GRANTING OF WILL FOR ADOPTED CHILD BASED ON ISLAMIC LAW

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ABSTRACT

The adoption of a child is a legal act that diverts a child from the parent's sphere of authority of the responsibility for the care, education and raise of the child to others. The act of adopting a child has juridical consequences that the adopted child has a legal standing to the one who raised him/her. In different parts of Indonesia, adopted children have the same legal standing with their own offspring, including the right to inherit the wealth left by their adoptive parents at the time of death. In fact, a legitimate adopted child is still considered not part of the family which is the smallest community unit consisting of father, mother and child, so that the adopted child is deemed not entitled to the property of his/her parents because it is not the heirs of the parents who took him/her up. To protect the adopted child from obtaining the right to the property of his/her adoptive parents, the adoptive parents make a grant of will. The grant of a will is a provision of a voluntary item from the heir to another who will be in effect after the heir dies.

Keywords: granting of will, adopted child, Islamic law

Introduction

Humans as social beings cannot live apart from other human beings, because it has become their nature to co-exist with other fellow human beings to form families through marriage. Due to the existence of a marriage, there is a relationship among parent with children and their properties. Relationship conducted among the subject of the law is in order to meet the needs of his/her life.[1] The relationship between parent and children will arise if a child was born. Without the presence of a child in general there will be problems for the continuity of the household and become a concern for the married couple. The solution for the married couple that has no offspring is usually to adopt a child.

The reason of a couple adopt a child is because they have no biological child, or have a biological child but only daughters or sons so they want more child with different gender. Generally foster child is taken from his/her own family, but there are also who adopt child from other families or orphanages. With the presence of a child is expected to be a successor to the generation, taking a role as a place where the outpouring of parent's hope lays, to be a protector of the elderly when the elderly and becoming heir of all the properties of his/her parents.

The adoption of a child may result in a legal effect; one of them is the issuance of inheritance for an adopted child. The weakness of an adopted child often becomes a dispute among those who feel more entitled to the inheritance of the property left by an heir. In order to make sure the treasures of the adoptive parents can be enjoyed by their adopted child, the adoptive parents make a grant of a will that can be useful for his adopted child. The problem that arises such as how is the legal status of a testament grant by the heir to his adopted child according to Islamic law? Is the grant of a will received by an adopted child has a limitation?

Discussion

Adopted child is a child of another person who was appointed by husband and wife to be made as his own child. As stated by JT.Simorangkir about adopted child that raised a child of another person as his own child and have the same rights with biological child.[2]

According to Government Regulation No. 54 of 2007 on the Implementation of the Appointment of Children mentioned in Article 1 number (1) that adopted child is a child whose rights are transferred from the family power of parents, legal guardians or other persons responsible for care, education and raising the child, into the family environment of his adoptive parents based on a court decision or appointment.

It is also done on the *Arab Jahiliyah* customary community; there are also habits of adoption. The customary community of *Jahiliyah* punishes the adopted child the same as the child of his/her adoptive parents, causing one of the reasons for the inheritance rights, as well as the breaking of the legal relationship between the adopted child and his biological parents.[3]

The legal consequences of child adoption, whether in Arab Jahiliyah, indigenous society in Indonesia, or adoption in western civil law (Burgerlijk Wetboek), are as follows:

a. Breaking up of the civil relationship/*nasab* between adopted children with his biological parents.

[1] Yulies Tiena Masriani, 2014, ***Pengantar Hukum Indonesia***, Jakarta, Sinar Grafika, hlm.78.
[2] JT.Simorangkir, 1987, ***Kamus Hukum***, Penerbit Rajawali Press, Jakarta, hlm 4.
[3] Lihat Ahmad Rofiq, 1995, ***Hukum Islam di Indonesia***, Penerbit PT Raja Grafindo Persada, Jakarta, hlm 362.

b. The relationship of civility and kinship/adopted child *nasab* turns to the kinship of adoptive parents. Therefore, the adopted child is called by the name of his adoptive parents. It means *bin*, its *binti* wearing the name of its adoptive parent.

c. The legal status of the adopted child is as legitimate child and equal to the natural child with all rights and obligations.

d. The position of the adopted child in inheritance equals his / her position with the biological child.[4]

According to the Compilation of Islamic Law concerning adopted child which is regulated in Article 171 letter (h) Book II of the Law of Inheritance which states that adopted child is a child who is in maintenance for their daily lives, education fees and others in which switching the responsibilities from parents of origin to adoptive parents based on the Court's decision.

