

WESTERN LAW IS MORE PROTECTIVE, SUPERVISION OF CHILDREN UNDER GUARDIANSHIP: MARRIAGE LAW, KHI VS CIVIL CODE

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Abstract. This study aims to answer two problems. The first is how to regulate the supervision of child guardianship in Indonesia? Second, how effective is the implementation of supervision of children's assets under guardianship? The results of the study concluded that, First, the state's authority to supervise guardianship through BHP is not regulated in the Marriage Law and the Compilation of Islamic Law but is regulated in the Civil Code as a Western legal product. Second, the effectiveness of the BHP guardianship supervision function has not been effective. In the future, regulations are needed that accommodate Pancasila values as a form of protection for children under guardianship. Therefore, it is necessary to make changes to the Marriage Law to accommodate Articles 366 and 369 of the Civil Code, as well as further research on the existence of the Compilation of Islamic Law, which is not yet known in the hierarchy of laws and regulations in Indonesia.

Keywords: Guardianship supervision, civil code, marriage law, KHI

I. INTRODUCTION

The principle of the rule of law has actually been developed by philosophers from Ancient Greece for a long time. The concept of the rule of law in the continental European tradition was developed using the term *rechtsstaat*, while in the Anglo-Saxon tradition it uses the term *rule of law* [1]. In theory, the idea of the rule of law is also related to democracy and power [2]. The concept of *rechtsstaat* includes the protection of human rights, the division of power, government based on law, and the existence of state administrative courts. While the concept of the rule of law includes the supremacy of law and equality before the law. Both concepts of course need to always be aligned with the values of Pancasila [3].

As a state of law [4], Indonesia is certainly a country that provides protection of human rights [5] for every citizen, including for every child for survival, growth, and development as well as protection from violence and discrimination. The child is a gift and deposit from God which must always be guarded and protected because in the child there are inherent dignity, dignity, and rights as a human being that must be upheld, the child is the successor to the ideals of the nation so that the child has the right to survival without coercion, violence, discrimination or exploitation of any kind, in this case, parents are obliged to provide protection as early as possible so that children can live and develop and get proper education to get a better future.

Children are the most valuable assets for families, communities, and nations. He is the party on which the family, society, and nation depend on hope, even more, so the child is the party who will determine whether a country is brought to prosperity or to adversity. According to religious teachings which state that every child born into this world is holy, then it is his parents who will make him a Jew, Christian, or Magian. Both parents are obliged to maintain and educate their children as well as possible until the child is married or can take care of himself [6]. This includes assets, where parents are not allowed to transfer rights or pawn permanent assets owned by their children who are not yet 18 years old or have never married unless the interests of the child so desire [7].

However, not all children [8] are lucky to be able to pass their childhood in the love of their parents until they grow up. The termination of the marriage due to the death of the parents gave birth to the legal event of guardianship. The legal event of guardianship is an activity to supervise minors who are not under the authority of their parents to educate and care for the child until he is an adult by managing the assets, inheritance of his biological parents until he is an adult. In this condition, the role of the state through the Balai Harta Peninggalan (BHP) as the Supervisory Guardian becomes important to supervise each guardian so that they take actions for the best interests of the child.

II. RESEARCH METHODS

This study aims to answer two problems, namely: first, how is the regulation of child guardianship supervision in Indonesia and secondly how is the effectiveness of the implementation of supervision of children's assets under guardianship. The research method used is a normative juridical and empirical juridical research method by utilizing primary and secondary data which are analyzed with the theory and concept of the rule of law.

III. RESULTS AND DISCUSSION

Child Guardianship Supervision Arrangements in Indonesia

Guardianship or a guardian means helping someone who loves [9]. Etymologically, it can also mean power or authority, as in the expression *al-wali* or *al-walayah* (*al-wilayah*), who manages or controls something [10]. A person who is given guardianship powers is called a guardian [11]. Guardianship can also mean supervision of a child who is not yet an adult [12] and is not under the authority of his/her parents [13], as well as management of the child's property before he/she becomes an adult [14]. This means that guardianship is carried out both for the child's person and his/her property [15].

In Indonesia, the institution of marriage as part of family law has long been a concern of the state, not only because the family is the smallest unit that determines the development of a nation but also concerns the protection of the rights of every child. Strict regulation by the state through positive law then gave birth to Law Number 1 of 1974 concerning Marriage (Marriage Law).

