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### Abstract

The purpose of this study is to identify, describe, and analyze the reasons why banks require the establishment of child guardianship as a requirement for taking ownership certificates. In addition, this study also aims to identify the factors and legal consequences of the guardianship arrangement, as well as how the trusteeship process ends. The research method used is a normative legal approach with a juridical-philosophical approach. The data used in this study were obtained from primary and secondary legal materials through library research. The data analysis technique used is descriptive analysis technique. The results of this study reveal that banks require the establishment of guardianship as a requirement because it is used as authentic evidence of the existence of legal guardianship by the authorities. Notary can act as a representative for minors who are represented by parents who are still alive. This applies especially when the parent who took the loan from the bank has passed away, but it is necessary to have a guardian to take the collateral for the certificate of ownership whose installments have been paid to the bank. This step is also necessary for future destinations on a certain date as well as related parties involved in it. The importance of the guardianship deed through a notary in the family is the basis for consideration, considering that the bank cannot provide collateral if the conditions included in taking the guarantee are not fulfilled. This includes cases where deceased creditors still have minor children. Although the law states that biological parents who are still alive have the authority to arrange the deed of sale and purchase of land rights for children who have lost one of their parents, in the context of banking, the existence of a trusteeship is recognized as an important step in ensuring the completeness of the collateral collection documents.

**Keywords:** Determination of child guardianship, Collateral, Certificate of Property Rights

### 1. Introduction

As a republic, Indonesia recognizes itself as a rule of law, a concept reflected in Article 1, paragraph (3) of the 1945 Constitution of the Republic of Indonesia. This concept of a rule of law underlies the principles of certainty, order, and legal protection for all. Individuals, communities, governments, and state institutions in exercising their rights and obligations. In this context, law is a set of rules governing social order and must be followed by all members of society. This aligns with Utrecht's view that law is the basis for social order (Kansil, 1986).

As a rule-of-law country, Indonesia recognizes the importance of law in the various systems implemented (Sillagan, 2016). In Indonesia, the state operates based on the principle of the rule of law (resistant), not the principle of a state based on power (machtstaat) (Triputra, 2015). Within this framework, a legal aspect regulates the rights and interests of individuals in society, known as Private Law or Civil Law. Civil law in Indonesia, including family law, is based on the Western legal system, particularly the Dutch Civil Code or *Burgerlijk Wetboek* (Wati & Zulfikar, 2018).

Fundamental human interests and needs often influence relations between people. The law regulates these relationships through regulations, creating legal certainty and maintaining a balance of rights and obligations (Sagama, 2016). In this context, implementing this relationship in law is known as a legal relationship or action. This legal relationship occurs

between individuals, known as a civil law relationship, which forms the basis of civil law in Indonesia (Padang, 2018).

Legal protection for children is crucial because children are the next generation of the nation who need special protection according to their immature physical and mental conditions (Lestari, 2022). In this case, the Convention on the Rights of the Child emphasizes the principles of child protection, such as the principle of non-discrimination, the child's best interests, the principles of survival and development, and respect for children. In the Convention on the Rights of the Child, Indonesia has adopted these principles through relevant laws and regulations (Erlina, 2017).

In this context, child guardianship becomes an important issue. Guardianship is the authority to take specific legal actions for the interests and rights of children whose biological parents have died or cannot perform legal actions (Merchiano, 2023). This concept is also by the principle of the dignity of children, which should be upheld. Article 47 of the Marriage Law regulates guardianship of children by parents who are still alive, and if the parents are absent or incompetent, the judge can appoint a guardian (Prasetyawati et al., 2022).

However, related to guarantees or assets, there are situations where children as debtors or collateral owners do not yet have legal maturity. In this case, it is necessary to have arrangements regarding trusteeship so that rights and obligations related to guarantees can be fulfilled. In this process, setting up child guardianship as a condition for taking collateral for certificates of ownership becomes essential, especially if the debtor has passed away and his heirs need to establish child guardianship to administer the guarantee.

This study focuses on child guardianship as a condition for taking collateral for property rights certificates. In cases where the debtor has passed away, child custody becomes relevant because the heir must take the necessary steps to protect the mortgage. Therefore, this research will further discuss the dynamics of child guardianship in taking collateral for property rights and its relation to civil law in Indonesia.

