

LEGAL ANALYSIS OF THE STATUS OF INHERITANCE RIGHTS OF CHILDREN BORN FROM A SURROGATE MOTHER AGREEMENT REVIEWED ACCORDING TO POSITIVE LAW

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ABSTRACT

Basically, regulations related to surrogacy do not have specific provisions governing surrogate mothers. Therefore, regarding the provisions of Article 127 paragraph (1) of the Health Law, there is an agreement with the provisions of Law Number 39 of 1999 in Article 10 paragraph (1), which states that in order to continue the lineage, a legal marriage is required. Therefore, from the perspective of Islamic law and civil law, a child born outside of a legal marriage only has a civil relationship with the mother and the mother's family. The child is not entitled to inheritance rights or support from the biological father. Therefore, in Islamic law, there is no "child of adultery"; there is only "a child born outside of a legal marriage" whose status is the same as a child born from a relationship between a man and a woman without the bonds of a legal marriage. Therefore, the status of an illegitimate child cannot be said to be a legitimate child. The method used in this writing is a qualitative research method with a normative juridical approach. The results of this study aim to relate to the policy of the Constitutional Court Decision No. 46/PUU-VIII/2010 concerning the review of Article 43 paragraph (1) of the Marriage Law regulates the recognition of civil relations between illegitimate children and their fathers, as follows: Children born out of wedlock have a civil relationship with their mother and their mother's family as well as with the man as their father who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship, including a civil relationship with their father's family. Therefore, in the provisions of Articles 862 to 873 of the Civil Code regarding the conformity of the Civil Code regulations, inheritance only applies to illegitimate children who are recognized by their father and/or mother. Without recognition from the father and/or mother, illegitimate children do not have the right to inherit.

Keywords: *Inheritance Law, Agreement, Children, Uterine Lease, Positive Law.*

ABSTRAK

Pada dasarnya, peraturan terkait surrogasi tidak memiliki ketentuan khusus yang mengatur ibu pengganti. Oleh karena itu, terkait ketentuan Pasal 127 ayat (1) Undang-Undang Kesehatan, terdapat kesesuaian dengan ketentuan Undang-Undang Nomor 39 Tahun 1999 pada Pasal 10 ayat (1) yang menyatakan bahwa untuk melanjutkan garis keturunan, diperlukan perkawinan yang sah. Oleh karena itu, dari perspektif hukum Islam dan hukum perdata, anak yang lahir di luar perkawinan yang sah hanya memiliki hubungan perdata

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dengan ibu dan keluarga ibu. Anak tersebut tidak berhak atas hak waris atau nafkah dari ayah kandungnya. Oleh karena itu, dalam hukum Islam, tidak ada istilah "anak zina"; yang ada hanyalah "anak yang lahir di luar perkawinan yang sah" yang statusnya sama dengan anak yang lahir dari hubungan antara seorang pria dan seorang wanita tanpa ikatan perkawinan yang sah. Oleh karena itu, status anak luar nikah tidak dapat dikatakan sebagai anak sah. Metode yang digunakan dalam penulisan ini adalah metode penelitian kualitatif dengan pendekatan yuridis normatif. Hasil penelitian ini bertujuan untuk mengaitkan dengan kebijakan Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010 tentang pengujian Pasal 43 ayat (1) UU Perkawinan yang mengatur pengakuan hubungan perdata antara anak luar kawin dengan ayahnya, sebagai berikut: Anak yang lahir di luar perkawinan mempunyai hubungan perdata dengan ibunya dan keluarga ibunya serta dengan laki-laki sebagai ayahnya yang dapat dibuktikan berdasarkan ilmu pengetahuan dan teknologi dan/atau alat bukti lain menurut hukum mempunyai hubungan darah, termasuk hubungan perdata dengan keluarga ayahnya. Oleh karena itu, dalam ketentuan Pasal 862 sampai dengan 873 KUH Perdata mengenai kesesuaian peraturan KUH Perdata, pewarisan hanya berlaku bagi anak luar kawin yang diakui oleh ayah dan/atau ibunya. Tanpa pengakuan dari ayah dan/atau ibunya, anak luar kawin tidak berhak mewarisi.

Kata Kunci: Hukum Waris, Perjanjian, Anak, Sewa Rahim, Hukum Positif.

INTRODUCTION

A. Background

Humans are by nature creatures who are more honored and prioritized by God than other creatures. Allah SWT has even established regulations regarding marriage for mankind. Therefore, these rules established by Allah SWT are not permitted to be violated, because humans are not permitted to act as they please, ignoring all the commands and recommendations that Allah SWT has given to His people. Therefore, based on the provisions of the Compilation of Islamic Law, Article 2 (KHI), the Compilation of Islamic Law explains that: "Marriage according to Islamic law is marriage, a very

strong contract, miitsaqan ghaliizhan, to obey Allah's commands, and its implementation is an act of worship."

