

Juridical Analysis of Applications for Child Guardianship That Cannot Be Accepted by the District Court Causing Harm to the Child

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ABSTRACT

A child who is not under the authority of his parents who apparently does not have a guardian, either one person, then in this case the judge can appoint through a court order, namely a guardian at the request of certain parties who have an interest. The exception is when the parents who live the longest include in their will (testament) to appoint or appoint a guardian for their child, then it is called a trusteeship according to a will. Trusteeship is an institution that replaces parental authority over children who have not reached a certain age (age) or are not yet married. The aim of the study was to analyze the basis for the judge's considerations in deciding the civil case Number 134/Pdt.P/2020/PN Prp which stated that it could not accept the application submitted by the applicant, which caused harm to the child. By using normative juridical methods and statutory approaches, concepts and case study approaches, the results of the research found that the basis for the judge's considerations in deciding civil cases Number 134/Pdt.P/2020/PN.Prp stated that they could not accept a request that filed by the applicant, what caused harm to the child was the consideration that during the trial the Petitioner never submitted evidence explaining HS 's heirs, then knowing the fact that there was another person who had arranged for HS 's inheritance certificate, giving rise to suspicion that someone else had become heirs of HS and there is no evidence stating that HS 's heirs other than EV are not willing to become the guardians of EV , so it is not yet possible to determine whether the Petitioner has the legal right to apply for guardianship of EV , therefore the Petitioner's petition cannot be accepted.

Keywords: Guardianship, Children, Determination, District Court

A. INTRODUCTION

1. Background:

The 1945 Constitution as a basic rule or constitution and is the highest source of law in the Unitary State of the Republic of Indonesia, in Article 28 B paragraph (2) stipulates, that every child has the right to survival, growth and development and the right to protection from violence and discrimination. In

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the laws and regulations, guarantees are also provided for the rights regarding the survival of children.

The rights of these children are among others guaranteed in the rules contained in Book I of the Civil Code (KUH Percivil), Law Number 1 of 1974 which regulates Marriage and the rules contained in Book I of the Compilation of Islamic Law (KHI). Parents are the main and first parties responsible for living expenses, education costs, and children's health costs. Parents must also under certain circumstances act, do something that is already the right and interest of the child.

Related to these things, not all parents are able to do it. Nor are all children in the power of parents. In dealing with the above circumstances, it is necessary to have a substitute institution for parental power over children who have not reached a certain age or have not married. The institution that replaces the power of children to take care of their rights and interests is known as guardianship (*Voogdij*).

Guardianship is the authority to perform certain legal acts for the benefit and rights of children whose biological parents have died or are unable to perform certain legal acts. Or it is also interpreted as a legal protection given to an immature or never-married child who is not under parental control. Guardianship can also be interpreted as supervision of minors who are not under the control of parents and the management of the child's property or property as regulated by law.¹

It is more common in every guardianship to have only one guardian for a child, unless the guardian, the mother, remarries, and the husband is called *a medevoogd*. Statutory guardianship is when one parent of the minor dies, then by law the other parent who lives the longest automatically acts as sole guardian for the child.

The occurrence of a Guardianship can result from the breakup of a marriage, either due to the death of the biological parents or due to a divorce stipulated in a court decision. The breakup of marriage always has legal consequences both on the husband or wife, children and property, especially for underage children.²

A child who is not in the power of his parents who turns out that he also does not have a guardian, either one person, then in this case the judge can appoint through a court determination that is a guardian at the request of certain parties who have interests. The exception is when the longest-living

¹ Admin, *Trust*, bhpjakarta.kemenumham.go.id/index.php/layanan-publik/perwalian, retrieved April 25, 2022.

² *Ibid.*

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parent includes in his will (testament) to appoint or appoint a guardian for his child then it is called guardianship according to the will.³

Guardianship is an institution that replaces parental power over children who have not reached a certain age (age) or have not married. And to determine the age limit in terms of the definition of children, then we will get various kinds of age limits for children, considering the various definitions of child age limits in several laws, can be seen as follows:

