

Responsibilities of the Notary for the Deed of Will that He Makes Violates the Absolute Rights of the Heirs (Legitime Portie)

Yonatan Dea Lorensa

Fakultas Ilmu Hukum, Program Studi Kenotariatan, Universitas Jendral Soedirman

Article Info

Article history:

Accepted: 8 July 2024

Publish: 1 September 2024

Keywords:

Testamentary Grant;

Akta Notaris;

Legitime Porte.

Abstrak

The testamentary grant is a grant regarding goods whose ownership rights only pass to the grantee after the grantor dies. So that if you pay attention to the provisions in Article 875 BW, then the testamentary grant must be made by or before a Notary. then the problem that arises is how the legal consequences of the grant deed that violates the absolute rights of the heirs (Legitime Portie) and how the Notary's responsibility for the testamentary grant deed that violates the absolute rights of the heirs (Legitime Portie). Research Method The research method used in this writing is normative juridical by examining library materials or secondary data. The results of this research show that in written law, referring to the explanation and provisions in 1320, the deed of testamentary grant that violates the legitime portie is considered null and void by itself and is considered to have no binding force from the beginning. Then the liability of Notary includes civil, criminal, administrative responsibilities based on the Notary Office Law, and the Notary Code of Ethics.

This is an open access article under the [Lisensi Creative Commons Atribusi-BerbagiSerupa 4.0 Internasional](#)



Corresponding Author:

Yonatan Dea Lorensa

Universitas Jendral Soedirman

Email: deayonatan@gmail.com

1. INTRODUCTION

Inheritance is a process in which the property or wealth (rights and obligations) of a person who has died transfers ownership rights to the heirs of the person who has died. Provisions for civil inheritance law are regulated in the Civil Code. Inheritance issues arise when someone dies, without someone passing away there will be no discussion of inheritance issues as explained in Article 830 of the Civil Code (Burgerlijk Wetboek/BW). The principle of inheritance according to BW is through blood relations, this can be seen in the provisions of Article 832 BW which explains that those entitled to be heirs are blood relatives, whether legal according to law or outside marriage, and the husband or wife who has lived the longest. According to Article 874 BW, all assets inherited from an heir who dies belong to his heirs, unless the heir has legally determined this in a will (testament). What is meant by a will (testament), based on Article 875 BW is a deed containing a person's statement about what will happen after death, and which can be withdrawn.

In this case, a person who is still alive may not distribute his assets to his heirs (children, husband/wife, parents) on the basis of inheritance, because such a gift can be said to be a gift, or gift. Based on Article 1666 BW, a gift is an agreement whereby the grantor, during his lifetime, free of charge and irrevocably, hands over an object for the needs of the grantee who accepts the handover. The gift must be made while the grantor is still alive and must be done with a Notarial Deed as regulated in Article 1682 BW. According to Utami (2017), there are various types of grants, namely as follows:

1. Formal grants, namely grants that must be in the form of a Notarial deed regarding immovable goods (except land which must be in the form of a PPAT deed based on the Basic Agrarian Law Number 5 of 1960).
2. Material gifts, namely all gifts based on generosity that benefit the recipient of the gift and the form is not tied to a particular form.

3. A testamentary gift (legaat), namely a gift regarding items whose ownership rights only transfer to the recipient of the gift after the gift giver dies.

By paying attention to these provisions, testamentary gifts can also be made, namely gifts regarding items whose ownership rights only transfer to the recipient of the gift after the gift giver dies. So, if you pay attention to the provisions in Article 875 BW, then the will must be made by or before a Notary. The Notarial Institution is one of the social institutions in Indonesia, this institution arises from the need for interaction between human beings who require evidence regarding the civil legal relationships that exist and/or occur between them. The role of a Notary in the services sector is as an official who is given some authority by the state to serve the public in the civil sector, especially in making authentic deeds. Gifts or bequests can be given to anyone by the Grantor, but it should be noted that the terms of the gift must not be detrimental to other parties. The heirs of the grantor have the right to obtain legal protection for any assets owned by the grantor. (Pertwi, 2017)

