

The Urgency of Reformulating Regulations on the Postponement of Marital Property Distribution to Fulfill the Best Interests of the Child

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Abstract

The regulation of the distribution of marital property in Indonesia has not yet incorporated a child-protection perspective. In fact, divorce has direct consequences for children, particularly in situations where the marital property consists of only a single asset, namely the family home. If such property is divided equally between the husband and the wife, it may result in adverse effects on the best interests of the child. This study aims to analyze the urgency of reformulating the regulation of marital property distribution in a manner oriented toward child protection and the best interests of the child as reflected in Supreme Court Circular Letter (SEMA) Number 1 of 2022. This research employs a normative legal research method. The legal materials used consist of the Marriage Law and the Compilation of Islamic Law. Data collection was carried out through a literature review of library materials. The data were analyzed descriptively and prescriptively. The findings indicate that reformulating the regulation on postponing the distribution of marital property in the form of legislation is essential to address the existing legal vacuum in Indonesia. Although the Supreme Court has issued an internal policy in the form of a SEMA, its effectiveness is weak because it functions merely as an internal directive that is not legally binding on judges. A provision acquires binding force only when it is regulated in statutory legislation. The SEMA has attempted to realize the best interests of the child by providing for the postponement of the distribution of marital property when the property acquired during the marriage consists solely of a house that serves as the family residence. Dividing the house equally between the husband and the wife may generate negative consequences for the child, as the child could lose their place of residence.

Keywords: Marital Property; Best Interests of the Child; Legal Protection

Introduction

Marriage generates rights and obligations for both husband and wife. In this context, obligations constitute duties that must be fulfilled by each party, meaning that husband and wife are required to meet each other's physical and emotional needs.¹ The discussion of rights and obligations encompasses two inseparable concepts, as rights cannot be dissociated from corresponding obligations.² Marital obligations encompass various aspects of life, both physical and emotional, that must be fulfilled by both spouses. The husband is obligated to provide maintenance for his wife and children according to his

¹ Zainul Fanani, "Implementasi Pembagian Harta Bersama Dalam Perkawinan Poligami." *Jurnal Negara dan Keadilan*, Vol. 10, No. 1 (2021), hlm. 2.

² Al Yasa' Abubakar, *Antara Setia dan Durhaka Ulasan tentang Hak dan Kewajiban Suami Isteri*, (Banda Aceh: Badan Pemberdayaan Perempuan dan Perlindungan Anak Provinsi Nanggroe Aceh Darussalam, 2008), hlm. 10

capacity,³ including fulfilling physical needs such as food, clothing, housing, as well as educational and healthcare requirements. Additionally, the husband is responsible for protecting his wife and children, both physically and emotionally, and providing daily support.

Moreover, both husband and wife are obligated to participate in the upbringing and education of their children in accordance with the children's interests and needs. They are equally obliged to uphold fidelity, mutual respect, and support for each other in the conduct of marital life. Spouses are also required to maintain open, honest, and attentive communication when addressing the various issues and needs that arise within the marriage.

A further consequence of marriage is the emergence of joint property between the spouses. Joint property, or *harta gono-gini*, consists of assets acquired by husband and wife during the course of the marriage. The marriage referred to here is a legally recognized marriage, as regulated under Law No. 1 of 1974 on Marriage.⁴ In addition to joint property, spouses may also possess individual property acquired prior to marriage. Joint property may include immovable property, movable assets, and securities. Accordingly, neither spouse may sell or transfer joint property without the mutual consent of both parties.⁵

The issue of joint property constitutes a significant legal matter, hence it is explicitly addressed in both the Marriage Law and the Compilation of Islamic Law (*Kompilasi Hukum Islam*, KHI). Property matters possess a material dimension and often give rise to disputes between spouses, particularly in the context of polygamous marriages, which can generate legal complications and potentially disadvantage the first wife.⁶

Divorce may have substantial effects on the wealth of both husband and wife. In many cases, spouses accumulate and develop joint assets during the marriage, including houses, vehicles, savings, investments, and other property. Upon divorce, these assets must be divided in accordance with the applicable legal provisions within the relevant jurisdiction.⁷

The Marriage Law and the KHI have not adequately addressed the issue of children in relation to the division of joint property. Current regulations focus exclusively on the husband and wife, neglecting the direct impacts on children, particularly regarding their education and future prospects, which often involve significant financial considerations. Another inadequacy is the treatment of joint property when the couple owns only a single property, such as a house. If this property is divided equally between husband and wife in

³ Hazarul Aswat, and Arif Rahman. "Kewajiban Suami Memberi Nafkah Dalam Kompilasi Hukum Islam." *Jurnal al-iqtishod*, Vol. 5, No. 1 (2021), hlm. 16-27.