According to history, not too long after the Old Order government was overthrown by the New Order regime, precisely in 1966, the Minister of Justice at that time assigned the National Legal Government Institution (LPHN) to draft a National Marriage Bill (RUU) in accordance with the Pancasila philosophy. In 1968, the work of LPHN succeeded in compiling a Draft Law (RUU) on the Basic Provisions of Marriage, and this manuscript was submitted to the Gotong Royong People's Representative Council (DPR-GR). On the other hand, in 1967, the government was at two poles. One pole can be said to be the pole of the government which at that time sided with the nationalists (a combination of Golkar and PDI), while the other pole was the PPP which represented Islamic religious groups. The first pole strongly supports the Marriage Bill, while the second pole objects, even basically rejects it. This difference resulted in a prolonged conflict [16].

This Marriage Law is a national legal product that was born from a long study, by accommodating the sociological aspirations of the Indonesian people, as a substitute for marriage arrangements in the Civil Code. In formal juridical terms, with the enactment of the Marriage Law, the purpose is to regulate marriage with all aspects that arise in it, previously regulated in the Civil Code which was considered incompatible with the spirit and personality of the religious Indonesian nation [17]. In the Marriage Law, guardianship is

regulated in Chapter XI concerning Guardianship, starting from Article 50 to Article 54.

Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI) also regulates guardianship as referred to in Article 1 letter (h) which states that guardianship is the authority given to a person to perform a legal act as a representative for the interests of and on behalf of a child who does not have both parents, parents who are still alive, not capable of carrying out legal actions. KHI itself does not know the BHP institution.

In the Civil Code Chapter XV Immaturity and Guardianship, Section 5 Trusteeship ordered by the District Court, specifically Article 362 it is stated that the guardian, as soon as his guardianship comes into force before the BHP is obliged to take an oath, that he will carry out the trust entrusted to him properly and sincere. If there is no BHP at the residence of the guardian or within fifteen pangs of the place or there is no representative, then the oath may be appointed before the District Court (PN) or the head of the regional government where the guardian lives. The minutes of taking the oath must be made.

Then in Section 7 of the Supervisory Trust, specifically Article 366, it is stated that in every trust ordered therein, BHP is assigned as the Supervisory Guardian. Furthermore, Article 369, in all cases, if guardianship is ordered by a Judge, the Registrar of the District Court concerned must immediately notify in writing of the appointment to BHP.

The position of a guardian is closely related to BHP as Supervisory Trustee, in terms of the guardianship accountability he does and the BHP's obligation to ask for the said accountability every year, as regulated in Article 372 of the Civil Code. Every year the Supervisory Guardian must ask each guardian (except the father and mother), to briefly provide a calculation of responsibility and to show him all the papers and securities belonging to the minor. This brief calculation will be made on unsealed paper and submitted without any cost, even without any legal form.

The importance of the existence of the Supervisory Guardian is also mentioned in Article 352 of the guardian of the father or the guardian of the mother who remarries, if the Supervisory Guardian wishes it, before or after the marriage takes place, must submit a complete list of assets of the minor to the Supervisory Guardian. If what is meant in the previous paragraph is not fulfilled within one month, the Supervisory Guardian, by attaching evidence of his request for it, may submit an application to the District Court so that the guardian is dismissed. The PN must make a determination in accordance with the request, except if within the period determined by the PN and notified to him, the guardian still submits the list he wants to the PN, the decision is taken without any form of event. As far as possible in the same stipulation, which contains the dismissal, the PN also appoints a new guardian.

If the guardian does not want to carry out what is meant in Article 372 of the Civil Code, the Supervisory Guardian is required to demand the dismissal of the guardian, as stipulated in Article 373 of the Civil Code. If a guardian is reluctant to

carry out what was warned in the previous article or, if the supervisory guardian in the brief calculation finds signs of fraud or major negligence, then the supervisory guardian must demand the dismissal of the guardian. He must also demand the dismissal in all matters stipulated in the law.

If a guardian leaves and neglects a child, then the negligence of a guardian can be threatened with compensation for costs, losses and interest, even up to his dismissal as a guardian, as regulated in Article 374 of the Civil Code. If the guardianship is vacant or abandoned due to the absence of the guardian, or also if the guardian is temporarily unable to carry out his duties, then at the threat of compensation for costs, losses and interest, the Supervisory Guardian must submit a request to the Court for the appointment of a new guardian or temporary guardian.