- 1) Law Number 1 of 1974 which regulates Marriage , 18 years according to the provisions of Article 50 paragraph (1) of Law Number 1 of 1974 which regulates Marriage;
- 2) Law Number 4 of 1979 which regulates Child Welfare defines children as not yet 21 years old and have never married;
- 3) Law Number 3 of 1997 which regulates the Juvenile Court defines a child as a person who in the case of a delinquent child has reached eight years old, but has not reached 18 years old and has never married;
- 4) Law Number 39 of 1999 which regulates Human Rights states that children are Legal Aspects of Child Protection in the Perspective of National Law of a person who is not yet 18 years old and has never married;
- 5) Law Number 13 of 2003 which regulates Manpower allows the working age of 15 years;
- 6) Law Number 20 of 2003 which regulates the National Education System enforces 9-year compulsory education, which is connoted for children aged 7 to 15 years;
- 7) Law Number 11 of 2012 which regulates the Juvenile Criminal Justice System (SPPA) explains that Children in Conflict with the Law, hereinafter referred to as Children, are children who are 12 (twelve) years old but not yet 18 (eighteen) years old who are suspected of committing a crime.
- 8) Customary law states that customary law does not determine who children say and who adults say. However, in customary law, the size of children can be said to be adults not based on age but on certain tangible characteristics, namely being able to work alone and capable to do what is required in community life and be responsible, and can take care of their own property.⁴

Thus according to the above definition, a child is unlikely to master or manage his own property independently, without the help of adults. The power of guardianship includes power over the person and property or

³ Elita Savira, Sihabuddin and Abdul Rachmad Budiono, *Determination of guardianship of children requested by PPAT as a condition for making a deed of sale and purchase of land rights*, Master of Notarial Affairs Study Program, Universitas Brawijaya, 2017, accessed from <https://hukum.studentjournal.ub.ac.id/index.php/hukum/index>, May 6, 2022.

⁴ Reza Fahlevi, *Legal Aspects of Child Protection in National Legal Perspective*, Journal of Lex Jurnalica Volume 12 Number 3, December 2015.

property of the child. The exercise of guardianship power by the guardian is expected to benefit the child as well as his property. Similarly, if the power ends, it must not cause harm to the child's person and also his property.⁵

Based on the analysis of the application for guardianship determination to complete the requirements of the process of buying and selling a land right, the determination of trust as the basis for the process of buying and selling land rights cannot be ignored. Through the Directory of Decisions of the Supreme Court of the Republic of Indonesia, it was found that a case of a determination application occurred in the area of the Pasir Pangaraian District Court, namely, an application for guardianship determination registered in civil case Number 134/Pdt.P/2020/PN.Prp District Court Pasir Pangaraian. On this determination of guardianship the applicant is LS as the elder brother (late HS father of the child who applied for guardianship on behalf of the father of EV, age 14 years, with the judgment of the application declared inadmissible (*Niet Ontvankelijk verklaard*). Whereas in most cases of application for determination of the same substance, the majority of judges direct the Applicant to withdraw the case if there is a lack or incompleteness of evidence or vagueness of legal facts presented in the application.⁶

The anomaly in the differences in related decisions related to guardianship above occurs due to the application of the principle of disparity (freedom) of judges in deciding a case submitted by the community to the Court. So that the community is harmed a lot, because on the other hand any court decision is based on the principle of "*Res judicata pro veritate habetur*" which means "The judge's decision must be considered correct" where the verdict is handed down, with the irah-rah "For Justice Based on the One and Only God". This principle places the judge very important in the process of law enforcement in this country, so that in practice there may be a conflict between the principle of disparity and the principle of *res judicata*. This thesis discusses the application of these two principles in the determination of guardianship which there is a lack of clarity on the application of the principle of disparity as stipulated in article 24 paragraph (1) of the 1945 Constitution which states that: "The judicial power is an independent power to administer justice in order to uphold law and justice".

2. Problem Statement

Based on previous research related to applications for guardianship determination submitted to the Court, both District Courts and Religious Courts, there were applications that were granted and some applications were

⁵ Ishak *Guardianship By Concept Of Written Law In Indonesia*, Kanun Jurnal Ilmu Hukum, Vol. 19, No. 3, (August, 2017), Faculty of Law, Syiah Kuala University, h. 571-590.

⁶ *Ibid.*

rejected. The judge's consideration in giving the determination is influenced by the principle of disparity in the appearance of a multiinterpretation, so there is no legal certainty. The problems discussed and there are no similarities with past or previous research are formulated as follows: What is the basis for the judge's consideration in deciding civil case Number 134 / Pdt.P / 2020 / PN Prp which states that it cannot accept the application submitted by the applicant, which causes harm to the child?

