

AUTHORITY TO ACT HUSBAND OR WIFE IN MAKING A DEED OF TESTAMENTARY ESTATE (*LEGAAT*) ON JOINT PROPERTY IN MARRIAGE

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Abstract

The purpose of this study was to analyze the actions of the husband or wife in making a deed of the testamentary estate of joint property in marriage. This type of research is normative-legal research, using a legal approach, a conceptual approach, and a case approach. The legal materials used are primary legal materials and secondary legal materials, using library research techniques, qualitatively analyzed using prescriptive presentation techniques. The results showed that the husband or wife's authority to act in making a deed of the testamentary estate (*lefaat*) on joint property in a marriage, namely a capable husband or wife and a lamp to act alone without requiring the approval of the wife or husband, as long as what was granted in the will only and part-owned by husband or wife over the object of joint property in marriage, because if the deed of grant of will on joint property in a marriage is made jointly by husband and wife or made by husband or wife with the consent of the wife or husband, then on the deed of grant of will it will be in danger of being canceled.

Keywords: a deed of the testamentary estate, act, authority

INTRODUCTION

Society consists of humans, consisting of either individuals or groups of humans who have gathered for various purposes and purposes. The elements of the community in carrying out their lives always interact with one another, between one group and another individual or other group. This interaction arises based on the need and dependence between one another.¹

One form of relationship between individuals in society is a marriage relationship that takes place between a man and a woman. Marriage is a legal relationship that has important consequences in the lives of husbands and wives who carry out marriages. The result of a legal marriage for husband and wife is the emergence of a legal relationship between husband and wife that comes from family relationships. This legal relationship has legal consequences in the form of rights and obligations for the husband and wife and on the assets of the husband and wife who carry out the marriage. One of the legal consequences arising from a legal marriage is the creation of property in the marriage. Property in marriage is needed to meet all the needs in family life.

According to Sonny Dewi Judiasih, marriage has legal consequences for the husband and wife in marriage, among others regarding the legal relationship between husband and wife, the formation of marital property, the position and status of legitimate children, and inheritance relationships.² Inheritance arises because of the event of death. Inheritance is related to family and also related to wealth. It relates to the family because it involves who will be the heir and relates to wealth because it involves inheritance rights to the assets left by the heir.

Inheritance can occur because it is determined by a law called ab-intestato inheritance, or inheritance can also occur based on the last will of the testator stated in a will (*testamen*) which is called *ad-testamento* inheritance. Article 874 *Burgerlijk Wetboek* (BW) stipulates that all assets left by a person who dies are the property of all his heirs according to the law, only that by a will no legal decision has been taken.

Article 875 BW stipulates that what is called a will or testament is a deed containing a statement of a person about what he wants will happen after he dies, and by which it can be revoked again.

The provisions of Article 876 BW stipulate that all provisions with a will regarding inheritance are to be taken in general, or on the basis of general rights, or also: on the basis of special rights. Each such decision, whether taken in the name of appointment of heirs, under the name of testamentary grant, or by any other name, must be subject to the rules contained in this chapter.

The provisions of Article 954 BW stipulate that a will for the appointment of an heir is a will, by which the person who wills, to one or more people, gives assets that he will leave behind if he dies, either in whole or in part, such as, for example, half, one third.

The provisions of Article 957 BW stipulate that a testamentary grant is a special will in which the person who bequeaths to one or more persons gives some of his goods of a certain type, such as all his movable or immovable property, or grants usufructuary rights over all or part of their inheritance.

The person who receives a will (*legaat*) is called a legatist. With the freedom of the right of a testator to inherit his property, a testament grantor can specifically give goods or usufructuary rights over all or part of his inheritance through a testamentary grant on the condition that it should not conflict with the law, one of the restrictions The important thing is that it must not violate the absolute right of the part (*legitime portie*) owned by the legitimate heirs.

The acquisition of property rights through inheritance often creates problems in a family relationship. The division of inheritance often creates a sense of injustice among the heirs regarding the amount or share they receive in the distribution of inheritance. Problems that often arise when the distribution of inheritance is often given an initiative to someone in his lifetime, to make the distribution of assets that he owns through a will (*legaat*) grant. This prior distribution of assets through will grants (*legaat*) is carried out to create a sense of justice in the distribution of inheritance among the heirs and to avoid conflicts or divisions in a family that may occur due to problems in the distribution of inheritance.

Throughout the marriage between husband and wife, a bonded joint ownership (*gebonden mede-eigendom*) is formed in the form of joint property as regulated in the Law of the Republic of Indonesia Number 1 Year 1974 concerning Marriage (the Marriage Law). The reason for making a testamentary grant by a husband or wife in a marriage is because it involves the determination of a special will regarding the distribution of rights to an undivided share of the marital property owned by husband and wife at the time the marriage is terminated due to death, however, how is it implemented?

¹ Mochtar Kusumaatmadja and B. Arief Sidharta, *Pengantar Ilmu Hukum: Suatu Pengenalan Pertama Ruang Lingkup Berlakunya Ilmu Hukum*, Book I. Bandung: Alumni, 2000, p. 14

² Sonny Dewi Judiasih, *Harta Benda Perkawinan: Kajian terhadap Kesetaraan Hak dan Kedudukan Suami dan Istri atas Kepemilikan Harta dalam Perkawinan*, 1st Edition. Bandung: PT. Refika Aditama, 2015, p. 3

if the deed of will grant is declared jointly by a husband and wife, but then one of them dies first, can the testamentary grant be implemented or do we have to wait until the husband and wife both die? Whereas supposedly with the death of one of the husband and wife, inheritance has been opened and inheritance occurs, and if they marry without making a marriage agreement to separate property, then one of the husband and wife who has died first will inherit $\frac{1}{2}$ (one half) the right to an undivided share of his joint property to his surviving married spouse and offspring. As for the provisions of Article 930 BW it is determined that, in the only deed, two or more persons are not allowed to declare their will, either to give birth to a third person or on the basis of mutual or reciprocal statements. Thus, in 1 (one) will only a will may be stated by a maker of wills, and all events required in making a will must be fulfilled under the threat of cancellation (Article 953 BW).

