



Division of joint and separate property post-divorce: A legal analysis of supreme court decision no. 32 K/AG/2009

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Abstract

This study analyzes judicial considerations in the division of joint property commingled with separate property following divorce and the legal protection for parties who possess the pre-marital property in property division post-divorce. The research employed a normative juridical method, incorporating statutory, conceptual, and case-based approaches. Legal material sources consisted of primary, secondary, and tertiary legal materials, and the data was qualitatively analyzed. The findings indicate that after divorce, in cases involving the division of joint property which has been mixed with separate property, judges mainly look at the division of joint assets according to existing legal provisions and have not given adequate consideration to the historical context and ownership status of separate property intertwined with joint assets during marriage. The legislation that protects those who hold pre-marital property in this situation is greatly guided by the Marriage Law and the Compilation of Islamic Law (KHI) because it states that separate property will be the personal possession of that party excluded from joint property division upon divorce.

Keywords: Joint property, separate property, divorce, judicial decision

Introduction

Article 1 of the Marriage Law No. 1 of 1974 (hereinafter referred to as the "Marriage Law") defines marriage as: the physical and spiritual union of one man and one woman as husband and wife, based on faith in Almighty God, for the purpose of establishing a happy and eternal home (family). This definition reflects a meaningful and purposeful concept that corresponds to the natural tendency of human beings to live in a social structure.

One aspect that contributes to family happiness is the management of assets. However, when a family experiences instability, the potential for disputes increases significantly. Marriage unites two individuals with differing perspectives, often leading to conflicting opinions. In cases where such conflicts cannot be resolved amicably, divorce is the solution. Divorce inevitably brings legal consequences, particularly concerning the custody of children and the division of property acquired during the marriage.

Article 38 of the Marriage Law stipulates that a marriage may be dissolved due to death, divorce, or a court decision. The death of either spouse automatically dissolves the marriage. Dissolution through divorce occurs using a divorce decree issued by the Religious Court. Additionally, marriage may be terminated by court decision upon the request of either party. One legal consequence of divorce is the division of joint property. In every marriage, spouses possess separate property—assets brought into or acquired before marriage. During the marriage, spouses also collectively acquire assets, defined in the Marriage Law as joint property bersama^[1].

Article 35 of the Marriage Law states that: (1) Property acquired during the marriage becomes joint property; (2) The separate property of each spouse and property obtained by either party through gift or inheritance remains under the control of the respective spouse, unless otherwise agreed by the parties.

Joint property can be divided by mutual agreement between the spouses. Regarding the separate property, each spouse

retains full rights to perform legal acts concerning their property, as it is excluded from the joint property^[2]. Therefore, if a spouse wishes to manage or dispose of property acquired prior to the marriage, obtaining the other spouse's permission is not required, as this property is entirely the right of the individual spouse. This contrasts with property acquired during the marriage, for which both spouses must mutually consent to any management decisions^[3].

Article 86 of Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI) provides:

(1) In principle, there is no mixing of the husband's property and the wife's property by the marriage; (2) The wife's property remains under her sole ownership and control, just as the husband's property remains under his sole ownership and control. Accordingly, a husband may not use the wife's property without her consent. If the husband does use the wife's property, even for daily necessities, this constitutes a debt owed to the wife, which must be repaid. The husband must provide physical and emotional support to his wife, but this does not imply that the spouses do not assist one another in building and maintaining the household.

In practice, issues often arise during the division of joint property mixed with separate property after divorce. For instance, if one party owns land upon which a house was built before the marriage, through inheritance or a gift from their parents, the issue becomes complicated. In Supreme Court Decision Number: 32 K/Ag/2009, the judge ruled that the separate property, including the yard and the permanent house built upon it, should be included as joint property.

Research Method

This research employed a normative juridical method, using secondary data or written legal norms, and examines relevant legal doctrines and principles within legal science.

The method involved an analysis of laws and regulations related to the issue under investigation ^[4]. The research incorporated three approaches: the statutory, the conceptual, and the case approach. The legal materials used consisted of primary, secondary, and tertiary sources. Upon collection and processing, the legal materials were analyzed qualitatively.

This study used a normative juridical method by employing secondary data or written legal norms and discussing pertinent doctrines and principles of law within the realm of legal science. It involved an analysis of laws and regulations related to the issue ^[4]. Three approaches were applied in this research: the statutory, the conceptual, and the case approach. The three categories of legal materials utilized were primary, secondary, and tertiary sources. After collection and processing these materials, a qualitative analysis was undertaken.