3. Research Methods

1. Types of Research

In this study, the research method used was normative legal research. The normative legal research method is a scientific research procedure to find the truth based on the logic of legal science from its normative side. Normative juridical research is a study carried out to solve legal problems normatively, basically relying on a critical and in-depth review of library materials and legal documents relevant to the legal issues studied. In normative juridical research, the studies to be discussed and studied are based on the analysis of written materials. Normative juridical research discusses doctrines or principles in legal science. In relation to the type of normative juridical research, the research approach used is: ⁽⁷⁸⁹¹⁾ *Statutory approach (statute approach)*, this approach is carried out by examining all laws and regulations related to the problem (legal issue) at hand. The approach by analyzing existing laws and regulations relates to the material discussed, namely regarding legal considerations that are used as reasons for deciding on guardianship determinations submitted by applicants, both in the District Court, and the Religious Court.¹⁰ (2) *Conceptual Approach*, This approach departs from the views and doctrines that develop in legal science. This approach is important because understanding the views / doctrines that develop in legal science can be a basis for building legal arguments when solving legal issues faced. (3) *Case Approach*, in this study using a case approach, where researchers take child guardianship cases that have permanent legal force by analyzing legal considerations in the form of *ratio decidendi* (Latin) which means the legal reasons used by the judge to provide a basis in deciding the case at hand.¹¹

⁷ Johny Ibrahim, *Normative Legal Research Theories and Methods*, Malang, Bayumedia Publishing, 2006, h. 57.

⁸ Admin, *Guidelines for Writing Scientific Papers (thesis, legal memoranda, Scientific Articles and Papers)*, Malang, Bachelor Program of Faculty of Law, Universitas Brawijaya, 2014., h. 4.

⁹ Zainuddin Ali, *Legal Research Methods*, Jakarta, Sinar Grafika, 2013, h. 24.

¹⁰ Peter Mahmud Marzuki, *Legal Research*, Jakarta, Kencana Prenada Media Group, 2010, p. 35.

¹¹ Marzuki, 2010, *On. Cit.* h. 158;

B. DISCUSSION

1. The judge's consideration in deciding Civil Case Number 134/Pdt.P/2020/PN.Prp which stated that it could not accept the application submitted by the applicant

That on November 8 (eight) on Wednesday at 02.00 WIB, Year 2006 (two thousand six), EV was born the first daughter of HS husband and wife with Herlina BR Sibarani in Kabun Village, Kabun District, Rokan Hulu Regency recorded in accordance with the Deed of Birth Certificate Citation Number 477/DKCS/4362/2006 issued by the Head of the Population and Civil Registration Office of Rokan Hulu Regency. Both of EV's biological parents have passed away, namely HS passed away on Tuesday, October 8, 2019 in Kabun Village, Kabun District, Rokan Hulu Regency in accordance with the death certificate issued by the Head of Kabun Village dated October 14, 2019 with Number 474.3 / UM / 1459. While Herlina Br Sibarani passed away on Wednesday, May 20, 2015 at 15.30 WIB. Due to illness in Kabun Village, Kabun District, Rokan Hulu Regency in accordance with death certificate Number 68 / KBN / VI / 2015 dated June 20, 2015 issued by Kabunda Clinical Doctor.

Because EV is not old enough (immature), a guardian is needed for minors, to take care of the property left by their parents and to meet their living needs. To be appointed as a guardian mentioned above, a determination from the Pasir Pengaraian District Court is required.

LS applicant is a sibling (Younger Sibling) of the late HS and is married in accordance with the letter of *Hatorangon Hot Ripe* (Certificate of Marriage) Number 42/SKN/P/RS/VIII/2000 issued by Huria Kristen Batak Protestant (HKBP) Pangembangan Senen August 14, 2000 Rev. Lumbanturuan, teacher of the congregation Gr. H. Sinamo.

In determination Number 134/Pdt.P/2020/PN.Prp of the Pasir Pengaraian District Court, the following matters were considered:

- 1) The purpose of the Applicant's application is for the Applicant to be appointed as the guardian of the child named EV because both parents of the child have passed away.
- 2) Article 50 of Law Number 1 of 1974 which regulates marriage states: (1) Children who have not reached the age of 18 (eighteen) years or have never entered into marriage, who are not under the power of parents, are under the power of guardians. (2) The guardianship is about the person of the child concerned and his property. Considering, that Article 1 point 1 of Government Regulation Number 29 of 2019 which regulates the Terms and Procedures for Appointment of Guardians states "A guardian is a person or entity that in reality exercises custody power as a parent to a child".
- 3) In Article 1 point 2 of Government Regulation Number 29 of 2019 which regulates the Terms and Procedures for the Appointment of Guardians states

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"Parents are biological fathers and/or mothers, or fathers and/or stepmothers, or adoptive fathers and/or mothers" and in Article 1 point 3 of Government Regulation Number 29 of 2019 which regulates Terms and Procedures for Appointment of a Guardian states that a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb".