As stipulated in Article 209 paragraph (1) Compilation of Islamic Law that the inheritance of the adopted child is divided based on Articles 176 to 193, while the adoptive parents who do not receive the will is given a will as much as 1/3 of their adopted child's will. Furthermore, in paragraph (2), it is mentioned that the adopted child who does not receive the will is given a will as much as 1/3 of the inheritance of his adoptive parents.

In relation to the above matters, Article 211 of the Compilation of Islamic Law has provided a solution, that is by grants given by parents to their children can be counted as inheritance. The word of "can" in the passage does not mean to be imperative, but it is one of the alternatives that can be taken to resolve disputes or inheritance disputes. As long as the heirs do not question the grant received by some heirs, the inheritance of the unassigned property can be distributed to all heirs according to their respective parts. But if there are some heirs who question the grant given to some other heirs, then the grant can be named as inheritance, by calculating the grant received with the inheritance that should be received. If the received grant is still less than the inheritance, then just add the shortcomings, and vice versa if the grant exceeds the inheritance, then the excess grant can be withdrawn to be submitted to the heirs who are less in the part.[5]

The Law of Inheritance in Indonesia still applies three legal systems, whereas all of them are not rarely found any fundamental differences one with another. The three legal systems are the Legal System of Traditional Inheritance, Burgerlijk Wetboek Legal System (BW) and the Legal System of Inheritance of Islam. However, the one which will be explained in more detail is the right of inheritance of adopted child to its inheritance's properties based on Islamic Law of Inheritance.

The Law of Inheritance according to Article 171 letter (a) of Presidential Instruction No.1 of 1991 on the Compilation of Islamic Law (KHI), is a law which regulates the transfer of ownership rights of the heirs, determines who is entitled to be an heir and how many of each distribution respectively.

The word of inheritance is derived from the word *warith* (Arabic) which means the heir or the person who is entitled to inherit. Basically in organizing and resolving the issue of inheritance should not be occurred things like imposing the will of the one with another or demanding rights without thinking of the interests of other heirs. In the event of a dispute happens, so in between the heirs can resolve the issue using consensus and in peace.

The arrangement of inheritance can be done by granting or making a will. A grant is an agreement whereby the beneficiary in his or her life is free and irrevocable gives away something for the purpose of the grantee receiving the grant. The grant includes a one-sided agreement, in which only one party has an obligation to the treaty, namely the grantee, while the receiving party has no obligation at all.

The statement "in his/her life time" of the beneficiary is to distinguish the benefactor from the grants made in the will, which will have power and shall prevail after the giver dies and at all times as long as the giver is alive, may be changed or withdrawn by the giver.

According to the Compilation of Islamic Law (KHI) Article 171 letter (g), it is stated that the grant is a voluntary giving of things without the compensation from someone to another living person to have it. Furthermore, pursuant to Article 210 of the Compilation of Islamic Law in paragraph (1), it is said that a person who has been at least 21 years old, sensible without coercion can grant as many as one third of his property to another person or institution before two witnesses to own them. Furthermore in paragraph (2) it is stated that the granted property shall be the right of grant. Thus if a person who grants his/her property which is his/her own, then his/her grant becomes void.

Based on the matters above, it can be said that everyone can give and receive a grant, except those who are declared incompetent for it. Besides, it is also necessary to conduct legal deeds for such grant, without any coercion from other parties, because it is one of the elements that must exist in the implementation of the grant.

Grant and will is different because grant according to Article 171 letter (f) Compilation of Islamic Law is the giving of an object from the heir to another person or institution that will apply after the heir passed away. Thus it can be said that a

[4] Anshary, 2010, ***Hukum Perkawinan di Indonesia***, Pustaka Pelajar, Yogyakarta, hlm 112.

[5] Azni Umar dalam An-Nida: ***Jurnal Pemikiran Islam***, Vol.40, No.2, Juli-Agustus 2015, hlm 104-105.

grant is a gift of a voluntary object from an heir to another person to have it, which applies after the testator dies. The granting of the will is given to someone else other than the heir.