One example of a testamentary grant for joint property in a marriage is Drs. Nalem Sembiring, M.B.A., A.K. and Siti Rochani Sitepu also named Siti Rochani is a married couple without making a marriage agreement, in accordance with the Marriage Deed Number 59/1968/dated May 24, 1968 issued by the Civil Registry Office of the City of Bandung. In this marriage, 2 (two) children have been blessed, namely dr. Darma Putra Sembiring, M.H., S.M. and Jul Indra Meliala, S.E. also named Jul Indra Meliana, S.E. also named Jul Indra Sembiring, S.E.

On January 19, 2006, Siti Rochani Sitepu also named Siti Rochani made a Deed of Will Grant dated January 19, 2006 Number 7 drawn up before Juli Indrayanti Siregar, Bachelor of Law, Notary in Medan City, which states that Siti Rochani Sitepu is also named Siti Rochani has given a testamentary grant for the property which is part of his joint property to his 2 (two) children, therefore not all parts of the joint property in marriage are given entirely in the deed of the will.

Siti Rochani Sitepu also named Siti Rochani died in Banjarmasin, on October 1, 2006, according to the Death Certificate Number 03/M-U/2006 dated October 12, 2006.

Drs. Nalem Sembiring, M.B.A., A.K. and Jul Indra Meliala, S.E. also named Jul Indra Meliana, S.E. also named Jul Indra Sembiring, S.E. filed a lawsuit against the deed of will by using dr. Darma Putra Sembiring, M.H., S.M. as Defendants I and Juli Indrayanti Siregar, Bachelor of Law, Notary in Medan City as Defendants II and also sued the National Land Agency of the Republic of Indonesia cq. Regional Office of the National Land Agency of Banten Province cq. Tangerang City Land Office as Co-Defendant I and the Ministry of Law and Human Rights of the Republic of Indonesia (now the Ministry of Law and Human Rights of the Republic of Indonesia) as Co-Defendant II, for an unlawful act (*onrechtmatige daads*) (Article 1365 BW), because the husband or the wife is not legally allowed to take legal action to transfer her ownership rights in any form, if there is no agreement from both parties (Article 35 paragraph (1) of the Marriage Law in conjunction with Article 36 paragraph (1) of the Marriage Law).

The Panel of Judges in legal considerations of the Supreme Court's Decision dated January 10, 2018 Number 1983K/Pdt/2017 considered that the *Judex Facti* decision in this case the Banten High Court did not misapply the law, taking into account Article 36 paragraph (1) of the Marriage Law which stipulates that, regarding the joint property of husband or wife can act with the consent of both parties. The testamentary grant on the joint property of the marriage was made without the approval of Drs. Nalem Sembiring, M.B.A., A.K. as the husband of Siti Rochani Sitepu is also named Siti Rochani, so the *Judex Facti* decision in this case the Banten High Court is correct in stating that the Deed of Will Grant dated January 19, 2006 Number 7 drawn up before Juli Indrayanti Siregar, Bachelor of Law, Notary in Medan City, is disabled and has no legal force because the making of a will grant deed on the joint property of the marriage is contrary to Article 36 paragraph (1) of the Marriage Law.

The Panel of Judges in the Supreme Court Decision dated January 10, 2018 Number 1983K/Pdt/2017 considered that, in granting a joint property in marriage, a husband or wife may act with the consent of both parties as stipulated in Article 36 paragraph (1) of the Marriage Law. This is contrary to Article 875 BW in conjunction with Article 930 BW which stipulates that, in a sole deed, two or more persons are not allowed to declare their will, either to give birth to a third person or based on mutual or reciprocal statements.

The legal issue that will be discussed in this thesis is the legal protection of legal rights in the cancellation of a will (*legaat*) grant deed on the joint marital property made without obtaining the consent of the husband or wife, because, in 1 (one) will only be stated by a maker of wills, so that the joint property in a marriage that the husband or wife wants to inherit, does not require the approval of the spouse, because if they will grant deed is made by 2 (two) or more people, it will result in the void as regulated in Article 930 BW *juncto* Article 953 BW which stipulates that, all procedures required in the making of wills according to the provisions of this section, must be fulfilled under threat of cancellation.

METHOD

The research is normative-legal research,³ normative legal research or library law research is legal research carried out by examining library materials or secondary data.⁴ This research uses a statutory approach, a conceptual approach, and a case approach.⁵ The legal materials used are primary legal materials and secondary legal materials,⁶ with the technique of using library research, namely by collecting materials from legislation and literature books as a theoretical basis, after the legal materials in the research are collected, the relevant legal materials will be inventoried then synchronized and then analyzed qualitatively by using prescriptive presentation techniques in order to draw conclusions in the form of arguments and provide prescriptions based on arguments and legal theory to answer the legal issues faced.

DISCUSSION

Authority to Act Husband or Wife in Making a Deed of Testamentary Estate (*Legaat*) on Joint Property in Marriage

Article 830 BW stipulates that inheritance only takes place due to death. An inheritance only takes place with the death of the testator, exceptions can occur in a state of absence (Article 467 BW in conjunction with Article 470 BW). In the law of inheritance, a principle applies, that if a person dies, then immediately by law, all rights and obligations pass to his heirs. This principle is contained in a French proverb which reads "*le mort saisit le vif*"⁷, while the transfer of all rights and obligations from the heir to his heirs is called "*saisine*". *Saisine* rights are regulated in Article 833 paragraph (1) BW which stipulates that all heirs automatically by law obtain ownership rights over all goods, all rights, and all receivables of the deceased. *Saisine* rights are the rights of the heirs to obtain all the rights and obligations of the heirs, which are obtained by the heirs by law, without having to do any action, nor do they need to demand the delivery of inherited goods.

