

Preparing To Appoint Indonesian Minor Guardians Under Islamic Law

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Abstract: The provisions relating to celibacy are known in the Civil Code, Law No. 1/1974 and KHAI. In this study, the questions to be considered relate to the agreement on how to name parents in Indonesia before the release of Government Regulation No.29 in 2019 and on how to name parents in Indonesia after the publication of No.29. 29 in 2019. That is. Islamic law point of view. This study method analyzes the relevant legislation on the issues acquired with the help of the study of normative law, and the essence of this study is an explanatory analysis that explains the law and regulation. Based on the legal theory of the provisions and regulations in force for the appointment of guardians in all related Islamic laws. If the parent of the child is unable to bring legal action, or if there is no unspecified place of residence or place of residence, the parent's status as guardian of the child must be replaced by an eligible natural or legal person. By the decision of the Inquisition for Muslims and the District Court for non-Muslims or the creation of a tribunal.

Keywords : terms and procedures for appointment of guardian; minor; Islamic law.

I. Introduction

I.1 Background of the Study

The obligation of parents is to provide protection and be responsible for the development of children. Not only parents have to prepare the younger generation but the community and the government. The starting point is the future of children through protecting children from all forms of neglect, violence, exploitation. Parental negligence causes neglect, if this is sustainable without resolution, acts of violence and cruelty continue to be experienced by children and exploitation of labor will result in shock and inner conflict in children. It will greatly influence and hinder the physical, mental, emotional and social development.¹ As a result, children make delinquent acts and cause disruption of Kabtibmas and violations of law. Thus, providing protection for children will avoid all forms of neglect, violence and exploitation. Children are expected to develop naturally towards potential young people for

national development.² Law No.23 of 2002 regulates the protection of children and in Article 33 paragraph (1) it is stated that in the event that parents of children are incompetent in carrying out legal actions, or where their existence or whereabouts are unknown,³ a person or legal entity that meets the requirements can appointed as guardian of the child concerned. (2) to become a guardian of a child as referred to in paragraph (1) is carried out through a court⁴ decision⁵.

On April 26, 2019 President Joko Widodo signed Government Regulation (PP) Number 29 of 2019 concerning the Terms and Procedure for Appointment of Guardians, the issuance of this Government Regulation is to implement the provisions of Article 33 paragraph (5) of Law Number 35 Year 2014 concerning Amendments to Law - Law Number 23 of 2002 concerning Child Protection.⁶ The background of the formation

of guardianship is in the book of this Law so that the interests of children under guardianship are not harmed or obtain sufficient guarantees from their guardians, especially those related to self-maintenance and management of their property.⁷ The scope of the regulation in Government Regulation Number 29 of 2019 concerning the Terms and Procedures for Appointment of the Trustee includes arrangements regarding the terms of appointment of Guardians, procedures for appointment of Guardians, expiration of Guardian, guidance and supervision of guardianship of Children, and reporting and documentation.

1.2 Problem of the Study

Based on the background of the problems stated above, several problems can be formulated as follows:

1. How are Regulations for Appointment of Guardians in Indonesia before the issuance of Government Regulation No.29 of 2019?
2. How is the regulation of appointment of guardians in Indonesia after the issuance of PP No.29 of 2019?
3. What is the point of view of Islamic law on the arrangement of appointment of the guardian?

II. Discussion

2.1 Regulations for Appointment of Guardians in Indonesia before the issuance of Government Regulation No.29 of 2019

Guardianship in terms can also be called helping those who love.⁸ Etymologically has several meanings including love (al-mahabbah) and help (an-nashrah) and also means power or authority (as-saltah wal-qudrah) as in the phrase al-wali, namely "people who have power". The essence of al-walayah (alwilayah) is "tawalliy al-amr"⁹ (taking care of or mastering something).⁹ Guardianship or commonly referred to as guardianship power is an institution that replaces the power of parents to children who have not reached a certain age or are not married. Children who have not reached a certain age are children who are under 21

years according to the provisions of Article 330 of the Civil Code, under 18 years of age according to the provisions of Article 50 paragraph (1) of Law No. 1/1974 or under 21 years of age according to the provisions of Article 107 paragraph (1) KHI.

