

# RIGHTS AND OBLIGATIONS OF THE GUARDIANS TO THE INHERITANCE OF MENTAL DISABLED CHILDREN

Yusida Fitriyati<sup>1</sup>  
Muhammad Zuhdi<sup>2</sup>

**Abstract:** The law protects the interests of individuals under all circumstances, including children with mental disabilities in term of incapacity due to legal incompetence. Law Number 8 of 2016 concerning Persons with Disabilities. Article 5 states that the Unitary State of the Republic of Indonesia guarantees the survival of every citizen, including persons with disabilities, in this case persons with disabilities who are Muslims have a legal position inseparable part of the Indonesian citizens and society. is a mandate and a gift from God Almighty, to live progressively and develop fairly and with dignity including obtaining justice and legal protection. Therefore, as a legal subject, people with mental disabilities are represented by their guardians in all their life activities. It is included in the control of the use of inheritance that is obtained. For this reason, this paper is made with a focus on the study of how the rights and obligations of guardians to the inheritance of mentally disabled children in Indonesia and global cultural relativism? This research is a library research with the data source used is secondary data. Collected data was analyzed using qualitative descriptive method with deductive conclusion. The result is the legal guardian rights based on positive law, cultural and global to the inheritance of mentally disabled children, which they have the power and freedom to manage the inheritance and get benefits from it. Meanwhile, the responsibility of the guardian based on positive law, culturally and globally for the inheritance of mentally disabled children, is the responsibility for managing the assets by doing their best and being responsible for their losses.

**Keywords:** Guardian, Inheritance, Mentally Disabled Children

## The Introduction

The law known as law is a collection of rules or rules governing life together which can be in the form of actions which in practice can be enforced with a sanction for order (Mertokusumo, 1999:40). According to Satjipto Rahardjo, law is the norm that contains all the instructions of human behavior that are engineered by humans from ideas that arise from society in cultural norms to bring about justice (Rahardjo, 2014: 27).

Likewise, according to Mochtar Kusumaatmadja, the definition of law is as a whole of the principles and principles governing human relations in society, the institutions and processes that create the application of these rules in society as a reality (Imaniyati & Adam, 2014:6). There is one thing in common with the definition of law above, that law is related to a set of rules or rules that contain orders and prohibitions to achieve the goals of public order and justice. Narrowly, law means orders and prohibitions in a collection

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<sup>1</sup> Fakultas Syariah dan Hukum UIN Raden Fatah Palembang, Email: yusidafitriyati\_uin@radenfatah.ac.id

<sup>2</sup> Fakultas Syariah dan Hukum UIN Raden Fatah Palembang, Email: muhammadzuhdi\_uin@radenfatah.ac.id

of written rules made by the state to regulate citizens in realizing social order.

Whereas in a broad sense, law is not only defined as a group of written rules, but all rules, whether written or not, whether made by the state or not, in the form of behavior, symbols, and all forms which ultimately aim to create social order and justice in society.

Law is understood as a social system that creates an orderly society. This does not only include the rules, but also the entire behavior of their enforcement and the culture or culture of society in seeing law as a value that must be obeyed. Law through normalization of all human behavior in all areas of human life, so that it can be said that the inclusion of law in all areas of public life will continue to increase in line with the increasing role of the state in society (Rahardjo, 1986:15).

When the law regulates legal relationships, which occur between individuals and individuals, individuals and communities then from this bond creates rights and obligations. These rights and obligations arise when applied to legal events. Something that moves the rule of law so that it effectively moves its potential to regulate is a legal event (Rahardjo, 2014: 35).

The power that is given and regulated by law to protect someone's interests is a right. Meanwhile, an obligation is something that must be done. Between rights and obligations have a very close relationship which reflects each other (Rahardjo, 2014: 53-54).

Law as a collection of rules is general and binding for everyone here, law is the objective of recht and law is normative because it determines what should and what should not be done and how to implement compliance with these principles. So law is interpreted as subjective recht which means rights and obligations (Mertokusumo, 1999:41).

The law protects the interests of a person under any circumstances, including individuals who are under legal means of incompetence. One of them is a mentally disabled child. Law Number 8 of 2016 concerning Persons with Disabilities. Article 5 states that the Unitary State of the Republic of Indonesia guarantees the survival of every citizen, including persons with disabilities, in this case persons with disabilities who are Muslims have a legal position and have the same human rights as Indonesian citizens and as an inseparable part of Indonesian citizens and society. is a mandate and a gift from God Almighty, to live progressively and develop fairly and with dignity, including obtaining justice and legal protection (Imaniyati).

