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## **Children's Position on a Defective Marriage (*Fasid*) in Terms Establishment of Inheritance Right as an Effort for Legal Certainty**

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### **Abstract**

Marriage in the legal system in Indonesia is said to be valid if it is carried out according to each religion and belief and must be registered based on the applicable provisions. To avoid the occurrence of a defective marriage (*fasid*), then when a marriage has been carried out based on religion and belief, then the marriage must be registered. This is to avoid any legal consequences that will arise especially for children born in said marriage to the legal status and position of children born in defective marriages (*fasid*) as heirs. The purpose of this research is to find out the position of children born from broken marriages in terms of determining inheritance rights. This type of this research is normative, which is legal research conducted through library research. The findings of this study indicate that the legal status of children born from defective marriages (*fasid*) are children out of wedlock which the legal status is recognized by both parents and are not children born from acts of adultery. Regarding the right to inherit a child out of wedlock from a defective marriage (*fasid*) which has been proven through a DNA test to have a biological relationship with the father and his father's family, the father and his father's family as the heir can provide a testamentary grant through a legal act of a will grant which is proven by a notarial deed as a form of inheritance rights but the share may not exceed 1/3 of the heir's inheritance.

**Keywords:** Defective Marriage, Children out of Wedlock, Inheritance

### **1. INTRODUCTION**

The Indonesian state guarantees its citizens to live together in a marriage relationship as stated in Article 28 B paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states "Everyone has the right to form a family and continue the lineage through legal marriage". Based on Law Number 1 of 1974 concerning Marriage Article 2 junto Article 2 paragraph (1) Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage it is stated that "a legal marriage is a marriage which is carried out according to their respective beliefs and also the marriage must be registered". Based on these provisions, marriage registration is carried out by an authorized marriage registrar. For marriages that are not registered, it is usually better known as unregistered marriages. The existence of marriages carried out in and/or by unregistered marriages will result in the offspring resulting from the marriage making them illegitimate offspring. The concluded that the offspring resulting from illegitimate marriages are not legitimate children or often referred to as illegitimate children. Children out of wedlock or illegitimate children only have civil relations with their mothers, which is further stipulated in the provisions of Article 43 paragraph (1) of the Marriage Law.

The provisions of Article 43 paragraph (1) of the Marriage Law have been amended with the issuance of the Constitutional Court Decision Number 46/PUU-VIII/2010 dated 17 February 2012 (hereinafter referred to as the Constitutional Court Decision No. 46/PUU-VIII/2010) which

determines that children out of wedlock can be canonized and has a civil relationship with his father and his father's family. Marriages that are carried out legally or in a siri must still be carried out in accordance with their respective religions and beliefs. Viewed from the perspective of Islamic law, marriage can be said to be valid as long as it is carried out in accordance with Article 2 paragraph (1) of the Marriage Law and if the marriage is not carried out in accordance with the provisions of their respective religions and beliefs, the marriage becomes invalid. Specifically in Islamic law, a marriage is considered valid if the conditions and pillars of a marriage contract have been fulfilled and there are no prohibited elements in carrying out a marriage. Basically, marriage in Islamic law is said to be invalid or null and void because the pillars are not fulfilled and marriages that do not fulfill the conditions are defective marriages (fasid). Conceptually, a broken marriage (fasid) is one of the problems in marriage law in which a marriage is said to be damaged because the pillars and legal requirements of marriage are not fulfilled as a whole in Islamic law.

One of the legal consequences of the occurrence of a marital relationship is the existence of an inheritance relationship. In addition, the cause of the inheritance relationship is kinship or blood relationship. Related to kinship or blood, which is also called *an-Nasab al-Haqiqi*, is the most basic thing in the occurrence of inheritance, because blood relations cannot be eliminated after all. There are changes to the provisions of Article 43 paragraph (1) of the Marriage Law, which creates a conflict of norms against other articles relating to the position of children outside of marriage, namely the position of children outside of marriage in the field of inheritance because changes in Article 43 paragraph (1) of the Marriage Law state that children outside married can have a civil relationship with his father and his father's family. Another thing conveyed differently, namely that there are provisions in other articles that regulate the inheritance of children out of wedlock, namely Article 186 of the Kompilasi Hukum Islam (hereinafter referred to as KHI). Article 186 of the KHI states that "Children born out of wedlock only have an inherited relationship with their mother and their mother's family." In the explanation of the article, what is meant by children born outside of marriage are children born outside of legal marriage or as a result of an illegal relationship.

