



TRANSFER OF MARRIAGE GUARDIAN (ANALYSIS OF NIKAH ISBAT DECISION NUMBER 442/Pdt.G/2022/PA.Spt)

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Abstract : *The law provides a legal solution so that private marriages have protection and legal force, namely by submitting a marriage isbat to the Religious Court. One of them is a marriage whose marriage isbat was submitted to the Sampit Religious Court with case number 442/Pdt.G/2022/PA.Spt. The case was granted by the panel of judges, even though the Petitioner's marriage was unclear regarding the transfer of the marriage guardian. The marriage was held with the uncle's guardian, because his biological father could not attend because he was in Java. The issues examined in this decision are the judge's considerations in granting the marriage isbat and the author's analysis of the transfer of guardians in marriages whose marriage isbat was proposed by the Petitioner. This type of research is normative legal research with a case study approach. The findings in this research are that the Panel of Judges granted this Isbat Nikah because they saw that the harmony and conditions of marriage were fulfilled, there were no obstacles to marriage between the bride and groom, and there were no objections to the parties while the marriage was taking place. However, the Panel of Judges did not pay enough attention to the part regarding the transfer of guardians which included marital harmony. Because if you refer to the applicable provisions, the transfer of the marriage guardian that occurred was not appropriate. However, if the Panel of Judges refers to an opinion that permits or sees a greater benefit, then this can be justified. However, this is not included in the Decision.*

Abstrak: Undang-Undang memberikan solusi hukum agar perkawinan di bawah tangan mempunyai perlindungan dan kekuatan hukum, yaitu dengan cara mengajukan isbat nikah ke Pengadilan Agama. Salah satunya yaitu pernikahan yang diajukan isbat nikahnya ke Pengadilan Agama Sampit dengan Nomor perkara 442/Pdt.G/2022/PA.Spt. Perkara tersebut dikabulkan oleh majelis hakim, padahal pernikahan yang dilakukan Pemohon tersebut terdapat ketidakjelasan perihal perpindahan wali nikahnya. Pernikahan tersebut dilaksanakan dengan wali paman, karena ayah kandungnya tidak dapat berhadir disebabkan berada di Jawa. Permasalahan yang diteliti terhadap putusan ini adalah bagaimana

pertimbangan hakim dalam mengabulkan isbat nikah dan analisis penulis terhadap perpindahan wali yang terdapat dalam pernikahan yang diajukan isbat nikahnya oleh Pemohon. Jenis penelitian ini adalah penelitian hukum normatif dengan pendekatan studi kasus (*Case Study*). Temuan dalam penelitian ini adalah bahwa Majelis Hakim dalam mengabulkan Isbat Nikah ini karena melihat terpenuhinya rukun dan syarat nikah, tidak ada penghalang nikah antara kedua mempelai, dan tidak ada pihak yang keberatan selama pernikahan itu berlangsung. Namun Majelis Hakim kurang memperhatikan bagian perpindahan wali yang termasuk rukun nikah. Karena apabila merujuk pada ketentuan yang berlaku, perpindahan wali nikah yang terjadi kurang tepat. Adapun apabila Majelis Hakim merujuk pada pendapat yang membolehkan atau melihat sisi masalah yang lebih besar, maka hal ini dapat dibenarkan.



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A. INTRODUCTION

For a marriage to be considered valid according to religious and state law, it must pay attention to the pillars and conditions of marriage. Among the pillars and conditions of marriage is the guardian. The view of the majority of ulama states that marriage is invalid without the involvement of a guardian. They argue that if a woman marries herself without a guardian, the marriage is considered invalid. The argument used is a hadith which reads: "A woman cannot marry another woman and cannot (also) marry herself" (HR. Ibnu Majah from Abu Hurairah).¹ A marriage cannot take place without the presence of a guardian because the guardian is responsible for marrying the bride to her future husband. This is in accordance with the hadith of the Prophet Muhammad SAW which states, "There is no marriage without the permission of the guardian" (HR. Abu Musa, history of Imam Ahmad and Imam Empat). This hadith emphasizes that the consent of the marriage guardian is required for the implementation of the marriage.²