Results and Discussion

A. Judicial Consideration in the Division of Joint Property Comingled with Separate Property Post-Divorce

Judicial consideration assesses and evaluates all facts and evidence presented during trial proceedings. Based on the evidence and factual circumstances revealed in court, the judge formulates conclusions regarding whether the plaintiff's or applicant's claims are substantiated. All facts and evidence must be assessed within the context of the chronological sequence of events.

A judge's decision must be made fairly and wisely to ensure a positive impact on society, aligning with the overarching objective of law enforcement: creating an orderly, peaceful, just, and prosperous society. The authority vested in judges to uphold legal norms established in statutory regulations is realized through their decisions, which must be grounded in the positive law of Indonesia. Each judicial decision is expected to resolve the dispute and generate broader societal benefits, as justice is served for the litigants and the public.

Judicial decisions are based on knowledge derived from the evidence and facts disclosed during the trial. A judge is not confined to a single rule of law but must engage in legal reasoning and discovery by drawing upon various faculties, including rational intelligence, emotional sensitivity, imaginative breadth, intuitive acuity, and wisdom. *Ijtihad* is undertaken to achieve the fairest legal solution using sharia principles and other forms of legal discovery. *Ijtihad* aims to bridge the gap between societal expectations or demands and the ideals of the law. It seeks to establish a state of equilibrium, ensuring that the resulting legal ruling upholds justice while guaranteeing legal certainty and societal benefit ^[5]. To achieve justice and satisfaction for the litigants, legal mechanisms are pursued to reach fair decisions under applicable law. However, not all decisions are capable of satisfying both parties involved.

In Decision Number 32 K/Ag/2009 at the cassation level, the dispute concerned the division of joint property mixed with separate property. The legal basis for distinguishing joint property from separate property is regulated under Article 35 of the Marriage Law, which states the following.

1. Property obtained in the course of marriage is regarded as common property owned and controlled by both. The fruits and uses of common property are shared equally by the husband and wife.

2. Personal property of each spouse, including property acquired by gift or inheritance, shall continue to be under the control of that individual spouse unless the parties agree otherwise.

This provision aligns with Article 31 (1) of the Marriage Law, affirming that the rights and positions of the wife are equal to those of the husband in family and social life within the broader community. Furthermore, Article 36 paragraph (1) stipulates that decisions regarding joint property must be made with the consent of both spouses. This underscores the principle of equality in managing joint property during the marriage and establishes shared responsibility for legal actions undertaken jointly or by either spouse ^[6].

In Verdict Number 32 K/Ag/2009, the court addressed the entirety of the joint property, which included: a permanent stone house and its associated land, a plot of yard land, a Xenia car, one set of living room chairs, one set of dining chairs, a Toshiba television, a Panasonic television, a National one-door refrigerator, and an LG air conditioner. The judge ruled that the joint property should be divided equally between the plaintiff (widower) and the defendant (widow).

The ruling is also justified based on the provisions in Article 97 of the KHI, which states that divorced widows or widowers shall be entitled to one-half of the common property upon divorce unless otherwise provided in a marriage contract. All property acquired by individuals as husband and wife during marriage shall be deemed common property. The general rule is that property acquired during marriage remains joint property whether the husband acquired it or the wife, whether the other party had knowledge of the acquisition, and notwithstanding in whose name the property is registered ^[7]. Therefore, irrespective of how much each party contributed to acquiring the property, all property acquired durante marriage is joint.

Division of joint assets is governed by the provisions in the Marriage Law and KHI, whether it be in the course of divorce while the spouses are still alive or on account of death, under which both the husband and wife are entitled to an equal share of the joint property. It is widely acknowledged that divorce has legal consequences for the parties involved and affects the assets accumulated during the marriage. Disputes over joint property frequently arise between spouses, and the judiciary plays a crucial role in resolving such conflicts. The judicial process includes determining the division of joint property following the dissolution of the marriage, the judge's legal reasoning in adjudicating the division, and consideration of other relevant legal aspects ^[8].

Although the division of joint property may be consistent with applicable laws and regulations, challenges remain in its practice. For instance, in the Religious Court case based on Decision Number: 45/Pdt.G/2007/PA.Mn, the counterclaim plaintiff (defendant) asserted ownership of inherited property consisting of a yard and a permanent house acquired before the marriage with the defendant (respondent). This raised legal issues concerning the division of separate property that had become comingled with joint property.

Separate property refers to assets owned individually by the husband or the wife before the marriage, including those acquired through gifts or inheritance. Such assets are automatically considered the property of the respective

party, unless otherwise stipulated in a prior agreement. According to the principle of separation, separate property brought into the marriage does not automatically become part of the joint property, unlike income or assets acquired during the marriage. Control over separate property remains with the respective spouse and entirely under their ownership and authority^[9].

