

THE INHERITANCE RIGHTS OF CHILDREN FROM MARRIAGE ARE NOT RECORDED ACCORDING TO THE MARRIAGE LAW AND THE COMPILATION OF ISLAMIC LAW

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<i>Submitted: 05-02-2024</i>	<i>Accepted: 23-04-2024</i>	<i>Published: 01-05-2024</i>
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Abstract

This research focuses on the inheritance rights of children from unregistered marriages in the Compilation of Islamic Law. Although marriages are supposed to be registered, situations where they are not recorded can have an impact on the inheritance rights of children. This research uses a qualitative research method with a normative juridical approach that is carried out based on legislation, which in this case includes the Civil Code, Law No. 1 of 1974. Data is obtained from sources of Law, Civil Code and journals. Data analysis is carried out to filter the data obtained and collected according to its type and finally draw conclusions from the findings obtained. The results show that children from irri marriages previously only received inheritance from the mother and the mother's family. However, the decision of the Constitutional Court allows extra-marital children to inherit from their biological father if legally proven. The Compilation of Islamic Law states that children from irri marriages only have a nasab relationship with the mother and her family, not with the father. Parents can apply for itsbat nikah to confirm the legal relationship, providing inheritance protection. However, if itsbat nikah is rejected, the child is not entitled to receive inheritance from the father. In conclusion, children from irri marriages have inheritance rights depending on the legal recognition of the relationship with their parents.

Keywords: *Illegitimate children, inheritance rights, compilation of Islamic law.*

Abstrak

Penelitian ini fokus pada hak waris anak dari perkawinan tidak tercatat dalam Kompilasi Hukum Islam. Meskipun perkawinan seharusnya didaftarkan, situasi di mana tidak tercatat dapat berdampak pada hak waris anak. Penelitian ini menggunakan metode penelitian kualitatif dengan pendekatan yuridis normatif yang dilakukan

berdasarkan perundang-undangan yang dalam hal ini diantaranya kuhperdata, UU No 1 Tahun 1974. Data diperoleh dari sumber-sumber UU, KUH Perdata dan jurnal-jurnal. Analisis data dilakukan untuk memfilter data yang didapatkan dan dikumpulkan sesuai dengan jenisnya dan terakhir menarik kesimpulan dari temuan yang didapatkan. Hasilnya menunjukkan bahwa anak dari perkawinan sirri sebelumnya hanya mendapat waris dari ibu dan keluarga ibunya. Namun, putusan Mahkamah Konstitusi memungkinkan anak luar kawin mendapat waris dari ayah biologisnya jika terbukti secara hukum. Kompilasi Hukum Islam menyatakan bahwa anak dari perkawinan sirri hanya memiliki hubungan nasab dengan ibu dan keluarganya, bukan dengan ayahnya. Orang tua dapat memohon itsbat nikah untuk menegaskan hubungan hukum, memberikan perlindungan waris. Namun, jika itsbat nikah ditolak, anak tidak berhak menerima waris dari ayahnya. Kesimpulannya, anak dari perkawinan sirri memiliki hak waris tergantung pada pengakuan hukum terhadap hubungan dengan orang tua mereka. **Kata Kunci:** Anak Tidak Sah, Hak Waris, Kompilasi Hukum Islam.

INTRODUCTION

Kompilasi Hukum Islam (KHI) stipulates that marriage is valid, if it is carried out according to Islamic Law in accordance with Article 2 paragraph (1) of Law Number 1 of 1974. A valid marriage is a marriage performed according to the laws of each religion and belief, in other words a marriage that is not according to the laws of each religion and belief is an invalid marriage. So that the children he gave birth to were also illegitimate children.¹ Then Islamic Law confirms that a marriage is considered valid if the marriage has fulfilled the pillars and conditions of marriage as stipulated in the Islamic Shari'a, which is meant by the conditions of the validity of marriage, namely that the marriage must have a prospective husband, prospective wife, marriage guardian, two witnesses and ijab and qabul.² In addition, marriage must be recorded, which is a condition for whether or not marriage is recognized by the state. With the registration of there has also been protection of interests for the parties in a marriage.

¹ Muhammad Husni Abdulah Pakarti. 2024. "Perlindungan Hak Anak Dalam Perceraian Menurut Hukum Keluarga Islam". Mawaddah: Jurnal Hukum Keluarga Islam 1 (1):1-20. <https://doi.org/10.52496/mjhki.v1i1.1>.

² Abdulah Pakarti, Muhammad Husni, and Diana Farid. 2023. "IMPLEMENTASI HUKUM WARIS DALAM ISLAM: STUDI KOMPARATIF TENTANG PRAKTEK WARIS DI NEGARA-NEGARA MUSLIM". El-Ahli: Jurnal Hukum Keluarga Islam 4 (2), 37-62. <https://doi.org/10.56874/el-ahli.v4i2.1267>.