¹ La Ode Ismail Ahmad, "Marriage Guardians in Contemporary Fuqaha and Muhadditsin Thought," *Al-Maiyyah* 8, no. 1 (2015): 41–78, <https://www.neliti.com/publications/285744/>, h. 49

² Ramadhan Syahmedi Siregar, Muhammad Syakban, and Muhammad Ikhlas bin Rosele, "The Role of Marriage Guardian of the Same Clan in the Traditional Marriage of Batak Toba Muslims in Samosir Regency in the Perspective of Islamic Law," *Al-Manahij: Journal of Islamic Legal Studies* 17, no. 1 (2023): 41–52, <https://doi.org/10.24090/mnh.v17i1.6750>, p. 42

There are 2 categories of marriage guardians, namely lineage guardians and judge guardians. A lineage guardian is a guardian who has guardianship rights based on blood ties. This lineage guardian can be a wali *aqrab* (closest relative), or a wali *ab`ad* (relative who is more distant in the family). As for the judge's guardian, namely the marriage guardian such as the marriage *qadi*, caliph (leader), ruler, or head of state who is given the power by the government to marry women who the judge's guardian has the right to marry.³

Apart from paying attention to the terms and conditions of marriage, another thing that is also considered is marriage registration. In connection with this, marriages in Indonesia must be performed before a Marriage Registrar (VAT) officer for Muslims.⁴ However, in reality, underhanded marriages still often occur in Indonesia today. A marriage that is not registered or legalized by a Marriage Registrar (VAT) is considered an invalid marriage. As stated in Article 2 Paragraph (2) of the Marriage Law Number 1 of 1974.⁵

Legislation has provided legal solutions for those who marry privately. In order to be protected and have legal force, an application for legalization (*isbat*) of the marriage can be submitted to the Religious Court as regulated in Article 2 paragraph (5) of Law Number 22 of 1946 in conjunction with Article 49 Letter a number 22 of Law Number 7 of 1946 1989 concerning Religious Courts as amended by Law Number 3 of 2006 and the second amendment by Law Number 50 of 2009 and Article 7 paragraph (2), paragraph (3), and paragraph (4) of the Compilation of Islamic Law. If the marriage *isbat* request is granted, then the private marriage is a valid marriage and has legal force.⁶

One thing that the author encountered was a marriage *isbat* case filed by an applicant named N binti M. The applicant married her husband in 2001. The

³Burhanuddin Burhanuddin and Sri Yunarti, "Analysis of the Judge's Decision Regarding *Itsbat Nikah* Case Number 2/Pdt.P/2019 at the Sawahlunto Religious Court in the Perspective of *Munakahat Fiqh*," *Journal of Sharia Science Integration (Jisrah)* 2, no. 1 (2021): 141–55, <https://doi.org/10.31958/jisrah.v2i1.3217>. , p 142

⁴ Muhammad Sabir Rahman et al., "Implementation of Marriage Through Wali Hakim (Marriage Guardian) in the Office of Religious Affairs," *International Journal of Multicultural and Multireligious Understanding* 9, no. 4 (2022): 116–23, <https://doi.org/10.18415/ijmmu.v9i4.3643>. p., 117

⁵ Nasaiy Aziz, "The Great Phenomenon of Online *Sirri* Marriage for Male and Female," *Budapest International Research and Critics Institute (BIRCI-Journal): Humanities and Social Sciences* 1, no. 3 (2018): 445–50. , p. 446

⁶ Iskhaq Iskhaq and Sri Kusriyah, "The Status of Children Due to Underhanded Marriages after Marriage Is Recorded without Marriage *Isbat*," *Khaira Ummah Law Journal* 16, no. 1 (2023): 35–44, <https://doi.org/10.26532/khaum.v16i1.19312>. , p. 38

applicant's marriage was conducted privately. At the time of the marriage ceremony, the guardian of the marriage was the Petitioner's uncle, because the Petitioner's biological father was in Java and could not attend, then the person who married the Petitioner to her husband was a headman.

