

## Protecting the Unprotected: A Legal Analysis of Guardianship for Underage Orphans

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**Abstract:** *This study aims to analyze the guardianship of orphans who are still minors from the perspective of positive law in Indonesia. Orphans who have lost both parents need legal protection, especially in terms of guardianship arrangements that function to ensure the welfare and rights of the child. In this case, guardianship is an important aspect to provide a sense of security for children who need legal guidance, especially in determining who is responsible for fulfilling the child's living and educational needs. This study uses a normative research method, with an approach to relevant laws and regulations, as well as a literature study involving primary and secondary legal materials such as laws, literature, and related journals. This analysis also includes various regulations regarding child guardianship in Indonesian positive law, especially those regulating the status of orphans who have not reached adulthood. The results of the study show that in Indonesian positive law, guardianship of orphans is regulated in Law No. 23 of 2002 concerning Child Protection and Law No. 1 of 1974 concerning Marriage. The process of guardianship of orphans aims to provide custody to the person who is considered most worthy, either from the family or other parties who can provide the best protection for the child. However, in practice, there are still various obstacles, such as the lack of public understanding of the rights of orphans and weak supervision of the implementation of guardianship. Therefore, it is necessary to increase legal awareness in the community and strengthen the role of the state in supervising the guardianship of orphans. The recommendation from this study is to increase understanding of the guardianship rights of orphans and strengthen the implementation of legal protection for children, through education and closer cooperation between related institutions.*

**Keywords:** *Guardianship; Minors; Orphans.*

**Abstrak:** *Penelitian ini bertujuan untuk menganalisis perwalian anak yatim piatu yang masih di bawah umur dalam perspektif hukum positif di Indonesia. Anak yatim piatu yang kehilangan kedua orang tuanya memerlukan perlindungan hukum, khususnya dalam hal pengaturan perwalian yang berfungsi untuk memastikan kesejahteraan dan hak-hak anak tersebut. Dalam hal ini, perwalian merupakan aspek penting untuk memberikan rasa aman bagi anak yang membutuhkan bimbingan hukum, terutama dalam menentukan siapa yang bertanggung jawab atas pemenuhan kebutuhan hidup dan pendidikan anak. Penelitian ini menggunakan metode penelitian normatif, dengan pendekatan terhadap peraturan perundang-undangan yang relevan, serta studi pustaka*

*yang melibatkan bahan hukum primer dan sekunder seperti Undang-Undang, literatur, dan jurnal terkait. Analisis ini juga mencakup berbagai peraturan mengenai perwalian anak dalam hukum positif Indonesia, khususnya yang mengatur status anak yatim piatu yang belum mencapai umur dewasa. Hasil penelitian menunjukkan bahwa dalam hukum positif Indonesia, perwalian anak yatim piatu diatur dalam Undang-Undang No. 23 Tahun 2002 tentang Perlindungan Anak dan Undang-Undang No. 1 Tahun 1974 tentang Perkawinan. Proses perwalian anak yatim piatu bertujuan untuk memberikan hak asuh kepada orang yang dianggap paling layak, baik dari keluarga atau pihak lain yang dapat memberikan perlindungan terbaik bagi anak. Namun, dalam praktiknya, masih terdapat berbagai kendala, seperti kurangnya pemahaman masyarakat mengenai hak-hak anak yatim piatu serta lemahnya pengawasan terhadap implementasi perwalian. Oleh karena itu, dibutuhkan peningkatan kesadaran hukum di masyarakat dan penguatan peran negara dalam pengawasan terhadap perwalian anak yatim piatu. Rekomendasi dari penelitian ini adalah untuk meningkatkan pemahaman tentang hak perwalian anak yatim piatu dan memperkuat implementasi perlindungan hukum bagi anak, melalui pendidikan dan kerjasama yang lebih erat antar lembaga terkait.*

***Kata Kunci; Perwalian; Anak Yatim Piatu; Anak Di Bawah Umur.***

## **INTRODUCTION**

Marriage is a sacred legal event that binds two individuals, carrying various legal consequences that are regulated in detail within the Indonesian legal system. Article 1 of Law No. 1 of 1974 in conjunction with Law No. 16 of 2009 defines marriage as a physical and spiritual bond between a man and a woman with the purpose of forming a happy and everlasting family based on the One Almighty God. Marriage gives rise to legal consequences for the husband and wife, their property, and the children born from the marriage, including situations in which both parents pass away and leave an inheritance. Marriage law and inheritance law are interconnected because the birth of a child within a marriage creates legal relationships related to inheritance, family, and guardianship. If a child as an heir lacks legal capacity at the time of the parents' death, a guardian must be appointed. According to Article 50 paragraph (2) of the Marriage Law, guardianship is the obligation to supervise and manage the person and property of a child who has not yet reached legal maturity.

