted by adopting a limited customary legal value into Islamic law, because of the amendment of the parents' responsibilities to his adoptive parents on the maintenance of daily life and education costs.

Judging and the methodological aspect, it can be understood that the question of the unruly problem in the compilation of Islamic law is the issue of Ijtihad which is established based on the legal argument of Maslahah al-Murshalah which is oriented to promote the values of justice and benefits that grow and thrive in the midst of Indonesian Muslim society.

III. CONCLUSION

Based on the explanation above, it can be concluded that the provision of the will of the face as a protection effort for the life of the adopted child is based on the values of justice and welfare that grows and develops in the midst of Indonesian Muslim society.

The implementation of the will of the face in practice in the community needs to be supervised by the Government carefully through local institutions to minimize the occurrence of legal issues that can harm the interest of adopted children.

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