⁴ Dominikus Rato, *Hukum Perkawinan dan Waris Adat di Indonesia (Sistem Kekerabatan, Perkawinan dan Pewarisan Menurut Hukum Adat)*, (Yogyakarta: Laksbang Pressindo, 2015), hlm. 85.

⁵ Tihami, dan Sohari Saharani, *Fikih Munakahat Kajian Fikih Nikah Lengkap*, (Jakarta: Rajawali Pers, 2010), hlm. 179

⁶ Willy Budianto, Rachmi Sulistyarini. "Kepastian Hukum Harta Bersama bagi Istri Pertama dalam Perkawinan Poligami." *Jurnal Ilmiah Pendidikan Pancasila Dan Kewarganegaraan*, Vol. 6, No. 1 (2021), hlm. 68.

⁷ Jacelyn Liwandi, Endah Hartati. "Akibat Perceraian Terhadap Harta Bersama (Studi Putusan Nomor 1470 K/PDT/2018)." *PALAR (Pakuan Law review)*, Vol. 8, No. 3 (2022), hlm. 724.

accordance with Article 97 of the KHI,⁸ the property ceases to remain intact, with the adverse consequences borne by the children born of the marriage.

The issuance of Supreme Court Circular (SEMA) No. 1 of 2022 has introduced a paradigm shift regarding the division of joint property. This SEMA provides that, to ensure the realization of the principle of the best interests of the child in cases where the object of joint property is the sole residence of the child, a claim may be granted; however, the execution of the division is postponed until the child reaches adulthood (21 years of age) or is married. This provision represents a significant advancement for child protection, as it prioritizes the best interests of the child by deferring the division of joint property.

The issue, however, lies in the fact that SEMA constitutes an internal regulation of the Supreme Court with very limited authority. Its status is not established within the hierarchy of statutory regulations, rendering its implementation optional and subject to discretion. Nevertheless, the substance of SEMA clearly advances the protection of children and the fulfillment of their best interests.

In light of these issues, this study aims to examine the urgency of reformulating regulations on the division of joint property through a mechanism of deferred distribution, with due consideration of the principle of the best interests of the child. To ensure the realization of this principle in cases where the object of joint property is the child's sole residence, a claim may be granted; however, the division shall only occur once the child reaches adulthood (21 years of age) or is married. The objective of this research is to analyze the urgency of reformulating regulations on the deferral of joint property distribution oriented toward the best interests of the child, as well as to examine how the principle of the best interests of the child is applied in relation to deferred division under SEMA No. 1 of 2022.

Method

The research method employed in this study is normative legal research utilizing a statute approach and a conceptual approach. Normative legal research is selected because the focus of the study rests on the analysis of legal norms governing the division of marital property, including Law Number 1 of 1974 on Marriage, the Compilation of Islamic Law (KHI), and Supreme Court Circular Letter (SEMA) Number 1 of 2022.⁹ Through the statute approach, this research examines the structure, hierarchy, and binding force of various legal rules related to the division of marital assets and the protection of the child's best interests, as well as identifies normative disharmonies arising from the differing legal authority among the Marriage Law, the KHI, and the SEMA. The conceptual approach is employed to elucidate core concepts such as the best interests of the child, marital property, and the regulatory authority of the Supreme Court in formulating norms through SEMA.¹⁰

The collection of legal materials is carried out through library research by gathering primary legal materials in the form of legislation, SEMA, and judicial decisions; secondary

⁸ M. Mohammad Daud, *Hukum Islam dan Peradilan Agama*, Cet 2 (Jakarta: PT Raja Grafindo Persada, 2002), hlm. 47

⁹ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta, Kencana: 2016), hlm. 35.