A valid marriage can only be proven by a marriage certificate made by the Marriage Registration Officer. In the event that the marriage cannot be proven by a marriage certificate, it can be submitted to the religious court. *Itsbat nikah* which can be submitted to the religious court in the relevant cases. Those who have the right to apply for marriage *itsbat* are the husband or wife, their children, the marriage guardian and parties interested in the marriage.³

A valid marriage must be performed based on the provisions of the laws of their respective religions. The marriage needs to be protected by law in accordance with applicable laws and regulations, so that the marriage has legal force. At this time not all people in Indonesia comply with the laws and regulations governing marriage in Indonesia, so many people carry out unregistered marriages (marriage under the hands).⁴

The definition of unregistered marriage (*nikah under hand*) is a marriage performed by a female guardian with a man and witnessed by two witnesses, but not reported or not recorded with the Marriage Registration Officer (PPN) and not registered with the Office of Religious Affairs (KUA).⁵

Unregistered marriages are performed without going through the proper process according to the Marriage Act. From this understanding, unregistered marriage (marriage under the hand) has no legal force because considering article 2 of Law Number 1 of 1974 concerning Marriage, marriage is valid if it is carried out according to the laws of each religion and belief. Every marriage is recorded according to applicable laws and regulations. Unregistered marriages (marriages under the hands) are legal according to the religion of Islam.⁶

³ Zidna Nama, "MAKNA YURIDIS STATUS HUKUM HAK WARIS ANAK HASIL DARI PERKAWINAN SIRI MENURUT KOMPILASI HUKUM ISLAM" (2014), <https://doi.org/10.21776/ub.arenahukum.2014.00701.4>

⁴ S. Sudarsono, "PERLINDUNGAN HUKUM HAK WARIS ISTRI KEDUA DARI PERKAWINAN TIDAK TERCATAT DIKAITKAN DENGAN FUNGSI PENCATATAN PERKAWINAN (Studi Komparatif Fiqih Islam Dan Undang-Undang Nomor 1 Tahun 1974)" (2022), <https://doi.org/10.54367/fiat.v2i2.1773>

⁵ Iffah Fathiah, Sofyan Mei Utama, Diana Farid, Muhammad Husni Abdulah Pakarti, Kemal Al Kautsar Mabururi, and Hendriana Hendriana. 2023. "Protection of the Rights of Adultery Children in Indonesia: A Perspective of Positive and Islamic Law". *Al-Qadha: Jurnal Hukum Islam Dan Perundang-Undangan* 10 (2), 147-60. <https://doi.org/10.32505/qadha.v10i2.7068>.

⁶ Dwitya Laras Suharyati, Susilo Edi Purwanto and I. N. Suarna, "ANALISIS HUKUM ATAS HAK WARIS ANAK PADA PERKAWINAN YANG TIDAK TERCATAT NEGARA (DITINJAU DARI HUKUM POSITIF DAN HUKUM HINDU)" (2021), <https://doi.org/10.53977/wk.v4i2.390>

Some factors that cause people in Indonesia to perform many unregistered marriages (marriage under hand) include Law Number 1 of 1974 adheres to the principle of monogamy, but still provides leeway for those whose religion allows polygamy (one of which is Islam) with very strict requirements. A person who wishes to practice polygamy must meet at least one of the alternative conditions specified in the law.⁷ The strict permission for polygamy also causes the person concerned to prefer marriage under the hand or nikah sirri because the implementation (ordinance) of marriage under the hand is simpler and faster to achieve the goal of marriage itself.⁸

A man or woman who is ready to marry, but has not met the age in the Law, finally they choose to have an unregistered marriage.⁹

Many people do not fully understand how important marriage registration is. Some people consider marriage registration to be just a matter of administration without considering full awareness of the beneficial aspects of marriage registration.¹⁰

The provisions of article 2 of Law No. 1 of 1974 are the subject matter of the validity of marriage. The provisions of paragraphs (1) and (2) of the article must be understood as a cumulative condition, not an alternative condition for the validity of a marriage. From the legal facts and / or legal norms are actually enough to be the basis for Muslims to register their marriages. However, this provision contains weaknesses because the article has multiple interpretations and also does not come with sanctions for those who violate it. In other words, the provisions for marriage registration in the law are not unequivocal.¹¹

Unregistered marriages (underhand marriages) can cause problems for the women who live them. Various problems can arise due to unregistered marriages (marriages under hand) due to unbound marriages in the country. Marriage registration is very important.