In civil inheritance law there are provisions on absolute rights for certain heirs to a certain amount of inherited assets or provisions that prohibit this. The absolute right of the heir is called Legitieme Portie. According to Muliana (2017), the conditions for someone to be able to claim their absolute share (legitime portie) are that they must fulfill the following conditions/criteria:

1. The person must be blood relatives in a straight line up and down. These are what are called Legitimaris. So, in this case the position of the husband/wife is different from that of the children and parents of the heir. Even though after 1923 Article 852a BW equalized the position of husband/wife with children (so that the husband/wife received the same share as the children), the husband/wife was not Legitimate. Likewise, the heir's siblings are not Legitimate. Therefore, wives/husbands and siblings do not have legitimate shares or are called non-legitimaris (do not have absolute shares).
2. The person must be an heir according to the law (ab intestato). Seeing these conditions, not all blood relatives in a straight line have the right to an absolute share. The only ones who own it are those who are also heirs according to the law (ab intestato).
3. These people, even without considering the testator's will, are legal heirs (ab intestato).
4. Based on these provisions, it can be understood that even though the Grantor/Heir has the freedom to make a gift deed to anyone, the Grantor/Heir still must pay attention to the absolute rights (legitime portie) of his heirs. Thus, giving a gift is closely related to inheritance.

Basically, BW has provided protection to heirs, which aims to determine the absolute share of heirs to prevent and protect the rights of the heirs' children from the heir's tendency to benefit other people. However, it still often happens in society that gifts are made in violation of the heir's absolute share (legitime portie) of their inheritance, so that the heir does not get a share of their rights, which ultimately gives rise to demands from other heirs.

Public understanding of gifts and inheritance often causes problems. The inconsistency between the provision of grants that occurs in the community and the provisions of Legitieme Portie causes legal problems to arise. Based on Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries (hereinafter referred to as UUNJ), Notaries as public officials who are given attributive authority by the state to make authentic deeds have the responsibility to guarantee the truth of what is being said. stated in a deed made by or before him. So, in terms of making a testamentary gift deed, the Notary has a very important role. Notary assistance from the start before the Heir dies when making the Deed of Will until the Heir dies is very necessary.

Heirs who suffer losses can claim their rights according to the procedures regulated by law. So, from the background above, the author was interested in carrying out this research. Based on the background described above, the problems studied are about the legal consequences of a gift deed which violates the absolute rights of the heirs (*Legitieme Portie*), and what the responsibility of the Notary is regarding the testamentary gift deed which violates the absolute rights of the heirs (*Legitieme Portie*).

2. RESEARCH METHOD

The type of research used in this research is qualitative research with a normative juridical research method, which means that this research refers to the analysis of legal norms with the aim of finding the truth based on scientific logic from the normative side. Specifically, this research uses 3 (three) types of approaches, namely the statutory approach, the conceptual approach, and the analytical approach.

Research is carried out by examining library materials or secondary data. This research is also called library legal research, namely by studying books, statutory regulations and other documents related to this research. The primary legal materials used in this research are the Civil Code (*Burgerlijk Wetboek*), and Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries.

Meanwhile, the secondary legal materials used in this research are conceptions that developed based on theories, concepts, literature and legal journals related to the legal issues discussed in this research. So secondary sources of material need to strengthen the discussion that is being tried to be researched.

3. RESEARCH RESULTS AND DISCUSSION

The general description in this research is an inheritance system which is a process in which the property or wealth (rights and obligations) of a person who has died transfers ownership rights to the heirs of the person who has died. Provisions for civil inheritance law are regulated in the Civil Code.

Meanwhile, inheritance issues often arise when someone dies, without someone passing away there will be no discussion of inheritance issues as explained in Article 830 of the Civil Code (*Burgerlijk Wetboek/BW*). The principle of inheritance according to BW is through blood relations, this can be seen in the provisions of Article 832 BW which explains that those entitled to be heirs are blood relatives, whether legal according to law or outside marriage, and the husband or wife who has lived the longest. So, a discussion was carried out in several dimensions that needed to be explored more deeply.