4) Based on the evidence presented by the Applicant at the trial, namely evidence P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9, P-10, P-11, P-12, P-13, P-14 and P-15 and the testimony of the above witnesses, legal facts were obtained including:

- That EV is the child of HS and Herlina Br Sibarani;
- That EV's parents HE and HS have passed away;
- That EV was born on November 8, 2006, and is currently 14 (four) years old;
- That the EV currently resides together with the LS Applicant ;
- That Applicant LS is married to Agustiani br Sibarani;
- That based on the affidavit of consent i.e. evidence P-12 to P-15, the siblings of the deceased HS and the siblings of Herlina br Sibarani have no objection to LS being the guardian of the child of the couple HS and Herlina br Sibarani named EV;
- That during his lifetime EV's parents worked as employees at PT. Padasa Six Major;
- That EV's deceased parents had property including land (exhibits P-9 and P-10) and land in the name of EV, and also land and a house and a piece of land on which there was a small building on it but it is not known where the papers were;
- That the Applicant's Legal Representative at the trial has submitted a Legal Opinion, in which it explains that the Applicant cannot submit a certificate of inheritance from HS to EV because the Government of Kabun Village, Kabun District, Rokan Hulu Regency in this case the Head of Kabun Village has issued the Certificate of Inheritance in question to a person who is not entitled and has a legal position as the beneficiary;

5) Based on Article 3 of Government Regulation Number 29 of 2019 which regulates the Terms and procedures for the Appointment of a Guardian, paragraph (1) explains that the person who can be appointed as a guardian is a person who comes from the Family of a child, brother, other person or legal entity by fulfilling the requirements for the appointment of a guardian and through a Court Determination.

6) At the trial, it was known from the testimony of witnesses that the Applicant is the younger brother of EV's parents named HS, so that taking into account Article 1 point 6 of Government Regulation Number 29 of 2019 which regulates the Terms and Procedures for the Appointment of the Guardian, the Applicant can be categorized as the brother of EV.

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- 7) But after the Judge read and paid attention to the legal opinion (*Legal Opinion*) of the Applicant's Legal Counsel, it was found that there was another party who had taken care of the inheritance certificate from HS to the Head of Kabun Village, Kabun District, Rokan Hulu Regency, and according to the Applicant's Legal Counsel, if the other party claimed without rights and legality to the child named EV, then the confession and documents he had were legally flawed and inadmissible.
- 8) To be declared legally defective, the document issued by Kelapa Desa Kabun as the legal opinion of the Applicant's Legal Representative, it is determined through the mechanism of a cancellation lawsuit in the state administrative court, so it cannot simply be declared a legal defect.
- 9) After the Judge considered and considered the evidence submitted by the Applicant and the legal opinion (*Legal Opinion*) of the Applicant's Legal Representative, it turned out that there was another party who took care of the certificate of inheritance from HS at the Kabun Village Office, but in this trial it was never used as evidence by the Applicant so that at trial it was not known who the person who had the certificate of inheritance, and this raises the suspicion that there are other heirs of the HS.
- 10) Because at the trial the Applicant did not submit a certificate of inheritance issued by the Kabun Village Office, so it cannot be known whether EV is the only person who is the heir of H S, besides that the Applicant at the trial also never presented the HS Family Card, either *photocopy* or original, so this makes it even more unclear who regulates heirs of the aforementioned HS.
- 11) In Article 3 paragraph (2) of Government Regulation Number 29 of 2019 which regulates the Terms and Procedures for the Appointment of Guardians , it is explained that to be appointed as guardians, the child's family is prioritized, namely Blood families in a straight line up to the third degree (vide Article 1 number 5 of Government Regulation Number 29 of 2019 which regulates the Terms and Procedures for Appointment of Guardians).
- 12) With the knowledge that there is another person who has taken care of the inheritance certificate from HS at the office of Kabun Village, Kabun District, Rokan Hulu Regency, which then raises the suspicion of other heirs of HS , the Applicant should file a guardianship lawsuit against the other heirs or other heirs who act as applicants to have their custody revoked and then appoint LS as a guardian (vide Article 9 of Government Regulation Number 29 of 2019 which regulates the Terms and Procedures for Appointment of Guardians).