Children are a trust as well as a blessing within the family bestowed by Almighty God, whose dignity, honor, and rights as human beings must always be protected and whose values must be upheld.[1]

Child guardianship is an important legal aspect within the family, especially when one or both parents are no longer able to fulfill their obligations as guardians due to death, divorce, or certain conditions that render them incapable. In Indonesia, child guardianship is regulated under various laws and regulations, including Law No. 1 of

1974 on Marriage, which sets out the rights and obligations of parents as well as the provisions on child guardianship.

The supervisory guardian is obliged to compel the guardian, under the threat of loss and interest, to comply with the obligation to compensate costs, as well as to prepare an inventory or detailed list of the assets of the estate in every inheritance that devolves upon a minor. However, in practice, the guardianship supervision process becomes disharmonious when the guardianship is considered by the guardian to have been completed following the issuance of a court determination. Guardians often neglect the provisions of Article 368 of the Indonesian Civil Code, which require the guardian to notify the Heritage Hall (*Balai Harta Peninggalan/BHP*) of the occurrence of such guardianship. This situation is influenced by the operative part of guardianship determinations issued by the District Court, which rarely explicitly stipulate the guardian's obligation to report to the BHP in its capacity as the supervisor guardian.[2]

As mentioned above, one of the purposes of forming a family can be said to be to obtain offspring. Therefore, within a family, the figures who have the greatest influence and authority over a child are the parents, as regulated in Article 47 paragraph (1) of the Marriage Law, which provides that:

1. Parental authority over a child continues until the child reaches the age of 18 (eighteen) years, or the child marries, or there is a revocation of parental authority by a court decision. There are several aspects of parental authority as regulated in the Marriage Law, namely: "Authority over the person of the child, as set forth in Article 45 paragraph (1) of the Marriage Law, which states: "Both parents are obliged to care for and educate their children as well as possible." This authority includes, among others, providing financial support, adequate housing, education, guidance for the child's best future, and ensuring the child's welfare until the child is able to enter into marriage."
2. Authority over the child's acts is set forth in Article 47 paragraph (2) of the Marriage Law, which states: "Parents represent the child in all legal acts, both inside and outside the court." This authority includes representing the child in carrying out legal acts within and outside the court, bearing the legal consequences arising from the child's acts, and guiding the child's conduct toward doing good.
3. Authority over a child's property is set forth in Article 48 of the Marriage Law, which includes managing, safeguarding, and expending the child's assets for the benefit of the child before the child reaches the age of 18 years or before marriage. With this limitation, the property remains the child's own, and parents may not arbitrarily transfer rights to or

encumber the child's property. Parental authority over a child's property includes:

a. Management (*het beheer*)

b. Enjoyment of the proceeds (*het vruchtgenot*).[3]

A child is a person born from the relationship between a man and a woman. A child is part of the younger generation as one of the human resources that constitutes potential and the successor to the nation's ideals and struggles, having a strategic role and distinctive characteristics and traits, and therefore requires guidance and protection in order to ensure physical, mental, and social growth and development. According to R.A. Kosnan, a child is a young human being, youthful in age and spirit throughout the course of life, because children are easily influenced by their surrounding environment. As a child, one should be given the widest possible opportunity to sustain life and to grow and develop naturally.[1]

Guardianship plays a fundamental and indispensable role in ensuring the welfare, protection, and legal security of minors or children who have not yet attained full legal capacity, including children who are abandoned, neglected, or otherwise deprived of adequate parental care. In such circumstances, guardianship extends not only to the management and protection of the child's property and financial interests, but also to the fulfillment of the child's daily needs, such as education, healthcare, emotional support, and social development. Since these children are legally and practically incapable of safeguarding their own rights, making informed decisions, or defending their interests before the law, it becomes necessary for a competent individual or legally recognized institution to assume responsibility on their behalf.

The appointment of a guardian is therefore intended to ensure that the child's fundamental rights are protected and that their physical safety, emotional well-being, and moral development are adequately maintained. A guardian is expected to act in the best interests of the child, providing guidance, supervision, and care in a manner that promotes stability and continuity in the child's life. In this sense, guardianship functions as a protective legal framework designed to prevent neglect, exploitation, or abuse, while simultaneously fostering an environment that supports the child's holistic growth. Consequently, guardianship should not be viewed merely as a formal legal arrangement, but rather as a broader social and moral obligation, reflecting the collective responsibility of society and the state to ensure that every child is afforded the opportunity to grow, develop, and reach their full potential under conditions of dignity, security, and protection.

