

# LEGAL PROTECTION FOR OWNERSHIP OF PROPERTY LAW ON MARRIAGE AFTER DIVORCE DECISION

Sugiarti

*Abstract*

*Marriage is a sacred and holy institution as stated in Law No. 1 of 1974 article 1 about marriage. Joint property can be used by the husband and wife, for anything and any amount as long as there is also agreement of both parties. Just right for a husband and wife with the right of use or wear it with the consent of both parties (reciprocal) is naturally given that the rights and position of the wife by the husband is in an environment of domestic life and social life together in society, a place where each each has the right to take legal actions. This means that both parties are given the opportunity to have an agreement that's about innate property may be inserted into the joint property, while other parts are certain to remain under the supervision of each. If each party has an agreement to enter the default property to be joint property, the management is certainly applicable provisions of the agreement regarding the default property.*

Pernikahan adalah lembaga sakral dan suci sebagaimana tercantum dalam Undang-Undang Nomor 1 Tahun 1974 pasal 1 tentang pernikahan. harta bersama dapat digunakan oleh suami dan istri, untuk apa pun dan jumlah apapun selama ada juga kesepakatan dari kedua belah pihak. Tepat untuk suami dan istri dengan hak penggunaan atau memakainya dengan persetujuan kedua belah pihak (timbang balik) secara alami mengingat bahwa hak dan posisi istri oleh suami adalah dalam lingkungan kehidupan rumah tangga dan kehidupan sosial bersama di masyarakat, tempat di mana setiap masing-masing memiliki hak untuk mengambil tindakan hukum. Ini berarti bahwa kedua belah pihak diberi kesempatan untuk memiliki kesepakatan itu tentang properti bawaan dapat dimasukkan ke dalam harta bersama, sedangkan bagian lain yakin untuk tetap berada di bawah pengawasan masing-masing. Jika masing-masing pihak memiliki kesepakatan untuk memasuki properti default menjadi harta bersama, manajemen tentu ketentuan yang berlaku perjanjian mengenai properti default.

*Keywords: Marriage, Joint, Property, Divorce*

## **1. Introduction**

This thesis is focused on the injustice of division of matrimonial property after marriage. The author realized that there are many wives suffered from the unfairness of matrimonial division regulation. The

division often benefits the husband than the wife, ignoring the fact that many of wives also earn more money in their marriage.

According to the Criminal Code Civil, joint property occurred since the time the marriage took place . All property into

either an existing one or will exist. In the Civil Code which carried possessions husband/wife before the marriage will take place into the joint property since the time of the marriage took place.

A wife in the Civil Code is not authorized to take legal action over his property, unless there is an agreement after the marriage or divorce or widowhood. Different things mentioned in Article 36 and 37 of the Civil Code which states both the husband and the wife still has the right to act to take legal action for such property not from the marriage. If the property acquired during the marriage, then legal actions must be mutually recognized and approved by the wife or the husband. Based on the foregoing, according to the Marriage Law joint property acquired from either the wife or the husband marriage may not take legal action alone but must be based on the consent of both parties. It is based that common property was obtained based on the sacrifices made by both parties . Such treasures along this is the joint property acquired from a marriage that has met the requirements of Article 2 paragraph ( 2 ) the Marriage Law marriage is recorded according to the legislation in force. Therefore, the marriage is not recorded, then the husband nor the wife can not sue over the treasure he had.

#### Legal Protection of Joint Property Terminated Due to Divorce

Marriage as stated in Law No. 1 of 1974 :

*“Marriage is a bond between a man and a woman as husband and wife with the aim of forming a family and a happy household and remain upon the divinity of the one true God.”*

In accordance to Marriage Law Article 1, the aim of a marriage is to form a happy family based on the divinity of the One True God--which means a marriage must be done based on individual beliefs. As in Islam, marriage is a holy agreement between a man and a woman as written in

Islamic holy Quran, which have seven principles, namely:

- a. Volunteerism  
The most important principle in Islam. This volunteerism is not only between the two prospective groom and bride, but also between their parents.
- b. Concession of both parties  
Both parties is a logical consequences of the first principle. There must be no coercion, and is already there after candidate approval from matrimonial customs. A marriage without concession of one or both parties can be cancelled by the court.
- c. Right to choose spouse  
Every man and/or woman have the right to choose or to decide his/her spouse.
- d. Partnership principle between spouses
- e. Partnership principle between man and woman is different because of its nature (fate, natural)
- f. Once in a lifetime principle  
This principle shows that marriage purpose is to establish generations and foster love and affection during the lifetime.
- g. Open Monogamous Principle

#### 2. Legal Status of Marital Asset

According to Article 35 paragraph (2) the MARRIAGE LAW, although the property is in default under their respective control is given the possibility to remain married to determine something about the innate property owned by the husband or the wife. This means that both parties are given the opportunity to have an agreement that's about innate property may be inserted into the joint property, while other parts are certain to remain under the supervision of each. If each party has an agreement to enter the default property to be joint property, the management is certainly applicable provisions of the agreement regarding the default property.