⁷ Muhammad Husni Abdulah Pakarti, Sofyan Mei Utama, Diana Farid, and Hendriana. 2023. "The Role of Family Law in Facing the Challenges of Polygamy in Contemporary Society". *At-Tahdzib: Journal of Islamic Studies and Muamalah* 11 (2):36-43. <https://doi.org/10.61181/at-tahdzib.v11i2.303>.

⁸<https://www.nomifrod.com/2022/06/4-faktor-penyebab-terjadinya-nikah-siri.html> diakses tanggal 16 Juni 2022

⁹Mahmudin Bunyamin dan Agus Hermanto, *Hukum Perkawinan Islam* (Bandung, Pustaka Setia, 2017), 151

¹⁰ <https://www.nomifrod.com/2022/06/4-faktor-penyebab-terjadinya-nikah-siri.html> diakses tanggal 16 Juni 2022

¹¹ <https://www.nomifrod.com/2022/06/4-faktor-penyebab-terjadinya-nikah-siri.html> diakses tanggal 16 Juni 2022

Although administrative, registration has a major juridical influence on legal recognition of marital law. With the registration of a marriage carried out by the Marriage Registration Officer, then the Marriage Certificate Quotation Book is published, there is authentic evidence of the existence of a valid marriage, which is religiously recognized and juridically recognized.¹² Although serial marriages are considered valid according to Islam, namely the existence of *ijab* and *qabul*, guardians and brides who are of legal age, but the marriage must also be valid under the laws of the country. Without state registration, children born from such marriages cannot be legally proven to be legitimate children of their fathers.¹³

Unenforced marriages in the country have no legal force and have juridical impact on the rights of public services that should be provided by the competent authorities. In the event of a divorce of joint property, the inheritance rights and custody of the child become unclear due to the absence of a marriage performed in front of the civil registry officer. Without a valid letter or proof in marriage, if there is a divorce it will be difficult to prove blood relationship or marriage. Wives who perform or children born from unregistered marriages (marriage under hand) cannot obtain legal protection and services, the status of husband and wife who perform unregistered marriages (marriage under hand) is not registered in the civil registry, so children born cannot obtain birth certificates. The invalidity of unregistered marriages (marriages under the hands) according to state law has a negative impact on the status of children born in the eyes of the law.¹⁴

Children born from unregistered marriages (marriage under hand) in this case include illegitimate children or extramarital children because the child was born from a marriage that was not recorded in the state administration in accordance with the provisions of the applicable laws and regulations, namely Law Number 1 of 1974 concerning Marriage. Consequently, the child only has a civil relationship with the mother and the mother's family. This means that the child has no legal relationship with his father (Article 42 and Article 43 of the Marriage Law, Article 100 of the KHI). In the birth certificate only included the name of the

¹² Mahmudin Bunyamin dan Agus Hermanto, 151.

¹³ Rosnidar Sembiring, *Hukum Keluarga*, (Depok Rajagrafindo Persada, 2016), 126.

¹⁴ Rosnidar Sembiring, *Hukum Keluarga*, (Depok Rajagrafindo Persada, 2016), 152.

mother who gave birth to him.¹⁵ After the Constitutional Court's ruling, the Constitutional Court stated that the father of the child must still be legally responsible, regardless of the procedure or administration of the marriage.

An unregistered marriage can become a valid marriage, if the husband and wife apply for a marriage certificate, to obtain legal force for the status of children.

Application for *itsbat nikah* based on the provisions of Article 7 Paragraph (3) letter e of the Compilation of Islamic Law. If the marriage requested for marriage is not subject to marriage as stipulated in Law No. 1 of 1974 concerning Marriage, the Religious Court will grant the request for marriage even though the marriage was carried out after the enactment of Law No. 1 of 1974 concerning Marriage.

Kompilasi Hukum Islam does not strictly regulate the definition of extramarital children. Article 186 of the KHI only confirms that a child born out of wedlock only has a civil relationship with his mother and of course only has a relationship of inheritance with his mother and his mother's family. The Civil Code regulates the division of extramarital children regulated in Articles 862 to 873 BW. If the heir leaves a legitimate descendant or a husband or wife, then the extramarital child will inherit one-third of the share.¹⁶ To determine the status of inheritance rights of children from unregistered marriages according to Law Number 1 of 1974 concerning Marriage and KHI, researchers will provide an explanation in the form of the position of unregistered marriages (marriage under hand), the position of children from unregistered marriages (marriage under hand) and the status of inheritance rights of children from unregistered marriages (marriage under hand).

RESEARCH METHODS

This research uses qualitative research methods with a normative juridical approach carried out based on legislation which in this case includes the Civil Code, Law No. 1 of 1974. The primary data in this study are KUHPerdata, Law No. 1 of 1974, KHI while secondary data is obtained from books related to marriage, inheritance and journals that

¹⁵Rosnidar Sembiring, *Hukum Keluarga*, (Depok Rajagrafindo Persada, 2016), 152.