In 2022, the Petitioner submitted a marriage isbat application to the Sampit Religious Court so that the marriage of the Petitioner and her husband, whose husband had died at the time of the application for marriage isbat, could be legalized. The purpose of this petition is to declare that the marriage that has taken place is valid and has legal force, as well as to claim BPJS Employment insurance belonging to the Petitioner's deceased husband. The end of this case was that the Sampit Religious Court granted the Petitioner's petition and the marriage between the Petitioner and her late husband was declared valid so that it could be submitted for registration at the local KUA, based on Determination Number 442/Pdt.G/2022/PA.Spt.

If viewed from the Compilation of Islamic Law (KHI), the guardian's transfer was due to his being unable to attend when the contract fell to the judge's guardian. Meanwhile, in this case, the guardian of the marriage was transferred to *the guardian ab`ad*, namely to the Petitioner's uncle. However, if we look at Islamic law in this case, the transfer of guardian from biological father to uncle and then being represented again by the headman is not appropriate. In the decision, it was not stated that the biological father gave permission to the uncle or represented the uncle. In fact, in Islamic law, if the biological father is still alive, his guardianship rights cannot be taken away by the next guardian unless the father gives permission or represents the next guardian. The application is accepted on the basis that the marriage meets the harmony and requirements. Meanwhile, in fact, guardianship issues are included in the pillars of marriage.

From a formal perspective, the legal considerations in this decision do not explain in detail what the terms and conditions of marriage are so that this marriage request is granted. As for whether the Judge's consideration of granting this isbat is based on considerations of benefit, it is also not stated what kind of

benefit theory is used in his legal considerations. Based on the background above, the aim of this research is to find out how the judge considers when granting a marriage isbat and the author's analysis of the transfer of guardians in marriages whose marriage isbat is proposed by the Petitioner.

B. RESEARCH METHODS

The type of research used by the author is normative research. Normative legal research can also be called doctrinal legal research. ⁷Quoted from the opinion of Soerjono Soekanto and Sri Mamudji, normative legal research is legal research carried out by examining library materials. ⁸The library material that the author will examine is a copy of decision Number 442/Pdt.G/2022/PA.Spt related to the marriage isbat case. The research approach used by the author in this research is a case study approach, namely an approach because there is a conflict so it is necessary to involve the court to resolve the case in the form of a decision.⁹ The legal material that has been processed will be analyzed descriptively and systematically by comparing the analysis with the copy of decision Number 442/Pdt.G/2022/PA regarding the marriage isbat case, as well as other legal materials in order to reach a conclusion in this research.

C. DISCUSSION

1. General Description of Court Decision Number 442/Pdt.G/2022/PA.Spt

On June 6 2022, the Petitioner filed a marriage isbat lawsuit at the Sampit Religious Court with Case Number 442/Pdt.G/2022/PA.Spt. The lawsuit was then registered on June 8 2022, where the Petitioner stated several reasons for the lawsuit.

In the lawsuit, the Petitioner stated that she and her late husband had a valid Islamic marriage. The wedding was held on June 9 2001, in Sei Hanya Village, Antang Kalang District, East Kotawaringin Regency. At the time of the marriage, both of them were virgins and young men. From this marriage, the

⁷ Jonaedi Efendi and Johnny Ibrahim, *Legal Research Methods: Normative and Empirical* (Prenada Media, 2018), <https://books.google.co.id/books?id=5OZcDwAAQBAJ>. h. 124

⁸ Efendi and Ibrahim. h. 129

⁹ Sahrum M, *Introduction to Legal Research Methodology: Normative, Empirical Research Studies, Proposal Writing, Thesis and Thesis Reports*, ed. Syahrum, Muhammad, and ST (DOTPPLUS Publisher, 2022). h. 4

bride's guardian was the Petitioner's uncle, while the marriage ceremony was carried out by a Penghulu.

Their marriage was witnessed by two witnesses with a dowry of 5 grams of gold paid in cash. Between the Petitioner and her husband there is no prohibition on marriage either from the perspective of Islamic law or the applicable laws and regulations. Their household runs harmoniously like a normal married couple, and they have two children. However, on September 14 2021, the Petitioner's husband died due to illness, as recorded in the Death Certificate issued by the Population and Civil Registration Service on March 22 2022.