¹⁰ Johnny Ibrahim, *Teori & Metodologi Penelitian Hukum Normatif*, (Malang: Bayumedia, 2007), hlm. 48.

legal materials including literature, scholarly journals, and expert opinions; and tertiary legal materials such as legal dictionaries and encyclopedias.¹¹ These legal materials are subsequently analyzed using a descriptive–qualitative method, which involves describing, systematizing, and interpreting relevant legal provisions to address the urgency of reformulating the regulation on the division of marital property through a postponement mechanism in order to safeguard the best interests of the child.¹² This analysis is also employed to assess the extent to which SEMA Number 1 of 2022 is capable of providing legal protection for children and how the regulation should be reformulated to ensure legal certainty, binding force, and consistency with the principles of child protection within the national legal system.¹³

Discussion

1. The Urgency of Reformulating Regulations on the Deferral of Joint Property Distribution from the Perspective of Child Protection

The urgency of legal reform is fundamentally a logical consequence of the dynamic evolution of society, making it untenable for law to be maintained as a rigid and closed system. From the perspective of legal scholarship, legal norms must continuously be renewed in order to remain responsive to social needs and to ensure the realization of substantive justice. Legal reform should not be reduced to a merely formal legislative process; rather, it constitutes part of a systematic effort to ensure that law operates as an instrument of protection and social welfare. In this respect, such urgency becomes increasingly significant when linked to the interests of vulnerable groups, particularly children, who require comprehensive guarantees of protection in all dimensions of legal life.¹⁴

In disputes concerning the division of matrimonial property following divorce, the prevailing legal construction has tended to position the spouses as the principal legal subjects, while the interests of the child are frequently treated as secondary or incidental. Empirical realities, however, demonstrate that the outcomes of such property division directly affect the child's subsistence, including access to basic necessities, education, and psychosocial development. Accordingly, a reconfiguration of legal norms is necessary to ensure that the interests of the child are incorporated as a primary consideration rather than a supplementary factor in all legal decision-making processes relating to family law.¹⁵

The necessity of legal reform may be understood through the theoretical framework of law as a tool of social engineering, which conceptualizes law as an instrument for shaping and directing society toward conditions of greater justice and welfare. Within this framework, law performs not only a regulatory function but also a corrective one, addressing social inequalities that arise in practice. Consequently, when existing legal norms fail to provide adequate protection for children in the context of matrimonial

¹¹ Soerjono Soekanto & Sri Mamudji, *Penelitian Hukum Normatif*, (Jakarta: Raja Grafindo Persada, 2011), hlm. 14.

¹² Amiruddin & Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajawali Pers, 2018), hlm. 121.

¹³ Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 2000), hlm. 89.

¹⁴ Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2006), hlm. 53–55.

¹⁵ Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermasa, 2005), hlm. 45–47.

property division, legal reform becomes imperative to ensure that the objectives of law—namely justice and utility—are effectively achieved.¹⁶

The theory of progressive law further provides a conceptual foundation by asserting that law must be oriented toward human welfare and must not be confined solely to the textual rigidity of statutory provisions. This approach emphasizes the importance of contextual interpretation aimed at achieving substantive justice. In the context of matrimonial property division, a progressive legal approach encourages judges and legal practitioners to take into account the concrete conditions of the child as an affected party, thereby ensuring that judicial decisions not only satisfy formal legality but also embody the sense of justice that prevails within society.¹⁷

Moreover, the principle of the best interests of the child constitutes a fundamental norm that must be integrated into all policies and legal practices concerning children. This principle requires that all legal determinations prioritize the child's overall welfare and development, encompassing physical, mental, and social aspects. Nonetheless, in practice, the implementation of this principle continues to face significant challenges, particularly when confronted with rigid legal norms that are insufficiently responsive to the specific needs of children. This situation reveals a discrepancy between normative expectations and empirical realities, thereby reinforcing the necessity for legal reform.¹⁸

From a utilitarian standpoint, law should aim to produce the greatest benefit for the greatest number of individuals, including children as members of society entitled to protection. In this regard, legal reform that accommodates the interests of children in the division of matrimonial property represents a concrete effort to promote collective social welfare. Where the law persists in adopting an overly formalistic approach, the risk of injustice toward children is significantly heightened, thereby undermining the fundamental objective of law to generate optimal social utility.¹⁹

In conclusion, the urgency of legal reform in the context of matrimonial property division must be understood as part of a broader process of legal system renewal oriented toward the protection of children's rights and the realization of substantive justice. The integration of various theoretical perspectives—including social engineering, progressive law, and utilitarianism—demonstrates that law must continuously evolve in response to societal developments. Accordingly, responsive and adaptive legal reform constitutes a fundamental prerequisite for the establishment of a legal system that not only ensures certainty but also delivers justice and tangible social benefit, particularly for children as legal subjects requiring special protection.²⁰

¹⁶ Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1922), hlm. 66–69.

¹⁷ Satjipto Rahardjo, *Hukum Progresif: Hukum yang Membebaskan* (Jakarta: Kompas, 2009), hlm. 112–115.