Considering that during the trial the Petitioner never submitted evidence explaining HS's heirs , then by knowing the fact that someone else had taken care of HS's inheritance certificate giving rise to the suspicion that someone else was HS's heir and there was no evidence stating HS's heirs other than EV were not willing to be EV's guardians Therefore, it cannot be determined

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whether the Applicant is legally entitled to file a guardianship application against EV, therefore the Petitioner's application cannot be accepted.

Since the Petitioner's application cannot be accepted, and this Determination is *declaratoir*, the costs incurred in the hearing of this case shall be charged to the Applicant the amount as in the following determination:

In view of the provisions of Law Number 1 of 1974 which regulates Marriage, Government Regulation Number 29 of 2019 which regulates the Terms and Procedures for the Appointment of Guardians and other relevant laws and regulations.

M E N E T A P K A N

- 1) Declaring the Applicant's application inadmissible;
- 2) Sentencing the Applicant to pay the costs of the case which to date is estimated at Rp 106,000.00 (one hundred six thousand rupiah).

Although the judge has the freedom to decide based on the principle of disparity, in deciding it must consider evidence at trial that can make the judge's conviction, so that whatever the judge's decision can be considered correct. In this case, there is a malpractice of advocacy by the Applicant's legal representative, the legal representative should not need to include the legal opinion made by himself as evidence. Because the legal opinion has no evidentiary value, it is instead used as a reason for the judge's doubts about the existence of heirs other than EV.

Indeed, in this case the Applicant did not include the Family Card in the list of evidence of his letter, so that he could not ascertain the number of children resulting from HS's marriage with HE. It is commonly known that people who have died by the Population and Civil Registration Office must have been deleted from the population data base, so that the Family Card also no longer appears the name and identity of the deceased person. So it is natural that the Applicant cannot include the Family Card in HS in the list of evidence, because the old Family Card must have been withdrawn by the Population and Civil Registration Office and replaced by a new one.

In this case if the Judge is careful, then considering the testimony of witness Mariati, sister of HE, Witness Agustian Sihombing, husband of the Applicant, as well as the babysitter of EV, Witness BN N, brother of the Petitioner who all explain that EV is the only child resulting from HS's marriage with HE, so EV is the only heir of the late HS with HE. This fact can be used as material by the Applicant in filing a cassation legal remedy in the Supreme Court or judicial review, because there is a misapplication of the law in Number 134/Pdt.P/2020/PN.Prp of the Pasir Pangaraian District Court.

2. Children's Rights in Child Protection Law

Based on the Convention on the Rights of the Child and Law Number 23 of 2002 which regulates Child Protection, there are 4 (four) general principles of child protection that are the basis for each country in organizing child protection, including:

- 1) Principle of Non-discrimination; The principle of Non-Discrimination means that all rights recognized and contained in the CRC must be applied to every child without any distinction. This principle is contained in Article 2 of the CRC Paragraph (1), "States parties shall respect and guarantee the rights set forth in this Convention to every child in their jurisdiction without discrimination of any kind, without regard to race, colour, sex, language, religion, political or other views, national origin, ethnic or social origin, property status, disability or not, birth or other status either of the child himself or of his or her legal guardian parents." Paragraph (2): "States Parties shall take all necessary measures to ensure that the child is protected from all discrimination or punishment based on the status, activities, opinions expressed or beliefs of the child's parents, legal guardians or members of his or her family."
- 2) the principle of *best interests of the child*; This principle is stated in Article 3 Paragraph (1) of the CRC: "In all actions concerning children carried out by government or private social welfare institutions, judicial institutions, government agencies or legislative bodies, the best interests of children must be the main consideration". This principle reminds all child protection providers that decision-making considerations concern the child's future, not with the size of adults, let alone centered on the interests of adults. What adults think is good, not necessarily good according to the child's interests. It may be the intention of adults to help and help, but what really happens is the destruction of the child's future.
- 3) *The Right to Life, Survival and Development*; This principle is contained in Article 6 of the CRC Paragraph (1): "States parties recognize that every child has an inherent right to life." Paragraph (2): "States parties shall ensure to the maximum extent the survival and development of the child." The message of this principle is very clear that the state must ensure that every child will be guaranteed his survival because the right to life is something inherent in him, not a gift from the people or individual persons. To guarantee the right to life means that the state must provide a conducive environment, adequate living facilities and infrastructure, and access for every child to basic needs. In relation to this principle, it has also been elaborated in the previous discussion related to children's rights.
- 4) The principle of *respect for the views of the child*; This principle is contained in Article 12, paragraph 1 of the CRC: "States parties shall ensure that

