



### THE BENEFITS AND PROTECTION OF CHILDREN IN DETERMINATION OF GUARDIANSHIP (JURIDICAL ANALYSIS OF THE DETERMINATION OF THE SHARIA COURT OF BANDA ACEH NUMBER 2/PDT.P/2021/MS.BNA)

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**Abstract:** Determination of The Sharia Court Of Banda Aceh Number 2/Pdt.P/2021/MS.Bna, which determines the biological mother as the guardian of her biological child, causes a legal conflict. On the one hand, based on the provisions of Article 47 of the Marriage Law, the biological mother, as the parent, represents the child in carrying out legal actions. On the other hand, based on this determination, the biological mother as guardian represents the child in legal actions. This research explains the method of legal discovery and legal considerations in determining guardianship. This research is normative legal research. Secondary data sources come from books, texts, journals, magazines, newspapers, documents, laws and regulations, etc. Research findings show that in the Determination Of The Sharia Court Of Banda Aceh Number 2/Pdt.P/2021/MS.Bna, the judge has carried out a legal construction of analogous arguments, namely Article 47 of the Marriage Law, which cannot resolve the case. However, the events faced in substance it is similar to other regulations related to guardianship, so when Article 47 of the Marriage Law cannot resolve the problem, this provision can be waived. An applicant who is able and has good faith in taking care of himself and the assets of the child who will be under his guardianship in the best possible way and solely for the benefit or benefit of the child, in the perspective of child protection theory, is entitled to be granted guardianship rights. In the Determination Of The Sharia Court Of Banda Aceh Number 2/Pdt.P/2021/MS.Bna there is benefit and harm, what becomes madarat is that if the petition is rejected, the child is abandoned because there is no one to take care of themselves and their property, while what becomes masalah is if the petition is granted by appointing the Petitioner as the guardian of their children, then the objectives of the Shari'a can be fulfilled, namely take care of the soul of the child and protect the property of the child.

**Keywords:** *guardianship, child protection, benefit*

#### A. Introduction

On January 14, 2021, the Banda Aceh Syar'iyah Court issued decision number 2/Pdt.P/2021/MS.Bna. This decision was issued based on Mrs. M's application dated January 04, 2021, registered at the Registrar's Office of the Banda Aceh Syar'iyah Court



on January 04, 2021. Please request to become a guardian of her five biological children, namely ZH (male), aged 17 years; MN (male), aged 15 years; PNN (female), aged 11 years; PSZ (female), aged 9 years; and PN (female) aged 7 years.

The reasons for the Petitioner requesting to be appointed as guardian are as follows:

1. The Petitioner has been blessed with 6 children from her marriage to her husband.
2. That the Petitioner's husband has died.
3. The Petitioner's five children are still immature and incapable of carrying out legal actions because they are still minors.
4. The aim and purpose of determining child guardianship that the Petitioner is proposing is to represent the Petitioner's biological children who are still minors in matters to manage the sale of the minor children's assets.

The Banda Aceh Syar'iyah Court granted the Petitioner's petition by determining that the Petitioner's biological children named ZH (male), aged 17 years; MN (male), aged 15 years; PNN (female) aged 11 years; PSZ (female) aged 9 years and PN (girl) aged 7 years are under the Petitioner's guardianship until the children are adults and independent.

Article 47 paragraph (1) of Law Number 1 of 1974 concerning marriage as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning marriage (hereinafter referred to as the Marriage Law) states that "Children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents as long as they are not deprived of their authority," then Article 47 paragraph (2) of the Marriage Law states that "Parents represent the child regarding all actions law inside and outside the Court."

Based on the provisions above, parents can legally represent children who have not reached the age of 18 (eighteen) years or have never been married to carry out legal actions inside and outside the court without needing a court decision. A child is under the authority of a guardian when a child who has not reached the age of 18 (eighteen) years or has never been married is not under the authority of his parents. A new guardianship will arise if the parent's authority over the child no longer exists because the child's parent has died or because the parent's authority has been revoked based on a court decision (Alfarobi & Prasetyo, 2019). The issue of guardianship is for orphans or children who are not old enough and are not under the control of their parents who need care and guidance (Busyro et al., 2021). Legal actions for minors are carried out by their parents if the child is under the authority of the parents. However, if the child is not under the authority of the parents, then the child is under guardianship, and the appointed guardian acts in the child's interests and property (Hartati et al., 2021). Guardianship, in terminology, is the authority given to a person to carry out a legal action as a representative for the benefit and on behalf of a child who does not have both parents or both parents are still alive but not capable of carrying out legal actions (Cahyani & Kadir, 2023).