In Islamic law, the concept of guardianship (*wilayah*) is clearly regulated and is generally divided into two main categories, namely guardianship in marriage and guardianship of minors. Guardianship in marriage refers to the authority granted to a guardian to contract a marriage on behalf of a child or a person who lacks legal competence, while guardianship of minors is intended to protect children who are legally incapable of managing their own affairs. This latter form of guardianship encompasses responsibility over the child's personal care,

education, upbringing, and property management. According to Imam al-Shafi‘i, guardianship is defined as a lawful authority bestowed upon a person of sound mind and legal competence, exercised for the benefit and protection of the individual placed under such guardianship. This definition emphasizes that guardianship must always be oriented toward the interests and welfare of the ward, rather than the personal interests of the guardian.

In order to obtain such a determination, a guardian must submit an application for guardianship along with all required files and documents relating to both the guardian and the child. Nevertheless, many parties do not comply with this requirement, because under the Marriage Law it is not expressly stated that the transfer of ownership rights belonging to a minor must be carried out through a determination of the District Court. Even so, several institutions, such as the Land Office, usually require a determination from the District Court, essentially referring to the provisions of the Civil Code (*Burgerlijk Wetboek*). This is because the contents of the Marriage Law are considered insufficiently strong in providing protection for the interests of minors. In surah Ad – Dhuha Verse 93:9, So as for the orphan, do not oppress (Him). It means, The verse “So as for the orphan, do not oppress [him]” comes from Surah Ad-Duha (93:9). In this verse, Allah instructs the Prophet Muhammad—and by extension all believers—to treat orphans with kindness and compassion. The word “orphan” refers to a child who has lost their father and is especially vulnerable, while “do not oppress” means not to mistreat, neglect, or be harsh toward them in any way. This command follows earlier reminders in the surah of how Allah cared for the Prophet when he himself was in a vulnerable state, emphasizing that those who have received mercy should show mercy to others. Overall, the verse highlights the importance of protecting and honoring the weak, encouraging empathy, gentleness, and social responsibility.

However, there are other legal consequences for the holder of child custody or the guardian. According to the provisions of Article 156 letter (c), it is stipulated that “if the holder of *hadhanah* is proven to be unable to guarantee the physical and spiritual safety of the child, even though maintenance costs have been adequately provided, then at the request of relatives the Religious Court may transfer custody to another relative.” Therefore, a guardian is required to carry out the mandate of guardianship in the best possible manner.[3]

A notable example of a guardianship case in Indonesia is the case of Gala Sky, the son of the late Vanessa Angel and Bibi Ardiansyah. Following the tragic death of both parents, who passed away without leaving a will or formally appointing a guardian, it became necessary for the court to determine who was legally entitled to assume guardianship over the child. In the author’s view, the closest family members of Gala’s parents possess the primary eligibility to serve as his guardians, provided that they meet the legal and moral requirements stipulated by law. The custody dispute surrounding Gala Sky highlights the critical importance of

applying the principle of the best interests of the child as the primary consideration in judicial decisions concerning guardianship. This case illustrates that guardianship determinations should not be based solely on familial ties or claims, but must prioritize the child's welfare, stability, and future development as the paramount concern of the court.

The adoption of a child is a legal act that transfers parental authority to the adoptive family, and it is regulated by several provisions such as Article 21 of the Convention on the Rights of the Child, Law No. 35/2014 on Child Protection, Law No. 12/2006 on Citizenship, and Government Regulation No. 54/2007 on the Implementation of Child Adoption. National law defines a child as an individual under 18 years of age who is unmarried, and guarantees the child's right to parental care, as affirmed in the Universal Declaration of Human Rights.

In civil law, particularly under the provisions of the Indonesian Civil Code, guardianship is expressly regulated in Article 331, which stipulates that a child who has lost both parents or a child who has not yet reached legal maturity and is no longer under parental authority must be placed under guardianship. This provision reflects the fundamental principle that minors who lack legal capacity require legal representation and supervision to ensure that their personal welfare and material interests are adequately protected. The appointment of a guardian is intended to guide the child in matters of daily life, education, moral development, and social interaction, as well as to manage and safeguard the child's property and legal rights until the child reaches adulthood or is otherwise legally competent.

