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# Guardian For Children Out of Marriage in Marriage (Analysis of Syafi'īyyah Fiqh and Civil law)

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**Abstract:** This writing aims to explain the position guardian in marriage according to Figh Syafi'īyyah dan Civil Law, as well asto describe guardian for children out of wedlock according to analysis Figh Syafi'īyyah and Civil Law. This research includes library research (Library Research). The method used is descriptive analysis research method, the approach used is a normative approach. To assist the preparation of this research the author reads books and books related to the problems to be discussed. The results showed that position guardian in marriage according to Figh Syafi'īyyah dan Civil law is very important, meaning that at the same time it has the nature of determining the validity of a marriage contract, so that if a marriage contract is carried out by a guardian or his representative, then the marriage contract will be valid, but on the contrary if the marriage contract is not carried out by the guardian or his representative, then The marriage contract is invalid and invalid. So between Figh Syafi'iyyahand Civil Law has the same view regarding position guardian in marriage. The results also show that which become guardian for children out of wedlock according to Figh analysis Shafi'īyyah is guardian judge, in this case is the president even though she is a woman, and state officials whose powers are delegated by the president in matters of trustees such as the Minister of Religion and his lowest officials such as the KUA. Whereas according to Civil Law analysis is the biological father of the child provided there is an acknowledgment from the mother and father and is proven by an authentic deed and can be proven based on science and technology.

**Keywords:** guardian; outside marry; syafi'īyyah figh; civil law

#### I. Introduction

The family is the simplest social unit in society. The welfare of this society depends on the welfare of the family. The family is formed through a marriage. Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on God Almighty.

Marriage is also a manifestation of religious orders. The Word of Allah SWT:

Meaning: If you are afraid that you will not be able to do justice to (the rights of) orphaned women (if you marry them), then marry women (other) that you like: two, three or four. (Surat al-Nisa: 3).

In the view of Islam, marriage is a form of worship to Allah SWT because marriage is the sunnatullah and sunnah of the Prophet which aims to create a peaceful, peaceful, and prosperous family physically and mentally. This is as the word of Allah in the Qur'an surah alRum verse 21:

Meaning: And among the signs of His power is that He has created for you wives of your own kind, so that you may tend to and feel at ease with them, and He has created between you love and compassion. Verily in that are signs for a people who think.(QS. Al-Rum verse 21:3).

Humans were created by Allah SWT in different types but in pairs with the intention that humans can maintain offspring. In Islam the legitimate way to develop offspring is through marriage. One of the signs of Allah's power is the creation of living things in pairs. This indicates that living in pairs is the nature of every living creature which is not only limited to humans. Of course the pairing as a medium used to maintain survival, without pairing it is difficult to imagine the creation of the survival of every creature created on this earth. Although humans are by nature no different from other creatures in terms of the need to live in pairs as a form of fulfilling their biological needs.

Marriage is a sacred bond between a man and a woman as prescribed by religion, with noble aims and objectives. A marriage is intended to create a happy and eternal family (household) filled with feelings of love, affection, and peace between each of its members, as reflected in the marriage law as follows:

Marriage is said to be valid if the conditions and pillars have been fulfilled. If the conditions are not complete then the marriage cannot be held, and if one of the pillars is not present then the marriage becomes invalid or becomes void.

Marriage acts as an outlet for sexual needs and regulate it so one does not become a slave to his/ her desires. It is a social necessity because through marriage, families are established and the family is the fundamental unit of our society. Furthermore, marriage is the only legitimate or halal way to indulge in intimacy between a man and a woman. Islam takes a middle of the road position to sexual relations. (Jamaluddin, 2018)

The guardian in marriage is basically the father of a child due to nasab (descendants) relationships. But what about children born out of wedlock, the child legally does not have a kinship relationship with his father, but he only has a kinship relationship with the mother who gave birth to him. So that it is an impossibility if the child who is born is a girl when she reaches adulthood and wants to marry who is acting as her guardian. Is it legal to be married by his mother? Meanwhile, one of the conditions for being a guardian must be a man.

Departing from the description above, the authors are interested and want to learn, and research by compiling research with the title "Guardian For Children Out of Wedlock in Marriage (Analysis of Figh Syafi'īyyah dan Civil law)".

