

Division of Inheritance Assets in a Serial Polygynous Marriage Based on Islamic Law

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Abstract

Marriage law in Indonesia adheres to the principle of non-absolute monogamy. The Marriage Law states that a husband may have more than one wife if the parties concerned wish, or this is known as polygamy. Polygamy is divided into two, namely polygyny and polyandry, but only polygyny is recognized in Indonesia. Polygyny has been regulated in such a way by the Government, however, the practice of serial polygyny (underhand) is still widespread, which has an impact on the distribution of assets. This research aims to find out about the validity of siri polygynous wives as heirs and the judge's decision ratio regarding the distribution of assets to siri polygynous wives. The research model used is normative juridical with a statutory approach, conceptual approach and case approach. So the result is that the wife of a polygynous marriage in a serial manner gets a division of assets (both joint assets and inherited assets) if the marriage is solemnized and in court can prove that the marriage actually occurred and was in accordance with the requirements and pillars of Islamic law.

Keywords: Serial Polygyny; Joint Assets; Inheritance .

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Introduction

Indonesia regulates marriage in Constitution Republic of Indonesia Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia 1974 Number 1, Supplement State Gazette of the Republic of Indonesia Number 3019), which follows will called Constitution Marriage. There is Constitution Marriage This is expected related problems with marriage in Indonesia is possible resolved with good and right, as well Constitution Marriage This made in a way deep so that No There is none conflicting provisions with Islamic law.¹

Constitution Marriage define Marriage in Article 1, that marriage is bond born inner between a man with a woman as husband wife with objective form family (home ladder) which is happy and eternal based on Almighty Godhead Esa. Whereas Compilation Islamic Law (KHI) in Article 2 interprets Marriage is marriage, that is very contract

¹ Anwar Rachman, Prawitra Talib and Saepudin Muhtar, *Indonesian Marriage Law in the Perspective of Civil Law, Islamic Law and Administrative Law* (Kencana 2022).

strong or mitssaqan ghaliza For obey Allah's commands and carry them out is worship.² This matter different with Burgerlijk Wetboek (BW), which is not give definition related marriage. In BW no found The governing article related definition marriage, because No There is the definition would be capable reach true essence.³

Related validity than marriage This is explained in Article 2 of the Law Marriage, that all marriage legitimate if done according to law each religion and belief, and is also mandatory For recorded Good marriage monogamy nor polygamy. Arrangement This aiming for later day if there is dispute nor dispute between second split party, state and law can protect the rights possessed by citizens his country. Specifically to women, because during This the majority have their rights ignored that is Woman. If that is done No in accordance with provision Constitution this, then action the clear contradictory with regulation legislation as well as principles or principles from Constitution Marriage.

Then in Constitution Marriage Article 3 paragraph (1) is stated that in principle in something marriage a man only can have a wife. A woman only can have a husband. Chapter the explain that marriage That requires bond inner and outer between a man and one woman as husband and wife. Marriage between a man and one woman This also called marriage monogamous.⁴

However, in Article 3 paragraph (2) it is stated that court can give permission to a husband For married more from a if desired by the parties concerned, or known with marriage polygamy. Polygamy is something bond marriage more from one, where One party married a number of against type in same time . Polygamy differentiated becomes 2, ie polygyny and polyandry. Polygyny is something marriage Where a husband married woman more from One in same time. Whereas polyandry is something marriage Where a wife married man more from 1 in same time.⁵

Term marriage polygyny and marriage series basically No there is in the Constitution but terms that arise Because response public to laws and methods law in

² Indira Retno Aryatie, Trisadini Prasastinah Usanti and Prawitra Talib, *Marriage Law (Study of Child Marriage in Indonesia)* (CV Jakad Media Publishing 2022).

³ *ibid.*

⁴ Indah Sumarningsih, Wati Rahmi Ria and Elly Nurlaili, 'Polygamy According to Law Number 1 of 1974 Concerning Marriage and the Compilation of Islamic Law' (2018) 2 *Pactum Low Journal* 493.