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children with their own views have the right to express views freely in all matters affecting the child, and such views shall be respected according to the age and maturity of the child." This principle confirms that children have personality autonomy. Therefore, he cannot only be viewed in a weak, accepting, and passive position, but is actually an autonomous person who has experiences, desires, imaginations, obsessions, and aspirations that are not necessarily the same as adults.¹²

The perspective of child protection is a way of looking at all issues by placing the child's position first and foremost. The implementation of such a perspective always puts children's affairs as the most important thing. As stated in the Declaration of the Rights of the Child, it states that: "*The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth*".¹³

Principles of Child Protection International Conventions Basically, in child protection, it was responded to in the United Nations General Assembly which again issued a statement of the Declaration of the Rights of the Child dated November 20, 1959 which can be seen in Principle 1, Principle 2 and Principle 9, which in principle among others said that:

- 1) Principle 1, "children should enjoy all the rights set forth in this declaration. Every child, without exception, shall receive these rights, without distinction or discrimination of race, color, sex, language, religion, political or other views, national or social origin, wealth, birth, or any other social status, whether himself or his family."
- 2) Principle 2, "The child shall enjoy special protection and shall be afforded opportunities and facilities, by other laws or regulations, to enable his physical, spiritual, spiritual, psychological, and social growth in good health and reasonably in conditions of freedom and dignity. In the establishment of laws for this purpose, the best concern is at the time when the child should be the first consideration."
- 3) Principle 9, "the child must be protected from all forms of neglect, cruelty, and exploitation. Children should not be subjected to trafficking in any of its forms."

Furthermore, child protection efforts finally yielded tangible results by being declared a Convention on the *Rights of the Child* unanimously by the UN General Assembly on November 20, 1989 (UN Resolution No. 44/25 dated December 5, 1989). Since then, children around the world have received special attention in international standards.

¹² Hadi Supeno, *criminalization of children; Offer Radical Ideas of Juvenile Justice Without Conviction*, Jakarta: Gramedia Pustaka Utama, 2010, h. 53-62.

¹³ United Nations, *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

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The State upholds human rights, including the human rights of children which are marked by guarantees of protection and fulfillment of children's rights in the Constitution of the Republic of Indonesia Year 1945 and several provisions of laws and regulations both national and international. This guarantee is strengthened through the ratification of an international convention regulating the Rights of the Child, namely the ratification of the Convention on the Rights of the Child through Presidential Decree Number 36 of 1990 which regulates the ratification of the Convention On The Rights Of The Child (Convention Regulating The *Rights Of The Child*).

The State, Government, Local Government, Community, Family and Parents are obliged to provide protection and ensure the fulfillment of children's human rights in accordance with their duties and responsibilities. Protection of Children carried out so far has not provided guarantees for children to get treatment and opportunities that are in accordance with their needs in various fields of life, so that in carrying out efforts to protect Children's Rights by the Government must be based on human rights principles, namely respect, fulfillment, and protection of Children's Rights.

Based on paragraph (1) of Article 26 of Law Number 35 of 2014 which regulates Amendments to Law Number 23 of 2002 which regulates Child Protection, it is stated that:

Parents are obligated and responsible for:

- a. Nurturing, nurturing, educating, and protecting Children;
- b. Develop children according to their abilities, talents, and interests;
- c. Prevent marriage at the age of the child; and
- d. Provide character education and instillation of ethical values in children.

Based on Article 33 of Law Number 35 of 2014 which regulates Amendments to Law Number 23 of 2002 which regulates Child Protection, it is stated that:

1. In the event that the Parents and Family of the Child are unable to carry out the obligations and responsibilities referred to in Article 26, a person or legal entity that meets the requirements may be appointed as the Guardian of the Child concerned.
2. To become the Guardian of the Child as referred to in paragraph (1) is carried out through a court determination.
3. The guardian appointed as referred to in paragraph (2) must have similarities with the religion of the child.
4. The guardian as referred to in paragraph (2) is responsible for the Child and must manage the property of the Child concerned for the best interests of the Child.