#### II. Research Methods

This research is a library research. In terms of the type of this research is qualitative research, namely an approach whose analysis is more emphasized on the deductive-inductive inference process and on the analysis of the dynamics of the relationship between observed phenomena using scientific logic. In terms of its nature, this research is descriptive analysis research, namely the study of a data and presented in written form and then analyzed, so that it can give birth to a complete description of the problems studied.

#### III. Result and Discussion

## 3.1 Position Guardian in Marriage According to Fiqh Syafi'īyyah dan Civil law a. According to Syafi'īyyah Fiqh

Marriage is said to be valid if the conditions and pillars have been fulfilled. If the conditions are not complete then the marriage cannot be held, and if one of the pillars is not present then the marriage becomes invalid or becomes void. Guardian is one of the five pillars of marriage.

This is as stated in the book Fathu Al-Mu'īn:

Meaning: There are five pillars of marriage, namely wife, husband, guardian, two witnesses, and shigat.

Marriage that is done without a guardian means a marriage that does not complete the pillars so that the status of the marriage is not valid. This is based on the words of the Prophet

Meaning: It was narrated from Abī Musa, he said: The Messenger of Allah said: marriage is not valid unless there is a guardian (H. R Ibn Majāh).

Of the many conditions and pillars for a valid marriage (marriage), a marriage guardian is the most important and decisive thing. Even according to Fiqh Syafi Tyyah Marriage is not valid without a guardian for the bride, while for the groom-to-be there is no need for a marriage guardian for the validity of the marriage. The existence of a marriage guardian in a marriage is an absolute must, without a marriage guardian the marriage is considered invalid or void.

According to the view of Fiqh Syafi'iyah, a woman who has reached puberty, has common sense, and has never been married, then the right to choose and marry her belongs to her guardian, if she is a widow, then both of them have the right to choose and marry her. Syafi'iyah scholars are of the opinion that guardianship is one of the conditions for a valid marriage. Therefore, marriages that are carried out without legal guardians are not valid.

Based on the view of Syafi'iyah Fiqh, a marriage is considered invalid if there is no guardian who marries the bride to the groom. This is because the presence of a guardian in marriage is a pillar of marriage that cannot be abandoned. Even if the bride does not have a guardian anymore, or for some reason her guardian cannot allow it, the position of the guardian in the marriage contract is still maintained by being replaced by a guardian judge.

Because the marriage contract jāb is only valid if it is carried out by the bride's guardian, this very important position of the guardian can be understood because from the time a child is in the womb until it is born and raised until it becomes an adult, it is a duty and responsibility for parents and a child requires a lot of sacrifices from people. parents because children are a trust and deposit from God. So it is fitting that if a child who is an adult and wants to enter the gate of married life should get permission and blessing from his parents and not just leave his parents, therefore the statement of submission of the bride to the groom.

If we can understand the situation mentioned above, then we can also conclude that by first fulfilling the conditions and pillars of marriage, before the marriage is carried out, namely specifically in terms of the permission, the blessing prayer and the willingness of the prospective bride's guardian to carry out the marriage. jāb in the marriage contract. All of these have a heavy psychological impact on the continuity of happiness in the household life concerned. Because as we all know that before humans enter the social life in the wider community, they are in the family environment, where then there is growth from childhood to adulthood, in that growth both boys and girls.

So for a girl who is about to marry to form a household with her future husband, she does not break away from the inner bond with her parents, she needs inner encouragement to start a new life for husband and wife, she feels she gets the inner urge to start a new life as husband and wife, she feel that he has the inner strength to let go of his parents while at the same time getting the urge to build his household. Likewise for the husband, he feels that the girl's parents have entrusted the girl to him with full trust, this will lead to self-confidence and a great sense of responsibility to act as a wise and understanding husband. These kinds of things are psychological influences that have a big meaning to encourage the realization of an eternal and happy household.

This is different from the male side, where in marriage there is no need for a marriage guardian. The reason why the existence of a guardian is so important is that there are differences between men and women. In general, women have less resistance to pain, so that in a state of fear, sometimes the pain is felt lighter than that of men. In addition, in various issues, women are more inclined to taqlid (participation) in addition to being weak in understanding various global issues.