The legal consequences of the conflicting differences between the Constitutional Court Decision No. 46/PUU-VIII/2010 which amends the provisions of Article 43 paragraph (1) of the Marriage Law with Article 186 of the KHI has an impact on legal uncertainty as evidenced by the existence of several different Religious Court decisions regarding the ratification of children. Determination of the Kotabaru Religious Court Number 78/Pdt.P/2019/PA.Ktb which states stipulates that the legal status of a child with the initials DRA from a defective marriage (fasid) between the applicants is an illegitimate child and cannot be said to be valid according to the applicable legal provisions because the applicant's marriage was not registered under the provisions of Article 2 of the Marriage Law, so that the child it is only recognized biologically that it is true that he is the child of Petitioner I and Petitioner II. Based on the Decree of the Religious Court of Penajam Number 140/Pdt.P/2019/PA.Pnj that the judge determined that the legal status of child X from the broken marriage between Petitioner I and Petitioner II who was an illegitimate child was a legitimate child. With the difference between the Constitutional Court Decision No. 46/PUU-VIII/2010 which amends the provisions of Article 43 paragraph (1) of the Marriage Law with the provisions of Article 186 KHI concerning the position of children out of wedlock, will affect the determination of inheritance rights which will make the position of children out of wedlock uncertain whether children out of wedlock have the right to become heirs or cannot inheritance.

## **2. METHOD**

This research is normative legal research, doctrinal legal research which is often termed research on literature or research on documents and is limited to written regulations or other supporting legal materials and conducted through library research.(Johnny, 2011) This research was conducted with the aim of analyzing and finding the position of children in defective marriages (fasid) in terms of determining inheritance rights as an effort to ensure legal certainty.(Abdulkadir, 2004) This research uses a statutory approach and a conceptual approach in analyzing legal issues. In this research, several legal materials will be used, namely: primary legal materials covering several laws and regulations regarding inheritance rights and the position of children in Indonesia, then secondary legal materials include books, scientific journals or legal journals, opinions of scholars, results of interviews with practitioners regarding issues that discuss the position of children in defective marriages (fasid)

relating to inheritance and tertiary legal materials including the Legal Dictionary, Big Indonesian Dictionary and Encyclopedia. Collection of information and legal materials used literature study techniques. After collecting the legal materials, they will be processed and qualitatively analyzed through systematic interpretation. This research also uses the theory of legal certainty and the maqashid syariah theory in analyzing legal issues.

### **3. RESULT AND DISCUSSION**

#### **3.1 The Legal Status of Children in Indonesian Law is associated with Defective Marriages (Fasid)**

Some of the legal regulations that apply in Indonesia are known as several kinds of terms children, namely: legitimate children, children out of wedlock, children of adultery, incestuous children, adopted children. A marriage is said to be valid if it is carried out according to the laws of each religion and belief and the marriage is registered according to the applicable laws and regulations so that it is different from a marriage which is said to be defective marriages (fasid). A marriage can be said to be damaged concretely if: Does not meet the requirements and harmony in the marriage; One of the married couples enters into a marriage without being officially declared divorced from the previous marriage partner; Marriages that are held are not registered with the state and/or in accordance with the laws and regulations that govern them; In a marriage still have a sibling relationship. Defective in this case can be in the form of damage to the pillars of marriage, so that the person concerned in this case is obliged to repeat and fulfill the legal requirements and is damaged in the sense that the marriage does not meet the terms and conditions determined by the state, and if this is not implemented then a marriage in this case it can be cancelled. (Isyana, 2013)

Basically, the existence of a defective marriage (fasid) will affect the legal actions that occur later from the husband and wife whose defective marriage in the event that there are children from the marriage to legal acts of inheritance. The protection provided in guaranteeing legal certainty in the event that the public is not aware of this matter can be given space to apply for determination of children and/or requests for determination of the origin of children from an illegitimate marriage and/or defective marriage (fasid) to provide space as wide as possible for the community to submit a material review of the provisions of the Articles in the Marriage Law. In order to create legal certainty in the legal status of children born from an illegitimate marriage, they are still based on the legal system in Indonesia and the Constitutional Court Decision No. 46/PUU-VIII/2010, children from defective marriages (fasid) are children with the legal status of children out of wedlock, whether those out of wedlock children are later recognized or not recognized before the law. The legal status of the child is very important in the future because it will determine the civil relationship of the child out of wedlock to both parents. The civil relations that arise are both in terms of legal acts of guardianship and legal acts of inheritance to these illegitimate children.

#### **3.2 Analysis of the Constitutional Court Decision Number 46/PUU-VIII/2010 Against the Disharmonization of the Religious Court's Decision Regarding the Determination of Child Legitimacy**

The Constitutional Court has made a revolutionary decision in the Constitutional Court Decision No. 46/PUU-VIII/2010 regarding the legal status of children out of wedlock which states that, children born out of wedlock not only have civil relations with their mothers and their mothers' families, but also have civil relations with men as biological fathers who can proven on the basis of science and technology and/or other evidence according to law to have blood relations, including civil relations with his father's family. The Constitutional Court Decision No. 46/PUU-VIII/2010 researchers analyzed using theory in Islamic law, especially with maqashid Syariah, namely the study of the intent or purpose of stipulating law, because actually a shari'a aims for the benefit of humans in the world and in the hereafter. (Ghofar, 2009) Which is the focus of the legal basis, namely, regarding civil relations between biological fathers to children outside of marriage and guarantees for the child's life. Regarding the civil relationship between father and child outside of marriage, this is in line with the principle of hifz al-nasl (maintaining lineage). The Constitutional Court Decision No. 46/PUU-VIII/2010 with the maqashid sharia theory in the Qashdu asy-Syari' fi Dukhul al-Mukallaf throne Ahkam asy-Syari'ah which means God's intention why individuals have to run sharia, where the goal of individuals running sharia is to obtain individual benefit and prevent individual harm both in this

world and in the hereafter. Can be seen from the individual who has to carry out sharia, it is true that a child must be looked for by his nasab so that with this nasab the child can get his rights as a child and the father can fulfill his obligations by being responsible for the child by recognizing the illegitimate child so that the child becomes an illegitimate child marriage recognized by the father.