The statement "someone else" mentioned here may also be adopted child. Because the adopted child is a child who is in maintenance for his or her daily life, the responsibilities for cost of education and other costs will switch from the parents of origin to his adoptive parents based on the decision of the Court (Article 171 (h) KHI). Thus it can be said that an adopted child may obtain a testament grant from his adoptive parents.

Will is a tasharruf (release) of the estate that held after the death of a testator. Originally, a will is an act committed sincerely under any circumstances.[6]

Legal basis of will in Islamic Law of Inheritance is Al-Qur'an surah Al-Baqarah verse 180 and surah Al-Maidah verse 106 which mentioned respectively as follows:

Al-Qur'an surah Al-Baqarah verse 180:

"Bequest is prescribed for you when death approaches one of you and leaving behind wealth for parents and near relatives, according to Ma'rûf (custom) is a duty (to be fulfilled, a right) upon those who are pious (the owners of piety, "takwâ")"

Al-Qur'an surah Al-Maidah verse 106:

"O you who believe (who are âmenû)! When (the state of) death draws nigh to one of you, at the time of bequest, let two just men from among you bear witness between you. Or if death befalls you while you are travelling in the land, call to witness the two men who are not of you. You should detain them after the prayer; if you doubt. They shall both swear by Allah saying: We will not take for it a price, even though it was a near kinsman, and we will not hide the testimony of Allah. Otherwise certainly we should be of the sinful".

To clarify the will of the Islamic Law of Inheritance, it is necessary to compare with the will of the law according to the code of Civil Law (BW). Understanding the will of the code of Civil Law is contained in Article 875, namely:

"The so-called will or testament is an act which contains a person's statement of what he/she wants to happen after he dies, and which by it may be revoked again"

If it is to be drawn in common, between the wills of Islamic Law of Inheritance and the code of Civil Law, then the similarity is the validity of the will after the death of the testator.

If the definition of will in the code of Civil Law is compared with the meaning of the will in Islamic Law of Inheritance, there is a very striking difference. In Islamic Law of Inheritance, there is no concept of appointment or appointment of heirs (*erfstelling*). There is only a gift from someone to another who applies when the one who gives passed away. "Giving" in such special circumstances is known as a will. Such terminology in the law of the inheritance of the Civil Code is called the grant of a will, or commonly called *legaat*.[7]

The provision of a will is set out in Article 194 of the Compilation of Islamic Law stipulating that an individual who is at least 21 years old, sensible and without coercion may be able to make a part of his property to another person or institution. The property must be the right of the testator. Ownership of new property can be carried out after the death of the deceased.[8]

A will is performed verbally in the presence of two witnesses, or written before two witnesses, or before a Notary. A will is permitted to a maximum of one-third of the estate unless all the heirs agree.[9]

And the will to the heirs applies when approved by all heirs. The consent statement is made orally before two witnesses or written before two witnesses before a Notary. It can be interpreted that the making of a will may be made by notarial deed to be kept in the Notary's office and will be valid after the testator has passed away. The making of a will by notarial deed is crucial, because of the notarial position of a notary public has an important role in every legal relationship (*rechtsbetrekking*) which guarantees the rights and obligations of the parties in order to realize legal certainty, law and public order. [10]

The making of a will, both written and oral, must be clearly stated and clearly who or what institution is appointed will receive the required possessions. Clarity of wills is required to avoid misinterpretation later on.

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[6] A.Rachmad Budiono, 1999, ***Pembaruan Hukum Kewarisan Islam di Indonesia***, Bandung, PT.Citra Aditya Bakti, hlm 22-23.

[7] Ibid, hlm 24.

[8] ***------,Bahan Penyuluhan Hukum***, 2001, Departemen Agama RI Direktorat Jenderal Pembinaan Kelembagaan Agama Islam, hlm. 89.

[9] Muhammad Saifullah dkk, 2005**, *Hukum Islam Solusi Permasalahan Keluarga***, Yogyakarta, UII Press, hlm. 217.

[10] Yulies Tiena Masriani , 2015, ***Kedudukan Hukum Akta-Akta Notaris Dalam Ekonomi Islam***, dalam e-Joernal Serat Acitya Universitas 17 Agustus 1945 Semarang, Vol.4, No.1 (2015), hlm.35.