Based on these differences, it can be said that women tend to be afraid to take responsibility and feel the need to submit to men because traditionally men are role models, leaders and protectors of women. Men are given the advantage to be able to solve all life's problems much bigger than women and also have the insight, strength and courage that all are not worthy of a woman. As the word of Allah SWT in Surah Al-Nisa verse 32 which reads:

Meaning: And do not be jealous of what Allah SWT has bestowed on some of you more than others. (because) for men there is a share of what they earn, and for women (even) there is a share of what they earn, and ask Allah for a portion of His bounty. Verily, Allah knows all things (Surah Al-Nisa: 32).

This is what makes women need a man as their guardian in marriage who can help them in solving all problems that may arise in the future. Guardianship is also called wilāyah which has the meaning of control and protection. Thus, the meaning of guardianship is full control given by religion to a person to control and protect people or goods.

From a sociological point of view, women have the same position as men, as well as in the eyes of the law. However, women's humility and shortcomings themselves make them limited in their actions, as is the case in Islamic marriage.

Therefore, to know and understand the position of women, in addition to studying the applicable laws and regulations, we must also learn about the position of women in society and the family.

In addition to the physical and psychological differences between them, women are considered by their families as jewelry that must be maintained as well as possible, whose value is very valuable, more valuable than worldly jewelry in the form of property. Therefore, in order to release a daughter to a marriage, the parents in this case are the father or other guardians who have the right to feel an interest in giving up their daughter by becoming a guardian who will make an agreement with the prospective groom.

The importance of guardians for women in the marriage contract, apart from being a religious commandment, also because women are noble creatures, beings who have several rights that have been prescribed by the creator and have a position that can maintain their dignity, humanity and holiness and is a form of love. a father or his family to his daughter who will build a household.

The position of the guardian of marriage in the view of Syafi'iyyah Fiqh is very important and has the nature of determining whether or not a marriage contract is valid. The point is that if a marriage contract is carried out by a guardian or his representative, then the marriage contract will be valid. On the other hand, if the marriage contract is not carried out by the guardian or his representative, then the marriage contract is invalid and legally flawed. In the context of Syafi'iyyah Fiqh, in the implementation of the marriage contract, a guardian is required to carry out his duties as a guardian of the prospective bride. Meanwhile, from the prospective groom, there is no need for a guardian in the marriage contract.

#### b. According to Civil law

In view Civil law, such as the Compilation of Islamic Law (KHI), explains that the role of the marriage guardian is as a substitute for women who will carry out the marriage contract. In Article 21 paragraph (3) of the Regulation of the Minister of Religion No.1 of 1990 concerning the obligations of Marriage Registrars (PPN) and the work procedures of the Religious Courts to implement marriage laws for someone who is Muslim, it is stated that the marriage contract must be carried out by a guardian or a representative. to Marriage Registrar Employees (PPN) or Marriage Registrar Assistant Employees (P3N) or other people who according to PPN or P3N are considered to meet the requirements as described in the Compilation of Islamic Law (KHI) article 19.

Based on the above provisions, the position of a marriage guardian is very important for a woman in a marriage contract because in addition to religious orders, women are noble creatures, beings that have several rights that have been prescribed by the creator and have a position that can maintain dignity, humanity.

And his holiness and is a form of love of a father or his family to his daughter who will build a household. Therefore, the guardian is a very important issue in marriage because there is no marriage without a guardian and a guardian becomes the pillars of a valid marriage.