Therefore, as a legal subject, people with mental disabilities are represented by their guardians in all their life activities. Included in the control over the use of the inheritance he received. The reality in community, a guardian of a mentally disabled person carries out his rights and obligations widely indefinitely so that he sometimes harms the disabled child for various reasons cause the inheritance of the disabled child to run out. Therefore, this study discusses the rights of guardians and the obligations of guardians to the inheritance of mentally disabled children in law Indonesian, cultural and global.

For this reason, this paper is made with a focus on the study of how the rights and obligations of guardians to the inheritance of mentally disabled children in Indonesia and global cultural relativeness.

## Research Methods

This research is a library research. library research is research conducted with how to collect information and data of various materials which is in the library. As for the data source used is secondary data. The collected data were analyzed using qualitative descriptive method with deductive conclusions.

## Discussion and Results

### Guardianship and Legal Basis

Guardianship is derived from the Arabic loanword from the word "wali" which means close, follow, and protect (Ali & Muhdlor, 1996:2038). In terms of guardianship, it means people who manage or control something. Trusteeship is full control given by religion to someone to control and protect people or property. People who are given power are called wali.

Guardianship for mentally handicapped adults is specifically called termination (Aprilia et al., 2018). Interdiction is guardianship of someone who is an adult but due to mental illness, not being smart, too wasteful and seriously ill, then interdiction is made to protect him. This research deals with someone who is an adult but has mental disorders.

Pasal 1330 of the Civil Code/KUHPperdata in conjunction with Pasal 433 of the Civil Code/KUHPperdata states that a person is an adult (aged 21 years and over) but is under supervision or interdiction, with the following reasons:

- a. Poor or unhealthy memory (mentally disturbed people)
- b. Spender
- c. Lack of intelligence and all other causes which basically cause the person concerned to be unable to take care of all his own interests.

From the above explanation, it can be concluded that interdiction is a legal effort to place an adult to be the same as an immature person (Simanjuntak, 2007:26).

As in Pasal 433 of the Civil Code/KUHPperdata, which states:

"Every adult, who is always in a state of ignorance, brain pain or dark eyes should be put under restraint, even if he is sometimes able to use his mind. An adult may also be placed under interdiction because of his wastefulness".

Pasal 452 of the Civil Code/KUHPperdata also explains:

"Everyone who is placed under interdiction has the same position as a minor ... etc."

The appointment of a supervisor is made based on a court decision based on the conviction of the judge, while those who have the right to become a supervisor under Pasal 434 of the Civil Code/KUHPperdata are:

"Every blood family has the right to ask for the interruption of a family by blood, based on their condition of ignorance, brain disease or dark eyes. Based on his extravagance, interdiction may only be requested by his blood relatives in a straight line and by his contemporaries in a line up to the fourth degree. In one case or another, a husband or wife may ask for the interdiction of the wife or husband. Whoever, because of the weakness of the strength of his

mind, feels incapable of using his own interests as well as possible, is allowed to ask for his own forgiveness”.

In line with the above, it is also explained in Pasal 51 paragraphs 1 and 2 of the Marriage Law Number 1 of 1974/Undang-undang Nomor 1 Tahun 1974 which states:

1. A guardian can be appointed by one parent who exercises parental power, before he dies, by a will or orally in the presence of 2 (two) witnesses.
2. As far as possible, the guardian is taken from the child's family or other adult who is healthy, fair, honest and has good behavior.

Trusteeship according to customary law refers to a series of beliefs, norms, or habits that are usually established in communities so that the trust that occurs is not based on formal law, but is based on custom. This is because Indonesian customary law has its own characteristics, namely; religio-magical, communal, cash and concrete (Sudiyat, 1991:35).

In customary law, guardianship is carried out when both of the child's parents have passed away, meaning that the child is an orphan. In bilateral families, the guardianship of the child is carried out by one of the closest relatives (for example, uncle, aunt, grandparent), either from the father or mother who has the ability to care (Soekanto, 2016:257-258).

For matrilineal families, child care comes from the mother's family, as well as patrilineal child care from the father's family. If the child has other siblings who are adults (already married) and capable of being healthy, then usually he is the one who performs guardianship or interdiction (Soekanto, 2016:257-258).

### **The Rights of Guardians for the Inheritance of Children with Mentally Disabilities**

The right of guardian to the inheritance of the mentally handicapped child that he is assigned to Specific and detailed rights and obligations of guardians are not found in the laws and regulations in Indonesia. Especially with regard to the rights of the guardian to the inheritance he / she is entitled to, namely mentally disabled children. However, as previously stated by Satjipto Rahardjo, that right comes together with the obligation itself, because right is the allocation of power to him to act in the interests of his interests (Rahardjo, 2014: 53). the interest here is to provide protection for the inheritance of mentally disabled children. According to Salmond quoted by Satjipto Rahardjo, "rights" have four meanings, namely rights in the narrow sense, independence, power and immunity (immunity) (Rahardjo, 2014: 56).