Inheritance based on a will (*testamen*) is regulated in Article 874 BW which stipulates that all the inheritance of a person who dies, belongs to all his heirs according to the law, only that by a will no legal decision been taken.

In Article 874 BW, it is concluded that an important principle of inheritance law is that inheritance based on the law (*ab intestato inheritance*) will only apply, if the testator during his lifetime, has not taken a legal and deviant decision regarding his inheritance which is regulated and stated in the law. will deed.

Based on the provisions of Article 874 BW, if at the time the testator dies, there is a will that regulates the inheritance of the testator, then in the distribution of the inheritance of the testator, the provisions that have been regulated in the will, then the remaining assets will be implemented. the inheritance of the heir will be distributed to the heirs based on the law, without prejudice to the right of the legitimate heirs to claim their absolute share which has been determined in the BW (*legitime portie*).

Article 875 BW stipulates that what is called a will or testament is a deed containing a statement of a person about what he wants will happen after he dies, and by which it can be revoked again.

The provisions of Article 876 BW stipulate that all provisions with a will regarding inheritance are to be taken in general, or on the basis of general rights, or also: on the basis of special rights. Each such decision, whether taken in the name of appointment of heirs, under the name of testamentary grant, or by any other name, must be subject to the rules contained in this chapter.

All provisions with a will or testament regarding inheritance as regulated in Article 876 BW, are taken by:

1. The basis of general rights is the appointment of inheritance (*erfstelling*).
2. The special right is a testament grant (*legaat*).

According to J. Satrio, the word "on the basis of general rights (order algemene title)" here means: includes the rights (*activa*) and obligations (*pasiva*) of the heirs and the amount includes a

³ Irwansyah, *Penelitian Hukum, Pilihan Metode dan Praktik Penulisan Artikel*, Mirra Buana Media, Yogyakarta, 2020, p. 93

⁴ Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Depok: Rajawali Pers, 2018, p. 13

⁵ Peter Mahmud Marzuki, *Penelitian Hukum*, Revised Edition, Jakarta: Kencana, 2017, p. 134

⁶ Kadarudin, *Penelitian di Bidang Ilmu Hukum (Sebuah Pemahaman Awal)*, Formaci Press, Semarang, 2021, p. 171

⁷ R. Subekti, *Ringkasan tentang Hukum Keluarga dan Hukum Waris*, 5th Edition, Jakarta: PT. Intermasa, 2005, p. 96

share proportional to the inheritance.⁸ From these limitations, it can be concluded that an *erfstelling* does not have to cover the entire inheritance, as long as the appointment includes a portion that is proportional to the inheritance. If *erfstelling* only covers a part of the inheritance, of course there is a part of the inheritance left. The rest applies *ab intestaat* inheritance. Granting on the basis of general rights is called: heir appointment or *erfstelling* and the person who gets the will to inherit the inheritance is really an heir.

Inheritance based on a will (*testamen*) on the basis of general rights or a provision with the name of appointment of testamentary heirs with a will (*erfstelling*) occurs in the event that during his lifetime, the testator makes a will deed containing the appointment of one or more heirs who are entitled to all or part of the inheritance of the heir. *Erfstelling* is regulated in the provisions of Article 954 BW that, a will for the appointment of an heir is a will, whereby the person who wills, to one or more people, gives assets that he will leave behind if he dies, either in whole or in part, such as, for example, half, one third.

According to J. Satrio, it is actually more appropriate to speak of "a comparable share" here rather than inheritance. Because, if the gift through a will over part of the inheritance is in the form of a certain item, then here we are dealing with *legaas* (Testamentary Estate).⁹ The provisions of Article 955 BW stipulate that, when the beneficiary dies, all those who are appointed as heirs by virtue of the will, as well as those who by law have the right to inherit a share in the inheritance, by law also acquire ownership rights to the property. legacy of the deceased. Articles 834 and 835 apply to them.

Heirs who inherit based on a will (testament) are called testamentary heirs. Testamentary heirs who are appointed as heirs with a will (*erfstelling*) inherit on the basis of general rights, which means that testamentary heirs who are appointed as heirs with a will (*erfstelling*) have the same position as heir's *ab intestato*. Based on Article 955 BW, when the testator dies, the testamentary heir who is appointed as heir with a will (*erfstelling*) by law has the right to inherit the inheritance of the heir, both all assets and all burdens/debts of the testator (*pasiva*) the same as heirs of *ab intestato*. Testamentary heirs who are appointed as heirs by means of a will (*erfstelling*) have the same rights as those of *ab intestato* heirs such as *saisine* rights, *petitio hereditaria* rights, and the right to request separation and distribution of inheritance (Article 955 BW in conjunction with Article 834 BW in conjunction with Article 835 BW in conjunction with Article 1066 BW).

The provisions of Article 957 BW stipulate that a testamentary grant is a special will in which the person who bequeaths to one or more persons gives some of his goods of a certain type, such as all his movable or immovable property, or grants usufructuary rights over all or part of their inheritance.

A testamentary grant is a testamentary determination on the basis of special rights in which the grantor of the testament grants gives some of his goods of a certain type, such as for example all his movable or immovable property, or grants usufructuary rights over all or part of his inheritance to one or more persons. The beneficiary of the testament (*legataris*).

While the grantor of the will is still alive, he has the right to determine specifically the granting of goods or usufructuary rights over all or part of his inheritance through a testamentary grant which will only take effect after he dies. The grant through a testamentary grant is stipulated on the condition that it must not conflict with the law, one of the important restrictions is that it must not violate the right of an absolute share (*legitime portie*) owned by legitimate heirs.