The parental authority and guardianship provisions are linked to the Banda Aceh Syar'iyah Court Determination Number 2/Pdt.P/2021/MS.Bna. It is interesting to study further for several reasons:

1. Based on the provisions of Article 47 of the Marriage Law, children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents as long as they are not deprived of their authority and the

parents represent the child regarding all legal actions in and outside court. So, the biological mother, who is the parent as stipulated in Article 1 point 4 of the Child Protection Law, can legally take legal action to represent her biological child.

2. Based on Article 33, paragraph (5) of the Child Protection Law, the conditions and procedures for appointing a guardian are regulated by Government Regulation. The Government Regulation is Government Regulation Number 29 of 2019 concerning Requirements and Procedures for Appointing Guardians (hereinafter referred to as Government Regulation concerning Requirements and Procedures for Appointing Guardians). In Article 3, paragraph (1) of the Government Regulation concerning Requirements and Procedures for Appointing Guardians, in order to be appointed as guardian because the parents are absent, the whereabouts of the parents are unknown, or for some reason, the parents are unable to carry out their obligations and responsibilities, a person from:
  - a. Child Family;
  - b. Siblings;
  - c. others; or
  - d. legal entity,must fulfill the requirements for appointing a guardian and through a court order.

So, the appointment of a guardian based on a court order can occur when the parents are not present, the whereabouts of the parents are unknown, or, for some reason, the parents cannot carry out their obligations and responsibilities. In the Banda Aceh Syar'iyah Court Determination Number 2/Pdt.P/2021/MS.Bna., the children's parents, namely their biological mother, are still there; their whereabouts are known, and they can still carry out their obligations and responsibilities as parents.

There is a Determination by the Banda Aceh Syar'iyah Court Number 2/Pdt.P/2021/MS.Bna., which determines the biological mother as the guardian of her biological child, becomes the basis for representing the child in carrying out legal actions, causing legal conflicts. On the one hand, based on the provisions of Article 47 of the Marriage Law, the biological mother, as the parent, represents the child in carrying out legal actions. On the other hand, based on this determination, the biological mother as guardian represents the child in legal actions (Article 34 Law Number 23 of 2002 Concerning Child Protection, n.d.).

At the same time, the mother has two powers at once, on the one hand as a parent based on the provisions of Article 47 of the Marriage Law, and on the other hand as a guardian based on the Determination of the Banda Aceh Sharia Court Number 2/Pdt.P/2021/MS.Bna. In the Marriage Law, the regulation of the powers of parents and guardians is differentiated, including their rights and obligations. The existence of two powers in a person confuses, ultimately giving rise to uncertainty.

Apart from the problems above, in the field of civil law, there is something called legal power of attorney, also called *wettelijke vertegenwoordiging* or legal mandatory. It means that the law has determined that a person or an entity can automatically act on behalf of that person or entity without requiring a power of attorney. So, the law stipulates that the person concerned is a proxy or representative with the right to act for and on behalf of that person or entity (Harahap, 2013).

M. Yahya Harahap, in his book, describes that parents of minor children are the power of attorney who represent the interests of minor children to third parties or

before the court without requiring a special power of attorney from the child (Harahap, 2013).

Other researchers have researched the guardianship of minors. There are differences and novelties in this research from previous research of Firman Wahyudi's research in the Legal Pulpit Volume 31, Number 3, October 2019, entitled Application of Prudential Principles in Child Guardianship Cases. This research is different from the research that the researcher will carry out because the object is different; namely, this research is research on guardianship in general, while the researcher examines the Guardianship Determination Of The Sharia Court Of Banda Aceh. Then, this research focuses on studying prudential principles in child guardianship cases, while researchers focus on methods of legal discovery and the benefit and protection of children in determining guardianship. 4. Eva Cahyana Dewi's research in the Journal of Legal Perspectives, Vol. 20, no. 2, November 2020, entitled Juridical Review Regarding the Guardianship of Underage Orphans. This research focuses on the legal consequences of guardianship of children abandoned by their parents based on Civil Law and Islamic Law that apply in Indonesia. At the same time, researchers examine legal discovery methods and children's benefit and protection in determining guardianship.