It is also stated that if you want to perform a marriage contract, the prospective husband or marriage guardian must appear before the PPN or P3N and in a state of compulsion his presence can be represented by another person who is strengthened by a power of attorney ratified by the PPN or the head of the representative of the Republic of Indonesia if he is abroad. With the articles mentioned above, it can be said that Law no. 1 of 1974 through PMA No. 2 of 1990 has provided provisions regarding the need for a marriage guardian for prospective brides. This is very important because it is explicitly stated in the above article that it is stated that the guardian himself or his representative (in a forced state) carries out the marriage contract for the bride. All of them show an equation with the provisions contained in the Syafi'iyyah Figh, namely the guardian of marriage is the person who carries out the marriage contract for a woman. The similarity in this legislation with the provisions in Syafi'iyyah Figh is further shown from the provisions regarding representation for marriage guardians, although to perform the marriage contract the bride basically has to be present herself, but if in a state of compulsion this can be possible. to be represented by others. Thus, representation in the guardian of marriage is also found in this regulation. but if in a state of coercion it may be possible to be represented by another person. Thus, representation in the guardian of marriage is also found in this regulation. but if in a state of coercion it may be possible to be represented by another person. Thus, representation in the guardian of marriage is also found in this regulation.

However, according to the Compilation of Islamic Law, if a guardian wants to marry off his child, then the guardian must seek approval from the woman he will marry. As stated in Article 16 KHI which reads:

- 1) Marriage is based on the consent of the prospective bride and groom.
- 2) The form of approval of the prospective bride, can be in the form of a firm and tangible statement in writing, verbally or with gestures but can also be silent in the sense as long as there is no firm refusal.

If in this request for approval the woman does not want and refuses to be married, then the marriage carried out by her guardian is not valid. We can see this in Article 17 KHI:

- 1) Before the marriage takes place, the marriage registrar must first ask for the approval of the prospective bride and groom in front of two marriage witnesses.
- 2) If it turns out that the marriage is not approved by one of the prospective brides, the marriage cannot be held.

This article clearly states that "forced marriage" is not allowed. Here the emphasis is mainly given to the bride-to-be to refuse. Thus, birrul walidain should not be used as a basis for a shield for parents to force their daughter's marriage. So, according to this article, the guardian must respect and accept what the child's choice is not forced.

# 3.2. Which become Guardian for Children Out of Wedlock According to Fiqh Analysis Shafi'īyyah and Civil Law

### a. According to Fiqh Analysis Shafi'īyyah

According to Fiqh Shafi'īyyah children born outside marrylegally does not have a kinship relationship with his father, but he only has a kinship relationship with the mother who gave birth, the child is also called an adulterous child. A new child can be linked to his father's lineage if he is born from a legal marriage. Meanwhile, children resulting from adultery (out of wedlock) cannot be linked to their father, but only to their mother. Because the determination of the relationship is a blessing, and favors are not given by God as a result of an act of jarimah. Meanwhile, the child resulting from adultery comes from sperm or semen which is not valued according to syar'i.

With regard to guardianship, scholars assert that the biological father of an adulterous child does not have the right to be a guardian for him, especially marriage guardians. The reason is that the adulterous child is not linked by lineage to his biological father, and the adulterous child whose legal woman is married by his biological father is because the sperm that comes out through adultery is not respected in the view of religion.

In the provisions concerning marriage guardianship, the most entitled to become guardians are the guardians of the lineage. If the guardians in this section do not exist, either in real terms (hiss) or according to religious views (syar'ī) then the right of guardianship passes to the maulā al-mu'tiq or his 'ashabah. If the woman to be married is not a former slave, the right of guardianship passes to the sultan or his successors. As the Messenger of Allah said in a hadith narrated by Turmidhi:

Meaning: The ruler (king) is a guardian for those who do not have a guardian. (H. R: Turmidzī).

In relation to the present, who is the guardian of judges in the Unitary State of the Republic of Indonesia (NKRI) is the president, who delegates his authority in this guardianship issue to the Minister of Religion (because it involves religious matters) and the minister of religion delegates to his lowest apparatus through tauliyah to judges.

This fits perfectly with the concept Fiqh Syafi'īyyahAccording to the Syafi'īyyah Fiqh, the jurisdiction of the judge in marriage is in the hands of the president and the officials who have been delegated his authority. As stated in the decision of the congressNU:

Meaning: The Sultan is the guardian for people who do not have a guardian, the Sultan in this case is the highest ruler of the country, the judge or the person they both have the mandate to handle these affairs.

Based on the foregoing, we can understand that, in the context of The Indonesian state who becomes the guardian of judges is the president, who delegates his authority in this guardianship issue to the Minister of Religion (because it involves religious matters) and the minister of religion delegates to his lowest apparatus through tauliyah to judges.