Inherited assets are generally part of the family property, the amount of which is determined by the marriage property law applicable to the heir. The presence or absence of a marriage agreement that regulates the marital property of the heir also determines the amount of the inheritance *boedel* from the heir.

Marriage is a legal relationship that causes legal consequences in the form of rights and obligations on the personal self of a husband and wife and on the assets of a husband and wife who carry out a marriage. The legal consequences arising from a legal marriage include the creation of property in the marriage, the position and status of a legitimate child, and inheritance relationships.

According to Subekti, other consequences of marriage:¹⁰

- 1) children born from marriage are legal children (*wettig*);
- 2) the husband becomes the heir of the wife and *vice versa*, if one dies in the marriage;
- 3) by law it is prohibited to buy and sell between husband and wife;
- 4) labor agreements between husband and wife are not allowed;
- 5) giving of objects in the name is not allowed between husband and wife;
- 6) the husband is not allowed to be a witness in his wife's case and *vice versa*;

⁸ J. Satrio Satrio, *Hukum Harta Perkawinan*, 1st Edition. Bandung: PT. Citra Aditya Bakti, 1991, p. 193

⁹ *Ibid*

¹⁰ R. Subekti, 2005, *Loc.Cit.*

7) the husband cannot be prosecuted for some crimes against his wife and vice versa (eg theft).

Property in marriage is needed to meet all the necessities of life in family life with the aim of forming a happy and eternal family based on God Almighty. Property in marriage is regulated in Article 35 to Article 37 of the Marriage Law. Article 35 of the Marriage Law stipulates that:

- (1) Property acquired during the marriage becomes joint property.
- (2) Inherited property of each husband and wife and property obtained by each as a gift or inheritance, are under the control of each as long as the parties do not specify otherwise.

Based on Article 35 of the Marriage Law which regulates property in marriage, it can be concluded that, in principle the Marriage Law stipulates that, in 1 (one) family there are more than 1 (one) group of assets, which consists of:

1. Joint property;
2. Inherited assets are divided into:
 - a. husband's innate property;
 - b. wife's property;
 - c. Property acquired by the husband as a gift or inheritance;
 - d. Property acquired by the wife as a gift or inheritance.

Marital joint property is regulated in Article 35 paragraph (1) of the Marriage Law. Joint assets are assets obtained by husband and wife during the marriage, namely from the time the marriage is legalized and recorded according to the applicable laws and regulations until the marriage is terminated due to the death of one of the husband or wives, divorce, or by a court decision.

According to M. Anshary, the joint property can come from the following components:¹¹

1. Inherited assets that are agreed upon becoming the assets of the unanimous union;
2. The husband's income earned during the marriage;
3. The results obtained from the respective assets;
4. Property purchased during the marriage;
5. Property that can be proven to be obtained in marriage;
6. Property purchased after divorce.

According to Evi Djuniarti, all assets obtained by husband and wife during the marriage bond become joint property, whether the property is obtained separately or obtained jointly. Likewise, property purchased during the marriage bond is joint property, it doesn't matter whether the wife or husband buys it, it doesn't matter whether the wife or husband knew at the time of the purchase or it doesn't matter in whose name the property was registered.¹²

Congenital property is the innate property of each husband or wife, which is obtained before the marriage is legalized and recorded according to the applicable laws and regulations, including property obtained as a gift or inheritance of each husband or wife, even though it is obtained during the marriage. including property. Congenital assets are under the control of each husband and wife as long as it is not agreed otherwise in the marriage agreement. Each husband and wife have the full right to carry out legal actions on their innate assets (Article 36 paragraph (2) of the Marriage Law), without requiring the consent of the wife or husband. Thus, in principle, Article 35 paragraph (2) of the Marriage Law adheres to the principle of separate assets, because by law there is no mixing of the innate assets of each husband and wife due to marriage unless agreed otherwise in the marriage agreement before or at the time of the marriage.

Legal authority is the power to act which is owned by a legal subject and by law is determined to be able to obtain or have the right, obligation, and authority to carry out a certain legal act.

A legal subject is a person or legal entity that according to the law can obtain or have the right, obligation, and authority/power to act in legal action. Legal subjects must be competent and authorized to carry out certain legal actions to cause legal consequences.

Since birth, humans have rights and obligations throughout their lives until they die. A newly born child, even a child who is in the womb of a woman, is considered to have been born and is a legal subject if the interests of the child bring with it demands his rights and it is considered that he never

¹¹ M. Anshary, *Harta Bersama Perkawinan dan Permasalahannya*. Bandung: CV. Mandar Maju, 2016, p. 35-41

¹² Evi Djuniarti. *Hukum Harta Bersama Ditinjau dari Perspektif Undang-Undang Perkawinan dan KUH Perdata (The Law of Joint Property Reviewed from The Perspective of Marriage Law and Civil Code)*. Jurnal Penelitian Hukum De Jure. Volume 17 No. 4 December 2017. Ikatan Peneliti Hukum Indonesia (IPHI) in collaboration with the Research and Development Agency for Law and Human Rights of the Ministry of Law and Human Rights of the Republic of Indonesia, 2017, p. 448

existed if he dies at the time of his death. born (Article 2 BW).

One of the legal consequences arising from a legal marriage is the creation of property in the marriage. Based on Article 31 paragraph (2) of the Marriage Law, each husband and wife have the right to take legal actions on property in marriage. Property in marriage is needed to meet all the necessities of life in family life with the aim of forming a happy and eternal family based on God Almighty. Husband and wife must be capable and authorized in carrying out legal action on a property in marriage. The authority of husband and wife over marital property is determined by the type of property contained in the marriage. Article 36 of the Marriage Law stipulates that:

- (1) Regarding joint assets, husband or wife may act with the consent of both parties.
- (2) Regarding each other's property, husband and wife have the full right to take legal actions regarding their property.