Similarly, within the framework of Islamic law, guardianship is recognized as an essential institution aimed at protecting children who are unable to care for themselves. Islamic scholars generally agree that a guardian (*wali*) possesses both the authority and the responsibility to care for, nurture, and guide the child placed under their guardianship. This responsibility encompasses not only physical care and financial management but also moral, religious, and educational guidance in accordance with Islamic principles. Thus, both civil law and Islamic legal doctrine emphasize that guardianship is not merely a formal legal status, but a trust (*amanah*) that must be exercised in the best interests of the child, ensuring their holistic well-being and proper development until they are capable of independently managing their own affairs.

How is the guardianship of underage orphans regulated within the framework of Indonesia's positive law? What are the legal considerations taken by judges in appointing a guardian for an underage child, as reflected in the West Jakarta Religious Court Decision Number 3315/Pdt.G/2021/PA? The purpose of this research is to identify and analyze the regulation of guardianship for underage orphans under Indonesia's positive law. In addition, this research aims to identify and analyze the judges' legal considerations in appointing a guardian for underage orphans.

The benefits of this research are as follows: it serves as a contribution to law faculty students in general and to the author personally for the development of legal knowledge. The research findings can be used as reference material, a source of information, and a contribution of ideas that are expected to be useful for students, as literature for readers, and as input for researchers conducting studies in the same field, particularly from perspectives different from those explored in this research.

### **RESEARCH METHOD**

This research is normative legal research, which relies on legal norms and materials relevant to the issues being examined. Normative legal research, or library research, analyzes documents through secondary data such as legislation, legal theories, and expert opinions. The types of legal materials used consist of primary legal materials, namely binding laws and regulations such as the Indonesian Civil Code (KUH Perdata) regarding guardianship provisions, Law No. 1 of 1974 on Marriage, Law No. 35 of 2014 on Child Protection, and Law No. 3 of 1997 on Juvenile Courts. Meanwhile, secondary legal materials are obtained from literature, legal books, research findings, and other sources relevant to the research issues.

The technique for collecting legal materials in this research was conducted through a comprehensive document study, which involved reviewing and examining various records, documents, and official materials directly related to the research issues under discussion. In addition, a literature study was undertaken by analyzing a wide range of sources, including textbooks, statutory regulations, scholarly articles, court decisions, and other relevant academic works that support and enrich the writing of this study. These sources were selected to ensure a thorough understanding of the legal framework and doctrinal perspectives concerning guardianship and child protection, particularly in relation to underage orphans.

The legal materials obtained were subsequently analyzed using a descriptive-analytical method, employing normative legal interpretation of the applicable laws and regulations. This analysis was carried out by systematically interpreting statutory provisions, legal doctrines, and principles, while also integrating relevant legal theories to provide a comprehensive understanding of the regulation and implementation of guardianship for underage orphans. In conducting this analysis, particular emphasis was placed on the principles of child protection and the doctrine of the best interests of the child, which serve as fundamental guidelines in civil law and child welfare legislation.

Furthermore, the identification and clarification of legal norms were achieved through an in-depth examination of laws and regulations governing child protection, highlighting the crucial role of guardians in safeguarding and fulfilling the rights of orphaned children. This research adopts a statutory approach by closely examining various relevant legal instruments, including Law No. 1 of 1974 on Marriage and Law No. 35 of 2014 on Child Protection, as

well as related implementing regulations. Through this approach, the study seeks to provide a systematic and coherent analysis of the legal framework governing guardianship, with the ultimate objective of ensuring legal certainty and optimal protection for underage orphans within the Indonesian legal system.

## **RESEARCH AND DISCUSSION**

### **A. Regulation of Guardianship for Underage Orphans in the Perspective of Positive Law**

When a child has no parents, it is the State that guarantees protection through legal safeguards. The State provides protection to children who lack both material and immaterial capacity; therefore, it establishes requirements for adoption as a basis for ensuring the prospective adoptive parents' ability and responsibility to provide education and meet the child's economic needs. In order to implement the provisions on adoption as regulated in Law Number 35 of 2014 on Child Protection, it is necessary to stipulate a Government Regulation governing adoption, namely Government Regulation Number 54 of 2007 on the Implementation of Adoption. In addition, there are other civil law provisions that regulate adoption procedures, such as those found in Islamic law.[4]