This research serves as input and a contribution of thought to the Sharia Court or Religious Court in examining and adjudicating guardianship cases. For the reasons of the provisions and doctrine mentioned above, the researcher is interested in analyzing the Guardianship Determination of the Banda Aceh Syar'iyah Court Number 2/Pdt.P/2021/MS.Bna in terms of the benefit and protection of children.

## **B. Method**

This type of research is normative legal research (juridical-normative). The type of approach used in this research is as follows:

### **a. Statute Approach**

The statute approach is carried out by reviewing and analyzing all laws and regulations related to the legal issue being handled (Sunggono, 2015).

### **b. Case Approach**

The case approach reviews cases related to the problems that have become court decisions with permanent legal force (Syamsudin, 2007). The main object of study in the case approach is ratio decidendi or reasoning, namely the court's considerations in arriving at a decision. Both for practical purposes and academic studies, ratio decidendi or reasoning is a reference for preparing arguments in solving legal issues (Syamsudin, 2007).

The data source in this research is secondary data. Secondary data is collected by reviewing and analyzing literature and documents related to the research object, then formulated in statements. Secondary data consists of:

- 1) Primary legal materials, namely binding legal materials (Soemitro, 1988).
- 2) Secondary legal materials, namely legal materials that are not binding but explain primary legal materials that result from processing the opinions or thoughts of experts or experts who study a particular field, will provide guidance on the direction of this research. The secondary material in question is the doctrines contained in books, writings of experts, legal journals, and so on.

- 3) Tertiary legal materials, namely legal materials, provide information about primary and secondary legal materials by providing insight and comprehension of other legal materials such as dictionaries, papers, articles, and the internet.

Data analysis is the study and decomposition of data so that the data can be given meaning and meaning that is useful in solving problems in this research. The secondary data obtained is then arranged sequentially and systematically and then analyzed using qualitative methods to provide verbal descriptions of the findings and prioritize the quality of the data, not quantity (HS & Nurbani, 2013).

### **C. Result and Discussion**

#### **1. Legal Discovery Method in Determining Guardianship of the Banda Aceh Syar'iyah Court Number 2/Pdt.P/2021/MS.Bna**

In Chapter from his authority", Article 47 paragraph (2) of the Marriage Law states that "Parents represent the child regarding all legal actions inside and outside the Court." Likewise, it is stated in the Chapter that this provision is related to the Banda Aceh Syar'iyah Court's Guardianship Determination Number 2/Pdt.P/2021/MS.Bna., where the Petitioner who applied for guardianship over five children is the biological mother, and the application for guardianship was submitted to represent the children. Underage in terms of managing the sale of assets. Based on Article 1 point 4 of the Child Protection Law, the biological mother is the parent, so legally, the Petitioner can represent minor children who are his biological children in managing the sale of the child's assets.

Thus, the biological mother can represent the child in managing the sale of the child's assets as a parent without being appointed as guardian. Apart from that, there are conditions to become a guardian if you refer to several regulations. The appointment of a guardian for a child is carried out if there are three conditions, namely 1) the parents are not present, 2) the whereabouts of the parents are unknown, or 3) for some reason, the parents are unable to carry out their obligations and responsibilities. It follows the provisions in Article 26 of the Child Protection Law and the definition of guardianship in the Compilation of Islamic Law, which states, "Guardianship is the authority given to a person to carry out legal acts as a representative for the interests and on behalf of a child who does not have both parents, parents who are still alive are not capable of carrying out legal actions."

If three conditions are described above, a person or legal entity can submit a guardianship determination to the court. The court in question is the Religious Court for Muslim people and the District Court for those other than Islam. It follows the provisions of Article 33, paragraph (2) of the Child Protection Law.

Government Regulations on Requirements and Procedures for Appointing Guardians determine the requirements for a person or legal entity to be appointed as a guardian. There are four categories of parties who can serve as guardians. First, the child's family; second, brother; third, other people; and fourth, legal entity. What is meant by a child's family is a blood family in a straight line up to the third degree (Article 3 paragraph (1) Government Regulation Number 29 of 2019 Concerning Requirements and Procedures for Appointing Guardians). What is meant by a child's family is a blood family in a straight line up to the third degree (Article 1 paragraph (5)

Government Regulation Number 29 of 2019 Concerning Requirements and Procedures for Appointing Guardians). What is meant by a sibling is a male or female family relative, including grandfather/grandmother, father/mother, and children (Article 1 paragraph (6) Government Regulation Number 29 of 2019 Concerning Requirements and Procedures for Appointing Guardians).