All legal actions regarding joint property in marriage can be carried out by husband and wife with the consent of both parties. Marriage does not make the wife a person or legal subject who is incompetent to carry out legal actions as stipulated in Article 108 BW in conjunction with Article 110 BW, which by Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 1963 has been deemed invalid. Thus, the authority of a wife to carry out a legal act and to appear before a court is no longer required to be carried out with the help of a deed or with written permission from her husband and the wife is considered capable of carrying out legal actions.

With the enactment of the Marriage Law, the provisions of Article 108 BW are declared no longer valid, based on Article 31 of the Marriage Law in conjunction with Article 66 of the Marriage Law. In essence, Article 66 of the Marriage Law stipulates that, for marriage and everything related to marriage based on this Marriage Law, with the enactment of this Marriage Law, all the provisions of the previous legislation governing marriage to the extent that it has been regulated in the Marriage Law is declared invalid.

Article 31 of the Marriage Law stipulates that:

- (1) The rights and position of the wife are in balance with the rights and position of the husband in domestic life and the association of living together in society.
- (2) Each party has the right to take legal action.
- (3) The husband is the head of the family and the wife is a housewife.

The provisions of Article 31 of the Marriage Law stipulate that the rights and positions of husband and wife are balanced and each husband and wife have the right to take legal actions. Article 36 paragraph (1) of the Marriage Law stipulates that, regarding joint assets, a husband or wife can act with the consent of both parties. Based on the provisions of Article 31 paragraph (2) of the Marriage Law in conjunction with Article 36 paragraph (1) of the Marriage Law, it has been determined that each husband and wife have the right and authority to take legal actions on their joint assets in a marriage.

Consent is a statement of the will to agree or regarding a certain action or thing. A statement of consent can be given in the oral or written form, it can also be given expressly or tacitly. Article 36 paragraph (1) of the Marriage Law does not determine the form and method of agreement so that husband and wife can take legal actions on joint property in marriage, nor does it determine which legal actions on joint property in marriage require consent of husband and wife.

Based on the results of the author's research, all respondent notaries are of the opinion that the form of agreement between husband and wife in carrying out legal actions on joint property in a marriage is based on the provisions of Article 35 paragraph (1) of the Marriage Law in conjunction with Article 36 paragraph (1) of the Marriage Law, then husband and wife must be present and give mutual consent by signing the deed and affixing a fingerprint before a notary.

However, if one of the husbands or wives is unable to appear before the notary, then based on the results of the author's research, there are differences of opinion between the respondent notaries regarding the form of approval from the husband or wife who is unable to attend before the notary to give his approval in carrying out legal actions on joint assets. in marriage.

According to Muhammad Asyik Noor¹³, Mustahar¹⁴ and Ria Trisnomurti¹⁵, if one of the husband or wife is unable to attend before a notary, then the husband or wife who is unable to attend is obliged to give his/her approval which is made in writing with a deed of approval made before the local notary where the husband or wife is located or at least with a deed of approval made under the hand and has been legalized by a notary.

¹³ Muhammad Asyik Noor. Notary in Makassar City. The interview was conducted on June 14, 2021.

¹⁴ Mustahar. Notary in Makassar City. The interview was conducted on June 15, 2021.

¹⁵ Ria Trisnomurti. Notary in Makassar City. The interview was conducted on June 22, 2021.

According to Ria Trisnomurti, if one of the husbands or wives is unable to appear before a notary, then the comparison and premise of the deed of approval made before the notary shall contain:¹⁶

“ - Mr B (...)
- My appearer, Notary knows.
- The appearer is the husband of Mrs. A (...) based on (...)
- The Appellant explains that, with this deed, he fully agrees with the actions of his wife, Mrs. A, to pledge the land which will be mentioned below: (...)”.

According to Andi Lola Rosalina¹⁷, Cita Marlika Parawansa¹⁸, Octorio Ramiz¹⁹, Mieie²⁰ and Endang Soelianti,²¹ if one of the husband or wife is unable to attend before a notary, then the form of approval from the husband or wife who is unable to attend is given in writing in the form of a deed of approval and power of attorney made before the local notary where the husband or wife is located or at least in the form of a deed the approval and power of attorney made under the hand whose signature has been ratified and the date of the letter has been confirmed under his hand by being registered in a special book (legalization) by a local notary.

According to Brilliant Thioris²², Betsy Sirua²³ and Tjhin Jefri Tanwil,²⁴ The form of agreement between husband and wife in carrying out legal actions to sell land rights which are joint assets in marriage is that if one of the husband or wives is unable to attend before a notary, then the husband or wife who is unable to attend is obliged to give his approval in the form of a deed of approval and power of attorney. made before a local notary where the husband or wife is located or in the form of a power of attorney to sell made before a local notary where the husband or wife is located. The difference between the deed of approval and power of attorney and the deed of power of attorney to sell is that if the certificate of land rights is registered in the husband's name, then the wife cannot be present before a notary, then the wife gives approval and power of attorney to her husband who is present before the notary in the form of a deed of approval and power of attorney. made before the local notary where the wife is located, whereas if the certificate of land rights is registered in the husband's name, then the husband cannot be present before the notary, then the husband gives approval and power of attorney to his wife who is present before the notary, in the form of a power of attorney to sell those made before the local notary where the husband is. So, it depends on whose name the certificate of land rights is registered.

If husband and wife marry without making a marriage agreement, the ownership of the joint property is not determined by the name of the husband or wife, the joint property is registered so that even though the property is registered in the name of the husband, the ownership includes the wife as their joint property in marriage. vice versa. Even though the marital joint assets are registered in the husband's name, all legal actions on marital joint assets must still be carried out jointly, namely by the husband with the wife's consent and vice versa if the joint property is registered in the wife's name.