In the KUH Perdata, the guardianship arrangement is listed in First Book, Chapter XV, Part 2 (two) up to Part 13 (thirteen), starting from Article 331 to Article 418a. guardianship according to civil law consists of 3 (three) types, namely; First, statutory guardianship (wettelijke voogdij) is guardianship by parents who are still alive after one person dies first.¹⁰ Second, guardianship because of the parents' testament (testairair voogdij), which is a guardianship with a will by one of their parents.¹¹ Third, guardianship appointed by the judge (datieve voogdij).¹²

In Law No. 1 of 1974, guardianship arrangements are included in Chapter XI, starting from Article 50 to Article 54. In Article 54 paragraph (1) it is determined that children is under 18 years of age or have never had a marriage, which not under the authority of parents, under the authority of the guardian. In the KHI guardianship arrangements are regulated in Book I, Chapter XV, starting from Article 107 to Article 112. According to the provisions of Article 107 paragraph (1), guardianship is only for children who have not reached the age of 21 and have never been married. Subsequently in paragraph (2) guardianship includes guardianship of self and its assets. Underage children left by their parents by law are deemed incompetent to carry out legal actions, so that a guardian who will represent him is required to take care of his interests. In Law No. 1 of 1974 concerning Marriage Principles it is stated that the requirement to become a guardian is as much as possible from the family of the child with a court decision, or another person who is mature, healthy, fair, honest and well behaved.¹³ The way to get a guardian is regulated in Article 51 paragraph (1) of Law No. 1 of 1974 which stipulates that the method of appointment of a guardian is of three types,

namely through oral before two witnesses, can also be in the form of a will and in a written way through the determination of the judge in the case of revocation.

In the appointment of the guardian, it is expected that the guardian will have a family relationship so that things will not happen that are not desired for the use of assets for personal purposes by the guardian will not occur.¹⁴

The appointment of a guardian from a child's family is also found in the hadith of the Prophet Muhammad:

ان النبي صلى الله عليه وسلم قضى نف ابنة مجزة خالتهما وقال اخلافة مبذلة الم (اخرجه البخارى

Meaning: Indeed the Prophet. Deciding the guardian for Hamzah's daughter to her mother's sister, and he said: "Mother's sister occupies the position of mother". (Riwayat Al-Bukhari).

Guardianship according to the Compilation of Islamic law is as follows: "Guardianship is the authority given to someone to do a legal act as a representative for the interests and on behalf of a child who does not have both parents, parents who are still living incapable of carrying out legal actions".¹⁵

From the descriptions above, it is clear that in principle there are differences in arrangements regarding guardianship according to Law No.1 of 1974 and Civil Code, where according to the Civil Code the children who receive guardianship are children who are not 21 years old or have not married (article 330 paragraph 3 of the Civil Code) while according to Law No.1 of 1974 which accepts guardianship are children who have not reached the age of 18 years or have not married (article 50 paragraph 1).

In the case of the appointment of guardians in the Civil Code there are distinguished three types of guardianship, namely:

1. Guardianship from a husband or wife who lives longer (articles 345-354).
2. Trusteeship appointed by the father or mother with a separate will or deed (article 355 paragraph 1).
3. Trustees appointed by the judge (article 359).

Whereas according to Law No.1 of 1974 concerning marriage: Guardianship only exists because of the appointment by one of the parents who exercised power as a parent before he died with a will or verbally in the presence of two witnesses (article 51 paragraph 1 of Law No. 1 year 1974).

Law No. 23 of 2002 concerning child protection regulates guardianship, Article 33 states in paragraph:

1. In the event that a child's parent is incapable of carrying out a legal act, or is not known to have a place of residence or existence, then a person or legal entity that fulfils the requirements can be appointed as the guardian of the child concerned.
2. To become a guardian of a child as referred to in paragraph (1) is carried out through a court decision.¹⁶
3. The appointed guardian as referred to in paragraph (2) of his religion must be the same as the religion adopted by the child.
4. For the benefit of the child, the guardian as referred to in paragraph (2) must manage the property of the child concerned.
5. Provisions regarding the terms and procedure for appointment of guardians as referred to in paragraph (1) shall be further regulated by Government Regulation.