As long as the Petitioner and her husband were still together, there was no interference from third parties that disturbed the integrity of their marriage and during that time both of them remained Muslim. However, until the time of filing this case, the Petitioner and her late husband did not yet have a Marriage Certificate Excerpt because their marriage was not registered at the Antang Kalang District Religious Affairs Office. Meanwhile, the Petitioner feels it is necessary to have a Marriage Certificate for legal certainty and other legal interests.

Based on these considerations, the Petitioner submitted a petition to legalize the validity of the marriage between herself and her late husband, in order to obtain the necessary legal certainty.¹⁰

To strengthen the arguments that have been presented, the Petitioner also presented evidence in the form of documents and two witnesses. These documents are photocopies of the Petitioner's KTP, Respondent's KTP, Excerpt from the Petitioner's Husband's Death Certificate, Family Card, and BPJS Employment belonging to the Petitioner's late husband.

Meanwhile, two witnesses who were questioned on oath stated that they were present at the Petitioner's wedding and knew about it, they also knew that the Petitioner's husband had died due to illness, they knew that the guardian of the marriage at that time was the Petitioner's Uncle because his biological father was there. In Java, the marriage ceremony is then carried out by the Penghulu with a dowry of 5 grams of gold paid in cash. At that time witness 1 and witness

¹⁰ "Directory of Supreme Court Decisions,". Retrieved November 20, 2023

2 were also witnesses at the Petitioner's marriage. At the time of their marriage they had the status of a girl and a boy, there were no obstacles to getting married, and neither party had any objections during their marriage. They lived in harmony and never divorced until her husband died. Apart from that, they have two children. The purpose of this marriage isbat is to claim BPJS Employment insurance belonging to the applicant's deceased husband.

In its considerations the Panel of Judges looked at several things. Based on Article 49 paragraph (1) of Law Number 7 of 1989 which has been amended by Law Number 3 of 2006, as well as Law Number 50 of 2009 concerning Religious Courts, this case is the absolute competence of the Sampit Religious Court to examine and resolve it. . Based on Article 142 R.Bg, relatively speaking the Sampit Religious Court has the authority to examine and try this case.

The applicant submits a request for legalization of marriage/isbat nikah by referring to Article 2 paragraph (5) of Law Number 22 of 1946 concerning Registration of Marriages, Divorce and Reconciliation, Article 49 number (22) explanation of Law Number 7 of 1989 which has been amended with Law Number 3 of 2006, the second amendment with Law Number 50 of 2009 concerning Religious Courts, as well as Article 7 paragraphs (2), (3), and (4) Compilation of Islamic Law .

The Panel of Judges considered that the petition for legalization of the Petitioner's marriage/isbat marriage had been announced for 14 days without any objections being raised by any party, so that this case could be continued for examination.

The Panel of Judges also considered that the main reason the Petitioner applied for Isbat Nikah was because they had already married. However, the Petitioner and her husband did not have a marriage certificate because the marriage was not registered at the Religious Affairs Office (KUA). Therefore, the Petitioner needs proof of a valid marriage for legal purposes.¹¹

The Panel of Judges considered that the evidence in the form of letters P.1, P.2, P.3, P.4, and P.5 was considered to fulfill the formal and material requirements and was an authentic deed so that it had perfect and binding

¹¹ "Directory of Supreme Court Decisions." Retrieved November 20, 2023

evidentiary power. Two witnesses who have been questioned separately, are adults and have been sworn in, fulfill the formal requirements as regulated in Articles 171, 172 and 175 R.Bg. Witness statements are facts that are seen and heard by oneself, are in agreement with each other, and fulfill the material requirements based on Articles 307, 308 R.Bg, so that witness statements are accepted as evidence.

The Panel of Judges considered Article 7 paragraph (2) of the Compilation of Islamic Law. that every marriage must be registered before a Marriage Registrar (VAT) in accordance with the provisions of the Marriage Law. However, if the marriage is not registered or cannot be proven by a marriage certificate, the Compilation of Islamic Law provides provisions that the marriage can be recognized or attributed.