¹⁸ United Nations, *Convention on the Rights of the Child* (New York: United Nations, 1989), hlm. 3–5.

¹⁹ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1789), hlm. 1–3.

²⁰ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge: Harvard University Press, 1936), hlm. 390–392.

Fundamentally, the purpose of law is to provide protection to the entire society.²¹ Similarly, in the context of joint property distribution, the existence of law should consider the interests of the society it governs.²² Concerning joint property that affects children, adequate legal provisions are necessary to ensure that children retain suitable housing following their parents' divorce.

The current positive law in Indonesia, or *ius constitutum*, regulates joint property between husband and wife, as stipulated in the Marriage Law and the Compilation of Islamic Law (Kompilasi Hukum Islam, KHI). These legal instruments establish the principles and provisions governing the distribution of property acquired during the course of a marriage.²³ The Marriage Law regulates various aspects of marriage, including the rights and obligations of spouses, among which is the division of joint property. The law provides that property acquired during the marriage is presumed to be joint property, unless otherwise specified in a marital agreement. These provisions constitute the legal basis for regulating and resolving disputes concerning joint property in the courts.²⁴ Similarly, the KHI provides rules regarding joint property. However, the provisions in the Marriage Law and the KHI do not address the deferral of joint property distribution in cases where the joint property consists solely of a single house. If this house represents the only shared asset and must be divided equally between the husband and wife after divorce, it has the potential to adversely affect the child.²⁵

In response to the evolving legal dynamics surrounding joint property, the Supreme Court has issued internal policies applicable within the Religious Courts. Juridically, the deferral of joint property distribution is regulated in Supreme Court Circular Letter (SEMA) No. 1 of 2022 concerning the Implementation of Plenary Session Resolutions of the Supreme Court Chambers of 2022 as Guidelines for Court Duties. The SEMA stipulates that, to ensure the realization of the principle of the best interests of the child in cases of joint property where the object is proven to be the child's sole residence, the claim may be granted; however, the distribution shall only be executed after the child reaches adulthood (21 years of age) or is married.

According to the aforementioned Supreme Court Circular Letter (SEMA), the protection of the child's best interests constitutes a paramount consideration in adjudicating disputes over the division of matrimonial or joint property, particularly in circumstances where such property represents the child's sole place of residence. In this regard, the SEMA introduces a nuanced legal approach by permitting the court to formally grant a claim for the distribution of joint property, while simultaneously deferring the execution of such division. This deferment operates as a legal safeguard designed to prevent any immediate disruption to the child's living conditions, thereby ensuring continuity in shelter, stability, and overall well-being during a formative stage of life.

²¹ Irvan Rizqian, "Upaya Perlindungan Hukum Terhadap Anak Sebagai Korban Tindak Pidana Kekerasan Seksual Dikaji Menurut Hukum Pidana Indonesia." *Journal Justiciabelen*, Vol. 1, No. 1 (2021), hlm. 51.

²² Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar*, (Yogyakarta: Liberty, 2010), hlm. 71.

²³ Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, (Jakarta: Rajawali Pers, 2013), hlm. 212.

²⁴ M. Yahya Harahap, *Hukum Acara Perdata*, (Jakarta: Sinar Grafika, 2017), hlm. 98.

²⁵ Nandang Sambas, *Hukum Perlindungan Anak di Indonesia*, (Bandung: Refika Aditama, 2018), hlm. 64.

More specifically, the normative construction embedded within the SEMA reflects a balancing mechanism between the proprietary rights of the former spouses and the protective obligations owed to the child. While the legal entitlement of each party to a share of the joint property is acknowledged and affirmed through the granting of the claim, the postponement of its material execution serves to prioritize the child's right to adequate housing. This approach demonstrates a departure from a purely formalistic application of property law principles, instead embracing a more purposive interpretation that integrates family law considerations and child protection norms within the adjudicative process.²⁶

Furthermore, the deferment of the actual division of property until the child reaches legal adulthood or enters into marriage is grounded in the recognition that children, by virtue of their dependency and vulnerability, require a stable environment to support their physical, emotional, and social development. The immediate partition or sale of jointly owned property—particularly when it serves as the child's residence—could result in displacement, psychological distress, and diminished access to essential resources. Accordingly, the SEMA's approach aligns with broader legal principles that emphasize the necessity of safeguarding the child's welfare as a primary consideration in all decisions affecting their interests.²⁷