⁵ *ibid.*

society. By general, marriage series This often interpreted with marriage confidential or also often mentioned with marriage under hand (without recorded).⁶

Polygyny in a way series is marriage a man with a number of woman as his wife in the same time, and his marriage No registered at the Religious Affairs Office (KUA). By Islamic law / sharia Islamic law of marriage polygyny in a way series That is things that are legal and appropriate with Islamic law, if condition legal and harmonious from marriage applied with Good.⁷

However, in fact law positive, polygynous in a way series is legal marriage according to law his religion only, and less perfect Because No recorded in accordance with regulated will in Constitution Marriage in Indonesia. As stated in Article 2 paragraph (2). that each marriage noted according to regulation current regulation.⁸ This difference in views has led to the emergence of new problems in society, especially regarding matters related to marriage such as the division of joint property and also regarding inheritance.

The division of inheritance is a very sensitive matter, so it can give rise to disputes.⁹ The position of a wife who is serially polygynized has no legal power in the eyes of the law, meaning it has no legal consequences, and has no protection for the parties, but is legal according to religion. Likewise, inheritance rights, joint property rights and also the rights of children resulting from serial polygynous marriages cannot be protected by the state because the status of the parents' marriage is invalid according to positive law. For this reason, it is interesting to research and analyze more deeply, especially regarding the division of assets (related to joint assets and inherited assets) in serial polygynous marriages based on Islamic law (from the perspective of the Marriage Law and the perspective of Islamic Law, Compilation of Islamic Law).

⁶ M Yazid Fathoni, 'Legality of Sirri Polygamy Marriage Based on Positive Laws in Indonesia' (2018) VI Law and Justice Studies (IUS) 130.

⁷ Rizky Perdana Kiay Demak, 'Rukun and Terms of Marriage According to Islamic Law in Indonesia' (2018) VI Lex Privatum 123.

⁸ Dr Hj Iffah Muzammil, 'FIQH MUNAKAHAT (Marriage Law in Islam)' (2019) 53 Journal of Chemical Information and Modeling 9.

⁹ Ellyn Dwi Poespasari and et al, *Kapita Selekt Indonesia Inheritance Law* (Kencana 2020).

Research Method

Research method used is study law normative. Approach problem in use is approach legislation, approach conceptual, and case study. Source material the law used is material primary law viz regulation applicable laws in Indonesia, and materials law secondary form books and or related journals with study This . Procedure collection material law in research law This done with method gather material primary law, and law secondary, the later processed and formulated in a way systematic in accordance with principal discussion about analysis distribution treasure heir.

The Validity of Serial Polygynous Wives as Heirs

Moch. Isnaeni opinion that marriage considered as something institution sacred so respect and obedience to rules marriage become nature absolute, majority the provisions No can diverted. The articles contained in rule marriage dominated by provisions existing law as force (*dwingend recht*),¹⁰ and also opinions that marriage is field supreme law sensitive consequence a very religious concoction dominant.¹¹

In Article 2 paragraph (1) of the Marriage Law it is stated that a marriage is valid if it is carried out in accordance with each respective religion and belief, and in paragraph (2) of this Article it is also stated that every marriage must be registered. For couples who are Muslim, the marriage is registered at the Religious Affairs Office (KUA) which is recorded by the Marriage Registrar Officer. Meanwhile, non-Muslim couples are registered with the Population and Civil Registration Service. These two paragraphs of Article 2 of the Marriage Law are an inseparable unit, so the validity of the marriage becomes complete after it is registered.¹²

Compilation of Islamic Law in Article 4 regarding the validity of a marriage, it is stated that a marriage is considered valid if it is carried out according to Islamic law in accordance with Article 2 of the Marriage Law, because in order to ensure order in marriage in society, for the Indonesian Muslim community every marriage must be

¹⁰ M Isnaeni, 'Person and Family Law and Principles of Object Law' (Airlangga University 2017).

¹¹ M Isnaeni, *Indonesian Marriage Law* (PT Revka Petra Media 2016).