In relation to the rights of guardians to the inheritance of mentally disabled children, the "right" here means independence and power. Guardians have the freedom or freedom to exercise their powers, the power to protect the inheritance of mentally disabled children. The form of protection here does not mean that the inheritance is frozen, unused and unused, but that it can be used appropriately for the living expenses of the mentally disabled child he or she supports. Even the inheritance if possible can be cultivated and managed as stated in Article 33 paragraph 4 of Law Number 23 Year 2006 concerning Child Protection. Efforts to seek this inheritance provide the freedom to do something that according to Sudikno Mertokusumo

is a characteristic of rights. Rights are the breadth and enjoyment in exercising them (Mertokusumo, 1999:42).

If in management and this business generates profits, then the guardian may take his share of these profits. So this can be seen from the practice of customs in the culture of the Indonesian people with provisions that are in accordance with the reasonableness of society's habits.

Islamic law as the law commonly used by the majority of Indonesians is familiar with business management in various forms. For example, leasing, business cooperation with various models and forms. One of them is profit sharing or *mudharabah*, which is a business carried out between two parties, one as an investor (in this case a mentally disabled child who has assets as capital) and the business manager (guardian/*pengampu*) to make a profit (Karim, 1993:11-17). Profits obtained are shared equally, meaning that half for the guardian as manager and half for the share of mentally disabled children as investors. Although the benefits obtained for mentally disabled children are still managed under the guardian's supervision.

In the implementation of this management requires legal relativity. If you look at the KUHperdata, all management or business activities on the assets of the person under control must be based on the approval of the Court, in this case the judge, as stated in the Civil Code Articles 393-398. It is somewhat different from Islamic and customary law which in its implementation is more lenient, however in the appointment of a guardian it must go through a strict process, namely that a guardian must and must meet the requirements, namely:

- a. Baligh and sensible, and capable of acting law.
- b. The religion of the guardian is the same as the religion of the person they serve, because guardianship of non-Muslims against Muslims is illegal.
- c. Fair, in the sense of *istiqamah* in his religion, has good character, and always maintains his personality.
- d. The guardian has the ability to act and maintain the trust, because the guardianship is aimed at achieving the benefit of the person he is helping. If the person is weak in holding the mandate, then it is not legal to become a guardian.
- e. The guardian always acts for the benefit he is helping, in accordance with the Word of Allah SWT. in Surat Al-An'am verse 152 which means: "*And do not approach the property of the orphans except in a more beneficial way ...*". Therefore, a guardian may not take any legal action that only contains harm, such as granting or donating the assets of the person he is assisting, and dropping the divorce of the person he is managing, because this action is detrimental to the person under guardianship.

In order to protect the rights of mentally disabled children to their inheritance, the state shall appoint a supervisory supervisor, namely the heritage hall. As stated in Article 449 of the Civil Code, which states:

"If the decision for interdiction has obtained absolute power, then the court will appoint a supporter. The appointment is immediately notified to the Heritage Hall. Supervisors are ordered to the Balai ....". Also described in Pasal 366 of the Criminal Code/KUHPidana;

"For each trusteeship ordered in Indonesia, the Heritage Hall is obliged to carry out the duties of the supervisory guard".

The Legacy Hall (BHP) can be seen in the Civil Code/KUHPerdata, Pasal 415 to 418a. Then regarding the duties and powers of supervisory guardianship regulated in Pasal 366 to 375 of the Civil Code/KUHPerdata. The existence of guardian supervisor is to prevent abuse of authority by the guardian.

### **The Obligations of Guardians for the Inheritance of Children with Mentally Disabilities**

The responsibilities of the guardian for the inheritance of the child that he/she controls are regulated in Pasal 51 paragraphs 3 and 4 of Law Number 1 of 1974 concerning Marriage/Undang-undang Nomor 1 Tahun 1974:

Pasal 3: "The guardian is obliged to take care of the child under his control and his property (inheritance) as well as possible by respecting the child's religion and beliefs."

Pasal 4: "The guardian is obliged to make a list of the assets of the child who was under his/her authority at the time of starting his position and record all changes in the child's assets".

Pasal 5. "The guardian is responsible for the assets of the heirs under his/ her trusteeship as well as losses arising from his/her mistake or negligence".

The provisions of Pasal 52 (for the guardian also applies to Pasal 48 of this Law) further stipulates that the guardian may not transfer the rights or pawn the permanent items owned by heirs who are 18 years old or have not yet married. If those who are being cared for are mentally disabled, then those who are able to be treated are cured, unless it is the child's interest that they wish.