The conditions that the 4 parties must fulfill are as follows:

1. The child's family appointed as guardian must meet the following requirements (Article 4 paragraph (1) Government Regulation Number 29 of 2019 Concerning Requirements and Procedures for Appointing Guardians):
  - a. Indonesian citizens who permanently reside in Indonesia;
  - b. at least 30 (thirty) years of age;
  - c. physically and mentally healthy;
  - d. well-behaved;
  - e. economically capable;
  - f. the same religion as the child's religion;
  - g. obtain written consent from husband/wife for those who are married;
  - h. willing to become guardian as stated in the statement letter;
  - i. Make a written statement that never and will not do:
    - 1) violence, exploitation, neglect, and mistreatment of children; or
    - 2) application of physical punishment for any reason, including to enforce discipline against children;
  - j. prioritize family and children in the closest degree, And
  - k. Obtain written consent from parents if:
    - 1) still exists;
    - 2) its existence is known, And
    - 3) competent to carry out legal actions.
2. The sibling appointed as guardian must fulfill the following requirements (Article 5 paragraph (1) Government Regulation Number 29 of 2019 Concerning Requirements and Procedures for Appointing Guardians):
  - a. Indonesian citizens who permanently reside in Indonesia;
  - b. at least 21 (twenty-one) years of age;
  - c. physically and mentally healthy;
  - d. well-behaved;
  - e. economically capable;
  - f. the same religion as the child's religion;
  - g. obtain written consent from husband/wife for those who are married;
  - h. willing to become guardian as stated in the statement letter;
  - i. make a written statement that never and will not do:
    - 1) violence, exploitation, neglect, and mistreatment of children; or
    - 2) application of physical punishment for any reason, including to enforce discipline against children;
  - j. Obtain written consent from parents if:
    - 1) still exists;
    - 2) its existence is known, And
    - 3) competent to carry out legal actions.

3. Other people appointed as Guardians must meet the following requirements (Article 6 paragraph (1) Government Regulation Number 29 of 2019 Concerning Requirements and Procedures for Appointing Guardians):
  - a. Indonesian citizens who permanently reside in Indonesia;
  - b. at least 30 (thirty) years of age;
  - c. physically and mentally healthy;
  - d. well-behaved;
  - e. economically capable;
  - f. the same religion as the child's religion;
  - g. obtain written consent from husband/wife for those who are married;
  - h. willing to become guardian as stated in the statement letter;
  - i. make a written statement that never and will not do:
    - 1) violence, exploitation, neglect, and mistreatment of children; or
    - 2) application of physical punishment for any reason, including to enforce discipline against children;
  - j. Obtain written consent from parents if:
    - 1) still exists;
    - 2) its existence is known, And
    - 3) competent to carry out legal actions.
4. The legal entity appointed as guardian comprises technical implementation units of ministries/agencies, regional apparatus, and child social welfare institutions (Article 7 paragraph (1) Government Regulation Number 29 of 2019 Concerning Requirements and Procedures for Appointing Guardians).

The technical implementing units of ministries/agencies and technical implementing units of regional apparatus must fulfill the following requirements (Article 7 paragraph (2) Government Regulation Number 29 of 2019 Concerning Requirements and Procedures for Appointing Guardians):

  - a. formed based on the provisions of statutory regulations and
  - b. carry out the duties and functions of child care.

Children's social welfare institutions, as above, must meet the requirements (Article 7 paragraph (3) Government Regulation Number 29 of 2019 Concerning Requirements and Procedures for Appointing Guardians):

  - a. legal entity in the form of a foundation and accredited;
  - b. willing to become a Guardian as stated in a statement letter from the administrator appointed on behalf of the Children's social welfare institution;
  - c. obtain recommendations from the department that carries out government affairs in the social sector;
  - d. make a written statement that they have never and will not discriminate in protecting children's rights;
  - e. for religious children's social welfare institutions, the religious children's social welfare institutions must be of the same religion as the child's religion And
  - f. obtain written consent from Parents if:
    - 1) still exists;
    - 2) its existence is known, And
    - 3) competent to carry out legal actions.