¹² Aryatie, Usanti and Talib (n 2).

recorded by the marriage registrar. This aims to ensure that if disharmony occurs in marriage and results in divorce, the state needs to intervene and the state can protect the rights of its citizens.¹³

Article 3 paragraph (2), although it is possible for a husband to have more than one wife, the government does not arbitrarily do so, therefore the conditions for husbands who want to practice polygamy (in this case meaning polygyny) are issued which are stated in Article 4 and Article 5 of the Marriage Law. There are two types of requirements for polygyny, namely alternative requirements in this case found in Article 4 of the Marriage Law and cumulative requirements contained in Article 5 of the Marriage Law.¹⁴

Guided by the Marriage Law, husbands who wish to enter into a second marriage are required to have a permit issued by the Court. One of the frequently encountered violations regarding polygyny is committing polygyny without permission issued by the court (in this case it is called serial polygyny).¹⁵ The further consequence is, if a husband enters into a polygynous marriage and it is not in accordance with Article 3 of the Marriage Law jo. Article 40 of Government Regulation Number 9 of 1975, means that this act is qualified as a criminal act in the category of "violation", with the threat of a fine.¹⁶

Siri marriage is a marriage carried out in secret. Etymologically, the word "sirri" comes from Arabic, namely "sirrun" which means secret, silent, hidden as the opposite of 'alaniyyah, which is overt. The word sirri was then combined with the word nikah to become nikah sirri to refer to a marriage that was carried out secretly or hidden. This secret and hidden meaning gives rise to two understandings, namely marriages that are secretly not announced to the general public or marriages that are unknown or not registered with state institutions. Meanwhile, the definition of unregistered marriage according to the Big Indonesian Dictionary is a marriage that is only witnessed by a

¹³ Indira Retno Aryatie, Prawitra Talib and Trisadini Prasastinah Usanti, 'Legal Assistance Regarding Child Marriage in the Framework of Towards a Women-Friendly and Child-Caring Village (DRPPA) in Madiun Regency' (2022) 02 Janaloka Journal 144.

¹⁴ Isnaeni (n 11).

¹⁵ Imanjauhari Yusrizal, Hamid Sarong, 'Use of the Legal Instrument of Polygamy in the General Court Environment and Its Relation to the Principle of Monogamy in Government Regulation Number 9 of 1975' (2016) 4 25 <<https://jurnal.unsyiah.ac.id/MIH/article/view/5760>>.

¹⁶ Isnaeni (n 11).

modin and a witness, not through the Office of Religious Affairs, according to Islam, it is legal or is often also called a private marriage. So, serial polygyny is the marriage of a man with several women as his wives at the same time, and the marriage is not registered at the Religious Affairs Office (KUA).¹⁷

Poligyny is also regulated by the Government as in Constitution Marriage. However, in practice polygyny often misused and misinterpreted, so contain Lots element negative and carrying implications bad social for public. It's rampant practice polygyny is not Healthy. This is because perpetrator polygyny more choose do it in a way stealth in the end bring the implications are not undesirable and polluting image sublime marriage.¹⁸ One of them is the rise of serial polygynous marriages. This marriage is often carried out by a man who is not satisfied with his wife, then goes to a cleric who is willing to marry them in an unregistered manner and without the consent or knowledge of the first wife. This serial polygynous marriage is chosen when a man wants to commit polygyny but without informing his wife beforehand.¹⁹

Marriage polygyny in a way series neither is this in accordance with regulated provisions in Constitution Marriage. If want to do marriage polygyny must be through permission Religious Court with terms certain. Whereas marriage polygyny in a way series this, done with without permission Religious Court or done outside permission Court Religion.²⁰ Consequence law from marriage polygyny in a way series is his marriage No have strength law. With thereby marriage That considered No valid and considered No There is.

Consequence This understood from connection the sentence "mandatory" in Article 4 paragraph (1) of the Law Marriage and from provision Article 56 paragraph (3) Compilation Islamic law states "no have strength law". Position permission For polygynous is mandatory, so if done No more formerly get permission (or in a way

¹⁷ Addin Daniar Syamdan and Djumadi Purwoatmodjo, 'Legal Aspects of Siri Marriage and Their Legal Consequences' (2019) 12 Notarius Journal 458.