¹⁶ T. Pratiwi, K. Kurniati and Abdul Rahman, "INHERITANCE STATUS OF CHILDREN RESULTING FROM ADULTERY RELATIONSHIP PERSPECTIVE COMPILATION OF ISLAMIC LAW AND CIVIL CODE" (2023), <https://doi.org/10.24952/tazkir.v9i1.4009>

have been published with high credibility. This research was conducted by reviewing library materials and legislation related to the status of children's inheritance rights from unregistered marriages (marriage under hand), in this case concerning issues of marriage, inheritance and children's rights that must be fulfilled, one of which is the right to inherit children. After the data is obtained, the next step is data analysis to filter the data obtained and collected according to its type and finally draw conclusions from the findings obtained.

RESULTS AND DISCUSSION

Understanding and Legal Basis of Inheritance

The law that regulates the transfer of inheritance from heir to heir is called inheritance law, which in Islamic Law is known by several terms such as: faraidl, Fiqh, Mawaris. Islamic inheritance law is the law that governs everything pertaining to the transfer of rights and obligations over a person's property after death to his heirs.¹⁷

Kompilasi Hukum Islam which is contained in the format of legislation regulating inheritance provisions is used as a guideline in Islamic inheritance law. The law of inheritance in Islamic law is regulated in the Qur'an and as a complement to it is used by the sunnah of the Prophet and the results of the ijthad of Islamic jurists. Islamic inheritance law is also regulated in Presidential Instruction No.1 of 1991 concerning the Compilation of Islamic Law (Articles 171-214 KHI).¹⁸

Article 171 of the KHI states that inheritance law is a law that regulates the transfer of ownership rights of heirs (tirkah), determining who is entitled to be the heir and their respective shares.¹⁹

From the above understanding, the inheritance law according to the KHI includes the following provisions:

1. Provisions governing who is the heir.
2. Provisions governing who the heirs are.
3. Provisions governing estate.

¹⁷ Fitri Ayu Sari Wijaya, "Perlindungan Hukum Hak Waris Anak dari Perkawinan Poligami yang Tidak Dicatatkan (Studi Putusan Mahkamah Agung No. 671K/Ag/2015)" (2020), <https://doi.org/10.31289/DOKTRINA.V3I2.4140>

¹⁸ Vaula Surya Hannifa, Johni Najwan and M. Qodri, "Hak Waris Anak Angkat dalam Perspektif Kompilasi Hukum Islam Indonesia" (2022), <https://doi.org/10.22437/zaaken.v3i1.15919>

¹⁹ Hamdani Hamdani, Adi Mansar and T. Erwinsyahbana, "Hibah Wasiat Bagi Anak Yang Lahir Dari Perkawinan Tidak Tercatat" (2022), <https://doi.org/10.33087/legalitas.v14i1.324>

4. Provisions governing the consequences of the transfer of estate from heir to heir.
5. Provisions governing the share of each heir

Thus the principle of only rights and obligations covering property can be inherited, it turns out that it cannot be upheld and there are some exceptions.

Islamic Inheritance Law only applies to societies that embrace Islam, where the system of inheritance distribution uses the principle of bilateral individuality. So it can be said that the heirs must be from the paternal or maternal line. In addition, the meaning of inheritance is if the property or asset given by the person who gave it has died, if the person is still alive the term is called Grant not inheritance.²⁰ Although the Qur'an already explains in sufficient detail about heirs and their parts, the Hadith also explains some things about the division of inheritance.

The Hadith is among others narrated by Ibn Abbas Ra:

الْجُؤُوا الْفَرَائِضَ بِأَهْلِهَا , فَمَا بَقِيَ فَهُوَ لِأَوْلَى رَجُلٍ ذَكَرٍ

It means: "Give those who have a fixed share according to their own share, while the excess is given to the closer asabah, that is, the man who is more important".

There are 3 (three) elements of inheritance in the KHI namely:

1. Heir (Muwarit), i.e.: A person who has died and left something that can pass to his surviving family heir. The testator is the person who, at the time of death, leaves behind heirs and estate. Article 171 point b of the KHI explains that: "An heir is a person who, at the time of his death or who is declared dead based on a Muslim court decision, leaves behind heirs and relic property" Thus, a new heir is said to exist if the person concerned dies and has estate and heirs.
2. Warits, namely: People who are entitled to inheritance because they have a relationship with the heir, in the form of kinship, marriage or other relationships. Heirs In Article 171

²⁰ Wasdikin, W, Mohamad Muidul Fitri Atoilah, Yogi Iskandar, Muhammad Husni Abdulah Pakarti. Asas Hukum Kewarisan Islam Sebagai Parameter Dalam Menyelesaikan Masalah Waris."Al-Ahwal Al-Syakhsiyyah: Jurnal Hukum Keluarga dan Peradilan Islam 4, No. 1 (2023): 15-28. Doi: <https://doi.org/10.15575/as.v4i1.21052>.

point c of the KHI it is explained that the heir is a person who at the time of death has a blood relationship or marital relationship with the heir, is Muslim and is not hindered by law from becoming an heir.