However, in the context of laws and regulations, it is interesting to observe why the supervision of guardianship is not regulated in the Marriage Law or KHI. Guardianship as a family law event seems very inclusive, even though the Marriage Law and KHI should see that there are minors who must be protected by the state through the BHP. The Civil Code as a product of Western/Dutch law actually provides more protection for children. The desire to leave western legal products by giving birth to the Marriage Law and KHI, which is intended to be "impressed" to accommodate the Islamic values of the majority of Indonesian people will not succeed, if for the sake of child protection there is no coercive role of the state.

Trustee supervision is still regulated in the Civil Code, as a comparison of trusteeship and guardianship supervision in Indonesia is regulated in several laws and regulations, as shown in the table below:

Table 1. Guardianship Arrangement and Guardianship Supervision in Indonesia

No.	Rule of law	Kind of Trust	Guardianship
1.	Civil Code	1. Trust under the Act	Regulated
		2. Guardianship due to parental will	
		3. Judge-appointed guardianship	
2.	Law No. 1 of 1974	1. Oral guardianship or by will.	Not regulated
		2. Guardianship appointed by the judge	
3.	Islamic Law Compilation	1. Guardianship of children under 21 years of age	Not regulated

Effectiveness of the Implementation of Supervision of Children's Assets Under Guardianship

In practice, the authority to supervise guardianship by BHP has not been running optimally. This can be seen from several facts. In Medan in 2018, there was a murder case that caused a child to lose both parents and siblings, but the family did not know the whereabouts of the perpetrator [18]. In Makassar in 2016, there was a case of a guardian who was his

own uncle who had the heart to sell the inheritance of his guardian child [19]. In Surabaya in 2014, BHP Surabaya had received a consultation from a child who was previously under guardianship, but the guardian had never reported it to BHP. The consultation basically asked whether the inheritance from his parents was stored in BHP or not [20].

As is known in Article 366 of the Civil Code, it is stated that in every trust ordered in it, BHP is assigned as the Supervisory Guardian. Furthermore, Article 369 in all cases, if guardianship is ordered by a judge, the Registrar of the District Court concerned must immediately notify in writing of the appointment to BHP. The results of the research that the researchers conducted, the majority of 28 BHP respondents had been appointed as Supervisory Guardian, as illustrated in the Figure below:

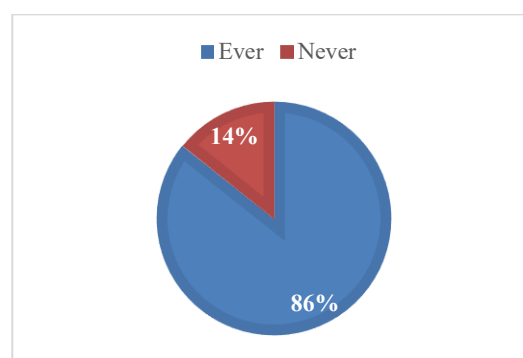


Figure 1. Appointment as Supervisory Guardian

Source: Primary Data (Data Processed)

Of the 24 respondents (86%) who had been appointed as Supervisory Trustees, in the last 10 (ten) years the average respondent carried out their duties as Supervisory Trustees 1 to 5 times, generally BHP in carrying out guardianship supervision after receiving a copy of the determination from the PN, as illustrated in the table and Figure below:

Table 2. Number of Appointments as Supervisory Guardian

No.	Answer	Frequency
1.	1 - 5	24
2.	6 - 10	4
TOTAL		28

Source: Primary Data (Data Processed)

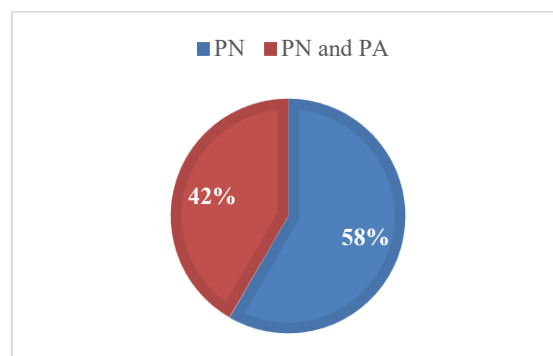


Figure 2. Guardianship is carried out after receiving a copy of the determination from PN or PA.