## **2. Research methods**

This study uses normative juridical research methods. Research in this writing will be carried out by means of library research. A literature study is conducted to find out as much as possible the opinions and or concepts of experts who have conducted research or written beforehand regarding unlawful acts. Data analysis in this study is using qualitative analysis. The sources selected for this study were then carefully analyzed, which involved thorough reading to identify the main points, arguments, and views expressed by the experts in these sources. Furthermore, information from various sources of literature is categorized and grouped based on certain themes or aspects that are interrelated. This helps reveal patterns or similarities in the views of experts. The next stage involves a more in-depth analysis of the views contained in the literature. The similarities, differences, and trends in expert opinion are explored to understand the broader conceptual framework. Having obtained a broader view then draw a conclusion.

## **3. Discussion**

### **Factors for Determining Child Guardianship as a Requirement for Taking Guarantee of Property Rights Certificates**

The power of parents only exists as long as the parents fulfill their obligations towards their children properly and as long as they are not revoked or released. The obligation imposed on the parents is in the form of alimony obligation (alimentation obligation), namely the obligation to care for and educate their children who are not old enough (Article 298 paragraph (2) of the Civil Code). Based on this, every child is underage, and for those who are less than

21 (twenty-one) years old and have never been married. So he has not been able to enter into agreements, then it is the parents who are obliged to carry out all his needs.

The guardianship arises based on the authority of the deceased parent or the revocation of parental authority by the court based on a court decision. Article 47 paragraph (1) of Law Number 1 of 1974 concerning Marriage states that " *Children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents as long as they are not deprived of their authority*". Article 47 paragraph (2) of Law Number 1 of 1974 concerning Marriage stipulates that parents represent the child regarding legal actions inside and outside the court.

Law Number 1 of 1974 concerning Marriage, regulates the Position of the Child.

Article 42: A legitimate child is a child born in or as a result of a legal marriage.

Article 43 paragraph:

1. Children born out of wedlock only have civil relations with their mothers and their mothers' families.
2. The position of the child referred to in paragraph (1) above will then be regulated in a Government Regulation.

Article 44 paragraph:

1. A husband can deny the validity of a child born to his wife if he can prove that his wife has committed adultery and the child is the result of the adultery.
2. The court makes a decision about whether the child is legal or not at the request of interested parties.

Rights and Obligations Between Parents and Children, regulated in Article 45 paragraph:

1. Both parents are obliged to care for and educate their children as well as possible.
2. The obligations of the parents referred to in paragraph (1) of this article are valid until the child marries or is able to stand alone, which obligations continue even if the marriage between the parents is broken.

Article 46 paragraph:

1. Children are obliged to respect their parents and obey their good wishes.
2. If the child has grown up, he is obliged to look after according to his ability, parents and family in a straight line, if they need help.

Article 47 paragraph:

1. Children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents as long as their authority is not revoked.
2. Parents represent the child regarding all legal actions inside and outside the Court

Article 48: Parents are not allowed to transfer rights or pawn fixed assets owned by children who are not yet 18 (eighteen) years old or have never been married, unless the interests of the child require it.

Revocation of parental authority, regulated in Article 49 paragraph:

1. One or both parents may have their power revoked over a child or more for a certain time at the request of the other parent, the child's family in a straight line and adult siblings or an authorized official, with a Court decision in matters :
  - a. He was grossly neglectful of his duties to his son;
  - b. He was behaving badly.
2. Even if the parents are deprived of authority, they are still obligated to provide maintenance costs for the child.

Obligations and Responsibilities of Family and Parents, regulated in Article 26 paragraph:

1. Parents are obliged and responsible for:
  - a. Caring for, nurturing, educating, and protecting children;
  - b. Developing children according to their abilities, talents and interests; And
  - c. Prevent the occurrence of marriage at the age of children.
2. In the event that parents are not present, or their whereabouts are unknown, or due to some reason, are unable to carry out their obligations and responsibilities, then the obligations and responsibilities referred to in paragraph (1) can be transferred to the family, which is carried out in accordance with the provisions of laws and regulations. valid invitation.

Obligations and Responsibilities, Article 20: The state, government, community, family, and parents are obliged and responsible for the implementation of child protection.

Obligations and Responsibilities of the State and Government, Article 21:

The state and government are obliged and responsible for respecting and guaranteeing the human rights of every child without distinction of ethnicity, religion, race, class, gender, ethnicity, culture and language, legal status of the child, order of birth of the child, and physical and/or mental condition.

Article 22:

The state and government have the obligation and responsibility to provide support for facilities and infrastructure in the implementation of child protection.

Article 23 paragraph:

1. The state and government guarantee the protection, maintenance, and welfare of children by taking into account the rights and obligations of parents, guardians, or other people who are legally responsible for children.
2. The state and government supervise the implementation of child protection.

Article 24:

The state and government guarantee that children use their rights to express opinions according to the age and level of intelligence of the child. Obligations and Responsibilities of Society.