According to the civil law that since the start of the marriage, since it also started mixing in marital property, as long as both are not entered into a separation of

property before or at the time of the marriage begins. Mixing joint property is not only limited to the assets acquired during the marriage, but also about all assets and liabilities (equity and debt) carried by each party. Wealth in the law called *Gemenschap*, 16 in article 140 paragraph (3) of the Civil Code declared husband right can be limited when there is agreement.

Joint property includes movable and immovable property. However, the division of joint property based on the provisions of Article 128 paragraph (1) of the Civil Code, the division of joint property in the form of movable and immovable objects can be distinguished. The difference meant that because it is based on the submission of a moving object and the object is not moving.

Division of joint property in the form of moving objects is done under the provisions of Article 612 of the Civil Code is a form of direct delivery between a husband and wife who have been divorced. The submission of the division remains based on the provisions of Article 128 paragraph (1) of the Civil Code which is equal parts between the value of the husband and wife who have been divorced. Based on these submissions is usually carried out assessment and / or sales of the moving objects in which the proceeds divided equally between the husband and wife who have been divorced.

But otherwise, the delivery of immovable objects such as land and buildings and / or other objects that are not moving, then the division should be based on the provisions of Article 616 of the Civil Code in conjunction with Article 620 of the Civil Code. The provisions of Article 616 of the Civil Code states: "The delivery of immovable goods or appointment made with the announcement of the deed in question in a manner as specified in Article 620 of the Civil Code."

#### Selling Immovable Property

The official which authorized in the process of buying and selling immovable property are :

#### 1. Public Notary

A Notary is a public official who is authorized to make an authentic deed. Authentic act declared by law as evidence of the strongest and fullest, so it has an important role in any legal relations in society.

#### 2. Land Deed Official

General Officer who is given the authority to make authentic deeds regarding certain legal actions concerning land rights or Upper Freehold Flats Unit.

National Land Agency is an agency whose duty is to execute tasks in administration of land in national, regional, and sectoral scale (Article 2 of President Regulation No. 10 of 2006). National Land Agency's function in general is to organize and to execute surveys, measurements, and mapping of the land. Also to set and determine the rights of the land and to supervise and control the land ownership tenure.

Marital Property is divided into three :

#### 1. Inmate Property;

Innate property is a treasure that brought each spouse prior to the marriage.

#### 2. Joint Property;

Joint property means property acquired during the marriage takes place, either by the husband or the wife.

Acquisition of property is property acquired spouse during the marriage in the form of a grant or a gift or inheritance. As well as an innate property, the husband and wife also have personal power over the treasures of the acquisition. Each husband and wife have full rights to assets acquired from gift, inheritance, or grants. The state of exception can be held by a husband and wife with the consent of each nuptial agreement.

Submission of joint property in the form of immovable property is done by splitting. This splitting process is done based on article 128 (1) of Civil Code. The splitting is conducted by request of the

rightholder. The disputed land is splitted to be new field of lands with the exact same legal system with the previous land. (Page 38)

### **3. Law Protection towards Joint Property after Divorce**

The position of the joint property in Indonesian Marriage Law stipulated in Article 35 and Article 36 of the Marriage Law which states that property acquired during the marriage becomes joint property and can be used with the consent of both parties, while the innate property, gift, and inheritance remain under the control of each individual and the right of all the parties do not fully specify otherwise.

Therefore, the joint property is marital property owned by husband and wife together. Namely, both property movable or immovable acquired since the establishment of legitimate marital relationship, which can be used by a husband and wife to finance their life purpose and their children, as a unified whole in the household. Therefore, the joint property is property acquired during the marriage bond takes place and regardless of whose name is listed above. Initial formation of joint property in this marriage, because of the persistence of the principle of each for husband and wife is entitled to retain his property itself, like before they became husband and wife, except property held in common with that.