¹⁸ Reza Fitra Ardhan, Satrio Anugrah and Setyawan Bima, 'Polygamy in Islamic Law and Indonesian Positive Law and the Urgency of Granting Polygamy Permits in Religious Courts' (2015) Vol III Private Law.

¹⁹ Nurul Faizatur Rohmah and Budihardjo Budihardjo, 'The Practice of Polygamous Marriage in View of Islamic Law and State Law' (2021) 22 Prophetics: Journal of Islamic Studies 237.

²⁰ Hari Widiyanto, 'The Concept of Marriage in Islam (Phenomenological Study of Postponement of Marriage During the Pandemic)' (2020) 04 103.

stealth / siri), then marriage That No have strength law, with thereby marriage neither does that legitimate Because considered No Once happen. The legal consequence of a serial polygynous marriage is that if one day the husband neglects his obligations as a husband, then the wife from a serial polygynous marriage has no right to sue, the status of the child is not recognized and only has a relationship with the mother, the wife has no right to the mutual property and nor is the wife entitled to her husband's inheritance.²¹

One of the legal consequences of serial polygynous marriage is in terms of inheritance. In Islamic law, inheritance is regulated in the Compilation of Islamic Law, Book II, Articles 171 to Article 193. In Article 171 letter c, it is defined that an heir is a person who at the time of death has a blood or marital relationship with the testator, is a Muslim and is not prevented by law from become an heir. An heir is someone who is related by blood or marriage, besides that they only have the legal right to receive an inheritance by fulfilling the requirements.²² From the definition above that inheritance No happen with itself will but There is causes certain.²³

The wife is the heir due to a marital relationship, she becomes the heir of her deceased husband.²⁴ Regarding the distribution of inheritance, refer to Article 96 *Jo*. Article 97 of the Compilation of Islamic Law states that widows or widowers who are divorced or alive are each entitled to half of the joint property as long as it is not otherwise stipulated in the marriage agreement.

Regarding the legality of wives from serial polygynous marriages to become heirs, wives from serial polygynous marriages are legally considered not to be legitimate wives in the eyes of the law. So, if the husband dies, the inheritance will fall on the legal wife and their family, while the wife of a serial polygynous marriage does not receive an inheritance and cannot contest it. Article 96 of the Compilation of Islamic Law states that in the event of a divorce, half of the joint property becomes the right of the spouse

²¹ Siti Faizah, 'Dualism of Islamic Law in Indonesia Regarding Siri Marriage' (2014) 1 *Isti'dal: Journal of Islamic Legal Studies* 21.

²² MBA Arif Marsal, Lc, MA and Ryna Parlyna, 'Marriage Registration: Between Rukun Nikah and Administrative Requirements' (2015) 4 *An-Nur Journal* 41 <<http://ejournal.uin-suska.ac.id/index.php/Annur/article/view/2052>>.

²³ Abd Shomad and Prawitra Talib, *Islamic Inheritance Law in Indonesia* (Master of Notary Program, Faculty of Law, Airlangga University and Lutfansah Mediatama 2013).

²⁴ Sayyid Sabiq, 'Fiqh Al-Sunnah', *Volume 4* (Cakrawala Publishing 2015).

who survives longer, but the rights of the wife from a serial polygynous marriage cannot be fulfilled with this provision considering that its existence is not legally recognized. If the wife of a serial polygynous marriage can prove that her marriage before the Panel of Judges is in accordance with the terms and conditions of marriage as regulated in Islam, then this can be a consideration for the judge to grant her the status of heir.