3. Inheritance (Mauruts), namely: Something left by the deceased, both in the form of movable and immovable objects. Inheritance KHI distinguishes between inheritance and inheritance.

In Article 171 point d of the KHI: "Estate is property left by the heir, both in the form of objects that belong to him and his rights". The basis and main source of Islamic Law as Islamic law as Islamic religious law is the nash or text contained in the Qur'an and the sunnah of the prophet. It is the verses of the Qur'an and the sunnah of the Prophet that directly govern the inheritance.²¹

Basically, the issue of inheritance is always synonymous with the transfer of ownership of an object, rights and responsibilities from the heir to his heirs. And in Islamic inheritance law the acceptance of inheritance is based on the principle of *ijbari*, i.e. inheritance moves by itself according to the decrees of Allah SWT without depending on the will of the heir or heir.²²

In the KHI, the provisions on inheritance are regulated in Book II, which consists of 23 articles, from Article 171 to Article 193. In these various provisions there are some things that are not in classical jurisprudence, but are in the KHI, as well as provisions that should exist, but are not included in the KHI. Inheritances function as a change of position in owning property between the deceased person and the living person he left behind (heirs). Therefore, the heir-inherit (the one who bequeaths).²³

There are several conditions that must be met in the division of inheritance, these conditions always follow the harmony, but some stand

²¹ G. Safitri, "Status Anak Di Luar Perkawinan Menurut Kompilasi Hukum Islam Bab XIV Pasal 100" (2021), <https://doi.org/10.31293/DDK.V30I1.5675>

²² S. PutriNofita, "TINJAUAN YURIDIS TERHADAP KEDUDUKAN DAN HAK WARIS ANAK LUAR KAWIN MENURUT UNDANG-UNDANG NOMOR 1 TAHUN 1974 TENTANG PERKAWINAN DAN KOMPILASI HUKUM ISLAM" (2018)

²³ Wasdikin, W., Atoilah, M. M. F., Iskandar, Y., & Pakarti, M. H. A. (2023). ASAS HUKUM KEWARISAN ISLAM SEBAGAI PARAMETER DALAM MENYELESAIKAN MASALAH WARIS. *Al-Ahwal Al-Syakhsiyyah: Jurnal Hukum Keluarga dan Peradilan Islam*, 4(1), 15-28. DOI: <https://doi.org/10.15575/as.v4i1.21052>

alone. In the event that there are three conditions of inheritance that have been agreed upon by the scholars, the three conditions are:

1. The death of a person (heir) either haqiqi, hukmy, (e.g. presumed dead) or taqdiri.
2. There are heirs who live haqiqi at the time of the testator's death.
3. All heirs are known for certain their respective parts.

The Position of Children in Marriage Is Not Recorded According to the Marriage Law and the Compilation of Islamic Law

Marriages performed in Indonesia are subject to the provisions in Law No. 1 of 1974 concerning Marriage (UUP) which stipulates the principles or principles of marriage. The purpose of marriage is to form a happy and eternal family. For this reason, husband and wife help and complement each other so that each can develop his personality, help and achieve spiritual and material well-being. A marriage is valid if it is performed according to the laws of each religion and belief, and in addition each marriage must be recorded according to the laws and regulations in force.²⁴

If the marriage is not performed based on religion and belief and is registered at the Civil Registry Office, the marriage performed is invalid and not recognized by the state. Sirri marriage is a marriage that is carried out not in accordance with the provisions of the applicable laws and regulations.²⁵

Based on Article 2 Paragraph (1) of the Marriage Law states that:
"A marriage is valid when it is performed according to the laws of each religion and belief."

According to Article 2 paragraph (2) of the Marriage Law, it is stated that:

"Every marriage must be recorded in accordance with applicable laws and regulations".