Source: Primary Data (Data Processed)

The results of the literature search conducted by the researcher in 2020, the determination of guardianship, based on the source of the Supreme Court Decision Directory, in the last 10 (ten) years, there were 5104 decisions from all courts in Indonesia. However, only 423 (8.29%) of the Court's decisions were submitted to the BHP (Guardian Supervisor) as the basis for implementing its authority in supervising guardianship, as can be seen in the table below, as follows:

Table 3. Number Trust Stipulations and Trust Stipulations Submitted to BHP in the last 10 years

No.	Year	Number Trust Stipulations	Number Trust Stipulations submitted to BHP
1.	2020	1226	30
2.	2019	2308	197
3.	2018	1282	91
4.	2017	152	4
5.	2016	40	27
6.	2015	46	17
7.	2014	14	8
8.	2013	6	2
9.	2012	7	4
10.	2011	23	1
TOTAL		5104	423

Source: Secondary Data (Data Processed)

The views and opinions of the PN and the Religious Courts (PA) regarding the implementation of Article 366 and Article 366 of the Civil Code show data that are contrary to the perception of the BHP. Of the 13 respondents, the majority answered that they had not implemented it. Public knowledge of the existence of BHP as an agency authorized to supervise guardianship, the majority of respondents answered that they did not know, each respondent's answer is illustrated in the 2 Figure below:

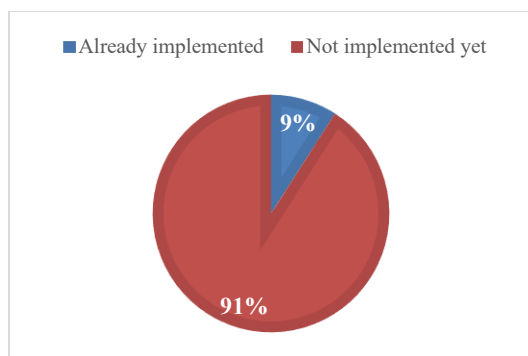


Figure 3. Implementation of Articles 366 and 369 of the Civil Code

Source: Primary Data (Data Processed)

Some of the reasons for not implementing Article 366 and Article 366 of the Civil Code, according to PN respondents, are because there are no provisions requiring them, both those regulated in the SE Supreme Court (SEMA) and Supreme Court Regulations (PERMA). In practice, so far the decision on the guardianship application does not include an order to the clerk to notify the BHP, besides that they also do not know how to do it. Respondents of PA so far have received more

requests for guardianship from people who are Muslim and are not related to the property of the child, so that in examining the guardianship application, they do not use the basis of the Civil Code but use the basis of the Compilation of Islamic Law (KHI).

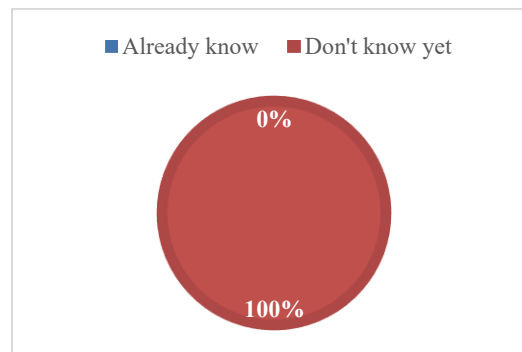


Figure 4. PN/PA's Perception of Public Knowledge BHP as Supervisor

Source: Primary Data (Data Processed)

From the description of the data above, it can be analyzed that the presence of the state as a form of implementation of the principles and concepts of the rule of law as mandated in Article 1 paragraph (3) of the 1945 Constitution, with the parameters of respect and protection of human rights as referred to in Article 28 A, Article 28 B paragraph (1) and Article 28 B paragraph (2) of the 1945 Constitution in the context of guardianship supervision by BHP so far has not been carried out optimally.

Legally, the formulation of Article 366 and Article 369 of the Civil Code is a very clear, easy to understand, and enforceable article formulation. Referring to Article 66 of the Marriage Law, Article 366 and Article 369 of the Civil Code must also be considered as provisions that are still valid because they have not been regulated in the Marriage Law and KHI. There are several reasons for not carrying out the mandate of Article 366 and Article 369 of the Civil Code because it has not been regulated in the SEMA/PERMA and the guardianship decision does not include the obligation to submit to the BHP because it is not an application that is requested to be counterproductive if it is associated with legal objectives for justice, certainty, and legal benefit. SEMA/PERMA is actually an internal regulation that regulates for the purpose of clarity and legal certainty. The justice to be realized by Article 366 and Article 369 of the Civil Code is justice for the rights of a child under guardianship through the presence of the state, legal certainty by looking at the clarity of the two formulations of the article there should be no doubt about carrying it out, and the benefit, of course, is to provide protection. against each child under guardianship guaranteed by law.