In the book I'ānatu al-Thālibīn it is stated:

(قوله: والمراد) أي بالسلطان من له ولاية: أي عامة أو خاصة أن المراد بالسلطان كل من له سلطنة وولاية على المرأة عاما كان كالامام أو خاصا كالقاضي والمتولي لعقود الانكحة

Meaning: The expression of Shaykh Zainuddīn al-Malibaī: "What is meant" is that the Sultan is a person who has power, either general or special, really what is meant by a sultan is all people who have power and guardianship rights for women, both in general as the highest ruler of the country, or specifically like judges and people who are made guardians for the implementation of marriage.

According to Fiqh Shafi'īyyah who is the guardian of the judge in marriage is the president even though she is a woman, and state officials whose authority is delegated by the president in matters of trustees such as the Minister of Religion and his lowest officials through tauliyah to judges.

In this case, Figh Shafi'īyyah allow it to be guardian judge in marriage. This is in accordance with the opinion of Sheikh Sulaiman Al-Bujairimī:

Meaning: (Statement of Shaykh Zakariyā al-Ansarī: "Women may not perform the marriage contract"), meaning that he does not have the authority to perform the marriage contract. What is meant by contract is one of its elements, namely ijāb and qabul. Al-Halab argues: "Unless he holds the highest position of the state, then he may marry a woman other than himself, he may not marry himself, just as the sultan may not make a contract for himself.

The same thing is also explained in the book Hasyiah Al-Bajurī Alā Fath al-Qarīb:

Meaning: And a woman may not marry another woman, not with guardianship and representation rights, because of the hadith: "Women may not marry other women, nor may they marry themselves", However, if a woman serves as the highest leader of the state State, may Allah SWT protect us from it, then the rulings of the laws apply, as the opinion of Ibni Abdis Salam and other scholars. And the qiyas is that it is legal for him to marry another woman with general authority.

Based on the texts of the book above, we can understand that according to the Fiqh Shafi'iyyah, female judge Becomes guardian for women who do not have guardians marry.

As for what becomes guardian for children out of wedlock according to fiqh Shafi'īyyah is not his father, because the child cannot be attributed to his biological father, grandparents from his father's line, but which become guardian for him is the guardian judge, In this case is the president even though she is a woman, and state officials whose authority is delegated by the president in matters of trustees such as the Minister of Religion and his lowest officials through tauliyah to judges such as the KUA.

### b. According to Civil Law Analysis

To respond to the guardian's problem for children out of wedlock According to the analysis of Civil Law, the writer should first raise the issue of the lineage of the child, because if the lineage of the child is linked to the man who impregnated his mother, the guardian is the man, otherwise if the lineage of the child is not linked to the man who impregnated his mother then the guardian is not the man.

According to the Civil Code (BW) article 281, the acknowledgment of children out of wedlock can be done through;

- a. on the child's birth certificate.
- b. In the marriage certificate the father and mother if later married.
- c. In the deed made by the Civil Registry Officer and then recorded in the birth register according to the date the deed was made.
- d. In another authentic deed. In this case, any interested person can demand that this acknowledgment be recorded in the child's birth certificate.

Therefore, with the acknowledgment of the mother and father and proven by an authentic deed, the child still has a civil relationship with the mother and father even though he is not a legitimate child of them. So if the child has a civil relationship with his father, his guardianship also rests with his father because he has the same rights and position as a legitimate child.

This is further strengthened by the decision of the Constitutional Court (MK), namely: Article 43 paragraph 1, which previously read, "Children born out of wedlock only have a civil relationship with his mother and his mother's family" must be read as follows, "Children born out of wedlock have civil relations with their mother and mother's family as well as with men. a man as the father who can be proven based on science and technology and/or other evidence according to the law has blood relations, including civil relations with his father's family.

Civil rights are relationships that regulate a person's rights and obligations with others. In the decision on the article on children out of wedlock, the relationship concerns the child's human rights. Civil rights can be in the form of demands on other parties such as compensation, both material and immaterial, fulfillment of certain obligations, compensation, attention, guidance, and living expenses. Furthermore, these civil rights can take the form of guardianship rights.