Marriage aims to establish a family, continue the lineage, prevent immoral behavior, and maintain peace of mind and soul. The importance of marriage extends beyond the sexual relationship between a man and a woman, but more broadly concerns the life and interests of society, the nation, and the state. Law No. 1 of 1974 concerning Marriage explains that marriage is closely related to spirituality and religion. Marriage encompasses not only physical or physical elements, but also spiritual or spiritual elements, which play a crucial role in forming a happy family, close ties with offspring, which is also the purpose of

marriage. Their care and education are the rights and obligations of parents.

Therefore, the arrival of a child in a household is always awaited and hoped for by families, especially for married couples who have not been blessed with children for a long time. Their arrival is a moment of great joy and anticipation for the couple and their family. A child born healthy, with perfect limbs and functioning properly, is a cherished desire for both husband and wife.

According to Article 42 of Law No. 1 of 1974 concerning Marriage, a legitimate child is one born within or as a result of a legal marriage. Meanwhile, Article 250 of the Civil Code explains that a legitimate child is a child born during a marriage. Therefore, a child born within a legal marriage has the status of a biological child, with inherent civil rights and the right to use a name after his or her name to indicate his or her descent and origin.

Therefore, it can be analyzed that a child "born outside of a legal marriage" can be understood in the context of the status of children outside of marriage, which generally addresses issues of the civil status of children, as explained in Article 42 of Law No. 1 of 1974 concerning Marriage. A legitimate child is a child born within or as a result of a legal marriage. Then, it is explained again in the provisions of Article

2 paragraph (1) of Law No. 1 of 1974 concerning Marriage, which explains that "a marriage is valid if it is carried out according to the laws of each religion and belief" and Article 2 paragraph (2) of Law No. 1 of 1974 concerning Marriage states, "every marriage is recorded according to the applicable laws and regulations."

Therefore, regarding marriage registration, the main legal issue regarding marriage registration according to laws and regulations is regarding the legal meaning of marriage registration. Regarding this issue, as stated in general provisions number 4 letter b of Law No. 1 of 1974 concerning Marriage concerning the principles of marriage, it states:

"... that a marriage is valid if it is conducted according to the laws of each respective religion and belief. Furthermore, each marriage must be registered according to applicable laws and regulations. The registration of each marriage is the same as the registration of important events in a person's life, for example, birth and death, which are stated in a certificate or a deed, which is also included in the registration list."

PROBLEM FORMULATION

To focus the discussion in this research, the following problem formulations are made regarding the legal issues raised:

1. How is the Legal Analysis of the Inheritance Status of Children Born from a Conjugal Lease Agreement Considered According to Positive Law ?

2. How is the Biological Civil Relationship of Inheritance of Children Born from a Conjugal Lease Agreement Considered According to Positive Law ?

RESEARCH METHOD

Related to the previous problem identification, this research uses a normative or doctrinal juridical approach. The normative juridical approach is a legal research method conducted by examining library materials and is used because this research starts from and utilizes primary data, namely secondary data.

This research is often also called doctrinal legal research, namely library research or document study, because this research is conducted or directed only at written regulations or other legal materials. Essentially, research conducted by examining library materials or secondary data, consisting of primary, secondary, and tertiary legal materials. Therefore, doctrinal legal research uses secondary data, by studying and reviewing or in an effort to inventory the rules of positive law, the discovery of legal principles and the philosophical basis of positive law to determine how the actual legal behavior of

the actors in legal relations and normative order Regarding the Juridical Analysis of the Inheritance Status of Children Born from Uterine Lease Agreements Reviewed According to Positive Law derived from library materials and other laws and regulations. Normative legal research not only examines regulations in the form of laws but also the principles related to the research problem. As the researcher has previously described in the author's research background, and it is hoped that the use of this approach can objectively explain all the problems studied as the basis for compiling materials in writing this journal research. And the comparative approach is an approach taken to qualitatively answer existing legal problems in accordance with the reality of the application of existing theories in surrogacy contracts by surrogate mothers. In order to answer legal certainty and justice. Based on the title and problem statement in this research proposal, this research is descriptive analytical and prescriptive in nature, employing qualitative methods. This research aims to provide in-depth, specific descriptions (deductive) and is prescriptive in nature, aiming to illustrate or formulate problems based on existing circumstances/facts. In other words, prescriptive research is research aimed at obtaining recommendations on what should be done

to address specific problems. As a prescriptive science, jurisprudence studies legal principles, legal systematics, comparative law, legal objectives, legal certainty values, legal validity, legal concepts, and legal norms. As an applied science, jurisprudence establishes standard procedures, provisions, and guidelines for carrying out legal activities.