Child guardianship refers to the supervision of a child's personal affairs and the management of their property when the child has not yet reached legal maturity and both parents have passed away, become incapable, or based on a court decision. The purpose of guardianship is to protect the child's physical, mental, and material interests until they reach adulthood. The legal basis for child guardianship in Indonesia is regulated in the Indonesian Civil Code (Articles 330–364), which establishes fundamental principles of guardianship, such as the principle of indivisibility, family consent, guardianship by the surviving parent, the appointment of a guardian by the parents, and court-appointed guardianship when no lawful guardian exists. Law No. 1 of 1974 on Marriage, Law No. 35 of 2014 on Child Protection, the Compilation of Islamic Law (Articles 107–112 of the KHI), and Government Regulation No. 29 of 2019 also provide a clear legal foundation regarding guardianship, including the requirements and procedures for appointing a guardian through court determination.[3]

According to the provisions of the Indonesian Civil Code, children who are considered to require guardianship encompass several categories of minors who, due to certain legal or factual conditions, are unable to obtain adequate care, supervision, and legal representation from their parents. These categories include legitimate children whose parents have both passed away, thereby leaving the child without any parental authority; children whose parents' parental rights have been revoked through a court decision as a result of neglect, abuse, or other legally recognized grounds; children born to parents who are divorced and who are unable, unwilling, or legally unfit to exercise parental authority; as well as children born outside of marriage who do not receive sufficient legal protection or recognition from

their biological parents. In each of these circumstances, the absence or inadequacy of parental responsibility creates a legal vacuum that may place the child's welfare and rights at risk.

In such situations, guardianship functions as a vital legal mechanism to ensure the continuity of care and protection for the child. Through the appointment of a guardian, the child is provided with an individual who is legally authorized and obligated to oversee the child's upbringing, education, health, and daily needs, while also representing the child in legal matters. In addition, guardianship plays an important role in safeguarding the child's property and financial interests, preventing misuse or exploitation of assets that may belong to the child. Consequently, the institution of guardianship serves not only as a substitute for parental authority but also as a protective framework designed to secure the child's personal welfare, legal rights, and future interests until the child reaches legal maturity or is otherwise deemed capable of managing their own affairs.

Guardianship may arise through several legal pathways. It may occur by operation of law, for example, when one parent dies and the surviving parent automatically assumes guardianship over the child. It may also be established through a will or testament made by the parents prior to their death, in which they appoint a specific individual to act as guardian for their child. In the absence of such arrangements, guardianship may be determined through a court ruling, particularly when no lawful guardian exists or when there is a dispute regarding who is most suitable to assume the role. In these cases, the court plays a crucial role in assessing the eligibility, competence, and integrity of the prospective guardian, with primary consideration given to the best interests of the child.

Furthermore, the protection of children's rights is expressly guaranteed under Article 54 of Law No. 35 of 2014 on Child Protection, which emphasizes that every child is entitled to protection from all forms of discrimination, violence, exploitation, and neglect. This protection extends to the fulfillment of the child's fundamental rights, including the right to play, to receive education, to obtain proper healthcare, to possess a legal identity, and to be raised and cared for in a safe and nurturing environment. Child protection is not merely a private responsibility of the family but constitutes an essential component of national development. This principle is reinforced in Article 1 paragraph (2) of Law No. 35 of 2014, which affirms that child protection is a continuous and systematic effort aimed at ensuring the optimal growth and development of children, both physically and mentally, in accordance with human dignity and fundamental human rights.

Previous studies have generally highlighted the legal process, legal basis, and the role of guardians in caring for orphaned children. These studies often include analyses of court

procedures, criteria for the appointment of guardians, and evaluations of court decisions related to guardianship applications. Some studies have also discussed differences in guardianship practices across various legal systems and how administrative requirements influence judicial decisions. However, most prior research tends to focus on a general overview or is conducted at broader regional or national levels, without giving particular attention to local contexts or procedural details at the level of a specific city. For example, studies at the national or regional level may not sufficiently examine the specific practices and challenges encountered in the guardianship process in a particular city.[3]

In addition, the Compilation of Islamic Law expressly stipulates that guardianship constitutes a legal authority granted to a competent individual to represent a minor in carrying out various legal acts for the benefit and protection of the child. This authority extends to matters concerning the personal interests of the child as well as the administration, management, and safeguarding of the child's property and financial assets. However, such authority is not absolute or unrestricted in nature; rather, it is accompanied by a set of legal, moral, and ethical obligations that must be exercised in good faith and strictly in accordance with applicable legal norms and principles. The guardian is therefore required to prioritize the welfare of the child and to act solely in the child's best interests, avoiding any actions that could potentially cause harm or prejudice to the child.

Indeed, a child's obligation to respect parents and obey their wishes is universal; there is hardly any nation that does not uphold such a principle. Conversely, parents must set a good example in a wise manner and should not act through coercion.