A lawful child is the result of a legal marriage. This is stated in Law No.1 of 1974 concerning Marriage Article 42 Paragraph 1: Legal

²⁴ Suaib Lubis and K. Khairani, "Hak Waris Anak Angkat Menurut Fikih dan Kompilasi Hukum Islam (KHI)" (2020), <https://doi.org/10.46799/ar.v4i1.80>

²⁵ M. N. Najmuddin and Adi Laksono, "KEDUDUKAN HAK WARIS ISTRI SIRI BESERTA ANAKNYA MENURUT HUKUM WARIS ISLAM" (2022), <https://doi.org/10.32492/justicia.v1i1.685>

children are children born in or as a result of a valid marriage.²⁶ Children born from sirri marriages in this case include extramarital children because the child was born from marriages that were not recorded in the state administration in accordance with the provisions of the applicable laws and regulations, namely Law Number 1 of 1974 concerning Marriage. The status of the child born is considered an illegitimate child. Consequently, the child only has a civil relationship with the mother and the mother's family. That is, the child has no legal relationship with his father (article 42 and article 43 of the Law).²⁷

Based on the limitations provided by Article 250 KUHPerdata It can be concluded that the so-called extramarital child is any child born outside of legal marriage. Act Number. 1 Year 1974 on Marriage regulates the position of extramarital children in Article 43, namely:

- a. A child born out of wedlock has only a civil relationship with his mother and his mother's family;
- b. The position of the child in paragraph (1) above will then be regulated in a Government Regulation.

Positive law in Indonesia distinguishes between legitimate offspring and illegitimate offspring. Legitimate offspring is based on the existence of a valid marriage, in the sense that one is the offspring of the other by birth or as a result of a valid marriage, such children are called legitimate children.²⁸ Whereas an illegitimate child is a descendant who is not based on a valid marriage, people call such a child an extramarital child.

A marriage that is valid under state law is a marriage that is registered and meets the conditions set by the government. A serial marriage is a marriage that is not registered so that it does not meet these conditions. Children born from unregistered marriages are considered extramarital children (considered illegitimate) by the state so that children only have civil relations with their mothers and families while civil relations with their fathers do not exist, in addition children born from unregistered marriages will have difficulty obtaining birth

26 Abdullah Jayadi, *Fenomena Nikah Sirri Presfektif Makna Pelaku Nikah Sirri*, (Cet. I; Putra Media Nusantara, Surabaya: 2012), hlm. 11-12.

27 Dyah Ayu Anggraeni, "KEDUDUKAN ANAK ANGKAT TERHADAP HARTA PENINGGALAN ORANG TUA ANGKAT YANG BERASAL DARI HIBAH ORANG TUA BERDASARKAN KOMPILASI HUKUM ISLAM" (2023), <https://doi.org/10.24123/argu.v8i1.5185>

28 J. Satrio, *Family Law on the Position of Children in Law*, PT Citra Aditya Bakti, Bandung, 2000, p. 5.

certificates, In the absence of birth certificates for children, So the state has obstacles in protecting children, because legally there is no record of the child's birth status along with the data of both parents who caused the birth of the child.²⁹ Without the existence of state legal registration, children born from such marriages cannot be legally proven to be legitimate children of their fathers. Another legal consequence of serial marriage on children is that children cannot take care of birth certificates. This can be seen from the application for a birth certificate submitted to the Civil Registration Office. If you cannot show the marriage certificate of the child's parents, then in the child's birth certificate the status is considered an extramarital child.

A legitimate child is a child born of a legal marriage. A valid marriage is a marriage that is in accordance with its religion and beliefs and is recorded by a state institution According to Article 4 of the KHI, Marriage is valid, if it is carried out according to Islamic law in accordance with Article 2 paragraph (1) of Law No. 1 of 1974 concerning Marriage which states "Marriage is valid if it is carried out according to the laws of each religion and belief." Such marriages must be reported and recorded at the Office of Religious Affairs or in the Civil Registry for non-Muslims. This is in accordance with the provisions of Article 2 paragraph (2) of the Marriage Law which states "Every marriage is recorded according to applicable laws and regulations.

Similarly, Article 5 of the KHI states:³⁰

1. In order to ensure marital order for the Islamic community, every marriage must be recorded.
2. The registration of the marriage in paragraph (1), is carried out by the Marriage Registration Officer as stipulated in Law No. 22 of 1946 jo Law No. 32 of 1954. Children born from sirri marriages in this case include extramarital children because the child was born from a marriage that was not recorded in the state administration in accordance with the provisions of the applicable laws and regulations, namely. According to the KHI, the status of a child born is considered an illegitimate child. Consequently, according to Article 100 of the Compilation of Islamic Law the child only has a civil

²⁹ Rosnidar Sembiring, *Op. Cit*, hlm. 126.

³⁰ M. Lubis, "KEDUDUKAN ANAK ANGKAT TERHADAP HARTA WARISAN DALAM KOMPILASI HUKUM ISLAM (Analisis Putusan Mahkamah Syar'iyah Aceh No. 125/Pdt.G/2011/MS-Aceh)" (2023), <https://doi.org/10.47652/metadada.v5i2.376>

relationship with the mother and the mother's family. That is, the son has no legal relationship with his father.