The aim is to accurately and accurately describe the conditions or phenomena related to the legal force of legal analysis of the implementation of surrogacy agreements from a positive legal perspective. This research is also expected to strengthen existing theories related to the implementation of surrogate mother agreements from a positive legal perspective. The data collection technique used in this research is obtained from library data sources. This research was conducted to obtain secondary data obtained from library study data sourced from primary legal materials, secondary legal materials, and tertiary legal materials.

RESEARCH RESULTS AND DISCUSSION

1. Legal Analysis of the Inheritance Status and Rights of Children Born from a Uterus Rental Agreement, Reviewed According to Positive Law

In a marital relationship, the most important factor is the presence of a child, a gift desired by many married couples. Likewise, couples who are unable to conceive will often seek all means to achieve this through in vitro fertilization (IVF), polygamy, and even, in modern times, the practice of womb rental for childbearing.

Uterus rental involves the fertilization of a husband and wife's egg and sperm, which are combined and implanted in the uterus of a woman they rent. In other words, using another woman's uterus to conceive and give birth to the couple's offspring, paying a fee to the woman who agrees to carry their child.

Therefore, surrogacy is fundamentally prohibited by the Indonesian Ulema Council (MUI) based on MUI Fatwa Decree Number: KEP-952/MUI/XI/1990. This is because the child resulting from surrogacy will lead to unclear lineage and inheritance, and will also cause more harm than good.

A surrogacy contract is entered into by a married couple who desire children but are unable to conceive naturally and then decide to use surrogacy.

Therefore, the legal consequences of a surrogacy contract are that if one party breaks their promise or commits a breach of

contract, they cannot sue the other party. There is no legal basis for the parties to sue. In the context of the case, the agreement does not meet the objective requirements for a valid contract, thus rendering it null and void (van rechtswege nietig). Therefore, legally, the agreement never existed and no obligation was ever formed between the parties. A womb rental agreement by a surrogate mother is called a "barring contract" in Dutch, while in English it is called a surrogacy contract. A surrogate mother is a woman who carries a child for another person and also gives the child to that other person and also transfers her parental rights to that other person. A woman who carries a child from another partner and then, after giving birth, transfers custody of the child to the couple from whom the child was born.

According to Fred Amelen, a woman binds herself through an agreement with another party (husband and wife) to become pregnant after the union of male and female germ cells, which is fertilized outside the uterus until delivery according to the agreement. The baby is then handed over to the husband and wife in exchange for an agreed-upon financial reward.

Surrogate motherhood is a test-tube baby (in vitro fertilization) technique in which the sperm and ovum of a married couple are processed in a test tube and then inserted

into the uterus of another person, not the wife. A woman who agrees to have her embryo entrusted to her is called a surrogate mother, and a married couple who wishes to use her services are commonly referred to as intended parents. The surrogate mother is paid for all expenses during the pregnancy, labor, and after delivery. After giving birth, the surrogate mother must hand over the child to the intended parents. Therefore, the sperm of a man (husband) and a woman (wife) is then implanted in the womb of the surrogate mother. The surrogate mother is bound by an agreement between the husband and wife, with a specific fee for the woman renting the womb. After giving birth, the surrogate mother is obligated to hand over the baby she is carrying to the parents who rented the womb, based on the agreement.

Fundamentally, inheritance distribution procedures are crucial under Islamic law, particularly upon the death of the testator. Therefore, according to Islamic law, inheritance involves not only property but also liabilities or debts left by the testator, including outstanding obligations.

Islamic law emphasizes the importance of settling all rights of the testator before inheritance distribution occurs. as this is regulated in the provisions of the Al-Qur'an Surah An-Nisa' Verse 11. As Allah S.W.T says:

Meaning: "Allah has ordained for you concerning (the division of inheritance for) your children, (namely) a son's share equal to that of two daughters. If the children are all daughters, more than two, their share is two-thirds of the estate left behind. If she (the daughter) is only one, she gets half (the estate left behind). For both parents, each of their share is one-sixth of the estate left behind, if he (the deceased) has children. If he (the deceased) has no children and he is inherited by both parents (only), his mother gets one-third. If he (the deceased) has several siblings, his mother gets one-sixth. (The inheritance is distributed) after (fulfillment of) his will or (and repayment of) his debts. (Regarding) your parents and your children, you do not know which of them is of greater benefit to you. This is the decree of Allah. Indeed, Allah is All-Knowing, All-Wise."