In other considerations, it was stated that, although the legal explanation in Article 49 paragraph (2) number 22 of Law Number 7 of 1989 was amended through Law Number 3 of 2006 and a second time with Law Number 50 of 2009 concerning Judiciary Religion, together with Article 7 paragraphs (2) and (3) letter d of the Compilation of Islamic Law, shows that only marriages that occurred before Law Number 1 of 1974 can be submitted for ratification in the Religious Courts, if there is no proof of a marriage certificate. Meanwhile, the marriage carried out by the Petitioner was in 2001 and was not registered at the Religious Affairs Office where the marriage took place. However, because the marriage does not conflict with Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning marriage (see Article 7 Paragraph (3) letter e KHI), the judge is of the view that it is appropriate to consider the petition submitted. by the applicants.

In the consideration of the Panel of Judges, the facts revealed at the trial showed that the marriage proposed by the Petitioner met the harmony and requirements of marriage. In this context, the Panel of Judges referred to the Book *Tanah al-Thalibin* Juz IV page 304 which states that "In the application (determination of the existence of) a person's marriage to a woman, the validity of the marriage must be stated and the conditions such as the presence of a guardian and two people. fair witness." Apart from that, the Panel of Judges

agreed with the view of Abdul Wahab Khalaf, an expert in Islamic law who in his work *Ilmu Ushul Fiqh* page 390 stated that "Whoever knows that a woman is the wife of a man, then such a thing can be punished by marriage as long as it is not there is other evidence that determines otherwise (the dissolution of the marriage)."

The Panel of Judges concluded that the Petitioner's marriage was in line with all relevant laws, namely Law Number 1 of 1974 and KHI. Thus, the Petitioner's request to officially declare her marriage with her husband was deemed worthy of approval.¹²

2. The Concept of Changing Guardians According to Islamic Law and Positive Law

In Islamic law, guardians have the right to marry women under their guardianship. However, there are several things that cause the guardian of *aqrab* to switch to the guardian of *ab'ad* or to the guardian of the judge.

Imam Syafi'i is of the opinion that the wali *aqrab* can switch to the wali *ab'ad* in several cases, namely the wali *aqrab* is still small (not yet competent), the wali *aqrab* is stupid, the wali *aqrab* is wicked, the wali *aqrab* is absent (*udzur*), the wali's religion is different from the religion of his daughter, and the guardian of *aqrab* is on a long journey without *taukil* (handing over power) to other people.

Imam Hanafi is of the opinion that the wali *aqrab* can switch to the wali *ab'ad* if the wali *aqrab* does not meet the required qualifications, namely being independent, mukallaf, and Muslim if the woman is Muslim. Meanwhile, according to Imam Hambali, the wali *aqrab* can switch to the wali *ab'ad* if the wali *aqrab* is still a child (incompetent), an infidel, and a slave.¹³

Regarding the transfer of the nasab guardian to the judge's guardian based on the Compilation of Islamic Law which refers to the opinion of Imam Syafi'i, the nasab guardian can be transferred to the judge's guardian in 9 cases, namely the nasab guardian does not exist at all, the nasab guardian is *mafqud* (whereabouts unknown), the nasab guardian the nasab becomes the groom of

¹² "Directory of Supreme Court Decisions." Retrieved November 20, 2023

¹³ Fasihuddin Arafat, "Legal Construction of the Transfer of Guardianship Rights Due to Masafatul Qashri," *MASADIR: Journal of Islamic Law* 1, no. 2 (2021): 265–92, <https://doi.org/10.33754/masadir.v1i2.424>. h. 282

the woman under his guardianship, the nasab guardian is in a distant place (more than 92.5 km), the nasab guardian is carrying out the Hajj/Umrah, the nasab guardian is in prison, the nasab guardian is unseen (unknown existence), wali nasab *tawaro'* (hiding to avoid marriage), and wali nasab *adlal* (unfair). If one of these 9 things happens, then the judge's guardian has the right to be the guardian of the woman's marriage.¹⁴