A will is void if the prospective will-taker based on the verdict the judge who has had the force of law is still punished because (Article 197 KHI):

a. Be blamed for killing or attempting to murder or severely persecute the testator;
b. Severely blamed for filing a complaint that a property has committed a crime punishable with five years in prison or more severe punishment;
c. Be blamed for the violence or threat of preventing the right to make or revoke or amend the will for the will of the prospective will-taker;
d. Be blamed for having embezzled or damaged or forged a will from a testator.

Cancellation of a will may also occur when the person designated to accept the will:
a. Not aware of the will until he died before the death of the testator;
b. Knowing the will, but he/she refuses to accept it;
c. Knowing the will, but never declare accept or refuse until he dies before the death of the testator.

And the will is void if the will is destroyed. However, the will in the form of the result of an object or the utilization of an object must be given a certain period. This is done so that the provision and the acquisition of wills is clear does not cause confusion.

Testator may withdraw his will as long as the will-taker has not given consent or after declaring consent but then withdraws his will. The revocation of a will may be made verbally witnessed by two witnesses or in writing witnessed by two witnesses or by a Notary deed if the previous will is made orally. If the will is made in writing, it can only be revoked by written means witnessed by two witnesses or by notary's certificate. When a will is made on the basis of a Notary's deed, it can only be revoked based on Notary's certificate.

The immovable property, if due to a valid cause suffered depreciation or damage that occurred before the death of the testator, the will-taker will only receive the remaining property.

If the will exceeds one-third of the inheritance while the heirs do not approve, the will is only held to one-third of his estate. Granting of the wills that intends for various noble activities while the estate is not sufficient, then the heirs can determine which activities take precedence implementation.

If the condition of a will is close, then it is stored in the initial Notary's place when making it or elsewhere, including letters related to the will. When a will is revoked, the will is handed back to the testator. But if the testator passes away, the will is closed and kept to the Notary, opened by the Notary in the presence of the heir, witnessed by two witnesses and by making the transmittal note for the opening of the will.

If the will is kept not by the Notary, the depositary shall deliver the will to the local Notary or the Office of the Local Religious Affairs and further the Notary or the Office of Religious Affairs shall open it for the contents and intent of the will and shall be submitted to the will-taker for further solution.

In order to protect the heirs, so that there will be in poverty after leaving the heirs, the most probable property to grant is one-third of all inheritance. The concept of wills is used to solve the problem of adopted child[11], so that the grant of wills for adopted child is given as much as 1/3 of the inheritance of their adoptive parents. Similarly, foster parents get a share of the treasures of his adopted child. This is done if the testator does not give a will, and the given part must not exceed 1/3 of the estate. If exceeded, then the amount is reduced to 1/3 relic, not in proportion, but based on a complex calculation system based on priority (unless the heir agrees).[12]

The acquisition of the will of a number of 1/3 of the property of the adoptive parents to the adopted child indicates that the purpose of the adoption of the child to realize the welfare of the child and the protection of the child is accomplished. Thus the socially and economically capable societies are able to carry out the mandate to help the needy, abandoned and underprivileged child who is in desperate need of help and affection by adopting a child.

Conclusion

In accordance with the mentioned statements above, the conclusions are as follows:

1. The legal position of the granting a will made by the Heir against his adopted child according to Islamic Law is free whether to make or not to make a will. However, some scholars argue that the freedom to make a will or not only applies to people who are not close relatives. For close relatives who do not get an inheritance, a person is required to make a will. This is based on Al-Qur'an surah Al-Baqarah verse 180. The will is performed orally in the presence of two witnesses, or written before two witnesses, or before a Notary.
2. The grant of a will received by an adopted child has its limits. Giving of a will for a foster child shall be given mandatory grant (*wasiat wajibah*) as many as 1/3 of the inheritance of his adoptive parents, unless all heirs agree.

[11] Asep Saepudin Jahar dkk, 2013, ***Hukum Keluarga, Pidana & Bisnis***, Jakarta, Kencana, hlm. 89.
[12] Joseph Schacht, 2010, ***Pengantar Hukum Islam***, Bandung, Nuansa, hlm. 247.

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