With regard to the theory of maqashid sharia, it can be concluded that the Determination of the Religious Court of Penajam Number 140/Pdt.P/2019/P.Pnj is a court ruling that is not in accordance with the theory of maqashid syariah where in the proof it is proven that their marriage is not in accordance with sharia or the rule of law where must be recorded or reported to the state so that children get their rights as children as they should. To get benefit from this case and prevent harm to both the child and their parents, it is true that children in fasid marriages should only be recognized as illegitimate children, as is the case in the Kotabaru Religious Court Decree Number 78/Pdt.P/2019/ P. Ktb. in which the stipulation is still guided by absolute Islamic law and also state rules which cannot be separated to achieve benefit and prevent harm. This is also in accordance with the Constitutional Court Decision No. 46/PUU-VIII/2010 where in the Constitutional Court's decision there are also no words that change article 42 that children out of wedlock can turn into legitimate children. Article 42 of the Marriage Law only changes that a child out of wedlock can have a civil relationship with his father with proof.

### **3.3 Determination of Inheritance Rights to Children Born in Defective Marriages (Fasid)**

Children out of wedlock resulting from a defective marriage (fasid) who have been proven to have a biological relationship with their father and his father's family in the future are expected to have the same rights as legitimate children in inheritance rights. As long as it can be proven by science and technology, namely through a DNA test that children out of wedlock have blood relations with the man as their biological father, the provisions in Article 186 KHI, in addition to having civil relations with the mother and the mother's family, the child out of wedlock also has civil relations with his biological father and his father's family. Basically KHI apart from being based on the Qur'an and as Sunnah is also based on and/or guided by the legal provisions of laws and regulations in Indonesia.(Oemarsalim, 2016) The existence of inheritance rights for children out of wedlock because of a defective marriage (fasid) is a legal implication of the existence of civil relations between children out of wedlock and their mothers and their mothers' families, as well as with their fathers and their father's families. According to Islamic law, there are several conditions for a person to inherit and/or be said to be an heir, namely having a blood relationship or marital relationship with the heir, being Muslim, and not being hindered by law to become an heir.

Inheritance rights of children out of wedlock according to Islamic law after the Constitutional Court decision No. 46/PUU-VIII/2010 namely the recognition of children out of wedlock (biological results), in which children out of wedlock who are recognized will have civil relations including in terms of guardianship and inheritance with their biological father, provided that it can be proven by the existence of a biological relationship between the child and biological father based on science and technology, which in this case uses DNA test results. However, if there is denial regarding the recognized illegitimate child from the children of legal heirs, then a request for a Court Order regarding the status of the illegitimate child as a biologically legitimate child is required from his father as the heir. Regarding the right to inherit a child out of wedlock from a defective marriage (fasid) which has been proven through a DNA test to have a biological relationship with the father and his father's family, the father and his father's family as the heir can provide a testamentary grant through a legal act of a will grant which is proven by a notarial deed against that to the child out of wedlock as a form of inheritance rights but the share may not exceed 1/3 of the inheritor's inheritance. The purpose is to protect the rights of biologically related children, not to legitimize the kinship relationship between the child and the man who caused the birth.

## **4. CONCLUSION**

The position of children in defective marriages (fasid) in terms of determining inheritance rights as an effort to ensure legal certainty is that they still have the legal status of children out of wedlock. The legal status of a child is said to be an illegitimate child if he is born from an illegitimate marriage as a result of a defective marriage (fasid). Marriages are said to be damaged (fasid) because one of them is that a marriage that takes place is not registered with the state based on statutory regulations. The

Constitutional Court Decision No. 46/PUU-VIII/2010 Children out of wedlock apart from having civil relations with the mother and the mother's family, also have civil relations with the father and the father's family as long as they can be proven by science and technology, namely using a DNA test which is in line with the principles of *hifz al-nasl* (maintain lineage). It is acknowledged that children out of wedlock are the result of a defective marriage (*fasid*) through the determination of child legitimacy, children out of wedlock have the same rights and obligations as legitimate children, including the right to inherit. In Islamic Law, the right to inherit for a child out of wedlock due to a broken defective (*fasid*) can be in the form of granting a testament to the heir's inheritance based on blood and/or lineage relations from the biological father and the biological father's family.

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