From a doctrinal perspective, this policy can also be interpreted as an application of the principle of *the best interests of the child*, which has been widely recognized in both domestic and international legal frameworks. The principle requires that any legal determination involving children must prioritize outcomes that most effectively promote their well-being and development. By allowing the recognition of proprietary claims while delaying their enforcement, the SEMA effectively harmonizes the competing interests at stake, ensuring that the enforcement of adult property rights does not undermine the fundamental rights of the child.²⁸

In addition, this approach reflects an evolution in judicial reasoning toward a more context-sensitive and socially responsive model of adjudication. Rather than treating property disputes as isolated civil matters, the SEMA implicitly acknowledges their broader social implications, particularly for dependent children. This perspective resonates with contemporary legal thought that advocates for the integration of substantive justice considerations into judicial decision-making, thereby reinforcing the role of courts as institutions not only of legal certainty but also of social protection.²⁹

It is also important to note that the temporal limitation imposed by the SEMA—namely, the postponement of division until the child reaches adulthood or marries—serves as a clear and objective legal threshold. This ensures legal certainty while simultaneously accommodating the child's developmental needs. By establishing a definitive point at which the execution of property division may proceed, the SEMA avoids indefinite delays

²⁶ M. Yahya Harahap, *Hukum Acara Perdata* (Jakarta: Sinar Grafika, 2017), hlm. 275–277.

²⁷ John Eckelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determination," *International Journal of Law, Policy and the Family* 8, no. 1 (1994), hlm. 48–50.

²⁸ United Nations, *Convention on the Rights of the Child* (New York: United Nations, 1989), hlm. 3–4.

²⁹ Satjipto Rahardjo, *Hukum Progresif: Hukum yang Membebaskan* (Jakarta: Kompas, 2009), hlm. 120.

that could otherwise prejudice the rights of the parties, thereby maintaining a proportional balance between competing legal interests.³⁰

This provision demonstrates a clear normative orientation toward the protection of children as vulnerable subjects within judicial proceedings, particularly in disputes concerning the division of matrimonial property. Within the legal structure of family relations, children occupy a position of dependency and do not possess equal bargaining capacity when compared to their parents. For this reason, legal intervention is required to ensure that their interests are not marginalized in the adjudicative process. In this regard, the deferral of the execution of joint property distribution should be understood not merely as a procedural arrangement, but as a substantive safeguard designed to prioritize the welfare of the child within the framework of judicial decision-making.³¹

The postponement of the actual division of matrimonial property until the child reaches adulthood or enters into marriage has important implications for maintaining residential continuity. During formative stages of development, a stable and secure living environment constitutes a fundamental requirement for the child's physical well-being, emotional security, and social development. Immediate enforcement of property division may lead to the loss of the child's primary residence, thereby creating instability that can negatively affect their overall growth. Accordingly, the deferment operates as a protective legal mechanism intended to prevent harm arising from sudden disruption of the child's living conditions.³²

Furthermore, this legal approach reflects the substantive application of the principle of the best interests of the child, which requires that all decisions affecting children prioritize their overall welfare and developmental needs. In this context, delaying the distribution of joint property serves to ensure that the child's rights and living stability are not subordinated to the competing proprietary interests of the parties. The law, therefore, functions not only as an instrument for resolving civil disputes, but also as a normative framework for protecting individuals who are in a position of structural vulnerability.³³

In addition, the deferment of property division provides legal certainty and protective assurance until the child attains sufficient maturity and independence to manage economic and legal interests responsibly. Upon reaching adulthood or marriage, the child is presumed to have acquired the legal capacity and cognitive maturity necessary to understand and administer property-related matters. This temporal limitation thus balances the need for child protection with the eventual realization of property rights, ensuring that both protective and proprietary interests are accommodated in a proportionate manner. In this sense, the rule reflects a forward-looking legal policy that integrates immediate protection with long-term legal rationality.³⁴

³⁰ Sudikno Mertokusumo, *Penemuan Hukum: Sebuah Pengantar* (Yogyakarta: Liberty, 2009), hlm. 85–87.

³¹ John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism," *International Journal of Law, Policy and the Family* 8, no. 1 (1994), hlm. 45–47.

³² Jonathan Herring, *Family Law* (Harlow: Pearson Education, 2019), hlm. 412–414.

³³ United Nations, *Convention on the Rights of the Child* (New York: United Nations, 1989), hlm. 3–5.

³⁴ Judith Masson, Rebecca Bailey-Harris, and Rebecca Probert, *Cretney's Principles of Family Law* (London: Sweet & Maxwell, 2008), hlm. 583–585.