In this case, the Panel of Judges held that the separate property should be included as part of the joint property. Accordingly, they deemed it unjust to apply Article 97 of the KHI, which mandates an equal division for the Plaintiff (widower) and the Defendant (widow), because the property subject to division had been commingled with assets belonging to the counterclaim plaintiff (Defendant). This interpretation contradicts the theory of justice as articulated by Jimly Asshiddiqie, who argued that a fair judicial decision must adhere to the following principles.

1. **Conformity with the Constitution:** The decision must align with constitutional principles, such as protecting human rights and the supremacy of the law^[10].
2. **Justice for All Parties:** The decision must ensure that no party is unfairly disadvantaged, individually or collectively^[11].
3. **Procedural and Substantive Justice:** The judicial process and outcome must be transparent and grounded in moral values.

In light of the judge's reasoning in the aforementioned decision, the treatment of separate property owned by the counterclaim plaintiff (Defendant) as joint property is questionable. In adjudication, judges must consider juridical, philosophical, and sociological aspects to deliver a ruling that reflects the three dimensions of justice: legal, moral, and social justice^[12].

In their verdict, the panel of judges at the court of first instance, namely the Majene Religious Court, rejected the evidence submitted by the counterclaim plaintiff (Defendant), asserting that the yard and permanent house constituted separate property acquired prior to the marriage. Instead, the panel classified these assets as joint property shared between the plaintiff and the defendant.

In this context, a different stance was taken at the appellate level, specifically in the Makassar High Religious Court decision (Decision Number: 10/Pdt.G/2008/PTA.Mks). The panel of judges did not clarify whether the property in question belonged to the counterclaim plaintiff (defendant) or constituted joint property. Consequently, the ownership status of the yard and its permanent house remained ambiguous.

An appeal hearing constitutes a secondary legal process initiated when one of the parties, either the plaintiff or the defendant, disagrees with the decision rendered by the court of first instance. At this stage, the panel of judges at the High Religious Court reassesses the case file previously adjudicated by the lower court^[13]. The primary function of the appellate hearing is to offer the dissatisfied party an opportunity to seek a review of the initial decision. The appellant may submit additional arguments and evidence to reinforce their position during this process.

The appellate court evaluates the appeal by examining the arguments and supporting evidence presented by both parties. Moreover, it comprehensively reviews the first-instance decision, including its legal reasoning and factual findings, to determine whether the lower court's ruling

should be upheld, overturned, or modified. Furthermore, there was no indication of a marriage agreement between the two parties regarding the property division. As a result, the panel of judges at the cassation level ultimately classified the property as joint property.

Article 29 of the Marriage Law provides that:

1. Based on mutual agreement before or during the marriage, the parties can make a writteagreement, which must be approved by a marriage registrar and then binds third parties as long as the third party is involved.
2. Such an agreement shall not be validated if it contravenes legal provisions, religious norms, or public decency.
3. The agreement shall become effective as of the solemnization of the marriage.
4. During the marriage, the agreement may not be amended unless both parties consent to the modification and such changes do not prejudice third parties.

Generally, a marriage agreement is established to regulate the property rights of spouses, covering both assets acquired before and during the marriage and outlining the consequences of such property and other matters, provided they do not conflict with statutory regulations. Before Constitutional Court Decision Number 69/PUU-XIII/2015 concerning marriage agreements. Such agreements could only be executed prior to the solemnization of the marriage, as stipulated in Article 29 of the Marriage Law. However, following the enactment of the Constitutional Court's decision, a significant amendment was introduced, stipulating that "at the time of, before, or during the marriage bond, the two parties may, by mutual consent, enter into a written agreement legalized by a marriage registrar or a notary, which shall also be binding upon third parties, provided such parties are involved." Thus, establishing a marriage agreement is not mandatory but conditional upon the parties' mutual needs and consent.

B. Legal Protection for Parties Who Have Separate Property in the Division of Joint Property Post-Divorce

Separate property refers to property each spouse (husband or wife) brings into the marriage, including gifts, individually earned property, inheritances, or donations, acquired before or after the marriage. In practice, the management of separate property in society is often classified into several categories: inherited, granted, and gift property. Under Islamic marital law, the ownership status of individually held assets by either spouse is governed by strict provisions, applicable in cases of divorce or the death of one of the parties. The fundamental principle requires that such property be returned to the original owner or transferred to the rightful heirs by applicable legal provisions^[14].