3.1. Legal Consequences of Grant Deeds That Violate the Absolute Rights of Heirs (*Legitieme Portie*)

According to Soeroso, a legal consequence is an event that arises from a cause, namely an action carried out by a legal subject, whether an action that is in accordance with the law or an action that is not in accordance with the law. In other words, a legal consequence is the result of a legal act and a legal act is every action of a legal subject whose consequences are regulated by law. These consequences can be considered to be the will of the person carrying out the act. So that a consequence is caused by law for actions carried out by legal subjects. (Soeroso, 2013)

It is clearer that legal consequences are all the consequences that occur from all legal actions carried out by legal subjects against legal objects or other consequences caused by certain events that the relevant law has determined or considered as legal consequences. (Syafirin, 2011)

According to Soedjono Dirdjosisworo, in his book *Introduction to Legal Science*, legal consequences arise because of the existence of legal relationships

where in legal relationships there are rights and obligations. Events or events that can give rise to legal consequences between parties who have a legal relationship, these legal events exist in various aspects of law, both public law or private. (Dirdjosisworo, 2010)

Based on the definition above, legal consequences are a term used to refer to the consequences or results of actions or events involving legal actions. The act of granting a testamentary gift is a legal act that is realized by the existence of a deed of gift. Grants include formal agreements that require a notarial deed or authentic deed, so it can be said that this notarial deed or authentic deed is an absolute requirement for a testamentary gift deed. According to Adjie (2008), in this case there are 3 (three) aspects that must be considered when a deed is drawn up to be said to be authentic, these aspects are:

a. Outwardly (*uitwendige bewijskracht*)

The external ability of the Notarial deed is the ability of the deed itself to be able to prove its validity as an authentic deed (*acta publica probant seseipsa*). So, if we look at the stage of making it as an authentic deed, the Notarial Deed remains an authentic deed, until there is a lawsuit from another party which has permanent legal force.

b. Formal (*formele bewijskracht*)

Regarding the formal aspect of a Notarial deed, the Notarial deed must provide certainty regarding an event or legal action carried out by the parties as well as to formally prove the certainty of the day, date, month, year, time (time) facing and the parties appearing, initials and signatures of the presenters, witnesses and Notary.

c. Material (*materiale bewijskracht*)

Regarding the material aspects of a Notarial deed, namely regarding the validity of the material contained in the contents of the Notarial deed, it must be considered valid until it can be proven otherwise (*tegenbewijs*). Regarding the material made in a Notarial deed, it is the statement and wishes of the parties who come to the Notary to have an authentic deed drawn up.

The three aspects mentioned above are conditions for the perfection of a Notarial deed as an authentic deed and anyone is bound by the existence of the Notarial deed. The conditions for the validity of an agreement itself are regulated in Article 1320 BW, namely:

- a. their agreement that binds them;
- b. the ability to create an agreement;
- c. a particular subject matter;
- d. a reason that is not forbidden

The function of a testamentary gift deed is that apart from being a condition for stating the existence of a legal act, it is also a means of proof. The requirement to make a testamentary gift authentically is strengthened by the provisions of Article 1682 BW, that the gift deed must be made by or before a Notary. In the case of a violation of the gift deed regarding the legitime portie or absolute part, there will be legal consequences but it depends on the attitude of the heir. If the heirs can accept this fact for granted, then there is no need to sue or file a lawsuit in court for their absolute share. Basically, a testamentary gift deed functions as a person's last wish to another person regarding their inheritance. In this way, disputes between heirs are difficult to avoid.

The testamentary gift deed is a form of agreement as intended in Article 1320 BW. An agreement that does not meet the legal requirements as regulated in article

1320 BW, both subjective and objective requirements, will have consequences (Hernoko, 2009), which are as follows:

- a. *Nonexistence* If there is no agreement then there is no agreement
- b. *Vernietigbaar* can be cancelled, if the agreement was born because of a defect of will (*wilsgebreke*) or because of incompetence (*onbekwaamheid*). Article 1320 conditions 1 and 2, means that this is related to subjective conditions, so the result is that the contract can be cancelled.
- c. *Nietig* void by law, if there is an agreement that does not fulfill certain object requirements or does not have a cause or the cause is not permissible (Article 1320 paragraphs 2 and 4), meaning that this is related to the objective elements, so the result is that the agreement is null and void by law.