With this explanation, the court can reject the guardianship case submitted by the biological mother; however, the Judge in Guardianship Determination Number 2/Pdt.P/2021/MS.Bna. did not reject the case but agreed with the order of the Petitioner, who is the biological mother as guardian of the children until they are adults and independent.

Two conditions require a legal breakthrough: first, when existing applied legal norms are deadlocked so that they cannot penetrate the objectives of the law. Second, when the law experiences a gap between existing legal norms and the expected legal objectives, the existing legal norms cannot provide legal protection, fulfill a sense of justice, fulfill victims' rights, prevent injustice, or cannot be executed properly. In overcoming this condition, it is necessary to make a legal breakthrough through the reinterpretation and redefinition of verses, hadith, and existing legal texts by returning them through legal principles and legal theory to display the true function of law, namely (1) providing legal protection, (2) fulfilling sense of justice, (3) fulfill the rights of victims, (4) prevent injustice, and (5) can be executed (Arto, 2015).

The following summarises the legal considerations and basis in the Banda Aceh Sharia Court's Guardianship Determination Number 2/Pdt.P/2021/MS.Bna:

- a. In article 47 of Law Number 1 of 1974 it is stated:
  1. Children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents as long as they are not removed from their authority.
  2. Parents represent the child regarding all legal actions inside and outside the court.
- b. From these provisions, it can be understood that if biological parents automatically act as guardians of their biological child, including themselves and the child's assets, without having to obtain a decision from the court first, such power is a power of attorney according to law, which provides authority. Parents represent their children in either unilateral legal actions or legal actions or actions with third parties.
- c. That, even though according to the law, the biological father and/or mother is the parent and guardian of both themselves and the assets of their children, practice in the field of civil law, especially in the world of banking and the transfer of rights to land and buildings is carried out on principles or principles (Prudential ) still requires written evidence (Lex Scripta) of a legal right or relationship so that in such circumstances even biological parents need to obtain a determination from the court regarding their legality as guardians for their biological child.
- d. Thus, an important issue in Aquo's petition is the gap between the regulations regarding the powers of biological parents who are also legal guardians according to law for their children and the practice in Civil Law, which still requires written proof of such guardianship.
- e. The Panel of Judges believes that the gap between what is mandated in Law Number 1 of 1974 concerning marriage and the demands of the principles or Prudential Principles of civil practice is something beyond the power of the Petitioner who wants to manage the inheritance of the child who is still a minor without prejudice to the intention and the substance of the provisions in article 47 of Law Number 1 of 1974 concerning Marriage.



- f. One of the fundamental considerations in establishing guardianship over the five children is an assessment of the applicant's ability and good faith in taking care of himself and the assets of the children who will be under his guardianship as well as possible and solely aimed at the interests or benefit of the children.
- g. The facts revealed at trial show that the Petitioner has been able to carry out his role as parent and guardian for his five minor children well and responsibly.
- h. That the Petitioner fulfills the requirements as guardian of the child, as intended by Article 51 paragraph (2) of Law Number 1 of 1974 jo. Article 107 paragraph (4) Compilation of Islamic Law.

These legal considerations explicitly base their considerations on the following provisions:

1. Article 47 of Law Number 1 of 1974 concerning marriage, namely a. Children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents as long as they are not deprived of their authority; b. Parents represent the child regarding all legal actions inside and outside the court.
2. Article 51 paragraph (2) of Law Number 1 of 1974 concerning marriage, namely that the guardian is as far as possible taken from the child's family or another person who is an adult, of sound mind, fair, honest, and of good behavior.
3. Article 107 paragraph (4) Compilation of Islamic Law, namely that the guardian is as far as possible taken from the child's family or another person who is an adult, of sound mind, fair, honest, and of good character, or a legal entity.

The main issue in this determination is the guardianship for the sale of assets of minor children who are the applicant's biological children. The considerations are explicitly based on Article 47 of the Marriage Law, which states that biological parents automatically legally act as guardians of their biological children, including themselves and the child's assets, without having to obtain a determination from the court first that such power is a power of attorney. According to the law, it gives parents the authority to represent their children, whether in unilateral legal actions or legal actions or actions with third parties. However, there are certain facts that this provision cannot be applied or set aside.