According to the KHI, marriage does not result in the unification of property between husband and wife. This implies that the husband's property remains under his ownership, and the wife's remains under her ownership, each managed independently unless otherwise agreed upon in a marriage agreement. Separate property can be movable property, easily transferred, or immovable property, which is fixed and not easily moved.

In the institution of marriage, individual property rights (husband's property rights or wife's property rights) which are the spouses of the husband and wife will not be lost with the concept of joint property. Because individual property rights in a marriage bond will not be lost when someone gets married and becomes a husband and wife, although in the concept of joint property it is stated that property obtained during the marriage is joint property. KHI states firmly that marriage does not make the husband or wife merge their respective assets into the marriage. Thus, marriage does not create or affect the ownership of property of each party separately, unless otherwise determined by mutual agreement between the two parties. This means that the parties (husband or wife) have the right to their respective assets and each party is not allowed to influence it which causes the assets to be lost. Lost in the sense here is lost, merged or mixed with joint property, as if the property as a whole is joint property, even though some of it is the property of one of the parties. Therefore, marriage does not affect the ownership of separately acquired property, unless otherwise determined by agreement of both parties. The provisions contained in the KHI function to make the ownership of each husband or wife's own property clearer so that the legal status of ownership of the property is clearer. Property acquired during marriage is considered joint property of husband and wife. On the other hand, property acquired before marriage or received as a gift from parents remains separate property and is the exclusive right of the couple as separate property.

In Decision No. 32 K/Ag/2009, and more specifically in the first instance ruling, Decision No. 45/Pdt.G/2007/PA.Mn, the counterclaim plaintiff (defendant) asserted ownership over the yard land and a permanent house. The property was claimed to have been acquired by the plaintiff (respondent) before marriage. Hence, the status of this property is questionable as the judge ruled that it constituted part of the joint property.

According to the provisions of Articles 35 and 36 of the Marriage Law concerning marital property, separate property remains the personal property of each spouse, either the husband or the wife, unless a prior marriage agreement stipulates the inclusion of separate property as part of the joint marital property. Without such an agreement, inherited assets are not considered joint property and are not subject to division upon divorce. Based on these provisions, it is evident that although the separate property belonged to the counterclaim plaintiff (defendant) and was not governed by a marital agreement, since none was made between the parties, it was inappropriate for the judge to declare the separate property as part of the joint property.

In line with this explanation, it is clear that regardless of whether a marriage agreement exists, separate property remains under the control of its original owner, even after a divorce. Consequently, separate property cannot be combined with or divided as part of the joint property acquired during the marriage.

Resolving issues regarding property status is challenging in legal disputes where no authentic documentation is available. Therefore, it is necessary to establish regulations mandating the documentation of each spouse's inherited property to ensure clarity and certainty of ownership. While the Marriage Law already establishes an automatic separation between inherited and joint property without requiring documentation at the time of marriage, a clear

explanation regarding the origin of each asset is necessary to avoid complications during property division post-divorce^[15].

The joint property post-divorce is divided equally, with each spouse receiving half of the jointly acquired assets. This practice aligns with the provisions stipulated in prevailing legislation^[16]. Joint property is distinct from separate property, which cannot be divided upon divorce. Separate property refers to assets acquired by either party prior to the marriage. According to legal principles, such property remains the personal asset of the original owner despite the divorce.

In divorce proceedings, any claim for the division of joint property must be explicitly stated in the lawsuit or petition. The assets categorized as joint property must be clearly described and supported by evidence of ownership. This evidence may include land certificates, vehicle ownership documents, share certificates, or other securities, and must establish that the assets are joint property. The process of proving the status of marital property, whether joint or separate, must be undertaken by both parties by submitting appropriate supporting documents.

Joint property and individual separate property possess legal certainty regarding their status during and after marriage. During the marriage, the household's joint and separate property status is governed by Articles 35 and 36 of the Marriage Law. However, upon the divorce, the regulation concerning the use and division of joint property is subject to the applicable law, by Article 37 of the Marriage Law. Article 85 of the Compilation of Islamic Law stipulates that joint property in marriage does not negate the possibility of property being individually owned by the husband or the wife.

Furthermore, Article 86 emphasizes that: (1) essentially, there is no commingling of the husband's and wife's property due to marriage; and (2) the wife's property remains her own and under her full control, while the husband's property remains his and is fully controlled by him. Article 97 of the Compilation of Islamic Laws further stipulates that, upon divorce, both the widow and widower are entitled to half of the joint property unless otherwise stated in a marriage agreement.