In written law, referring to the explanation and provisions in 1320, a testamentary gift deed that violates the *legitieme portie* is considered "null and void" by itself and is deemed to have no binding force from the start, because it violates the objective conditions, namely what is the object of the gift. However, in practice, a will/testament deed remains valid even if it contains a violation of the *legitieme portie* of the heir, as long as it has not been canceled by the injured heir, so that its character is no longer "null and void" but becomes "cancelable".

3.2. Responsibility of the Notary for the Deed of Will Made by Him Violating the Absolute Rights of the Heirs (*Legitieme Portie*)

Notaries as public officials who are given attributive authority by the state through UUJN to make authentic deeds have the responsibility to guarantee the truth of what is stated in the deed made by or before them. In the Civil Code, the definition of an authentic deed can be found in Article 1368, which states "An authentic deed is a deed made in a form determined by law or before a public official authorized to do so in the place where the deed is made."

Then in the UUJN preamble it is stated, "that to guarantee legal certainty, order and protection, authentic written evidence is needed regarding acts, agreements, stipulations and legal events made before or by authorized officials." So in this case it explains that the Deed of Will made by a Notary is an authentic deed which has legal force with a guarantee of certainty.

Looking at the meaning and descriptions above, it can be seen how important the role of a will-grant deed made by a Notary is. However, it is not necessarily the case that a testamentary gift deed made by or before a notary can be said to be perfect, because in practice authentic notarial deeds sometimes violate the provisions of statutory regulations in their contents and can result in being null and void. So the Notary must be responsible for the deed made by or before him. Regarding the issue of official accountability, according to Kranenburg and Vegtig in Ridwan (2006), there are two underlying theories, namely:

- a. The theory of *fautes personnelles*, namely the theory which states that losses to third parties are borne by the official whose actions have caused the loss. In this theory the burden of responsibility is directed at humans as individuals.
- b. *Fautes de services* theory, namely a theory which states that losses to third parties are borne by the agency of the official concerned.

The scope of a notary's responsibility includes the material truth of the deed he or she makes. Regarding the responsibilities of notaries as public officials relating to material truth, in Ghofur (2009) it is stated that the responsibilities of notaries can be divided into four, namely:

- a. Civil responsibility for the material truth of the deed made;

- b. Notary's criminal responsibility for material truth in the deed he or she makes;
- c. The notary's responsibility is based on the notary office regulations (UUJN) regarding the material truth in the deed he or she makes;
- d. The notary's responsibilities in carrying out his duties are based on the Notary Code of Ethics.

In connection with the issue regarding the Notary's responsibility for the deed of will made by him that violates the *legitieme portie*, the notary is individually responsible for the authentic deed he makes. A notary's responsibilities arise from the obligations and authority given to him. These obligations and authorities legally and legally come into effect from the moment the notary takes his oath of office as a notary. The oath that has been taken is what should control all the notary's actions in carrying out his office.

In terms of civil law, the notary's responsibility for the testamentary grant deed made by him violates the *legitieme portie* based on Article 1365 BW concerning unlawful acts. Article 1365 BW states that "Every act that violates the law and causes loss to another person, requires the person who caused the loss through his fault to compensate for the loss."

Referring to this article, it can be interpreted that every act that violates the law and causes loss to another person requires the person who caused the loss through his fault to compensate for the loss. So, in this case, the Notary in assuming his position has been sworn in which has consequences and responsibilities, so that the Notary as a public official knows how to make a deed correctly in accordance with applicable legal provisions by adhering to the principles of accuracy and prudence. So, anything that gives rise to rights based on a deed of testamentary gift that causes harm to other people is an unlawful act. Furthermore, the responsibility that can be imposed on a notary as a result of the deed of will made by him violating the *logiteme portie* is administrative sanctions. In carrying out their official duties, Notaries must be guided by UUJN and the Notary Code of Ethics.

Based on Article 16 Paragraph (1) letter a UUJN, in carrying out his office "Notaries are obliged to act in a trustworthy, honest, thorough, independent, impartial manner and safeguard the interests of parties involved in legal actions." The meaning of carefulness in this article can be interpreted as carrying out the duties of one's position, one must act carefully as well as paying attention if the deed of testamentary gift that is made violates the absolute rights of the heirs.