If parents are devout to God Almighty and obedient in worship, then children are certainly obliged to respect and obey them. However, if parents are gamblers, drunkards, and immersed in immoral conduct, children are not obliged to obey them. The existence of these reciprocal obligations, when viewed from the principle of legal certainty, will give rise to clarity regarding the rights and obligations of parents and the children born to them, including children born out of wedlock.[2]

Article 110 of the Compilation of Islamic Law further affirms that a guardian bears the obligation to properly care for, nurture, educate, and protect the child under their guardianship, ensuring the child's physical, emotional, moral, and social development. In addition to responsibilities relating to personal care, the guardian is also entrusted with the duty to manage the child's assets prudently and responsibly, with the objective of preserving their value and, where possible, enhancing them for the child's future benefit. To prevent abuse of authority and to ensure transparency, the provision explicitly prohibits guardians from encumbering, transferring, or otherwise disposing of the child's property without legitimate legal grounds and prior judicial approval. Moreover, the guardian is required to prepare and submit an annual financial report detailing the management of the child's assets, which serves as an important mechanism of accountability and legal

supervision. Through these regulations, the Compilation of Islamic Law seeks to balance the authority granted to guardians with strict safeguards aimed at protecting the rights, property, and overall welfare of minors.

Furthermore, Government Regulation No. 29 of 2019 stipulates that guardianship should, as a matter of priority, be entrusted to individuals who have a familial relationship with the child, reflecting the principle that family members are generally best positioned to understand and fulfill the child's needs. Nevertheless, the regulation also allows guardianship to be granted to siblings, other individuals, or even legal entities, provided that such appointment is made through a formal court determination and is deemed to be in the best interests of the child. This mechanism ensures legal certainty, transparency, and oversight in the appointment of guardians.

According to the provisions of the Indonesian Civil Code, children who are considered to require guardianship include several categories of minors who lack adequate parental authority or care. These include legitimate children whose parents have both passed away, children whose parental rights have been revoked by a court decision, children of divorced parents who are unable or unfit to exercise parental responsibility, as well as children born outside of marriage who do not receive sufficient legal protection from their parents. Collectively, these legal provisions demonstrate a comprehensive regulatory framework that governs guardianship in Indonesia, integrating principles of child protection, accountability, and the best interests of the child within both civil law and Islamic law perspectives.

Guardianship may arise through several legal mechanisms, depending on the circumstances surrounding the child and the availability of parental authority. It may be established by operation of law, for instance, when one parent passes away and the surviving parent automatically assumes responsibility as the lawful guardian of the child. Guardianship may also be created through a will or testament made by the parents during their lifetime, in which they appoint a specific individual to assume guardianship in the event of their death or incapacity. In situations where no lawful guardian has been designated or where disputes arise regarding the suitability of a prospective guardian, guardianship may be determined through a court ruling. In such cases, the court exercises its authority to appoint a guardian who is deemed capable, trustworthy, and best able to safeguard the interests and welfare of the child.

Furthermore, the protection of children's rights is expressly guaranteed under Article 54 of Law No. 35 of 2014 on Child Protection, which emphasizes that every child is entitled to comprehensive protection from all forms of discrimination, violence, exploitation, and

neglect. This statutory protection encompasses not only the prevention of harmful treatment but also the fulfillment of the child's fundamental rights, including the right to play and enjoy leisure, the right to receive education, the right to obtain proper healthcare services, the right to possess a legal identity, and the right to be raised and cared for in a safe, nurturing, and supportive environment. These provisions reflect the state's commitment to ensuring that children grow and develop optimally, both physically and mentally, in accordance with human dignity and the principle of the best interests of the child. Child protection is also an essential part of national development, as mandated in Article 1 paragraph (2) of Law No. 35 of 2014, which affirms that child protection is an effort to ensure their optimal growth and development in accordance with human dignity. It must be granted with written consent signed by the party authorized to provide such consent.[5]

### **B. Judges' Legal Considerations in the Appointment of a Guardian for an Underage Child in the Study of the West Jakarta Religious Court Decision Number 3315/Pdt.G/2021/PA.**

In the study of the West Jakarta Religious Court Decision Number 3315/Pdt.G/2021/PA.JB, the judges' legal considerations focused on the principle of the best interests of the child in appointing a guardian for Gala Sky Adriansyah (GSA), who was still underage following the death of both of his parents. The judges took into account the psychological condition of the parties seeking custody, their economic capability, emotional closeness, and the evidence presented. Testimony revealed that the relationship between GSA's maternal grandfather, Doddy Sudrajat, and the late Vanessa Angel was not harmonious, marked by prolonged conflict, coercion to work while she was still in school, and minimal involvement in GSA's upbringing. In addition, the financial capacity evidence submitted by the respondent was deemed insufficient, raising doubts about his ability to care for his grandson. Conversely, the plaintiffs, the family of GSA's late father, demonstrated clear evidence of financial capability, stronger emotional attachment to GSA, and a recommendation from the National Commission for Child Protection, all of which reinforced their eligibility to be appointed as guardians.[6]