Therefore, drafting a marriage agreement related to property is crucial, as it is legal evidence in divorce. To date, legal protection afforded through marriage agreements has predominantly addressed matters of property or assets, providing greater benefit to wealthier spouses. Couples with limited or no assets may utilize marriage agreements as legal protection. It is recognized that the scope of a marriage agreement is not limited solely to the regulation of property, but may also include other aspects relevant to marital life^[17].

In divorce proceedings, the burden of proof for separate property must be proven with strong evidence. Property claimed without valid and binding documentation may weaken the strength of the evidence presented. If a lawsuit is deemed inadmissible, procedural deficiencies in the case may serve as grounds for the judge to issue a final decision declaring the claim unacceptable^[18]. Thus, it is evident that even if separate property has been merged into joint property, without a marriage agreement, the judge will first distinguish separate property from joint property. Before distinguishing the property, the judge will require the parties to submit proof of property ownership^[19]. For Muslims, the

regulation of joint property acquired during marriage is governed by the Compilation of Islamic Laws. In contrast, separate property acquired before marriage remains under the control of the respective spouse. Each party retains full legal rights over inherited or gifted assets acquired before marriage, similar to their other separate property.

Islamic law accords both husbands and wives the right to possess individual property, which must not be interfered with by other parties. A husband who receives a gift, inheritance, or similar assets without his wife's involvement retains full ownership of the property. Similarly, a wife who acquires a gift, inheritance, dowry, or similar assets independently of her husband maintains full rights and control over that property.

Article 1(f) of the Compilation of Islamic Law stipulates that assets acquired during the marriage (*syirkah*), individually or jointly by the spouses, are considered joint marital property irrespective of the name under which the assets are registered. When separate property is commingled with joint property or is converted into another form during the marriage, it is challenging to determine the value of growing separate property. However, if such separate property can be substantiated and its value accurately quantified through available evidence, it shall be excluded from the joint property and remain the separate property of the respective spouse.

In the present case, the legal issue concerns the commingling of separate and joint property owned by the defendant in reconvention (i.e., the plaintiff). The disputed property consists of a yard with a permanent house, but the court's ruling classified this property as part of the joint property.

Based on Article 35(2) of the Marriage Law, which governs separate property, this judicial determination may disadvantage the defendant in reconvention as the legitimate owner of the separate property. Such a decision undermines legal protection and infringes upon the owner's rights, as the property becomes indistinguishable from joint property.

In this ruling, the court rejected the claim that the disputed property constituted separate property belonging to the defendant in reconvention. Consequently, the legal guarantees and protections afforded to all citizens throughout judicial proceedings were not upheld.

Legal protection constitutes an effort to protect an individual's fundamental rights from violations by other parties, ensuring that all individuals can access the rights guaranteed by law. Legal protection generally encompasses various legal measures law enforcement authorities undertake to ensure psychological and physical security against any interference or threat. It is also intrinsically linked to every individual's right to legal guarantees and the right to live free from fear. According to Phillipus M. Hadjon, legal protection is classified into two forms: preventive legal protection and repressive legal protection. Preventive protection refers to efforts to prevent rights violations through legal instruments, whereas repressive protection involves dispute resolution after a violation has occurred, using legal mechanisms^[20].

In the context of the present case, the relevant form of protection is preventive legal protection, particularly concerning the marriage agreement as provided under Article 29 of the Marriage Law, and the practice of asset bookkeeping, which involves recording the details of assets and transactions throughout the marriage to prevent the

commingling of property. However, in this case, no marriage agreement was made between the parties, resulting in the absence of this preventive legal protection.

The marriage law does not explicitly regulate a comprehensive preventive legal protection mechanism for marital assets. As a form of preventive protection, the law requires marriage registration through an authorized institution—specifically, the Office of Religious Affairs for Muslim couples. This registration carries dual legal significance: first, as a prerequisite for the validity of the marriage, and second, as a legal basis for resolving property disputes, whether related to inheritance or joint property, in the event of divorce^[21].

The second form of protection, repressive legal protection, pertains to the proof of ownership of separate property and litigation through judicial proceedings. However, this approach did not offer an adequate solution for the dispute in the present case. Consequently, the separate property is commingled with the joint property of the parties involved.

Conclusion

In the judge's consideration of the division of joint property commingled with separate property following a divorce, the focus is solely on the division of joint property by applicable regulations. However, the judge fails to consider the historical context and ownership relations of the separate property commingled with joint property during the marriage. Legal protection for individuals who own separate property in such cases is significantly influenced by the provisions of the Marriage Law and the Compilation of Islamic Law, both of which establish that separate property remains the personal asset of the individual who received it and is not to be included in the division of joint property at the time of divorce.

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