The marriage must be reported and recorded at the Office of Religious Affairs (KUA). Although sirri marriage is considered valid according to Islam, namely the existence of ijab and qabul, marriage guardians and brides who are of legal age, but the marriage must also be valid under the laws of the country, even in the birth certificate the status is considered as an extramarital child, so only the name of the mother who gave birth to it is included. Information in the form of status as an out-of-wedlock child and the absence of the father's name will have a very profound social and psychological impact on the child and his mother.³¹ From this explanation, children born from serial marriages even though they meet religious provisions and have rights and obligations according to Islamic law but are not registered with the state registration agency are considered extramarital children who do not get rights like children born in legal marriages according to law.³² Therefore, to obtain legal certainty, marriage itsbat must be carried out in religious courts.

Application for isbat nikah, to determine the application for determination of the origin of the child, the panel of judges must conduct an examination to ensure that the marriage of the parents has fulfilled the requirements and harmony of marriage and does not violate the rules contained in the Compilation of Islamic Law Articles 14-38 and the child who is asked to determine the origin of the child is not the child of adultery or the child of illegal polygamy who is requested to be legalized. Parents can apply for itsbat nikah to the religious court, by submitting itsbat nikah, then a married couple who perform a sirri marriage will get a marriage certificate whose position is proof of the existence of the marriage and also protect the rights of children born from the marriage. The rights of the child in question include birth certificates, inheritance.³³

If there is a refusal of marriage itsbat, the status of children from the serial marriage does not have legal force. According to Article 99 of the Compilation of Islamic Law that a legitimate child is a child born in

31 Arso Sosroatmojo dan Wasit Aulawi, *Hukum Perkawinan di Indonesia*, Jakarta: GrafindoPersada, 2011), hlm. 116

32 Diana Farid et al., "Marriage and Divorce Practices in the Society of Bandung: Contestation of Islamic and State Law," *Al-Qadha: Jurnal Hukum Islam Dan Perundang-Undangan*, 2023, <https://doi.org/10.32505/qadha.v10i1.5673>.

33 Farid et al.

or as a result of a valid marriage, while an illegitimate child is a child born outside a legal marriage or born in a legal marriage but denied by her husband. According to Article 100 of the Compilation of Islamic Law, children born from unregistered marriages are considered extramarital children (considered illegitimate) by the state, so the child only has a civil relationship with the mother and her family in a civil relationship. Without the legal registration of the country, the children born from the marriage cannot be legally proven to be the legitimate children of their fathers.³⁴

Status of inheritance rights of children from Sirri marriage (marriage under hand) according to the Marriage Law

In Law No. 1 of 1974 concerning marriage, what is meant by a legitimate child is a child born in or as a result of a valid marriage and only a legal child has the right to inherit property from his mother and father. The Marriage Law does not regulate in detail the inheritance rights of extramarital children, so it depends on the heir who wants to follow which legal perspective.³⁵

The legal status of children born out of wedlock is valid as a unification in the field of National Marriage Law as stated in Law Number 1 of 1974 concerning Marriage, that article 43 paragraph (1) of the Law, states that children born out of wedlock only have civil relations with their mother or their mother's family. The provisions of the article stipulate that a child born out of wedlock only has a familial relationship with consequences, especially the right to inherit only with his mother. On the other hand, a legitimate child has a civil relationship in addition to his mother and his mother's family, as well as a civil relationship with his father and his father's family.³⁶

Currently, the Constitutional Court has issued a ruling regarding the position of extramarital children. Based on the Constitutional Court Decision No. 46/PUU-VIII/2010 dated February 17, 2012 which tested Article 43 paragraph (1) of the Law, the article must read: "A child born out of wedlock has a civil relationship with his mother and his mother's family and with a man as his father which can be proven based on science

³⁴ Rosnidar Sembiring, *op. cit.* hlm 129

³⁵ Mahmurodhi Mahmurodhi, "KEDUDUKAN HUKUM ANAK ANGKAT MENURUT HUKUM PERDATA DAN KOMPILASI HUKUM ISLAM DALAM KEWARISAN" (2021), <https://doi.org/10.59635/jihk.v8i2.156>

³⁶ Iriyanti Iriyanti, "HAK WARIS ANAK DALAM KANDUNGAN DIHUBUNGKAN DENGAN PASAL 836 KITAB UNDANG-UNDANG HUKUM PERDATA DAN KOMPILASI HUKUM ISLAM" (2018)

and technology or other evidence according to law to have a blood relationship, including civil relations with his father's family".³⁷