The results of the research that the researchers conducted to measure the level of effectiveness of the trusteeship supervision carried out by BHP, based on 4 indicators, showed the number 68.18 in the category of being quite effective. The program objective as one of the important

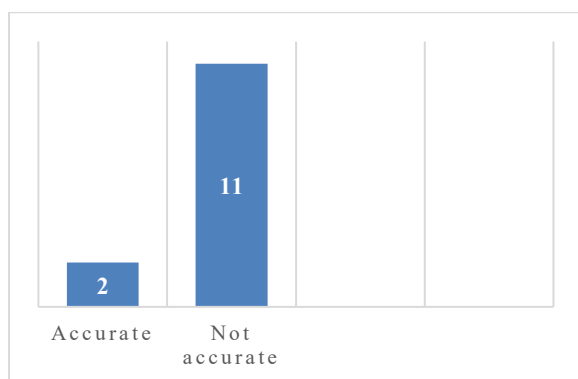
indicators to measure the level of effectiveness of a program/activity shows the smallest number, which is 45.45 (ineffective), as illustrated in the table below:

Table 4. Level of Effectiveness of the Implementation of BHP Trusteeship Activities

No.	Indicator	Target	Realization	Percentage (%)	Program Effectiveness
1.	Target Accuracy	22	15	68,18	Effective enough
2.	Program Socialization	22	17	77,27	Effective enough
3.	Program Objectives	22	10	45,45	Ineffective
4.	Monitoring	22	18	81,81	Very effective
AVERAGE				68,18	Effective enough

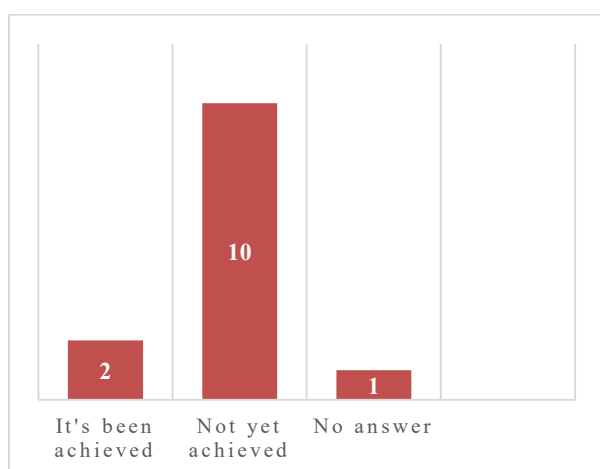
Source: Primary Data (Data Processed)

The low level of effectiveness of the trusteeship supervisory program carried out by BHP so far has also been confirmed and is in line with the views of 13 respondents from the PN/PA, and even tends to show a smaller number, as illustrated in the 2 Figure below:



Source: Primary Data (Data Processed)

Figure 5. Program Target Accuracy Guardianship Supervision



Source: Primary Data (Data Processed)

Figure 6. Guardianship Supervision Program Objectives

According to the PN/PA respondents, the targets and objectives of the trusteeship supervision program are not yet precise, according to the PN/PA respondents, due to several factors including, the general public is still ignorant and does not know about the existence and duties and functions of BHP as Supervisory Trustees. On the other hand, BHP has also not carried out socialization of its duties and functions as Supervisory Guardians who are authorized to supervise the guardianship of minors.

From the description of the data above, it can be analyzed that based on the perception of BHP, trusteeship supervision activities have so far been quite effective, although with relatively small numbers. Meanwhile, the perception of the PN/PA that the trusteeship supervision activities carried out so far, based on indicators of the accuracy of program targets and objectives, can be said to be ineffective. This is confirmed by the majority of judges and clerks in the PN/PA who do not yet know the importance of child guardianship supervision and the purpose of child guardianship supervision itself. In addition, PN/PA generally does not know the mandate of Article 366 and Article 369 of the Civil Code as the basis for BHP's authority to carry out its functions and authorities in the field of child guardianship supervision.

IV. CONCLUSION

Based on the findings of the data and the results of the analysis, it can be concluded that guardianship supervision arrangements do not exist in the Marriage Law or the Compilation of Islamic Law. The state's authority in supervising guardianship through the BHP is actually regulated in the Civil Code, the provisions are still valid but not optimally implemented. Meanwhile, regarding the effectiveness of the implementation of BHP's functions and authorities as Supervisory Trustees, according to BHP's view, it can be concluded that it is still quite effective with a relatively small figure of 68.18%. Meanwhile, according to the perception of PN/PA the level of effectiveness shows a smaller number.

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