So, in relation to the issue regarding the Notary's responsibility for the deed of grant of will that he made in violation of *legitieme portie*, it can be said to have violated Article 16 Paragraph (1) letter a UUJN because his careless actions resulted in causing harm to other people. So, in this case the Notary can be subject to sanctions based on Article 16 paragraph 11 UUJN, namely in the form of:

- a. written warning;
- b. temporary dismissal;
- c. honorable discharge; or
- d. dishonorable dismissal

Then from the perspective of the Notary Code of Ethics, based on Article 6 of the Amendment to the Code of Ethics at the Extraordinary Congress of the Indonesian Notary Association in Banten on 29-30 May 2015, administrative sanctions include two steps, namely preventive steps (supervision) and repressive steps (implementing sanctions). Sanctions imposed on members who violate the Code of Ethics can be in the form of:

- a. Reprimand;

- b. Warning;
- c. Temporary suspension of Association membership;
- d. Dismissal with honor from membership of the Association;
- e. Dishonorable dismissal from membership of the Association

4. CONCLUSION

Based on the discussion above, it can be concluded that the legal consequences of a gift deed that violates the absolute rights of the heir (*Legitieme Portie*) but depend on the attitude of the heir. If the heirs can accept this fact for granted, then there is no need to sue or file a lawsuit in court for their absolute share. However, according to written law, referring to the explanation and provisions in 1320, a testamentary gift deed that violates the *legitieme portie* is considered "null and void" by itself and is deemed to have no binding force from the start, because it violates the objective conditions, namely what is the object of the gift.

Then, the Notary's responsibility for the testamentary gift deed which violates the absolute rights of the heir (*Legitieme Portie*). The Notary is individually responsible for the authentic deed he or she makes. A notary's responsibilities arise from the obligations and authority given to him. These obligations and authorities legally and legally come into effect from the moment the notary takes his oath of office as a notary. The scope of a notary's responsibility includes civil responsibility, criminal responsibility of a notary, responsibility of a notary based on the Law on Notary Positions, responsibility of a notary in carrying out his duties based on the Notary's Code of Ethics.

5. BIBLIOGRAPHY

Book:

- Adjie, Habib. (2008). *Hukum Notaris Indonesia (Tafsir Tematik Terhadap UU No.30 Tahun 2004 Tentang Jabatan Notaris)*. Bandung: PT. Refika Aditama.
- Dirdjosisworo, Soedjono. (2010). *Pengantar Ilmu Hukum*. Jakarta:PT. Raja Grafindo Tinggi.
- Ghofur, Abdul. (2009). *Lembaga Kenotariatan Indonesia: Perspektif Hukum dan Etika*. Yogyakarta: UII Press.
- Hernoko, A. Y. (2009). *Hukum Pejanjian (Asas Proporsionalitas Dalam Kontrak Komersial)*. Surabaya: Kencana.
- Ridwan H.R. (2006). *Hukum Administrasi Negara*. Jakarta: Raja Grafindo Persada.
- Soeroso, R. (2013). *Pengantar Ilmu Hukum*. Jakarta: Sinar Grafika.
- Syarifin, Pipin. (2011). *Pengantar Ilmu Hukum*. Jakarta: Pustaka Setia.

Journal:

- Muliana, Akhmad Khisni. (2017). *Akibat Hukum Akta Hibah Wasiat Yang Melanggar Hak Mutlak Ahli Waris (Legitieme Portie)*. *Jurnal Akta* 4(4). 739-744
- Pertiwi, S. M., Sirtha, I. N., & Dharsana, I. M. P. (2017). *Tanggung Jawab Notaris Terhadap Akta Otentik Yang Berakibat Batal Demi Hukum Pada Saat Berakhir Masa Jabatannya*. *Acta Comitas* 2. 247-257
- Utami, D. S. (2016). *Akibat Hukum Pemberian Hibah yang Melebihi Batas legitime Portie (Analisis Kasus Putusan Pengadilan Negeri Nomor 109/pdt. g/2009/pn. mtr. Mengenai Hibah)*. *Jurnal IUS Kajian Hukum dan Keadilan*, 4(2).