In line with this, Law Number 23 of 2002 concerning Child Protection Pasal 33 paragraph 4 also stipulates that for the benefit of the child, the guardian is obliged to manage the assets of the child concerned.

So a guardian is actually the same as a father who looks after and cares for his child. As stated in Pasal 385 of the Civil Code/KUHPerdata, which reads:

"The guardian must take care of the assets of the immature like a good household father, and because of that he is also responsible for the costs, losses and interest that may arise due to poor maintenance. If to an immature person, either by means of a civil act between people who are still alive either with a will, has been granted or granted a number of assets, and the management of that is entrusted to a manager or more who for that has been appointed, then the provisions the provisions contained in article 307 that apply to parental power holders, also apply to guardians".

The responsibilities and obligations of the guardian for the inheritance of a mentally disabled child in positive law, Islamic law and customary law in Indonesia are actually the same, namely in the form of managing the child's property properly, including recording the amount of assets when starting guardianship, recording changes his assets during the trusteeship until the trust is complete.

## The Rights and Obligations of Guardians for the Inheritance of Children with Mentally Disabilities In Malaysia And Mesir

### Malaysia

In Malaysia, the provisions governing children's rights, responsibilities and obligations of parents towards children are regulated in the Enakmen of the Islamic Family Law 1990 (Enactment No.5 of 1990).

Pasal 89 ayat (1): (Jauhari, 2013)

*“Although the right to hadanah or the custody of the child may be vested in someother person, the father shall be the first and primary natural guardian of the erson and property of his minor child, and where he is dead, the legal guardianship devolves upon one of the following persons in the following order or preference, that is to say.*

*(a) the father’s father*

*(b) the executor’s appointed by father’s will*

*(c) the father’s executor’s executor*

*(d) the father’s father’s executor*

*(e) the father’s father’s executor’s executor provided that he is a Muslim, a dult, sane and worthy of trust.”*

Malaysia refers to the guardian of the *pengampu* with the term guard. As for the duties and obligations of a carer is to care for the child by providing sufficient income, maintaining his health and providing proper education (Pasal 3 of the Guardianship of Infants Act 1961). Then the guardian is also obliged to maintain, seek and supervise the child's property as if the property belonged to him and can do whatever he considers necessary to protect the child's property (Pasal 4 of the Guardianship of Infacts Act 1961).

### Mesir

Egyptian Family Law consists of: Wilâyah 'ala an-Nafs (power over the soul), Wilâyah' ala al-Mâl (power over property), Qânun al-Washâya (Willing Law), Qânun al-Mawârits (Legacy Law), Qânun al-Waqf (Waqf Law).

The law of wilâyah 'ala an-Nafs is regulated by Law Number 100 of 1985 as an amendment to Law Number 20 and 25 of 1929. Meanwhile, the law of the procedure is regulated by law Number 1 of 2000. The material law of wilâyah' ala al-Mâl is regulated based on Law Number 119 of 1952, and the law of the procedure is based on Law Number 1 of 2000.

This research is related to the inheritance of mentally disabled children, therefore the rules discussed in this study in the 'ala al-Mal area are determined on the basis of: First, young age (minors). Second, the owner of the property with mental disabilities.

The law stipulates, to request protection so that assets can be maintained until the age of 21 years. If you pass the age of 21 the assets can be handed over to the child. This law also stipulates that the assets of children under the age of 21 must be managed by someone; Likewise for assets of persons with disabilities, even though they have passed the age of 21. The defects in question are: (1). Crazy, (2). 'Thah, (3). Safah and (4). Ghaflah (Kurniati, 2014).

The Loss of memory can cause someone to waste money incorrectly. Therefore, the law stipulates that someone must manage their assets, known

as "hijr". The right of authority for management by the guardian must be proven based on a doctor's examination of the state of being insane, deaf, mute and blind as well as his recovery must also go through a doctor's examination.

The laws and regulations state that, if the person who manages the assets comes from the father or grandfather, then he is called a guardian. They have the right to manage the assets of minors. If they do not exist, then the judiciary determines their management which is known as "washi". Washi is the one who plays a role in managing property and has a role to represent him in court, even though he has no relatives. The law calls it "qayim", that is, wali washi.

### Conclusion

A guardian or pengampu or guard is someone who is likened to a father who has an obligation to look after and protect the person he is helping as his child. The obligation is to maintain, protect, protect themselves and the assets of the person they serve. The right of guardian, both in a positive, cultural and global manner, to the inheritance of a mentally disabled child, which he provides is the power and freedom to manage the inheritance and get benefits from this management. Meanwhile, the responsibility of the guardian, both legally positive, culturally and globally, for the inheritance of mentally disabled children, is the responsibility for managing the assets by doing their best and being responsible for their losses.

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