According to the Compilation of Islamic Law (KHI) article 99 states that legitimate children are:

- 1) Children born in or as a result of legal marriage.
- 2) The result of legal husband and wife fertilization outside the womb that was born by the wife.

So according to the articles above, it is understood that the lineage of a child according to the KHI is caused by a legal marriage. If the child is born outside of a legal marriage according to Indonesian marriage law, his existence will not be recognized and not linked to the father's lineage. It can be understood from these regulations, a child can be categorized as legitimate, if it meets one of 3 conditions, namely:

- a) Children born in legal marriages, with two possibilities, First, after a legal marriage contract occurs, the wife becomes pregnant, and then gives birth. Second, before the marriage contract the wife was pregnant first, and then gave birth after the marriage contract.
- b) Children born as a result of a legal marriage. For example, the wife becomes pregnant and then the husband dies. The child conceived by the wife is a legitimate child as a result of a legal marriage.
- c) Children who are fertilized outside the womb by a legal husband and wife, and then born by his wife. This provision is to answer technological advances regarding IVF.

Children out of wedlock have civil relations only to their mother and their mother's family. This relationship is commonly referred to as parental power, namely the emergence of rights and obligations between parents and children. However, the concept of Indonesian Civil Law in defining a legitimate child defines it in two categories.

First, children born "in" a legal marriage. The words "in" as contained in article 99 of the KHI suggest that what is a valid measure of whether or not a child is born is seen at the time of birth without taking into account when pregnancy occurs or the fertilization of an egg (ovum) by a sperm that occurs in the womb of the woman to be the mother. This is where the determination of the legal child is carried out.

Definition of "in" a legal marriage. Obviously this understanding ignores the occurrence of fertilization of the child's egg in the womb. Often found in today's society, the occurrence of pregnant marriages or marriage contracts in a pregnant state. So the definition of a legitimate child like this (KHI) is actually the same as the understanding contained in western civil law which defines a legitimate child as a child born or raised during marriage, obtaining a husband as his father. So that if the child is the result of adultery outside of marriage, if it is born in a valid marriage contract, its existence is still recognized by the state and assigned to the adulterous father. According to Vollmar, a legitimate child is a child that is conceived in a marriage (even though it takes place for a short period of time after the marriage takes place).

This is further reinforced by the opinion of Soeroo Wignjodipoero, if a woman becomes pregnant out of wedlock, then the man who impregnates her marries the woman she is pregnant with with the intention that the child born in a legal marriage will become a legitimate child.

Based on the above, the writer can conclude that which become guardian for children out of wedlock according to the analysis of Civil Law is the biological father of the child provided that there is an acknowledgment from the mother and father and is proven by an authentic deed and can be proven based on science and technology.

#### **IV. Conclusion**

Moving on from the descriptions that have been described in the previous chapters, the conclusions that can be drawn are:

- 1. Position guardian in marriage according to Fiqh Syafi'īyyah dan Civil law is very important, meaning that at the same time it has the nature of determining the validity of a marriage contract, so that if a marriage contract is carried out by a guardian or his representative, then the marriage contract will be valid, but on the contrary if the marriage contract is not carried out by the guardian or his representative, then The marriage contract is invalid and invalid. So betweenFiqh Syafi'īyyahand Civil Law has the same view regarding position guardian in marriage.
- 2. Which become guardian for children out of wedlock according to Fiqh analysis Shafi'iyyah and Civil Law are:
  - a. According to Fiqh analysis Shafi'īyyah is a magistrate, in this case is the president even though she is a woman, and state officials whose authority is delegated by the president in matters of trustees such as the Minister of Religion and his lowest officials through tauliyah to judges such as the KUA, because according to Fiqh Shafi'īyyah children born outside marry legally have no kinship relationship with his father.
  - b. According to Civil Law analysis as Civil Law Law (BW), which become guardian for children out of wedlock is the biological father of the child provided there is an acknowledgment from the mother and father and is proven by an authentic deed and can be proven based on science and technology. In contrast to KHI, which become guardian According to KHI, children out of wedlock are not fathers biology, because according to KHI children born outside marry legally have no kinship relationship with his father.

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