5. Further provisions regarding the terms and procedures for appointing a Guardian as referred to in paragraph (1) are regulated by Government Regulation.

3. The Urgency of Establishing Guardianship for the Benefit of the Child

Guardianship only exists when a child or several children are not under the authority of their parents at all. Guardianship is the power that replaces the power of parents over children and their property. Guardianship because both parents are incompetent to take legal action or have passed away.¹⁴

The emergence of a Guardianship is caused by the breakup of marriage either due to death or due to a court decision and always carries legal consequences both on the husband / wife, children and property, especially for minors.

Obligations that must be carried out as a Guardian:

- 1) Manage the property of children under their guardianship;
- 2) Responsible for losses incurred due to poor management;
- 3) Organizing the maintenance and education of minors in accordance with their assets and representing children in all civil actions;
- 4) Conduct recording and inventory of the child's assets;
- 5) Hold accountability at the end of duties as a trustee.

As it is known that children who are still under their age are not capable of acting in carrying out legal actions, in such cases they are very vulnerable to being used by their guardians for their things. For this reason, the role of Balai Harta Warisan (BHP) as a trustee serves as a guardian supervisor, a father / mother who lives longer to the guardian's treatment of his underage children, as well as to their property from things that are contrary to the law.

Guardianship of minors occurs due to:

- 1) One or both parents have passed away;
- 2) Parents divorced; and
- 3) Revocation from parental power.¹⁵

Therefore, the appearance of Balai Harta Warisan as the supervisory guardian will provide legal consideration for the minors, both their rights and obligations. In a sense, Balai Harta Warisan bears the duties of Temporary Guardian (*Tijdeijke Voogd*) and Trustee (*Toeziende Voogd*) (Article 1 of BHP Instructions and Article 366 of the Civil Code).

¹⁴ Ishak *Guardianship By Concept Of Written Law In Indonesia*, Kanun Jurnal Ilmu Hukum, Vol. 19, No. 3, August 2017, p. 571, Faculty of Law, Syiah Kuala University.

¹⁵ Heritage Hall, *Trust*, <https://bhpjakarta.kemenkumham.go.id/index.php/public-service/management-wills> retrieved August 06, 2022.

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Basically, guardianship is considered *urgent* in the event that the minor child has property left by his parents or other heirs. This trust is necessary to take legal action in relation to the management of the estate for the needs of minors. This relates to the legal terms of the agreement in the context of managing the estate.

In civil law practice, this guardianship is very important because it involves the legal conditions of an agreement stipulated in article 1320 of the Civil Code, namely:

- A. Agree those who bind themselves. The terms of this agreement mean that the legal subject conducting the transaction must exist and make an agreement between the owner and the prospective recipient of the goods;
- B. The ability to make an engagement. The requirement of proficiency that the transacting party must be competent in carrying out legal acts, where the ability to act in law is the ability of a person to make an agreement, so that the engagement he makes becomes valid according to law;
- C. A certain thing. This means that there must be a definite object of law, which in this case is the right to land and buildings;
- D. A lawful cause. That is, the material of the agreement must be an act that is not prohibited by law, violates public order and decency.¹⁶

The validity of an agreement, can be seen from the first 2 (two) conditions which are subjective conditions, which relate to the subject of the agreement, and the last 2 (two) conditions are objective conditions related to the object of the agreement agreed by the parties and will be implemented as an achievement of the parties. The object will manifest in achievements that result in the agreement must be fulfilled by one party to the other.¹⁷

The invalidity of the agreement is caused by an agreement that was born unfreely and/or because of the incompetence of people as the subject of the agreement, resulting in the agreement being canceled (*vernietigbaar*). Revocable means that either party who feels a loss can apply for the cancellation. The agreement itself remains binding on both parties, as long as it is not canceled by the judge at the request of the party entitled to request the cancellation.

¹⁶ Nia Sita Mahesa, *Is it legal to buy and sell land & buildings if the building turns out to belong to a third party?*, <https://www.hukumonline.com/klinik/a/sahkah-jual-beli-tanah-bangunan-if-the-building-turns-out-belongs-to-a-third-party-lt60e2745914b74>, retrieved May 07, 2022.