***Ratio Decidendi* on the Position of Wives from Siri Polygynous Marriages and Division of Assets**

Using two cases of inheritance disputes, namely *first*, from Decision Number 0663/Pdt.G/2016/PA.Smp which was appealed to the Surabaya High Religious Court with Decision Number 513/Pdt.G/2017/PTA.Sby. *Second*, Decision Number 1186/Pdt.G/2021/PA.Dpk. In the first case, the Pewaris died in 1979, during his life the Pewaris had had two marriages (series polygyny). The first marriage was carried out in 1944 (before the Marriage Law came into effect) with Defendant 1 and the marriage was not registered (only carried out under Islamic law). From this marriage there were no children, therefore the Testator and Defendant 1 agreed to adopt the child in 1956. The second marriage was carried out in 1961 with the Plaintiff, and the marriage was registered with the Head of the Religious Affairs Office. During the marriage they were blessed with 2 children, but the Heir's first child died before the Heir.

In this case of inheritance dispute, the Plaintiff regarding the legality of the wife from a serial polygynous marriage to become an heir, that the wife from a serial polygynous marriage is legally considered not a valid wife in the eyes of the law. So, if the husband dies, the inheritance will fall on the legal wife and their family, while the wife of a serial polygynous marriage does not receive an inheritance and cannot contest it.

The marriage between the heir and the first wife occurred before the enactment of the Marriage Law, so it is necessary to understand the regulations related to marriage before the existence of the Marriage Law. In 1823, during the Dutch colonial period, the Religious Court of Palembang City was established, headed by a penghulu (Islamic judge), with appeals being directed to the sultan. The authority of the Religious Court

was outlined in Staatsblad 1835 Number 58, stating that if there was a dispute among Javanese and Madurese people regarding marriage or the division of marital property, or other related matters to be decided according to Islamic law, the decision would be made by an Islamic religious scholar.

Subsequently, the Draft Ordinance on Registered Marriages (*Ontwerp Ordonnantie op de Ingeschreven Huwelijken*) emerged in June 1937, imposing the following legal consequences on indigenous people:

- a. A man was not permitted to marry more than one wife.
- b. A marriage could only be dissolved for three reasons: the death of one spouse, the disappearance of one spouse for more than two years without any news while the other spouse remarries with court permission, and a court-issued divorce decree.
- c. Every marriage had to be registered in the civil registry.

In 1942, the Dutch left Indonesia and were replaced by the Japanese. The Japanese policy towards the religious courts continued the previous policies, as outlined in the transitional regulations of Article 3 of the Japanese Army Law (*Osamura Sairei*) dated March 7, 1942, No. 1 of 1946 after Indonesia's independence. Subsequently, the Indonesian government established Islamic marriage regulations, namely Law Number 22 of 1946 concerning the Registration of Marriages, Divorces, and Reconciliation, which consisted of 7 articles. This law only applied to Java and Madura, but after 1954, it was enforced nationwide through Law Number 32 of 1954 concerning the Implementation of Law Number 22 of 1946 concerning the Registration of Marriages, Divorces, and Reconciliation throughout Java and Madura.

In the case above, the marriage between the heir and the first wife took place before the enactment of the Marriage Law, in 1944, through a customary or informal (*siri*) marriage. Based on the historical explanation of marriage registration regulations before the existence of the Marriage Law, the government had indeed regulated marriage registration. Although these regulations did not state that registration determined the legality of a marriage, it was stipulated that failure to register a marriage would result in sanctions.

Therefore, the status of the marriage between the heir and the first wife is valid according to Islamic law, but since the marriage was not registered, it is subject to sanctions according to the above regulations. Article 3 paragraph (1) of Law Number 22 of 1946 concerning the Registration of Marriages, Divorces, and Reconciliation states that anyone who conducts a marriage contract or marries a woman without the supervision of the designated official or their representative shall be fined a maximum of Rp. 50 (fifty rupiahs). Article 64 of the Marriage Law also states that marriages and all matters related to marriages that occurred before the enactment of this law, which were conducted according to previous regulations, are considered valid. Thus, the marriage between the late H. Saleh and Defendant 1 is valid.