In the opinion of the author, a statement of approval and/or authorization from a husband or wife who is unable to attend before a notary can be stated expressly in the form of a deed of approval and power of attorney made before a notary or in the form of a private deed that has been legalized before a notary. This means that because joint property in a marriage is joint ownership that is bound (*gebonden mede-eigendom*), then to carry out a legal act of transferring rights to joint property in marriage, a husband or wife who is unable to attend before a notary first gives approval for the transfer of rights. the share of the joint property belonging to the wife or husband who is present before a notary and at the same time authorizes the wife or husband who is present before the notary to transfer his share of the joint property.

Unlike the case, if the husband and wife are unable to appear before a notary, then the form and method of approval must be given to the recipient of the power of attorney who is present before the notary to act as a proxy to represent and for the husband and wife in carrying out legal actions for the transfer of rights to joint property in marriage can be done by using a power of attorney to sell or a deed of power to buy made before a local notary where the husband and wife are located or in the form of a private deed that has been legalized by a notary, if the legal act of transferring rights is to be

¹⁶ *Ibid.*

¹⁷ Andi Lola Rosalina. Notary in Makassar City. The interview was conducted on June 29, 2021.

¹⁸ Cita Marlika Parawansa. Notary in Makassar City. The interview was conducted on June 15, 2021.

¹⁹ Octorio Ramiz. Notary in Makassar City. The interview was conducted on June 19, 2021.

²⁰ Mieie. Notary in Makassar City. The interview was conducted on July 1, 2021.

²¹ Endang Soelianti. Notary in Makassar City. The interview was conducted on June 28, 2021.

²² Brilliant Thioris. Notary in Makassar City. The interview was conducted on June 21, 2021.

²³ Betsy Sirua. Notary in Makassar City. The interview was conducted on June 25, 2021.

²⁴ Tjhin Jefri Tanwil. Notary in Gowa Regency. Interviews were conducted on June 28, 2021.

carried out is the sale or purchase of joint property in marriage.

Based on the joint ownership theory, if a husband and wife marry without making a marriage agreement, then the ownership of joint property in a marriage is joint ownership that is bound (*gebonden mede-eigendom*) which means that ownership of joint property in a marriage is divided into $\frac{1}{2}$ (one-half) the right to an undivided share of the marital property belonging to the husband and $\frac{1}{2}$ (one-half) the right to an undivided share of the marital joint property belonging to the wife, but even so, it does not mean that legal actions on the marital joint property must be carried out by husband and wife together as owners, but it must still be carried out with mutually agree with each other, because of the right to $\frac{1}{2}$ (one half) of the undivided share of the joint property of a new marriage can be claimed by husband and wife through separation and division after the marriage is terminated.

The statement of consent should be expressly stated and given in writing to avoid denial and conflict in the future. If one of the husbands or wives is unable to appear before a notary, then the form and method of approval that must be given to the wife or husband who is present before a notary to carry out legal actions on joint assets in marriage can be carried out either by using a deed of approval, deed of approval and power of attorney or deed of power to sell made before a local notary where the husband or wife is located or in the form of a private deed that has been legalized before a local notary where the husband or wife is located. However, in the author's opinion, if one of the husbands or wives is unable to attend, then the form and method of approval given to the wife or husband who is present before a notary should be given in the form of a deed made before a notary (authentic deed), not in the form of a deed. the form of a private deed that has been legalized before a notary, because even though it has been legalized before a notary, the deed still has the power of proof as an underhand deed (Article 1874 a BW) and the authenticity and truth of the deed can still be denied and signatures by the parties by using the right to deny/deny the authenticity and truth of the deeds and signatures regulated in Article 1876 BW.

According to the form, the deed is divided into authentic deed and private deed. The deed is a writing that is intentionally made, dated, and signed with the intention of being used as evidence about the occurrence of an event and legal action that forms the basis of a right or an engagement. The element of a deed is the intention to make written evidence and sign the deed.

Article 1868 BW stipulates that an authentic deed is a deed that, in the form determined by law, is made by or in the presence of public officials in power for that purpose at the place where the deed was made.

Article 165 *Het Herziene Indonesisch Reglement* (HIR) stipulates that an authentic deed is a letter made by or before a public official who is authorized to make it, providing sufficient evidence for both parties and their respective heirs and all the person who gets rights from him about all the things mentioned in the letter and about the things listed in the letter as a notification; but the latter is only that which is notified it directly relates to the subject matter of the deed.

Based on Article 1868 BW in conjunction with Article 165 HIR, authentic deeds are divided into official deeds/deeds made by an authorized public employee (*acte ambtelijk, procesverbaal acte, relaas acte*) and party deeds made before an authorized public employee (*partij acte*).

Authorized public employees referred to in Article 1868 BW in conjunction with Article 165 HIR are notaries, Land Deed Making Officials (hereinafter referred to as PPAT), judges, bailiffs, clerks, civil registry employees, and so on. In carrying out the position, the authorized public employee is obliged to comply with the provisions stipulated in the laws and regulations and the code of ethics.

A deed of official report/deed of the official is a deed made as evidence of a description of the occurrence of an act or event that is seen, heard, witnessed, and explained by a public official who is authorized to carry out his/her position. Examples of official deed/deeds made by authorized public employees are summons for the bailiff, judge's decision, deed of minutes/minutes of General Meeting of Shareholders of a limited liability company.

A party deed is a deed that describes what happened based on the information provided by the public official(s) who are authorized and for this purpose deliberately appears before the authorized public employee so that the information or action is stated by the authorized public employee in a deed. and the appearers acknowledge the truth of the statements or actions described in the deed by signing the deed. An example of a party deed made before an authorized public employee is a deed of sale and purchase made before a PPAT, a deed of establishment of a limited liability company made before a notary, or a lease agreement made before a notary.