Freezing (diconserveer) joint property through foreclosure above, serves to secure or protect the availability and integrity of the property with the actions of the defendant is not responsible. Therefore, the focus of assessment should be considered a court at the request of the joint property is seized security or the protection of the existence of the joint property, and not focused on factors suspicion or conjecture the existence of a defendant attempts to darken the goods, but more focused on issues of security and protection joint property. 95 This is in accordance with the provisions of Article 823 Rv is based on the principle of procedural interests

(doelmatigheid process), that security measures include:

1. Sealing,
2. Registration of property,
3. Joint property valuation,
4. Joint property foreclosure.

Above foreclosure action, according to M. Yahya Harahap is a legal action that is very "exceptional" or legal action exception, because they should be applied by the Court with all considerations carefully, because as if the defendant had been sentenced before the sentence was handed down, as implicitly stated in Article 227 HIR or Article 261 RBg, that before the sentence was handed down to the defendant or before the verdict that sentenced him to not have binding legal force, the defendant has been convicted and found guilty to seize their wealth.

The legal basis is a request for confiscation of property with Article 24 paragraph (2) of Government Regulation No. c. 9 Year 1975 which stated, that during the divorce lawsuit at the request of the plaintiff or the defendant, the court may: (c) determine the things that need to ensure the preservation of the goods are entitled with spouse or goods that are entitled to the husband or goods the right of the wife.

The provisions of Article 24 paragraph (2) of Government Regulation No. c. 9 In 1975 the above, the implied meaning of a foreclosure action or remedy against joint property in marriage. Actions which can guarantee the maintenance of common property that is common property confiscation, where the husband or wife is authorized to submit to the court seized, then the court is authorized to grant such application in order to ensure the maintenance and integrity of the joint property in marriage. Although these provisions are considered too narrow, since the filing of the joint property seizure merely when there is a divorce case, as if the absence of divorce, not possible to file a foreclosure. A contrario, if no suit of divorce, the husband or wife can not apply for confiscation of property together,

whereas common property in a state of wholeness of action threatened the existence of waste, fraud, or a sale to another party.

When a husband or wife infringing upon approval, by doing an act that threatens the existence and integrity of joint property without the consent of the other party, then the remedy can be done to prevent such action is arbitrary confiscation of property together. However, the confiscation of private property does not reach a husband or wife, the property has been owned by a spouse before the marriage took place or gift, inheritance, or will that be accepted the husband or wife during the marriage takes place. The law prohibits putting together confiscation of property or personal property, because the property is located beyond the reach of common property confiscated. If the court is already laid to the personal property seized, should be appointed to the position and control restored to their rightful owners it (restoration to the original condition), the road was raised confiscation of goods. Application of confiscation of property between husband and wife together in marriage is solely to freeze all joint property, both in the control of the husband or wife. Partially justified not only placed on property controlled defendant alone. This is in accordance with the definition and purpose seizure itself, namely;

1. Freeze all joint property, whether that is in the hands of the plaintiff or defendant (husband and wife).
2. The goal is to ensure the safety and integrity of the entire property, during the examination of the case took place, was not intended to guarantee the debt or the delivery of goods.

#### Implementation of Separation of Joint Property After Divorce

At the request of the rights holder (husband and wife) who has been divorced against common property land and buildings are already registered certified or can be broken down into several sections perfectly after each is a new field for the

former husband and wife with the same legal status parcels of land originally. For each area of the land is made measurement certificate, land record, and a certificate to replace the measurement certificate, land record and certificate of origin.

Solving parcels of land must be in accordance with the Spatial Plan and should not be applicable not resulted in an implementation of the provisions of laws and regulations that apply, for example, land reform provisions. 127 Throughout farmland implementation of the solution of the minimum limit shall be demonstrated in accordance with the legislation in force the Law No. 56 Prp 1960 on the establishment of the agricultural land area.

If land rights are concerned burdened mortgage or other expenses listed, the new solution should be implemented after approval is obtained in writing from the mortgage holder or other authorized party approved the elimination of the load in question.

Article 133 paragraph (2), (3) and (4) Ministerial Regulation No. 3, 1997 set up the way it is registered as follows:

- a. to gain ground units the breakdown field measurements are carried out;
- b. the legal status of the unit of the ground plane is the same as the original ground plane legal status;
- c. for registration were each given a number of new rights and made a measurement certificate, land record and a new certificate in lieu of the right number, measurement certificate and certificate of origin.
- d. Note the absence of mortgage and other burdens that exist on the land book and certificate of origin on the land book and the new certificate, a letter is being measured, the land book and the original land title certificates are no longer valid by including a note in it.