The reformulation of joint property regulations through deferral mechanisms following parental divorce represents a crucial step in aligning the law with evolving social realities. Currently, legal gaps persist that may negatively impact children. Children have not received adequate attention under existing legal provisions. Optimal legal protection has not been fully realized, and thus the child's best interests have not been proportionately addressed. Therefore, legal reform is necessary to ensure that divorce proceedings not only accommodate the rights and needs of the individuals involved but also explicitly prioritize the welfare of children who are vulnerable to the emotional and psychological consequences of parental divorce.

To fill the legal void concerning the deferral of joint property distribution, the development of new legal instruments is required to adequately accommodate such circumstances. These instruments must provide legal certainty for all parties involved, including parents and children. Moreover, these instruments must offer maximum legal protection for the child, prioritizing their best interests. Provisions enabling the deferral of joint property distribution are necessary to allow time for the child's adjustment, both practically and emotionally. The establishment of robust legal instruments is expected to create a more inclusive and responsive legal environment that addresses the dynamics of post-divorce family life.

As a state governed by law, Indonesia obliges state officials, including the judiciary, to act in accordance with prevailing legal provisions.³⁵ If no specific law currently regulates the deferral of joint property distribution, it is necessary to reformulate legal regulations governing this matter. This step is essential to ensure adequate protection for children in divorce situations.

In the process of reformulating these legal provisions, it is important to establish a solid legal basis for judges in deciding cases involving deferred joint property distribution. This will provide clear and certain guidance for courts in handling such cases, ensuring that decisions are based on applicable legal principles while taking into account the child's best interests.

The issue of deferring joint property distribution when the property consists solely of a house is frequently debated in divorce or separation cases. In many instances, the house represents the most significant asset held by the divorcing or separating couple.³⁶ In the absence of clear regulations regarding the distribution of such a house, the situation can become highly complex and detrimental, particularly to children. Child protection must be a primary concern in these cases, as the overarching purpose of law is to provide protection to all members of society, including children.

Legislation regulating the deferral of joint property distribution when the house constitutes the sole asset can provide stability and security for children, especially if they continue to reside in the house. However, to date, such regulation has not been adequately implemented, creating challenges in the context of child protection.³⁷

³⁵ Sayid Anshar, "Konsep Negara Hukum dalam Perspektif Hukum Islam." *Soumatara Law Review*, Vol. 2, No. 2 (2019), hlm. 235-245.

³⁶ Mary Ann Glendon, *The Transformation of Family Law*, (University of Chicago Press, 1989), hlm. 233.

³⁷ Najmah & Efa Laela Fakhriah, "Pembagian Harta Bersama dalam Perkawinan dan Permasalahannya di Indonesia," *Jurnal Hukum dan Peradilan*, Vol. 7, No. 3 (2018), hlm. 462-464.

The urgency of reformulating deferral provisions for joint property distribution is necessary to ensure that the application of the law aligns with the objectives of Islamic law, or *maqāṣid al-sharī‘ah*. The *maqāṣid al-sharī‘ah* is a fundamental concept in Islamic legal studies, referring to the goals or purposes that Sharia seeks to achieve in regulating human life.³⁸ There are five primary objectives of *maqāṣid al-sharī‘ah*: **first**, *ḥifẓ al-dīn* (protection of religion), which encompasses efforts to preserve faith and religious practice while preventing apostasy or religious defamation; **second**, *ḥifẓ al-nafs* (protection of life), which includes ensuring physical and mental security and well-being, including prohibitions on murder, violence, and harmful acts; **third**, *ḥifẓ al-nasl* (protection of progeny), which involves safeguarding generational continuity and preventing actions that disrupt the family institution or human reproduction;³⁹ **fourth**, *ḥifẓ al-māl* (protection of property), which encompasses preserving property rights and preventing fraud, theft, or misappropriation; and **fifth**, *ḥifẓ al-‘aql* (protection of intellect), which entails safeguarding human rational capacity and preventing its impairment, such as through the consumption of alcohol or illicit drugs.⁴⁰

The establishment and enforcement of laws regarding joint property for children born within marriage can also be analyzed through the approach of *maṣlaḥah mursalah* or *istiṣlāḥ* (legal determination based on public interest and welfare). According to al-Ghazali, *maṣlaḥah* fundamentally involves deriving benefit (*manfa‘ah*) and preventing harm (*mafsadah*) to preserve the objectives of Sharia.⁴¹ In the context of joint property, this approach is applied by considering the benefits of having a legal institution regulating joint property, such as facilitating harmonious family life and preventing disputes between spouses regarding property. The *maṣlaḥah* approach also considers potential harms that may arise in the absence of such a legal institution, including conflicts between spouses or difficulties in property division upon divorce. Thus, laws governing joint property can be established and enforced in accordance with principles that uphold the objectives of Sharia, namely realizing justice, public welfare, and social order.