The judge granted guardianship of the five children not based on Article 47 of the Marriage Law because practice in the field of civil law, especially in the world of banking and the transfer of rights to land and buildings, is carried out on principles or principles (Prudential) which still require written evidence (Lex Scripta) based on rights or legal relations so that in such circumstances even biological parents need to obtain a determination from the court regarding their legality as guardians for their own biological child. There is a gap between the regulations regarding the powers of biological parents who are also legal guardians of their children and practice in the field of Civil Law, which still requires written proof of such guardianship. Therefore, the Panel of Judges is of the opinion that the gap between what is mandated in Law Number 1 of 1974 concerning marriage and the demands of the principles or Prudential Principles of civil practice is something beyond the power of the Petitioner, who wishes to manage the inheritance of the child who is still a minor by does not reduce the intent and substance of the provisions in article 47 of Law Number 1 of 1974 concerning marriage.

In addition, the judge granted guardianship of the five children based on an assessment of the Petitioner's ability and good faith in taking care of himself and the children's assets who would be under his guardianship as well as possible and solely aimed at the interests or benefit of the children. The facts at the trial showed that the Petitioner had been able to carry out his role as parent and guardian for his five minor children well and responsibly. This fact fulfills the child's guardian requirements, as intended by Article 51 paragraph (2) of Law Number 1 of 1974 jo. Article 107 paragraph (4) Compilation of Islamic Law.

The Banda Aceh Syar'iyah Court Determination Number 2/Pdt.P/2021/MS.Bna does not mention the legal discovery method used, but in essence, the judge has carried out legal discovery. In this determination, the judge has carried out a legal construction of analogical arguments, namely that Article 47 of the Marriage Law cannot resolve guardianship case number 2/Pdt.P/2021/MS.Bna, however, the incident encountered is substantially similar to other regulations related to guardianship, so when Article 47 of the Marriage Law cannot resolve the problem, this provision can be set aside. After carrying out the legal construction of the analogy argumentum, the judge has also carried out a systematic interpretation (systematic interpretation), namely interpreting Article 51 paragraph (2) of the Marriage Law by connecting it with Article 107 paragraph (4) of the Compilation of Islamic Law to create a law that is guardian as far as possible. -It can be taken from the child's family or another person who is an adult, of sound mind, fair, honest, and of good character, or a legal entity. Guardians are required to make a list of the child's assets under their control when they begin their position and record all changes in the child or children's assets.

## **2. The Benefit and Protection of Children in Legal Considerations for Determining Guardianship of the Banda Aceh Syar'iyah Court Number 2/Pdt.P/2021/MS.Bna**

Legal considerations, or what are often called *considerans*, are the basis for decisions. What is contained in the considerations section of the decision is the judge's reasons as a responsibility to society as to why he or she takes such a decision so that it has objective value. Legal considerations in determining the Banda Aceh Syar'iyah Court Number 2/Pdt.P/2021/MS.Bna. Divided into 2 parts. The first part is considerations regarding the legal standing of the Petitioner. The second part is a consideration of the main case.

The consideration in the Petitioner's legal standing is that the Petitioner's biological children are ZH (male), aged 17 years; MN (male), aged 15 years; PNN (female), aged 11 years; PSZ (female) aged 9 years and PN (female) aged 7 years is still a minor, so she is not yet competent to act before the law. The Petitioner submitted the Guardianship application to manage the inherited assets of the Petitioner's husband to be transferred to his heirs because her children are still minors, which requires a Guardianship determination from the Syar'iyah Court.

In its considerations, the panel of judges believed that although, according to law, the biological father and/or mother is the parent and guardian, both of themselves and the assets of their children, this is still true in the field of civil law (especially) in the world of banking and the transfer of land rights and Buildings that are run on prudential principles or principles still require written evidence (*Lex Scripta*) of a legal right or relationship, so that in such circumstances even biological parents need to obtain a

determination from the court regarding their legality as guardians for their own biological children. Whereas with the considerations above, the Syar'iyah Court is of the opinion that the Petitioner has Legal Standing (Legal Authority and interests) to apply for the appointment of a Guardian for the purpose (Persona Standi In Judicio).

In consideration of the main case, the panel of judges stated that the main case of this determination was that the Petitioner requested to be appointed as legal guardian for his children named ZH (male), aged 17 years, MN (male) aged 15 years, PNN (female) aged 11 years, PSZ (female) aged 9 years and PN (female) aged 7 years are still minors, so they are not yet competent to act before the law.