2.2. Arrangement of the appointment of guardians in Indonesia after the issuance of PP No.29 of 2019

Guardian is a person or entity who in reality carries out foster power as a parent to a child, the appointment of Guardian aims to protect the Rights and fulfil the basic needs of the Child and manage the assets of the Child in order to guarantee growth and the best interests of the Child.¹⁷ Appointment of Guardian is based on the request or will of the parent¹⁸ in accordance with the provisions of the laws and regulations¹⁹ submitted by a person or legal entity as a candidate for Guardian of the Court²⁰ and submitted together with a request for revocation of legitimate power that has been received and determined by the Court through a trial.²¹ The person or

legal entity that will be appointed as Guardian must attach a recommendation originating from the agency that administers government affairs in the local social / regency / city sector when conducting the court decision process.²²

The recommendation will be taken into consideration in establishing guardians or revocation of foster power and assigning professional social workers to conduct assessments to persons or legal entities who will be appointed as Guardians and assisted also by consideration teams for appointment of Guardians,²³ Guardians are also required to register the appointment of Guardian appointments to the service local population and civil census.²⁴

The guardian who has been determined by the Court has an obligation to:

- a. Conduct parental care
- b. Carry out Parental obligations and responsibilities, which consist of:
 1. Parenting, nurturing, educating, and protecting the child;
 2. Growing children according to their abilities, talents, and interests and guaranteeing the best interests of the child;
 3. Preventing marriage at the age of the child;
 4. Providing character education and planting values of character in children;
- c. Guiding Children in understanding and practicing religious life well;
- d. Managing children's property for children's needs; and
- e. Representing the Child to carry out legal actions inside and outside the Court.²⁵

A person appointed to be a Guardian, according to this PP, is prioritized by the Child's Family. (In the case that the Child's Family is absent, unwilling, or does not meet the requirements, you may be appointed. "In the case of the Child's Family and you are absent, unwilling, unknown, or not meeting the requirements, another person or legal entity may be appointed," said Article 3 paragraph (4) of this Government Regulation (PP) states that the Child's Family appointed as Guardian must fulfil the following requirements: a) Indonesian citizen who is

permanently domiciled in Indonesia, b) has a minimum age of 30 (thirty) years; and mentality, good manners, economically capable, religious with the religion adopted by the child, get written approval from the husband / wife, for those who are married, h willing to be the guardian stated in the statement; i) make a written statement never and will not do: 1. violence, exploitation, neglect and mistreatment of the child, or 2. the application of physical punishment for any reason including enforcement indulgence in Children; j. prioritize the closest family of children; and K. obtain written approval from the Parent if: 1. still exists; 2. its existence is known; and 3. capable of carrying out legal actions.²⁶

The end of guardian if the child is more than 18 (eighteen) years old, dies, the guardian dies, and the Guardian whose legal entity is dissolved or bankrupt.²⁷ In addition the Guardian can also end because of a court decision²⁸ because the Guardian neglects his obligations as Guardian, is incapable of carrying out legal actions, misusing authority as guardian and committing acts of violence against the child he cares for and the Parent is deemed capable of carrying out his obligations.²⁹ Legal entities or individuals can be appointed as trustees at the end of the guardianship,³⁰ where previously the Guardians or legal entities have applied for a revocation of parental authority by the Parents or by a person or legal entity to be appointed guardian so that the Court can determine the return and fostering responsibility to Parents or can assign a replacement Guardian

2.3. The View of Islamic Law on the Regulation of Appointment of Guardians

In Islamic law, people who are not yet mature are called *saghir* or *sabi*, while those who are adults are called *baligh*. The law of the small child still prevails, until this child is mature³¹ is what is meant in the Word of Allah SWT:

"And let you test the child until they are old enough to get married. Then if you think that they are smart, they are good at

maintaining property, then you must surrender it to them. "(Q.S. An Nisa: 6)

Requirements to be a guardian include:

- a. The Mukallaf people, because the people who are forgiving are people who can be burdened with the law and can account for their actions.
- b. Muslims, this is based on the Word of Allah SWT:
 لَا يَتَّخِذُ الْمُؤْمِنُونَ الْكَافِرِينَ أَوْلِيَاءَ مِنْ دُونِ الْمُؤْمِنِينَ
 Those who believe should not take unbelievers as their friends in preference to those who believe — and whoever does so should have no (expectations) of God — unless to safeguard yourselves against them. But God commands you to beware of Him, for to God you will journey in the end.
- c. Baligh and have a sound mind
- d. Fair
- e. Man³²