¹⁷ Kartini Muljadi and Gunawan Widjaja, *Engagement born of law*, Jakarta; Raja Grafindo Persada, 2005, h. 53.

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Meanwhile, if the objective conditions in the agreement are not fulfilled, then the agreement is null and void (*nietig*). Null and void means that from the beginning there was never a treaty or agreement. Another term that can be used is "*void ab initio*", which means "considered invalid from the beginning". Cancellation that occurs under the law, resulting in the legal action concerned is considered never to have occurred.¹⁸

The transfer of land rights can be through two ways, namely by "switching" and "transferring". Switching means that the transfer of rights to the land without going through a certain legal act, in the sense that the right to the land for the sake of law transfers by itself. The transfer of land rights due to inheritance without a will is an example of the transfer of land rights because the law passes to the heirs. The transfer of land rights to his heirs is regulated in inheritance law, and it depends on which inheritance law is used by the heir and heir concerned whether the inheritance law is according to religious inheritance law (e.g. Islam) or inheritance law according to customary law. The transfer of inheritance rights takes place when the heir dies, with the death of the testator, then legally the inheritance rights automatically transfer the heirs.

Meanwhile, the transfer or transfer of rights, namely the transfer of land rights through legal acts of transfer of land rights carried out deliberately by the right holder to another party. The form of transfer of rights can be in the form of buying and selling, exchange, grants, gifts according to custom, income in the company or "*inbrenng*" and testamentary or "*legat*" grants. The legal deed is carried out while the right holder is still alive and is a legal act of transfer of rights that is cash, except for testamentary grants. This means that with the implementation of the legal act, the right to the land concerned transfers to another party. Legal acts in the form of buying and selling, exchanging, grants, gifts according to custom, income in the company or "*inbrenng*" and testamentary grants or "*legaat*" are carried out by the parties before the Land Deed Making Officer (PPAT).¹⁹

According to customary law, land sale and purchase is an act of transferring land rights that is light and cash, clearly means that the transfer of rights must be carried out before the traditional head, who acts as an official who bears the order and validity of the act of transfer of rights so that the act is known to the public. Cash means, that the act of transferring rights and paying the price are carried out simultaneously, therefore cash may mean that the price of land is paid in cash, or only partially paid (cash is considered cash). In the event that the buyer does not pay the rest, then the seller cannot sue on

¹⁸ Fienso Suharsono, *Legal Dictionary*, Jakarta, Vendetta Publishing, 2010, h. 7

¹⁹ M. Or, *Indonesian Agrarian Law*, First printing, Jakarta; Sinar Grafika, 2015, pp.145-146;

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the basis of the sale and purchase of land, but on the basis of the law of accounts receivable.²⁰

According to the Civil Code, sale and purchase is an agreement in which one party (seller) binds himself to surrender (title to) an object and the other party (buyer) to pay the price that has been promised according to article 1457 of the Civil Code. As for according to article 1458 of the Civil Code, buying and selling is considered to have occurred between the two parties when an agreement is reached on the object being traded and the price even though the object has not been handed over and the price has not been paid. With the sale and purchase, the title to the land has not passed to the buyer even though the price has been paid and the land has been handed over to the buyer.²¹

The legal remedy that can be taken by an applicant who feels aggrieved because his guardianship determination application is declared inadmissible is to appeal to the Supreme Court of the Republic of Indonesia. Or because in this case it has not entered the substance of the examination, because it is only declared inadmissible, the applicant can file a new application by correcting the deficiencies in the past application.

E. CONCLUSION

The basis for the judge's consideration in deciding civil case No. 134/Pdt.P/2020/PN.Prp which stated that it could not accept the application submitted by the applicant, which caused harm to the child was the consideration that during the trial the Applicant never submitted evidence explaining HS's heirs, then by knowing the fact that someone else had taken care of HS's inheritance certificate thus giving rise to the suspicion that there are other persons who are the heirs of HS and there is no evidence stating that HS's heirs other than EV are not willing to be the guardians of the EV, then against the application of the Applicant it cannot be determined whether the Applicant is entitled under law to apply for guardianship against EV, therefore the application of the Applicant cannot be accepted.

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²⁰ Adrian Sutedi, *Transition of Rights to Land and its Registration*, Seventh printing, Jakarta; Sinar Grafika, 2016, h. 71-72.

²¹ *Ibid.*

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