The purpose of the guardianship application is for the Petitioner to act as guardian for her children, who are still minors, in signing a letter to take care of the children's assets, which are inherited assets left by the Petitioner's husband.

Whereas regarding this matter, the Panel of Judges gave the following considerations:

- a. That in article 47 of Law Number 1 of 1974 it is stated:
  1. Children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents as long as they are not removed from their authority.
  2. Parents represent the child regarding all legal actions inside and outside the court.
- b. That, from these provisions, it can be understood that if biological parents automatically act as guardians of their biological child, including themselves and the child's assets, without having to obtain a decision from the court first, such power is a power of attorney according to law, which provides authority. Parents represent their children in either unilateral legal actions or legal actions or actions with third parties.
- c. That, even though according to the law, the biological father and/or mother is the parent and guardian of both themselves and the assets of their children, practice in the field of civil law, especially in the world of banking and the transfer of rights to land and buildings is carried out on principles or principles (Prudential ) still requires written evidence (Lex Scripta) of a legal right or relationship so that in such circumstances even biological parents need to obtain a determination from the court regarding their legality as guardians for their own biological child.
- d. Thus, an important issue in Aquo's petition is the gap between the regulations regarding the powers of biological parents who are also legal guardians according to law for their children and the practice in the field of Civil Law, which still requires written proof of such guardianship.
- e. That the Panel of Judges is of the opinion that the gap between what is mandated in Law Number 1 of 1974 concerning marriage and the demands of the principles or Prudential Principles of civil practice is something beyond the power of the Petitioner who wants to manage the inheritance of the child who is still a minor without prejudice to the intention and the substance of the provisions in article 47 of Law Number 1 of 1974 concerning marriage.
- f. Whereas one of the fundamental considerations in establishing guardianship over the five children is an assessment of the applicant's ability and good faith in taking care of himself and the assets of the children who will be under his guardianship as well as possible and solely aimed at the interests or benefit of the children.

- g. Whereas the facts revealed at trial show that the Petitioner has been able to carry out his role as parent and guardian for his five minor children well and responsibly.
- h. That the Petitioner fulfills the requirements as guardian of the child, as intended by Article 51 paragraph (2) of Law Number 1 of 1974 jo. Article 107 paragraph (4) Compilation of Islamic Law.

Applicants who are capable and have good intentions in taking care of themselves and the assets of the child who will be under their guardianship as well as possible and solely for the interests or benefit of the child from the perspective of child protection theory are worthy of being granted guardianship rights. The aim of child protection, as stated in Article 3 of the Child Protection Law, is to ensure that children's rights are fulfilled so that they can live, grow, develop, and participate optimally following human dignity and dignity, as well as receive protection from violence and discrimination, for the sake of realizing children Indonesia with quality, noble character, and prosperity.

The implementation of child protection based on Article 2 of the Child Protection Law is based on Pancasila and based on the 1945 Constitution of the Republic of Indonesia as well as the basic principles of the Convention on the Rights of the Child, including

- a. non-discrimination;
- b. the best interests of the child;
- c. the right to life, survival, and development, And
- d. respect for children's opinions.

The principle of children's best interests is that in any action involving children carried out by the government, society, legislative bodies and judicial bodies, the child's best interests must be the main consideration. Understanding the principle of the right to life, survival, and development is the most basic human right for children, which the state, government, society, family, and parents protect. What is meant by the principle of respect for children's opinions is respect for children's rights to participate and express their opinions in decision-making, especially when it concerns matters that affect their lives.

The facts revealed at the trial show that the Petitioner has been able to carry out his role as parent and guardian for his five minor children well and responsibly.

The judge in the Banda Aceh Syar'iyah Court Determination Number 2/Pdt.P/2021/MS.Bna has applied the child protection theory, as stated by Philipus M. Hadjon above, that children are obliged to receive protection from the government, both preventive and protective, which is repressive. Preventive legal protection means that their rights as children are guaranteed certainty and legal protection through legislation.