According to Imam Syafi'i's view, guardians who have a closer relationship receive priority over those who have a more distant relationship. If the closer guardian is unable to attend or is in a state of *invisibility*, at a great distance or unable to represent himself, the woman to be married can still be married by the judge. This is because the *unseen guardian* is still considered a guardian, and has not been transferred to a guardian who has a further relationship. Therefore, the term "*unseen guardian*" refers to a female guardian who is unable to attend for various reasons, such as long distance, serious illness, and so on.¹⁵

According to the view of the Abu Hanifah school of thought, it is stated that in this situation, the woman will be married by a guardian who has a more distant relationship than the *unseen guardian*, in accordance with the order of guardians as previously explained. For example, if the *unseen guardian* is the father, then the person who will marry is the grandfather, not the judge or guardian whose unseen guardian is the grandfather, then the person who marries will be the brother, mother and father, and so on in order of guardian. This school of thought states its reasons as follows:¹⁶

- a. Guardians who have a more distant relationship are also considered guardians like those who are close, but those who are close are given priority because of their primacy.
- b. Hadith says that the judge's guardian is the guardian of those who do not have a guardian. In this case, the judge does not have the right to be a guardian because there is another guardian apart from supernatural guardians.

¹⁴ Arafat. h. 285

¹⁵ Beni Ahmad Saebani, *Fiqh Munakahat 1* (Bandung: CV Pustaka Setia, 2018). h. 242

¹⁶ Saebani. h. 243

According to existing law in Indonesia, regarding nasab guardians, the Compilation of Islamic Law regulates Articles 21-22 which read:

Article 21

(2) If in a group of marriage guardians there are several people who are equally entitled to be guardians, then the one who has the greatest right to be guardian is the one who is closer in degree of kinship to the prospective bride.

(3) If the group has the same degree of kinship, the person most entitled to be the guardian of the marriage is the biological relative of the same father.

(4) If in one group the degree of kinship is the same, namely the same degree of birth or the same blood relatives, they are equally entitled to be marriage guardians, with priority given to those who are older and fulfill the requirements for guardians.

Article 22

If the marriage guardian with the most rights does not fulfill the requirements as a marriage guardian or because the marriage guardian is speech impaired, deaf or has become elderly, then the right to be guardian shifts to another marriage guardian according to the next level.

As for the guardian, the judge is the ruler or representative of the authority who acts in the field of marriage. Usually, the guardian judge is a headman or officer from the Department of Religion. Situations where the nasab guardian cannot be present or there are obstacles, making it possible for the bride to move from the nasab guardian to the judge's guardian. The process of transferring to guardian judge may or may not involve the Religious Court, depending on the procedures followed.¹⁷

Article 23 of the Compilation of Islamic Law states that (1) The guardian judge can only act as a marriage guardian if the marriage guardian is not available or it is impossible to present him or his place of residence is unknown or he is unseen or unlucky or reluctant. (2) In the event that the guardian is illegitimate or reluctant, the guardian judge can only act as marriage guardian after the Religious Court decides on the guardian.¹⁸

¹⁷ Syuti Talib, *Indonesian Family Law* (Jakarta: University of Indonesia Publishers (UI-Press), 1974). h. 65

¹⁸ Abdurrahman, *Compilation of Islamic Law in Indonesia* (Jakarta: CV. Akademika Pressindo, 1995). p.119

Law No. 1 of 1974 concerning Marriage is different from Fiqh and KHI. The UUP does not recognize the pillars of marriage, only that the UUP contains matters relating to the terms of marriage.

Chapter 2 Article 6 of the Marriage Law Number 1 of 1974 states the conditions for marriage as follows:¹⁹

- 1) Marriage must be based on the consent of the bride and groom.
- 2) To enter into a marriage, a person who is less than twenty years old must obtain permission from both parents.

Meanwhile, in Article 26 paragraph (1) of Law no. 1/1974 stipulates that a marriage solemnized in the presence of a Marriage Registrar (PPN) officer who does not have the authority, an invalid marriage guardian, or without the presence of 2 (two) witnesses, can submit a request for annulment by the family in the line of descent upwards from husband or wife, prosecutor, and husband or wife.²⁰

The UUP does not explicitly discuss marriage guardians in detail. because the UUP is universal and applies to all religious groups. Meanwhile, the marriage guardian regulations are more specifically explained in Islamic law, namely fiqh or in the Islamic law that applies in Indonesia, namely the Compilation of Islamic Law.