Protection of the interests of holders of mortgage lenders, the provisions of Article 133 regarding the registration of the units of the breakdown field results need to be fixed which allows the persistence of mortgage

and other expenses burden the original parent parcel of land rights were broken. That still gives the parent unit numbers came from. Giving new numbers can still be done in terms of rights to land parcels were broken unit no load. Or encumbrance resolving originally approved by the creditor in question has been settled claims are therefore removed.

What is stated above applies also in the case held that the separation of the building into flats units bersatus use within each property of an apartment. If the right to land on which the building ats flats were built, at the time of separation is still burdened Mortgage, which would overload the continuance fixed per unit of desired results but the separation is carried out over the property in question flats thirsty anyway given the number equal to the number of rights on the ground that the separation was a common ground with the owners of the units belonging to the separation results. If the flats are common property.

#### **4. Conclusion**

At the request of the holder of the joint property rights (both ex-husbands and ex-wives) of a parcel of land as common property already listed inseparable part or several parts which in turn is a new field sauan. In the separation of the land under Article 49 is, of land were taken partly into a new field unit. The new plot of land idang parent is still there and has not changed its identity. New areas of land being the parent is still there and has not changed his identity except on the extent and limits. The term is used to distinguish the separation Degnan what do under Article 48.

For new fields separated unit made measurement certificate, book and certificate of land which some new pieces of land and registration of maps, lists of land, measuring letters, books and certificates of land parcels of land have appended a note on the separation.

As stated above, rights and burdens weighing on parcels of land rights previously experiencing breakdown, if

applicable to the separation of the mother land burdened mortgage or other charges.

#### **5. Reference.**

Djoko Prakoso, *Asas-asas Hukum Perkawinan Indonesia*, Bina Akasara, 2005.

H. Muhammad Daud Ali, *Hukum Islam, Pengantar Hukum Ilmu Hukum dan Tata Hukum Islam di Indonesia*, Jakarta: RajaGrafindo Persada, 2009.

Mulyadi, *Hukum Waris Tanpa Wasiat*, Edisi Pertama, Badan Penerbit Universitas Diponegoro, Semarang, 2008.

Ismuha, *Pencaharian Bersama Suami Isteri di Indonesia*, Bulan Bintang, Jakarta, Cet. II, 1978, hlm. 45

Sayuti Thalib, *Hukum Kekeluargaan Indonesia*, UI Press, Jakarta, Cet. V, 1998, hlm.

Abdul Manan, *Beberapa Masalah tentang Harta Bersama*, Mimbar Hukum, No. XXX, Tahun 1997, hlm. 59

K. Ng. Soebakti Poesponoto, *Asas-Asas dan Susunan Hukum Adat*, Pradnja Paramita, Jakarta, 1960, hlm. 193)

Hilman Hadikusuma, *Hukum Waris Adat*, PT. Citra Aditya Bakti, Bandung, Cet. VII, 2003.

M. Yahya Harahap, *Hukum Acara Perdata: Permasalahan dan Penerapan Conservatoir Beslag (Sita Jaminan)*, Jakarta, Cet. I, 1987

Djazuli Bachar, *Eksekusi Putusan Perkara Perdata: segi hukum dan penegakan hukum*, Jakarta; Akademika Pressinda, Cet. I, 1987.

R. Soeparmono, *Masalah Sita Jaminan (C.B) dalam Hukum Acara Perdata*, Mandar Maju, Bandung.

M. Yahya Harahap, *Kedudukan, Kewenangan, dan Acara Peradilan Agama (Undang-Undang No. 7 Tahun 1989)*, Jakarta, Pustaka Kartini, 1990.

Sudikno Mertokusumo, *Bunga Rampai Ilmu Hukum*, Yogyakarta; Liberty, 1984.

Abdul Manan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama*, Jakarta: Yayasan Al-Hikmah, 2000.

M. Yahya Harahap, Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan, Sinar Grafika, Jakarta, 2000,

Muchsin, "Menelantarkan Keluarga Merupakan Delik Omisionis". Dalam, Varia Peradilan, Majalah Hukum Tahun XXVI No. 303 Februari 2011, Jakarta

Bambang Poernomo, Asas-Asas Hukum Pidana, Jakarta; Ghalia Indonesia, 1994.

Perundang-undangan.

Undang-Undang No. 1 Tahun 1974 tentang Perkawinan

Undang-Undang No. 48 Tahun 2009 tentang Kekuasaan Kehakiman.

Undang-Undang No. 7 Tahun 1989 tentang Peradilan Agama

Peraturan Pemerintah No. 24 Tahun 1996 tentang Pendaftaran Tanah

Reglemen Acara Perdata (Reglement op de Rechtsvordering) S. 1847-52 jo. 1849-63