Preventively, it is fully regulated in the Child Protection, Human Rights, and Marriage Law. The birth of the Child Protection Law essentially cannot be separated from the government's anxiety about the oppression of children's rights. In general, children are a trust and a gift from God Almighty, which we must always look after because within them are inherent honor, dignity, and rights as human beings, which must be upheld. Children's rights are part of human rights in the 1945 Constitution of the Republic of Indonesia and the United Nations Convention on Children's Rights. In terms of national and state life, children are the future of the nation and the next generation of the nation's ideals, so every child has the right to survival, growth and

development, participation, and the right to protection from acts of violence and discrimination as well as civil rights and freedom.

Repressively, this decision implicitly leads to child protection, including protection from neglect because no one takes care of the child's personal and property, protection from violence because as long as the child is in the Petitioner's care, he is in good and healthy condition and the child's right to be raised and cared for by his own parents.

Furthermore, the Banda Aceh Syar'iyah Court Determination Number 2/Pdt.P/2021/MS.Bna. Analyzed based on *maslahah* theory. In using *maslahah* theory, Imam Malik is always guided by *maqasid al-syariah* and does not draw conclusions that conflict with the basics of sharia. *Maqasid al-syariah* is usually called the five objectives of sharia: to protect religion, the soul, the mind, and the offspring and property.

*Maslahah* and *mafsadah* are often meant by good and bad, benefit and harm, good and bad, and useful and good because *maslahah* is good, while *mafsadah* is all bad, harmful, and not good for humans. As explained above, the measures of *maslahah* and *mafsadah* are the objectives of the sharia (*maqasid al-syariah*).

In the Determination of the Banda Aceh Syar'iyah Court Number 2/Pdt.P/2021/MS.Bna. There is benefit and harm; what becomes *madarat* is that if the petition is rejected, then the child is abandoned because there is no one to take care of themselves and their property, whereas what becomes *maslahah* is if the petition is granted by appointing the Petitioner as the guardian of their children, then the objectives of the Shari'a can be fulfilled, namely protecting the child's soul and protecting the child's property.

#### **D. Conclusion**

Based on the description that has been presented regarding research on the benefit and protection of children in determining guardianship (study of Banda Aceh Syar'iyah Court Determination Number 2/Pdt.P/2021/MS.Bna.), it can be concluded that the Syar'iyah Court Determination Iyah Banda Aceh Number 2/Pdt.P/2021/MS.Bna does not mention the legal discovery method used, but in essence, the judge has carried out legal discovery. In this determination, the judge has carried out a legal construction of an analogical argument, namely that Article 47 of the Marriage Law cannot resolve guardianship case number 2/Pdt.P/2021/MS.Bna, however, the incident encountered is substantially similar to other regulations related to guardianship, so when Article 47 of the Marriage Law cannot resolve the problem, this provision can be set aside. After carrying out the legal construction of the analogy argumentum, the judge has also carried out a systematic interpretation (systematic interpretation), namely interpreting Article 51 paragraph (2) of the Marriage Law by connecting it with Article 107 paragraph (4) of the Compilation of Islamic Law to create a law that is guardian as far as possible. -It can be taken from the child's family or another person who is an adult, of sound mind, fair, honest, and of good character, or a legal entity. Guardians are required to make a list of the child's assets under their control when they begin their position and record all changes in the child or children's assets.

One of the fundamental considerations in establishing guardianship over the five children is an assessment of the applicant's ability and good faith in taking care of himself and the assets of the children who will be under his guardianship as well as possible and solely for the interests or benefit of the children. The facts revealed at trial show that the Petitioner has been able to carry out his role as parent and guardian for

his five minor children well and responsibly. Applicants who are capable and have good intentions in taking care of themselves and the assets of the child who will be under their guardianship as well as possible and solely for the interests or benefit of the child from the perspective of child protection theory are worthy of being granted guardianship rights. The aim of child protection, as stated in Article 3 of the Child Protection Law, is to ensure that children's rights are fulfilled so that they can live, grow, develop, and participate optimally under human dignity, as well as receive protection from violence and discrimination, for the sake of the realization of children Indonesia with quality, noble character, and prosperity. In the Determination of the Banda Aceh Syar'iyah Court Number 2/Pdt.P/2021/MS.Bna. There is benefit and harm; what becomes madarat is that if the petition is rejected, the child is abandoned because there is no one to take care of themselves and their property, while what becomes masalah is if the petition is granted by appointing the Petitioner as the guardian of their children, then the objectives of the Shari'a can be fulfilled, namely protect the child's soul and protect the child's property.

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