As for other provisions that apply in Indonesia, there are regulations regarding guardianship in the Minister of Religion Regulation (PMA) Number 30 of 2005 concerning Guardian Judges. This regulation specifically regulates guardian judges. Article 1 paragraph (2) states that the judge's guardian is the Head of the District Religious Affairs Office who is appointed by the Minister of Religion to act as a marriage guardian for prospective brides who do not have guardians.

Furthermore, regarding the conditions for transferring a nasab guardian to become a judge guardian as stated in Article 2 paragraph (1), the transfer of rights from a nasab guardian to a judge guardian occurs if the prospective bride

¹⁹ Amiur Nuruddin and Azhari Akmal Tarigan, *Islamic Civil Law in Indonesia (Critical Study of the Development of Islamic Law from Fiqh, UU No. 1/1974 to KHI)* (Jakarta: Prenada Media, 2004). h. 67-68

²⁰ Baharuddin and Fauzi Muhammad Ahmad, *Siri Marriage and Polygamy* (South Jakarta: REFERENCES (Gaung Persada Press Group), 2013). h. 33

does not have the right nasab guardian, the nasab guardian does not fulfill the requirements, the nasab guardian is *mafqud* (not whereabouts are known), the lineage guardian is absent, and the lineage guardian is in a '*adhal*' state . So, under these conditions, the marriage can be solemnized by the judge's guardian.

21

Apart from that, in the Minister of Religion Regulation no. 20 of 2019 concerning Marriage Registration, it is mentioned that if the marriage guardian is unable to attend, he must make a guardian's *taukil* letter as stated in Article 12 paragraph (5). In the event that the guardian cannot be present at the time of the marriage contract, the guardian shall make a guardian's *taukil* letter before the Head of the District KUA. / Penghulu / PPN LN in accordance with the domicile / existence of the guardian and witnessed by 2 (two) witnesses.

In this regulation there are also additional requirements regarding the transfer of a nasab guardian to a judge guardian, namely that the guardian cannot be present/met because he is imprisoned, the guardian is in a state of *ihram*, and the guardian who will be marrying becomes the bride and groom themselves.

It can be seen from several regulations in force in Indonesia that regulate marriage guardians, showing the importance of the marriage guardian's position in a marriage. Apart from that, the procedures for transferring guardians are not only regulated in Islamic law, but Indonesian positive law also regulates this, so this shows that the two regulations are in harmony. The importance of marriage guardians in Islamic law which is positioned in the pillars of marriage is also in line with the importance of marriage guardians in positive law, namely as a guarantee for women who are getting married so that they remain protected.

3. Analysis of the Transfer of Marriage Guardians in Court Decision Number 442/Pdt.G/2022/PA.Spt Viewed from Positive Law and Islamic Law

If viewed from UUP no. 1 of 1974 Article 6 paragraph (2) states that in order to enter into a marriage, a person who has not reached the age of 21 must obtain permission from both parents. If you look at the decision, there is no section that discusses this matter either in the case or in the judge's

²¹ Arafat, "Legal Construction of the Transfer of Guardianship Rights Due to Masafatul Qashri." h. 284

consideration. Article 26 of the Law states that one of the reasons a marriage can be annulled is because the marriage involved an invalid guardian. So in this case, more attention must be paid to whether in fact he had received permission from his father, but it was not mentioned in the trial or not at all. Meanwhile, regarding unauthorized guardians in Article 26, you should look at the rules governing guardians, namely Islamic law. In Indonesia, it refers to the provisions in the Compilation of Islamic Law (KHI) which regulate marriage guardians. If the KHI states that it is valid then according to positive law it is also valid and vice versa.

In accordance with this review, what the panel of judges decided regarding the Petitioner's marriage fulfilling the harmony and requirements so that the marriage could be considered less relevant, because it did not mention in detail the transfer of guardians that occurred. Meanwhile, if you look at the UUP, namely Article 6 regarding guardian permits and Article 26 regarding unauthorized guardians, they are also less relevant, because they are not taken into consideration. However, if you look at other considerations, namely regarding relative and absolute authority and other considerations contained in the decision, according to the author, they are relevant.