The panel of judges, in reaching its decision, carefully considered a range of factual and legal factors related to the welfare and future development of the child, GSA. The judges found that the paternal family demonstrated superior economic capability, a closer emotional bond with the child, and the ability to provide a stable and supportive environment conducive to GSA's physical, emotional, and psychological development. These considerations were supported by evidence presented during the proceedings, including testimony and documentary proof illustrating the daily care, attention, and emotional attachment that had already been established between the child and the paternal family. The judges further emphasized that a guardian must not only be financially capable

but also emotionally available and morally responsible in order to ensure the child's holistic growth.

At the same time, the panel underscored the importance of maintaining balanced family relationships by granting the defendant reasonable access to sustain a relationship with their grandchild. This approach reflects the spirit and objectives of the Child Protection Act, which recognizes a child's fundamental right to receive love, care, and affection from both sides of the family. By preserving the child's relationship with the maternal and paternal families, the court sought to avoid emotional harm and to promote the child's sense of identity and belonging within the broader family structure.

A child is the natural fruit of the strong affection between husband and wife. The status of husband and wife, who occupy the position of father and mother to their children, is a highly noble and meaningful role, serving as an expression that God has bestowed His grace so that both are endowed with mutual love, feelings of attraction, and a sense of lasting attachment to one another.

This can be seen from the purpose of marriage as stipulated in Law No. 1 of 1974, which is to form a happy and enduring family. The strong bond between parents and their children constitutes one of the most steadfast and noble forms of human relationships. God has preserved and ensured that this strong relationship endures and develops as an effort to maintain the continuity of human life and to strengthen human existence.[7]

In formulating its legal considerations, the judges relied on several key statutory provisions, including Article 3 of Government Regulation No. 29 of 2019, which regulates the requirements and qualifications for the appointment of a guardian; Articles 13 and 16 of Law No. 35 of 2014 on Child Protection, which emphasize the protection of children from discrimination, violence, and all forms of mistreatment; as well as the overarching principle of the best interests of the child as a primary consideration in all decisions concerning children. Based on these legal grounds and the evidence presented, the panel ultimately decided to grant custody to Plaintiff II, DZ Binti H. Z, who was deemed more eligible and suitable to act as guardian. This determination was grounded in her demonstrated emotional closeness to the child, sufficient financial capacity, and emotional stability throughout the proceedings.

Furthermore, the decision is consistent with the requirements set forth in Article 5 of Government Regulation No. 29 of 2019, which prioritizes the appointment of guardians who have a close relationship with the child, adequate economic capability, and the fulfillment of other legal and moral requirements. By adhering to these provisions, the

court sought to ensure optimal protection, care, and legal certainty for orphaned children such as GSA, while upholding the fundamental principles of child protection and the best interests of the child within the Indonesian legal system.

Regardless of the degree of correctness or error in the understanding of positive law, this misunderstanding originates from the views of Algra K and van Duijvendik, who equated the terminology *positiverecht* with *gelding van recht*. In this context, *positiverecht* is interpreted as positive law, while *gelding van recht* is understood as law that is currently in force. This interpretation has subsequently been followed from generation to generation without further clarification of the distinct meanings of each term. Therefore, this writing is intended, at least, to help provide clarification and a better understanding of the meanings of these two terminologies within legal science.[8]

In addition to the need for harmonization of laws and regulations as well as the harmonization of institutional integration, legal awareness on the part of guardians is also required. This legal awareness is related to society's perception of what the law is and what functions it serves. Both guardians who are the surviving parents and those appointed through a court determination are expected to act in good faith by consistently prioritizing the best interests of the child and by cooperating with the supervisory guardian. This may be initiated by implementing the provisions of Article 368 of the Indonesian Civil Code by notifying the Heritage Hall (*Balai Harta Peninggalan/BHP*) of the existence of the guardianship, followed by the administration of an oath, the inventory of the child's assets, the involvement of the BHP in every legal act, and the preparation of accountability reports relating to the guardianship.[2]