Based on Article 1868 BW, whether or not a deed is authentic is not only determined from the deed made by or in the presence of an authorized public official at the place where the deed was made, but also must be made in the form determined by law. A deed made without fulfilling the conditions stipulated in Article 1868 BW is not an authentic deed but has the power of proof as an

underhand deed if it is signed by the parties concerned (Article 1869 BW).

Article 1870 BW stipulates that an authentic deed provides between the parties and their heirs or persons who have rights from them, perfect proof of what is contained therein.

According to Sudikno Mertokusumo, the power of proof of an authentic deed is:²⁵

1. The power of proof of birth certificate is authentic
2. The power of authentic deed formal proof
3. The strength of authentic deed material proof

According to R. Subekti, the strength of proof of an authentic deed is: First, proving between the parties that they have explained what was written in the deed (the power of formal proof); Second, to prove between the parties concerned that the events mentioned there actually have occurred (the power of material evidence or what we call the "binding" strength of evidence); Third, to prove not only between the parties concerned but also against third parties, that on that date in the deed both parties had appeared before a public official (notary) and explained what was written in the deed. The third power is called the power of proving out (meaning "out" is against a third party or "outside world").²⁶

Based on Article 1870 BW in conjunction with Article 165 HIR, an authentic deed is a binding and perfect written evidence. An authentic deed is a binding written evidence in the sense that what is written in the deed must be trusted by the panel of judges as long as the untruth is not proven. An authentic deed provides a perfect proof, in the sense that no additional evidence is needed.

An underhand deed (*onder-handsch acte*) is a deed that is not made by or in the presence of an authorized official but is made by the interested parties themselves with the aim of being used as evidence. Underhanded deeds are regulated in Article 1874 paragraph (1) BW which stipulates that, as underhand writings, they are considered underhanded deeds, letters, registers, household affairs letters, and so on. -other writings made without the intermediary of a public official.

An underhand deed must be signed based on Article 1874 paragraph (1) BW. By signing a deed, a person is deemed to have assumed and is responsible for the correctness of the contents written in the deed. An unsigned deed does not have the power of proof as a deed, so it is not valid to be used as written evidence.

The right to deny/deny a signature is regulated in Article 1876 BW which stipulates that, whoever puts forward underhand writing, is obliged to expressly acknowledge or deny his signature; but for the heirs or the people who have rights thereof, it is sufficient if they explain that they do not recognize the writing or signature as the writing or signature of the person they represent.

In an authentic deed, the authenticity and correctness of the deed and signature are not the main issues. This is different from a private deed, which in the verification process places an examination process on the authenticity and correctness of the deed and signature as the first examination procedure. If the signature contained in the private deed is denied by the party who signed the deed as a party, then the party submitting the underhand deed as evidence must try to prove the authenticity and correctness of the deed and signature and if there is a denial of the deed and signature, the judge is obliged to order that the authenticity and correctness of the deed and signature be examined before the court (Article 1877 BW).

Denial of the signature in the private deed causes the validity of the private deed to be doubted so that the party submitting the underhand deed as evidence must try to prove with other evidence that the underhand deed has been signed by the party who denies it/denies it. If the party submitting the private deed cannot prove the authenticity and correctness of the deed and signature and the party who denies/denies the signature can prove its denial, the validity and strength of the formal and material evidence of the private deed will be invalid.

The private deed does not have the power of birth proof, because there is still the possibility that the signature on the underhand deed is denied by the parties concerned or their heirs or the person who has rights thereof.

Article 1875 BW stipulates that underhand writing that is recognized by the person against whom the writing is intended to be used or which according to the law is considered to be recognized, gives it to the people who signed it as well their heirs and those who have received it. rights from them, perfect evidence such as an authentic deed, and the same apply to the provisions of article 1871 for the writing.

If the signature on the deed under the hand has been recognized by the parties concerned or their heirs or the person who has rights thereof, then the deed under the hand has the power and becomes a binding and perfect written evidence like an authentic deed, so that the contents in the

²⁵ Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, Yogyakarta: Liberty, 1982, p. 123-124

²⁶ R. Subekti, *Hukum Pembuktian*, 13th Edition, Jakarta: PT. Balai Pustaka, 2015, p. 29-30

private deed must be considered as true as long as the untruth is not proven and the private deed is written evidence that is sufficient to prove the occurrence of an event and legal action which forms the basis of a right or an engagement.

In practice, legal actions on joint assets in a marriage that must be carried out with the consent of the husband and wife are legal actions that are in the nature of the transfer of rights such as buying and selling, grants, exchanging, entering into the company, taking credit, guaranteeing, granting power to impose mortgage rights, granting mortgage rights, and so on, unless there is a marriage agreement that regulates property in marriage. In practice, to carry out a legal act of buying in full, which is carried out by a husband or wife during a marriage, it is often not required or the consent of the wife or husband is required because, with the purchase in full, the right of the wife or husband to the joint property of the marriage will arise and will not abolish/eliminate the rights of the wife or husband to the joint property of the marriage.

In the doctrine, we recognize that there are 2 (two) kinds of common ownership, namely free common ownership and bound joint ownership.

According to Herlien Budiono, the notion of free common ownership and binding joint ownership, free common ownership is common ownership of an object which is the direct goal of the owners; they aim to have something in common. Bound joint ownership is joint ownership of an object which is one result of another legal event.²⁷

The existence of free common ownership is based on the will of the owners and to own an object together, such as the purchase of an object together. Bonded joint ownership does not depend on the will of the owners and to jointly own an object because bound joint ownership arises and is the result of a legal event such as union property in marriage, joint property acquired during marriage, inheritance *boedel*. arising from the death of the testator.