2. The Best Interests of the Child in Relation to the Deferral of Joint Property Distribution under Supreme Court Circular Letter (SEMA) No. 1 of 2022

The principle of *the best interests of the child* constitutes a fundamental doctrine within child protection law, emerging through a prolonged evolutionary process in the international legal system. Historically, this concept originates from a paradigm shift in traditional family law, which formerly positioned children merely as objects of parental authority, toward the recognition of children as legal subjects possessing independent rights. This transformation reflects a broader development in legal thought, moving from

³⁸ Ghofar Shidiq, "Teori maqashid al-Syari'ah dalam hukum Islam." *Majalah Ilmiah Sultan Agung*, Vol. 44, No. 118 (2009), hlm. 117.

³⁹ Zainil Ghulam, "Implementasi Maqashid Syariah dalam Koperasi Syariah." *Iqtishoduna: Jurnal Ekonomi Islam*, Vol. 5, No. 1 (2016), hlm. 90-112.

⁴⁰ Elvira Dewi Ginting, and M. Syukri Albani Nst. "UU Nomor 35 Tahun 2014 Tentang Perlindungan Anak Ditinjau Dari Maqashid Syari'ah Terhadap Kekerasan yang Dilakukan Orang Tua (Studi Kasus di Kabupaten Sibolga)." *Jurnal Penelitian Medan Agama*, Vol. 10, No. 1 (2019), hlm. 13.

⁴¹ Al-Ghazali, *Al-Mustashfa fi al-Ilmi l-Ushul*, (Beirut: Dar al-Kutub al-Ilmiyah, 1983), hlm. 286.

an authoritative approach to one oriented toward the comprehensive protection of children's rights and welfare.⁴²

The early development of this principle can be traced to the period following World War II, when the international community began to devote serious attention to the protection of human rights, including the rights of children as a vulnerable group. A significant milestone occurred with the adoption by the United Nations of the *Declaration of the Rights of the Child* in 1959, which affirmed that children require special protection, assistance, and legal consideration distinct from that afforded to adults. Although declaratory in nature, this instrument established a normative foundation for the subsequent development of the best interests principle in international legal instruments.⁴³

The consolidation of this principle reached its culmination in the *Convention on the Rights of the Child (CRC)* of 1989, which explicitly codified the principle of the best interests of the child in Article 3(1). This provision stipulates that in all actions concerning children, whether undertaken by public or private institutions, the best interests of the child shall be a primary consideration. Accordingly, the principle is not merely ethical or normative in character, but has attained binding legal force upon States Parties, including Indonesia, which ratified the Convention through Presidential Decree Number 36 of 1990.⁴⁴

Within the Indonesian national legal system, this principle has been adopted and internalized into various legislative instruments, particularly through Law Number 23 of 2002 concerning Child Protection, as amended by Law Number 35 of 2014. These statutes explicitly position the best interests of the child as a primary principle in all policies and actions relating to children, thereby demonstrating harmonization between domestic law and international legal standards in the field of child protection.⁴⁵

In judicial practice, this principle plays a crucial role as a guideline for judges in examining and adjudicating cases involving the interests of children, especially in family law matters such as divorce, child custody, and the division of marital property.⁴⁶ Judges are not only required to apply the law in a normative-positive sense, but must also consider the factual impact of their decisions on the psychological, social, and economic conditions of the child. Thus, the principle functions as an interpretative legal instrument directed toward the attainment of substantive justice.

The application of this principle within the Indonesian judicial system has been further reinforced through policies of the Supreme Court, particularly in the form of Supreme Court Circular Letters (*Surat Edaran Mahkamah Agung* or SEMA). One significant instrument in this regard is SEMA Number 1 of 2022, which provides guidance

⁴² Philip Alston, "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights," *International Journal of Law, Policy and the Family* 8, no. 1 (1994), hlm. 1–25.

⁴³ Geraldine Van Bueren, "The International Law on the Rights of the Child," *Netherlands Quarterly of Human Rights* 8, no. 3 (1990), hlm. 251–270.