Article 25:

The community's obligations and responsibilities for child protection are carried out through community role activities in the implementation of child protection.

Community Role, Article 72 states in a paragraph:

1. The community has the right to get the widest possible opportunity to play a role in child protection.
2. The role of the community as referred to in paragraph (1) is carried out by individuals, child protection agencies, social organizations, non-governmental organizations, educational institutions, religious institutions, business entities, and the mass media.

Article 73:

The role of the community is carried out in accordance with the provisions of the applicable laws and regulations.

Guardianship (*voogdij*) according to Law Number 1 of 1974 concerning Marriage is the supervision or management of minors or minors who are not under parental authority and the management of children's assets as stipulated in law (Sugiarto, 2015).

- a. Guardianship Requirements According to Article 33 of Law Number 35 of 2014 concerning Child Protection, the requirements for guardians are:
  1. A person or legal entity that meets the requirements can be appointed as the guardian of the child concerned.
  2. To become a guardian of a child is done through a court order.
  3. The appointed guardian must have the same religion as the child's religion.
  4. The guardian is responsible for the child and must manage the child's property in question for the best interests of the child.
  5. Further provisions regarding the terms and procedures for appointing a Guardian as referred to in paragraph (1) shall be regulated in a Government Regulation.
- b. Types of Trusteeship In terms of appointment, there are 3 (three) types, namely (Hasan, 2011):
  1. Guardianship by the longest living husband or wife;
  2. Trusteeship appointed by the father or mother with a separate will or deed.
  3. Trustees appointed by the Judge.
- c. End of Trusteeship  
The end of the trusteeship can be viewed from two aspects, namely (Hasan, 2011):
  1. In relation to the state of the child (absolute)
    - a. The child has grown up (meerderjaring)
    - b. The child died (minderjaring)
    - c. The return to power of his parents (ouderlijkemach)
    - d. The adoption of a child out of wedlock
  2. In relation to guardian duties (relative)
    - a. There is dismissal or release of the guardian
    - b. There is a reason for release or dismissal from guardianship (Article 380 of the Civil Code).

The ability of a person who is capable or competent according to law to enter into agreements or perform other legal actions. Legal actions are actions committed by people with the intention of causing a legal consequence that is desired and permitted by law.

It is said that children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents as long as they are not revoked from their authority. Even if the parents are deprived of authority they are still obligated to provide maintenance costs for the child. Thus the arrangement regarding the power of parents over children in the Civil Code. This can we understand why the legislators did not simply adopt these rules from the Civil Code, due to the form of the legal institution of great power for the Indonesian people.

The reason why the bank asked the Notary to draw up a deed establishing guardianship of a child as a condition for taking a collateral certificate of property rights in which one of the parents has died, in which the regulations in Article 345-354 of the Civil Code and Article 47 of the Marriage Law have stated that guardianship is automatic goes to his parents who lived the longest. If the creditor has died, the collateral can be taken by the heirs. However, in that case, the guarantee contained in the bank includes the right for the child who is not yet capable of age, then the guarantee for the assets that have been taken includes the ownership of the child who is not capable of age, the Notary will request a guardianship determination from the Court as a condition and from all explanations above it is known that the evidence is a strong reason for the request.

Of course, all of this is inseparable from Article 1320 of the Civil Code regarding the legality of legal acts of transferring rights that must fulfill the material requirements. The related context in this case is that the child who has inherited rights from his deceased parents cannot

buy and sell in the act of transferring land rights because he is not competent and therefore his parents who have lived the longest must be the guardian determined by a court order. Religion.

The bank requests a letter of establishment of trusteeship issued by a Notary to be used as a condition for taking collateral for a Certificate of Ownership. The reason for the bank's request for a guardianship stipulation made by a Notary to be used as authentic evidence in order to avoid disputes in the future is because there are still immature children of the applicant.

**Legal consequences of requesting guardians and attorneys from the applicant's heirs who are not yet mature enough to take the collateral for the house certificate**

Law Number 23 of 2002 concerning Child Protection, regulates guardianship, Article 33 states in paragraph:

- 1) In the event that the child's parents are incapable of carrying out legal actions, or their place of residence or whereabouts are unknown, then a person or legal entity that meets the requirements may be appointed as the guardian of the child concerned.
- 2) To become a child's guardian as referred to in paragraph (1) is carried out through a court order.
- 3) The appointed guardian as referred to in paragraph (2) must have the same religion as the child's religion.
- 4) (2) For the benefit of the child, the guardian referred to in paragraph (2) is obliged to manage the child's property.
- 5) Provisions regarding the terms and procedures for appointing a guardian as referred to in paragraph (1) shall be further stipulated in a Government Regulation

The court referred to in paragraph (2) is the Religious Court for those who are Muslim and the District Court for those who have a religion other than Islam.