If a testamentary grant deed on joint assets in a marriage is made jointly by a husband and wife or made by a husband or wife with the consent of the wife or husband, then one of the husband or wives dies first, then the grant deed is based on the will cannot be implemented because inheritance based on a testament grant will only take effect when the husband and wife who gave the testamentary grant have died. Whereas it should be based on Article 830 BW, inheritance has taken place due to the death of one of the husbands or wives. If the testamentary grant deed is to be partially enforced, because one of the husband or wives died first, then the partial implementation of the will violates the confidentiality of the contents of the will and will create legal uncertainty in its implementation. The form of the will grant deed is a form of legal uncertainty, because it violates the provisions of Article 875 BW in conjunction with Article 930 BW in conjunction with Article 953 BW in conjunction with Article 966 BW.

According to Satjipto Rahardjo in Achmad Ali, legal certainty is "*Scherkeit des Rechts selbst*" (certainty about the law itself). There are four things related to the meaning of legal certainty. First, that law is positive, meaning that it is legislation (*gesetzliches recht*). Second, this law is based on facts (*tatsachen*), not a formulation of an assessment that will later be made by the judge, such as "goodwill", and "politeness". Third, the fact must be formulated in a clear way so as to avoid mistakes in meaning, besides being easy to implement. Fourth, the positive law should not be changed frequently.²⁸

Legal certainty requires that the law must be obeyed, implemented, and in its enforcement must not deviate from what has been regulated in the legislation. Prohibition of making a will deed by 2 (two) or more persons declaring their will in the same 1 (one) deed, either to grant a third party or to include a statement of will jointly or reciprocally, in the sense that they jointly testify to other parties or those who mutually give wills to each other are determined in Article 930 BW. Therefore, the form of a will grant deed on joint assets in a marriage made jointly by a husband and wife or made by a husband or wife with the consent of the wife or husband, does not provide a guarantee of legal certainty for legal rights, because in its manufacture it violates The form of the will that is determined contains a statement of the final will of one person and violates the nature of the revocation of the specified will that can be carried out unilaterally by the testator without requiring approval from anyone as stipulated in Article 875 BW.

If the husband and wife do not jointly agree to revoke the deed of the testamentary grant on joint assets in a marriage made jointly by husband and wife or made by husband or wife with the consent of the wife or husband, then in the implementation of the will cause difficulties and legal uncertainty

²⁷ Herlien Budiono, *Kumpulan Tulisan Hukum Perdata di Bidang Kenotariatan Buku Kesatu*. Bandung: PT. Citra Aditya Bakti, 2016, p. 336

²⁸ Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence) Termasuk Interpretasi Undang-Undang (Legisprudence)*, Jakarta: Kencana, 2017, p. 235

regarding the validity of the will. The nature of the revocation of a will that is determined to be carried out unilaterally by a will (Article 875 BW) as well as a prohibition on the making of a will by 2 (two) or more persons stated in 1 (one) same will (Article 930 BW), is intended so as not to cause difficulties and guarantee legal certainty in the implementation of a will.

According to Ahmadi Miru, the principle of freedom of contract is a basis that guarantees the freedom of people to enter into contracts. This is also inseparable from the nature of Book III BW which is only a law that regulates so that the parties can deviate from it (set aside), except for certain articles that are coercive in nature.²⁹ The form of a will grant deed on joint assets in a marriage made jointly by a husband and wife or made by a husband or wife with the consent of the wife or husband, in addition to not providing a guarantee of legal certainty for legal rights, is also threatened with cancellation, because it violates the prohibition. making a will by 2 (two) or more persons stated in the same 1 (one) will as specified in Article 930 BW in conjunction with Article 953 BW.

Legal certainty in making a will grant deed must comply with the provisions of the form of a will as regulated in Article 930 BW - Article 953 BW. Legal certainty in making a will grant deed provides a guarantee of legal certainty for legal rights. In order for a will grant deed to be valid and provide legal certainty and legal protection for legal rights, it must be made by fulfilling all the procedures required in making a will as regulated in Article 930 BW - Article 953 BW. If a testament grant deed does not fulfill all the procedures required in the making of the testament grant deed, then the testament grant deed is threatened with cancellation (Article 953 BW). According to Ahmadi Miru and Sakka Pati, although they are both gifts, grants and wills have different legal arrangements, because these grants are part of the law of the agreement, while wills are part of inheritance law, so that the grant deed requires the signature of the recipient of the grant. whereas in a will, the signature of the will not be required.³⁰

The husband or wife's authority to act in making a testamentary estate deed (*lefaat*) on joint assets in a marriage, namely the husband or wife is capable and authorized to act alone without requiring the approval of the wife or husband, as long as what is granted in the will only the rights and parts belonging to the husband or wife. wife over the objects/objects of joint property in marriage (Article 903 BW in conjunction with Article 66 of the Marriage Law in conjunction with Article 966 BW), because if a testamentary grant deed on joint assets in marriage is made jointly by husband and wife or made by husband or wife with the approval of the wife or husband, then the deed of the will be threatened with cancellation as regulated in Article 930 BW in conjunction with Article 953 BW.

CONCLUSION

The husband or wife's authority to act in making a deed of the testamentary estate (*lefaat*) on joint property in a marriage, namely a capable husband or wife and a lamp to act alone without requiring the approval of the wife or husband, as long as what was granted in the will only and part-owned by husband or wife over the object of joint property in marriage, because if the deed of grant of will on joint property in a marriage is made jointly by husband and wife or made by husband or wife with the consent of the wife or husband, then on the deed of grant of will it will be in danger of being canceled.

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²⁹ Ahmadi Miru, *Hukum Kontrak dan Perancangan Kontrak*, Depok: Rajawali Pers, 2018, p. 4

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