Therefore, heirs must understand that all obligations of the heir, such as debts or dowries not yet paid to the wife, must be settled before the assets are passed on to the heirs.

Therefore, based on the provisions of Law No. 1 of 1974 concerning Marriage, as explained in Article 42 of the Marriage Law, a legitimate child is a child born within a legal marriage. Furthermore, Article 43 paragraph (1) of the Marriage Law states that an illegitimate child is a

child born outside of marriage and has a civil relationship only with the mother and the mother's family.

Under civil law, such a child can be categorized as a legitimate child. This is as stipulated in Article 50 of Law No. 24 of 2013 concerning Amendments to Law No. 23 of 2006 concerning Population Administration, which essentially states that child legitimacy must be reported to the implementing agency no later than 30 days after the child's father and mother marry and receive a marriage certificate. This provision can be exempted for parents whose religion does not permit the legitimization of children born out of wedlock.

It is understandable, therefore, that illegitimate children cannot inherit from their biological father. However, this does not mean that illegitimate children are excluded from inheritance from their parents. An illegitimate child can inherit from their biological father in several ways. As understood, the biological father of the illegitimate child can make a will. The child can also apply to the religious court for a mandatory will, which cannot exceed the legal heir's share, if the biological father wishes and is based on a court ruling.

Regarding the status of children born through surrogacy, we must first examine

the definition of a legitimate child in Article 42 of Law No. 1 of 1974 concerning Marriage ("Marriage Law"). Article 42 of the Marriage Law states that a legitimate child is a child born in or as a result of a legal marriage.

Meanwhile, in Islamic law, based on Article 99 of the Compilation of Islamic Law ("KHI"), a legitimate child is defined as:

- a. a child born in or as a result of a legal marriage
- b. and the result of a legal ectopic conception between husband and wife and born by the wife.

Based on biological principles, a child born to a surrogate mother through surrogacy is the child of the husband and wife, only born through another woman.

II. Analysis of the Biological Civil Relationship and Inheritance of Children Born from a Waiver Agreement, Reviewed According to Positive Law

In civil law, a child born out of wedlock is called a natural child. They can be acknowledged or disowned by their father or mother. According to the system adopted by the Civil Code, only with recognition does a kinship relationship arise, with its consequences, particularly inheritance rights between the child and the

acknowledging parent. A kinship relationship between the child and the acknowledging parent's family only occurs with legalization.

Article 43 paragraph (1) of Law No. 1 of 1974 concerning Marriage states: "A child born out of wedlock has a civil relationship only with his or her mother and her or her mother's family."

Essentially, the status of an illegitimate child differs from that of a legitimate child, as this status has implications for inheritance, namely, differences in the inheritance shares of illegitimate children and legitimate children. Even if an illegitimate child has a civil relationship with the mother and the mother's family, and with the father and the father's family, just as with legitimate children, the status of an illegitimate child remains.

Inheritance for illegitimate children is regulated by the Civil Code, including:

- a. If the deceased leaves legitimate descendants or a husband or wife, the illegitimate children inherit 1/3 of the share they would have received as legitimate children (Article 863);
- b. If the deceased leaves no legitimate heirs according to law, the illegitimate children inherit the entire estate (Article 865);

c. The law does not grant illegitimate children any rights to the property and blood relatives of their parents, except as stated in the following article (Article 872);

d. If a person or blood relative dies without leaving any blood relatives of a degree permitted to inherit and without leaving a husband or wife, the acknowledged illegitimate child has the right to claim the entire inheritance for themselves, overriding the state (Article 873).

Therefore, regarding inheritance of illegitimate children, Articles 862 through 873 of the Civil Code are discussed. Therefore, according to the Civil Code, inheritance only applies to illegitimate children recognized by their father and/or mother. Without recognition from the father and/or mother, illegitimate children have no right to inherit.

Therefore, regarding policy, Constitutional Court Decision No. 46/PUU-VIII/2010 does not mention birth certificates for illegitimate children or the legal consequences of the decision on birth certificates for illegitimate children. The implications of this Constitutional Court decision relate to the legal status and proof of parentage of illegitimate children. The relationship with birth certificates is that proving a child's parentage can only be done with an authentic birth certificate

issued by an authorized official as stipulated in Article 55 paragraph (1) of the Marriage Law. With Constitutional Court Decision No. 46/PUU-VIII/2010, the relationship between an illegitimate child and their father is a blood relationship in the biological sense, confirmed through legal process. The Constitutional Court's decision opens up the legal possibility of finding a legal entity responsible for an illegitimate child to act as the father through legal mechanisms using evidence based on the latest science and technology and/or law.