As for the hadlonah the Islamic scholars agreed that in care it is required that the person who cared must have a sound, trustworthy, self-righteous mind, not a sinner, not a dancer, and not a khamr drinker, and not ignore the child he cared for.³³

In Islamic law guardianship that applies to children, is divided into 3 (three) parts, namely:³⁴

1. Guardianship for nurturing and nursing
2. Guardianship against him
3. Guardianship of his property rights

Guardianship of a child is carried out to safeguard the welfare of the child himself because he oversees matters relating to him and the welfare that the child has not yet obtained himself. The duties of guardian according to Aminah Aziz, including educating children, educating their minds and directing their talents to learn skills, or continuing their school to the faculty according to their talents.³⁵ Compilation of Islamic Law means Guardianship is the power given to someone to represent a child who is not yet mature in carrying out legal actions for the interests and goodness of the child, which includes guardianship towards himself as well as his wealth. As for immature children according to the Compilation of Islamic Law,

children who have not reached the age of 21 and have never been married.

As is well known the issue of guardianship is also about guardians of young children, crazy people and saints. The scholars of the school agreed that the guardian of a small child was his father, while his mother had no guardianship, except in the opinion of some Syafi'i scholars.³⁶ Furthermore, the scholars of the sect differed about guardians who were not fathers. Hambali and Maliki said: The guardian after the father is the person who receives the will from the father. If the father does not have a person who is tested, the guardianship falls to the judge syar'iy. Whereas grandfather, has absolutely no rights in guardianship, because grandfather according to them cannot trust father's position. If the position of the paternal grandfather is like that, then what is the maternal grandfather. Hanafi said: The guardians after the father are the ones who accept the will from the father. After that, the paternal grandfather, then the person who received the will from him, and if it does not exist, the guardianship falls into the hands of qadhi.³⁷

Syafi'i said: guardianship switches from father to grandfather, and from grandfather to person who accepts a will from father and is passed on to the recipient of grandfather's will, and after that to qadhi. Imamiyah said: guardianship, first of all in the hands of father and grandfather (on the father's side) in the same degree, where each of them has the right to act as guardian independently without being bound by any of the others who first act as a trustee, it is he who is declared the guardian of the child, as long as he can carry out his obligations.

If the two of them fight over each other to be the guardian of the child, then what is prioritized is grandfather's guardianship. Whereas if each of them acts in a form that contradicts one another, then the first thing is the first action, while the latter is deemed invalid. But if it happens together, the first thing is grandfather. Whereas if there is no father and grandfather, guardianship falls into the hands of someone who receives a will from a father between the two. In this case the grandfather is prioritized by the recipient of

the father's will. If there is no father, grandfather, and no. The guardian who oversees the welfare of the child is a close relative who has blood relations with the child, the guardian is multi-storey.

III. Conclusion

It is clear that, there are differences in arrangements regarding the appointment of guardians according to Law No. 1 of 1974 and also the Civil Code where according to the Civil Code the children who are entitled to receive guardians are children who are not 21 (twenty one) years old or have not been married.³⁸ According to Law No. 1 of 1974 that those who are entitled to receive guardians are children who have not reached the age of 18 years or have not married.³⁹ In the case of the appointment of a guardian in the Civil Code it is divided into 3 (three) types, namely guardianship from a husband or wife who lives longer.⁴⁰ Appointment of guardian appointed by the father or mother with a separate will or deed.⁴¹ Appointment of guardian appointed by the judge.⁴² According to Law No.1 of 1974 guardianship only exists because the appointment by one of the parents who exercise power as a parent before he dies is by leaving a will or verbally in front of two witnesses.⁴³

The position of parents as guardians of a child can be replaced by a person or legal entity that fulfills the requirements, if the child's parent is incapable of carrying out legal actions, or where the residence or whereabouts are unknown. guardianship can also occur due to the marriage of a broken parent either due to one death, divorce or revocation of parental power through the establishment of a court or a court decision of the Religious Courts for those who are Muslim and the District Court for religious people other than Islam, because parents neglect their obligations to their children and behave badly. The judge will appoint a guardian accompanied by a guardian guardian who must oversee the guardian's work. Even though parents were deprived of their power, they

were still obliged to provide maintenance costs to the child.⁴⁴

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