In the provisions of Article 862 of the Civil Code, that an extramarital child who has been recognized by his biological father is entitled to inheritance in the provision of that article that in order to get a share of inheritance, an extramarital child must get recognition from his father. Therefore, if it is related to the Constitutional Court Decision No. 46/PUU-VIII/2010, the Constitutional Court decision overrides the Civil Code. In the Judgment, a child born out of wedlock has a civil relationship with his mother and his mother's family and with a man as his father which can be proven based on science and technology or other evidence according to law to have a blood relationship, including a civil relationship with his father's family".³⁸ The provision means, that an outside child born out of wedlock will get a share of inheritance rights (civil relations) as long as it can be proven based on science and technology and or other evidence according to law to have blood relations including civil relations and his father, without having to get recognition from the father of the child.

The status of inheritance rights of children from Sirri's marriage according to Kompilasi Hukum Islam (KHI)

In accordance with Article 186 of the KHI which states that: "A child born out of wedlock only has a relationship of inheritance with his mother and his mother's family".

Parents can apply for itsbat, the determination of marriage isbat is the emergence of inheritance that gets legal protection because of kinship or nasab relationship between the person who inherits and the person who inherits caused by birth. So children born in marriage are entitled to inheritance from their parents and vice versa. If there is a refusal of marriage itsbat, the status of children from the serial marriage does not have legal force. So children from sirri marriages are still called extramarital children.³⁹

Extramarital children who do not come to be recognized by the heir (his father). However, an extramarital child can inherit from his

³⁷ I. A. Surya, "Implementasi Pasal 280 Kitab Undang Undang Hukum Perdata Atas Hak Waris Anak Luar Kawin" (2023), <https://doi.org/10.47532/jirk.v6i2.924>

³⁸ I. Ismayani and Syaiful Khoiri Harahap, "Hak Asuh Anak dalam Hukum Islam dan Hukum Positif" (2023), <https://doi.org/10.58939/afosj-las.v3i2.585>

³⁹ Dinda Ediningsih Dwi Utami and Taufik Yahya, "Akibat Hukum Nikah Siri Terhadap Hak Anak Dan Isteri Ditinjau Dari Kompilasi Hukum Islam" (2022), <https://doi.org/10.22437/zaaken.v3i2.14767>

biological father if his biological father makes a will stating that the child gets a share of the estate left behind. A will is a tasharruf (release) of property executed after the death of a person.⁴⁰

According to the origin of law, a will is an act done by the will of the heart under any circumstances. Therefore, there is nothing in Islamic law that a will must be made by way of a judge's decision. Broadly speaking, a will is a gift of property from one person to another person or to several people after the death of that person. However, the share of inheritance from his biological father's will cannot be more than 1/3 of his estate, in order to protect the rights of the main heir.

CONCLUSION

From the results of this study, researchers concluded that, Children born from sirri marriages in this case include extramarital children because the child was born from marriages that were not recorded in the state administration in accordance with the provisions of the applicable laws and regulations, namely Law Number 1 of 1974 concerning Marriage. Without the existence of state legal registration, children born from such marriages cannot be legally proven to be legitimate children of their fathers. Another legal consequence of serial marriage on children is that children cannot take care of birth certificates. This can be seen from the application for a birth certificate submitted to the Civil Registration Office. According to the Compilation of Islamic Law, to obtain legal certainty, itsbat nikah must be carried out in religious courts. As evidence of the existence of the marriage and as well as protecting the rights of children born from marriage, if there is a refusal of marriage itsbat then the status of children from serial marriages does not have legal force and the status of children is still an extramarital child.

The inheritance status of a child from a sirri marriage according to the Marriage Law is only obtained from the mother and the mother's family, but after a decision from the Constitutional Court, an extramarital child can get inheritance rights from his father if it can be legally proven and clear that he has a blood relationship with his biological father. Meanwhile, the right of inheritance of sirri marriage according to the Compilation of Islamic Law remains in accordance with his position which states that he only has a sexual relationship and inheritance relationship inherits with his mother and his mother's family only but not

⁴⁰ Dinda Ediningsih Dwi Utami and Taufik Yahya, "Akibat Hukum Nikah Siri Terhadap Hak Anak Dan Isteri Ditinjau Dari Kompilasi Hukum Islam" (2022), <https://doi.org/10.22437/zaaken.v3i2.14767>

with his father. Parents can apply for itsbat, the determination of marriage isbat is the emergence of inheritance that gets legal protection because of kinship or nasab relationship between the person who inherits and the person who inherits caused by birth. So children born in marriage are entitled to inheritance from their parents. If there is a refusal of marriage itsbat, then the status of children from the serial marriage does not have legal force. So the child of the sirri marriage is not entitled to receive an inheritance from his father.

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