Regarding the second marriage, between the heir and the second wife, which occurred in 1961 and was registered with the Marriage Registrar, it is valid and has legal certainty. This is in accordance with the explanation of Article 1 of Law Number 22 of 1946 concerning the Registration of Marriages, Divorces, and Reconciliation, which states that the purpose of this article is to ensure that marriages, divorces, and reconciliations according to Islamic law are registered to obtain legal certainty. In an orderly state, all matters related to residents must be recorded, such as births, marriages, deaths, etc. Moreover, marriage is closely related to inheritance, so marriage registration is necessary to prevent disorder. Therefore, the second marriage has the right to legal claims due to its legal certainty, and the state has the right to protect these rights. Meanwhile, the marriage from the first marriage between the late H. Saleh and Hj. Siti Maryam does not have legal certainty, although it remains valid according to Islamic law. In the second case, Decision Number 1186/Pdt.G/2021/PA.Dpk, During his life the testator was married 3 times, the first to A who is Muslim, the marriage was carried out only according to the Islamic religion (siri/under the hand) and from marriage He was blessed with a child named Tamara, in this case Plaintiff 1. He felt that he was the legal heir and had the right to receive a share of the inheritance from the testator. For the second marriage with B (non-Muslim), and was blessed with a child named B1 (non-Muslim), but until now his whereabouts are no longer known. And after that in 1999 the heir married for the third time with Defendant 1 at KUA Limo, Depok City. From the third marriage, the heir was

not blessed with any children. However, when the Defendant married the heiress, she was a widow and had 3 children from her previous marriage.

In the first marriage between the testator and A, the Plaintiff did not clearly state when the marriage occurred. The Plaintiff at the trial only brought evidence of a Birth Certificate attached on March 24 1961. If you look at the Plaintiff's Birth Certificate, it is certain that the first marriage took place before 1961. In that year the 1974 Marriage Law had not yet been issued. Therefore, it is necessary to understand the regulations regarding marriages that took place after Indonesia's independence but before the enactment of the Marriage Law.

Indonesia gained independence in 1945. Subsequently, the Indonesian government established Islamic marriage regulations, namely Law Number 22 of 1946 concerning the registration of marriages, divorces, and reconciliations, which initially applied only to Java and Madura. However, in 1954, this law was extended to apply nationwide through Law Number 32 of 1954 concerning the Implementation of Law Number 22 of 1946 dated November 21, 1946, regarding the Registration of Marriages, Divorces, and Reconciliations across all regions of Java and Madura.

Marriage registration was regulated under this law, but it was not specified that the registration of marriage determined the legality of the marriage. However, it was stipulated that failure to register a marriage would result in sanctions. The implications of an unregistered marriage were also explained in the explanation of Article 1 of Law Number 22 of 1946 in conjunction with Law Number 32 of 1954, which stated that the purpose of this article was to ensure that marriages, divorces, and reconciliations according to Islamic law were registered to obtain legal certainty. In an orderly state, all matters related to the population must be recorded, such as births, marriages, deaths, and so on. Furthermore, marriage is closely related to inheritance, so it needs to be registered to prevent disorder.

In the inheritance dispute case mentioned above, the plaintiff sued the defendant because the heir's estate was not distributed to the rightful heirs. In this case, the plaintiff felt that they were a legitimate heir due to a kinship relationship (i.e., being a child). Therefore, the panel of judges made the right decision in this case because the plaintiff

could not prove the marriage between the plaintiff's mother and the heir during the trial, whereas Defendant 1 could prove their legitimate marriage to the heir.

From the same two cases regarding the distribution of assets for wives in polygynous marriages in a serial manner, there were 2 judge's decision ratios. The judge's ratio decidendi in the first case was that the wife of a serial polygynous marriage could prove that her marriage which occurred with the testator before the Marriage Law came into existence was valid and met the requirements and harmony of marriage, by bringing evidence and witnesses during the trial. Meanwhile, in the second case, the judge decided that the wife and child from a serial polygynous marriage had no right to become heirs of the heir. For this reason, the Panel of Judges decided that he was not entitled to be the heir of the testator.

Conclusion

The wife of a polygynous marriage in a serial manner receives a distribution of assets (both joint assets and inherited assets) if the marriage is concluded and in court can prove that the marriage actually occurred and was in accordance with the terms and principles of Islamic law.

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