The Constitutional Court's decision only strengthens the position of the illegitimate child's mother in requesting recognition of the child's biological paternity, if the father is unwilling to voluntarily acknowledge the child. With the biological father's recognition of the illegitimate child, a civil relationship arises between the biological father and his father's family. Thus, after the process of recognizing an illegitimate child, a civil relationship is born between the child and his or her father, as regulated in Article 280 of the Civil Code ("KUHPer"), which states:

With the recognition of an illegitimate child, a civil relationship is born between the child and his or her father or mother.

Based on the provisions of the Health Law No. 36 of 2009 Article 127 and the Minister of Health Regulation No. 73/Menkes/PER/II/1999 concerning the provision of artificial reproductive technology services that allow fertilization outside the uterus although limited to husband and wife who are legally married (article 4) can be done with the consent of the couple where the wife's egg will be fertilized by donor sperm in a tube and after fertilization can be implanted into the wife's uterus. With an understanding of the legal aspects in Indonesia, it is clear that a child resulting from a surrogate mother is an illegitimate child because the transfer of embryos resulting from artificial insemination between the husband's sperm and the wife's ovum placed in the uterus of another woman/in another wife is not permitted or because the husband and/or wife do not want the pregnancy, the law is haram and the status is a child resulting from adultery. Referring to Law No. 1 of 1974 concerning Marriage, Article 1, paragraph (1) and (2) states that "A legitimate child is a child born from a legitimate marriage"²⁹ Article 2: "if it is done according to the respective laws and beliefs".

A. CONCLUSION

The researcher can describe the conclusions from the legal issues above as follows:

1. Regarding the status of children born outside of a legal marriage, the status of children born through a surrogate mother can be recognized as illegitimate children due to adultery if the surrogate mother is not married to the husband of the couple. Meanwhile, the child's status changes to the status of a legitimate child if the surrogate mother, also known as the "surrogate mother," is married to the husband of the couple, as stipulated in Law Number 1 of 1974 concerning Marriage, Article 42, which states that "A legitimate child is a child born in or as a result of a legal marriage." Likewise, Article 99 of the Compilation of Islamic Law explains that there are two definitions of legitimate children: first, a child born in or as a result of a legal marriage; second, a child resulting from a legal fertilization outside the womb of a husband and wife and born by the wife. In the provisions of Article 43 paragraph (1) of Law No. 1 of 1974 reviewed from the Civil Code, namely: a) Article 43 paragraph (1) of Law No. 1 of 1974 regulates the recognition of illegitimate children; b) The socio-psychological losses suffered by illegitimate children cannot be fully recovered by the provisions of civil relations with their biological fathers, because the views of illegitimate children are still attached to the child; c) Efforts can be made to prove the relationship between

illegitimate children and their biological fathers through DNA tests, which can of course be proven with legal evidence regulated by law.

2. Therefore, if viewed from the provisions of the Civil Code regulations in Article 250 of the Civil Code, the child has the status of a legitimate child and has an inheritance and civil relationship with the biological parents as long as the husband does not deny it. And if the child is legitimate through the husband's recognition, the child has the right to receive inheritance from his parents, while a child who has the status of a child of adultery does not have inheritance rights from his parents. The Constitutional Court through decision number 46/PUU-VIII/2010 has created a new law regarding the legal status of children born outside of marriage. The core considerations of the Constitutional Court in the decision include: a) The relationship of a child with a man as a father, is not solely due to the existence of a marriage bond with the mother, but can also be based on proof of a blood relationship between the child and the man as a father; b) The rights of a child, regardless of the marital status of both parents, must receive fair protection and legal certainty, because basically, the law does not recognize the term hereditary sin.

B. SUGGESTIONS

The researcher can describe the following recommendations based on the above conclusions:

1. Clear and firm regulations regarding the status of illegitimate children should be provided to ensure that their rights are equal to those of children born of legitimate marriage. Currently, there are no government regulations governing this matter.

2. Legal education should be provided regarding the inheritance rights of illegitimate children from their biological fathers, as stipulated in Constitutional Court Decision No. 46/PUU-VIII/2010. This is because the public is still unaware of the inheritance status of illegitimate children. The goal is to provide legal certainty regarding the inheritance status of children, both biological fathers and mothers, while ensuring that the rights of children are aligned with legal, religious, and social values and do not violate public order.

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