Judging from the existing case, in the Petitioner's guardianship, the guardian is his uncle, while his father is still there. However, the process of transferring guardianship from the Petitioner's father to the Petitioner's uncle was not explained in detail. According to KHI Article 22, it is not stated that long distance is the reason for the transfer of wali *aqrab* to wali *ab`ad* (long guardian). Or if viewed according to jurisprudence law, there are two views. The first view states that, if the guardian *of aqrab* cannot be present and does not represent his guardianship rights to another person, then the marriage is carried out with the guardian of the judge, which is in line with the regulations in force in Indonesia. The second view states that, if the wali *aqrab* is unable to attend to marry the bride, then the wali *ab`ad* may marry her.

Referring to the provisions in the Compilation of Islamic Law which have been mentioned previously, in the case of a marriage, the applicant who has the right to be the guardian is the judge's guardian.

In the case, no detailed reasons were stated regarding the transfer of guardianship from the Petitioner's father to the Petitioner's uncle, so that the Petitioner's marriage was said to fulfill the terms and conditions. The decision only stated that the Petitioner's father could not attend because of distance, namely being in Java. Furthermore, it was not explained more clearly why the guardianship was transferred to guardian *ab`ad*, namely the Petitioner's uncle, it was not stated that the Petitioner's father gave permission to marry the Petitioner, and there was no mention of the Petitioner's father representing the Petitioner's uncle to marry the Petitioner to her husband.

It is also stated that the person who performs the *ijab* is represented by a headman. So according to the author, the celebrant here is not an authorized celebrant because the Petitioner, after carrying out the marriage contract, did not have authentic proof of marriage in the form of a Marriage Certificate Excerpt. Even though the consent is carried out by the Penghulu, previously the guardian who represents the Penghulu is the rightful guardian, namely the Applicant's father.

So, in accordance with this review, what is contained in the decision of the panel of judges is that the marriage is said to fulfill the harmony and requirements which are less relevant to the Compilation of Islamic Law. Meanwhile, according to jurisprudence law, if you refer to the opinion that says the guardian of *aqrab* cannot be present, it is transferred to the guardian of the judge, then it is also irrelevant.

However, if the panel of judges based on the *fiqh* opinion states that it is permissible for the guardian of *ab`ad* to marry, or in reality the Petitioner's father has given permission to the Petitioner's uncle to marry the Petitioner, then this can be justified as a consideration so it is granted. The Panel of Judges can also look at the greater benefit so that the request for marriage *isbat* is granted. But in fact this was not included in the consideration of the decision.

D. CONCLUSION

The legal considerations of the panel of judges in granting marriage *isbat* cases in decision Number 442/Pdt.G/2022/PA.Spt are more directed towards

fulfilling absolute and relative authority. As for the validity of the marriage, what the judge considers is the fulfillment of the pillars and conditions, namely seeing that the bride and groom, guardians, witnesses, consent and dowry are present, apart from that there are no obstacles to the marriage between the bride and groom, and there are no other parties who object to the Petitioner's marriage. In the judge's consideration it was said that the marriage was valid because it had fulfilled the terms and conditions, but the discussion regarding the transfer of guardians was not explored in detail.

The transfer of marriage guardians in Decision Number 442/Pdt.G/2022/PA.Spt in this marriage isbat case, when referring to positive legal provisions, is still less relevant to Articles 6 and 26 of Marriage Law No. 1 of 1974, regarding the guardian's permission for marriage, considering that there is no mention of whether there is permission from the father or not. Meanwhile, if seen from the perspective of Islamic law, the transfer of wali *aqrab* to wali *ab`ad* is possible if the wali *aqrab* cannot attend due to distance constraints. However, the decision does not expressly state that it is based on the legal provisions that are used as the basis. If we look at the KHI, it is normatively stated that such matters cannot be transferred directly to the guardian *ab`ad* , but instead transferred to the guardian judge.

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