## **CONCLUSIONS AND RECOMMENDATIONS**

This research shows that the regulation of guardianship for orphaned children in Indonesia is governed by various laws and regulations that explicitly emphasize the protection of children's rights. Positive law provides a clear framework for the appointment of guardians to comprehensively safeguard the interests of the child—physically, mentally, and materially—until the child reaches adulthood. Judges' legal considerations in appointing a guardian are based on the principle of the best interests of the child, taking into account various aspects such as the background of prospective guardians and the child's condition, to ensure that the decision provides optimal protection and guidance. In line with this, it is recommended that the government and relevant institutions enhance public awareness regarding the laws and regulations on child guardianship so that the public understands children's rights and the applicable legal procedures. Furthermore, it is advisable for judges to be equipped with clearer guidelines in the guardian appointment process, including the involvement of professionals such as psychologists or social workers, to ensure that decisions truly align with the principle of child protection.

**REFERENCES**

- Neman, H. A. (2021). Pertanggungjawaban Hukum Wali Tidak Melaksanakan Kewajiban Pada Anak Di Bawah Perwaliannya. *Jurnal Ilmu Hukum: ALETHEA*, 4(2), 147-164. (n.d.).
- Pratiwi, Y. D. (2019). Harmonisasi Perlindungan Harta Kekayaan Anak dalam Perwalian melalui Penguatan Peran Wali Pengawas. *Jurnal Suara Hukum*, 1(1), 61-90. (n.d.).
- Dewi, E. C. (2020). Tinjauan yuridis mengenai perwalian anak yatim piatu yang masih dibawah umur. *Perspektif Hukum*, 328-346. (n.d.).
- Sunandar, M. G. (2019). Eksploitasi Anak Di Bawah Umur Untuk Aktifitas Mengemis. *Dinamika*, 25(7). (n.d.).
- Suhartono, S. (2019). Hukum Positif Problematik Penerapan Dan Solusi Teoritiknya. *DiH: Jurnal Ilmu Hukum*, 15(2), 372134. (n.d.).
- Ontolay, A. B. (2019). Hak dan kewajiban orang tua dan anak ditinjau dari pasal 45 Juncto 46 Undang-Undang nomor 1 tahun 1974. *Lex Privatum*, 7(3). (n.d.).
- Putra, A. P., & Jazuli, H. E. R. (2021). Perbandingan Prosedur Pengangkatan Anak Menurut Hukum Positif Indonesia Dengan Hukum Islam. *Yustisia Tirtayasa: Jurnal Tugas Akhir*, 1(1). <https://doi.org/10.51825/yta.v1i1.11679>
- Ridho, M. A. (2023). TINJAUAN HUKUM ISLAM TENTANG PENETAPAN WALI UNTUK PENGELOLAAN HARTA WARIS ANAK. (n.d.).
- Merchiano, R., Syafariansyah, M., Effendi, E., Ichandri, I., & Sadli, S. (2023). Analisis Hukum dalam Penetapan Pengadilan Agama tentang Perwalian Anak Kandung yang Masih di Bawah Umur. *Lex Stricta: Jurnal Ilmu Hukum*, 2(1), 49-62.
- Hans, C. M. J., & Chua, J. (2024). Analisis perlindungan hukum atas hak asuh anak dalam perceraian menurut hukum perdata. *Jurnal Kewarganegaraan*, 8(1), 970-976.
- Heriyani, E., & Yuniarlin, P. (2015). Fungsi BHP Sebagai Wali Pengawas Terhadap Anak di Bawah Perwalian Dalam Rangka Perlindungan Anak (Studi Kasus di BHP Semarang). *Jurnal Media Hukum*, 22(2), 14-14.
- Utami, N. F., & Indrawati, S. (2022). Perlindungan hukum terhadap anak dalam perwalian dan tanggung jawab seorang wali. *Amnesti: Jurnal Hukum*, 4(1), 62-70.

- Rahman, T. A., & Rizkianti, W. (2024). Penyelesaian Sengketa Hak Asuh Anak Setelah Perceraian: Perbandingan Antara Indonesia dan Inggris. *Jurnal USM Law Review*, 7(1), 248-363.
- Suryantoro, D. D. (2024). Hak Asuh Anak Pasca Perceraian Menurut Kompilasi Hukum Islam: Analisis Yuridis Dan Konseptual. *Legal Studies Journal*, 4(1), 1-11.
- Brahmana, H., Harahap, M. A. R., & Alendra, A. (2024). Peran Komisi Perlindungan Anak Indonesia dalam Perebutan Hak Asuh Anak Pasca Perceraian. *Innovative: Journal Of Social Science Research*, 4(1), 9580-9599.