#### Article 34

The guardian who is appointed based on a court order as referred to in Article 33, can represent the child to carry out legal actions, both inside and outside the court for the best interests of the child.

#### Article 35 paragraph

1. In the event that the child has not yet received a court decision regarding guardian, then the child's assets can be taken care of by the Probate Court or other institutions that have the authority to do so.
2. Probate Court or other institutions referred to in paragraph (1) act as supervising guardians to represent the interests of the child.
3. Management of assets referred to in paragraph (1) and paragraph (2) must obtain a stipulation

#### Article 36 paragraph

1. In the event that the appointed guardian turns out to be incompetent in carrying out legal actions or abuses his power as guardian, then the guardianship status is revoked and another person is appointed as guardian through a court order.
2. In the event that the guardian dies, another person is appointed as guardian through a court order.

Based on the description above, it can be analyzed that due to the legal consequences of the application for a guardian and the power of attorney from the heirs of the applicant who are not yet mature enough to take the collateral for the house certificate based on a notary deed, as a result of the guardianship being granted, the guarantee for the certificate of ownership rights can be taken back. If the guardian has caused a loss to the child's property under his control, at the request of the child or the child's family by a Court Decision, the person concerned may be required to compensate for the loss.

## Expiration of the application for guardians and the power of attorney from the applicant's heirs who are not yet mature in order to collect the guarantee of the house certificate

At the end of each trusteeship, it is obligatory to carry out a closing responsibility calculation. This calculation is carried out in the event that, among other things, the trusteeship is completely terminated, namely to the *minderjarige* or to his heirs, the trustees who are terminated due to the guardian's self (person), namely the person who replaces it and the *minderjaring* which, after being under guardianship, returns to being under the authority parents, namely to the father or mother *minderjarige*.

The end of the trusteeship can be viewed from two aspects, namely:

1. In relation to the circumstances of the child In this relationship, the guardianship will terminate because:
  - a. The child under guardianship has grown up ( *meerderjaring* )
  - b. The child ( *minderjaring* ) died
  - c. Reappearance of parental authority ( *ouderlijkemach* )
  - d. The adoption of a child out of wedlock.
2. In relation to the duties of the guardian In relation to the duties of the guardian, the trust will end because:
  - a. Guardian died
  - b. Released or discharged from guardianship ( *ontzetting of ontheffing* )
  - c. There are reasons for release and dismissal from guardianship (Article 380 BW), while the main requirement for dismissal (ontzet) as guardian is based on the interests of the *minderjarige* itself.

The notary deed of guardianship for an underage child can be used for the benefit of the child until the child is old enough, starting from the aspect of daily needs, education, clothing, food, and so on, the end of the guardian's application and the underage heir's power to take collateral the certificate of the house while under guardianship can return its power to the parents if the father or mother gets a reinstatement of authority, in this regard, when the marriage takes place, the parents become the guardians.

If an immature child born out of wedlock is recognized according to law, at the time the marriage took place which resulted in the legitimacy of the child, or at the time of issuance of a letter of authorization if in the event that the person under guardianship regains the authority of the parents, at the time of the guardianship end.

### 4. Conclusion

In taking collateral for certificates of ownership from immature or capable heirs, the bank requests a letter of guardianship issued by a notary to be used as a condition for taking collateral for certificates of ownership. The reason for the bank's request for a guardianship stipulation made by a Notary to be used as authentic evidence in order to avoid disputes in the future, is because there are still immature children of the applicant. As a result of the law, the application for guardians and attorneys from the heirs of the applicant who are immature in order to take the collateral for the house certificate based on a notarial deed, as a result of the guardianship being granted, the guarantee for the certificate of ownership rights can be taken back. If the guardian has caused a loss to the child's property under his control, at the request of the child or the child's family by a Court Decision, the person concerned may be required to compensate for the loss. The Notary Deed on the guardianship of a minor child can be used for the benefit of the child until the child is old enough, starting from the aspect of daily needs, education, clothing, food, and so on. The trusteeship is said to end when the immature child, after being under guardianship, returns to the authority of the parents, because the father or mother has regained authority, at the time of the determination in this regard the guardian is notified. If the



child is not yet an adult, after being under guardianship, he returns under the authority of the parents, at the time of the marriage. if an immature child born out of wedlock is recognized according to law, at the time the marriage took place which resulted in the legitimacy of the child, or at the time of issuance of a letter of authorization if in the event that the person under guardianship regains the authority of his parents, at the time of the guardianship end.

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