⁴⁴ Michael Freeman, "The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?" *International Journal of Law, Policy and the Family* 11, no. 3 (1997), hlm. 360–388.

⁴⁵ Rika Saraswati, "Law and Policy on Child Protection in Indonesia," *Journal of Indonesian Legal Studies* 2, no. 1 (2017), hlm. 1–18.

⁴⁶ Robert H. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy," *Law and Contemporary Problems* 39, no. 3 (1975), hlm. 226–293.

for judges in handling certain cases that bear implications for the interests of children. The issuance of this circular reflects an institutional effort to ensure the consistent application of the best interests principle in judicial practice.⁴⁷

SEMA Number 1 of 2022 essentially affirms that in every case affecting children, judges are obliged to carefully consider the child's actual circumstances, including aspects of residence, continuity of life, and psychological and social stability. Consequently, the interests of the child are no longer treated as a supplementary consideration, but rather as a central element in the decision-making process.⁴⁸ This reflects a strengthening of the child protection paradigm within the modern judicial system.

In the context of disputes concerning the division of marital property, the implementation of this circular holds significant relevance, particularly where the disputed property also serves as the child's residence. In such circumstances, judges are not limited to considering juridical ownership aspects, but must also evaluate the social consequences of enforcing the judgment on the child's well-being and continuity of life.⁴⁹ Therefore, SEMA Number 1 of 2022 operates as a corrective instrument, guiding judges to prioritize substantive justice alongside legal certainty.

The importance of applying the principle of the best interests of the child within this circular also lies in maintaining a balance between legal certainty and social protection.⁵⁰ Law functions not only as a mechanism for dispute resolution, but also as an instrument for safeguarding vulnerable groups. In this context, children are positioned as legal subjects entitled to effective and sustained legal protection, rather than merely passive parties affected by legal disputes.

Furthermore, the application of this principle reflects a transformation in judicial paradigms toward a more humanistic and socially responsive approach. Children are no longer perceived as objects within family legal relations, but as legal subjects entitled to optimal protection of their rights. Accordingly, SEMA Number 1 of 2022 reinforces the orientation of the Indonesian judiciary toward a legal system grounded in the protection of human rights, particularly the rights of the child.⁵¹

In other, Children are regarded as divine trusts who require guidance to grow into individuals who are beneficial to the nation, the state, society, and the family. The Indonesian Constitution, namely the 1945 Constitution (UUD 1945), in Article 28B paragraph (2), stipulates the fulfillment of children's rights.⁵² Children are entitled to grow and develop and to receive protection. This provision underscores the importance of

⁴⁷ M. Nurul Huda, "Peran Hakim dalam Perlindungan Anak dalam Perkara Perdata," *Jurnal Hukum Ius Quia Iustum* 26, no. 2 (2019), hlm. 290–305.

⁴⁸ Supreme Court of Indonesia, "Judicial Guidelines and Child Protection in Indonesia," *Indonesia Law Review* 12, no. 1 (2022), hlm. 45–60.

⁴⁹ Lilik Mulyadi, "Implementasi Asas Kepentingan Terbaik bagi Anak dalam Putusan Hakim," *Jurnal Yudisial* 13, no. 2 (2020), hlm. 135–150.

⁵⁰ Jonathan Herring, "The Human Rights of Children and Families," *Modern Law Review* 73, no. 2 (2010), hlm. 265–288.

⁵¹ Anne B. Smith, "Children's Rights: Toward Social Justice," *International Journal of Children's Rights* 19, no. 1 (2011), hlm. 1–17.

⁵² Agus Darwanta, "Penerapan Prinsip Terbaik Untuk Anak (*The Best Interest of The Child*) dalam Pemenuhan Hak Anak di Lembaga Pembinaan Khusus Anak." *Reformasi Hukum*, Vol. 24, No. 1, (2020), hlm. 61.

providing safeguards, support, and opportunities for children to realize their full potential within a safe and nurturing environment.

The principle of the best interests of the child constitutes a legal doctrine asserting that the welfare and interests of the child must be the primary consideration in every decision affecting them. This principle aims to ensure that children are not disadvantaged in any circumstances, including parental divorce.⁵³ Within the context of divorce, it requires that every decision take into account the comprehensive impact on the child's welfare and interests. Accordingly, this principle directs efforts toward providing protection, support, and a stable environment for children both during and after the divorce process.

The issuance of Supreme Court Circular Letter (SEMA) No. 1 of 2022 demonstrates a significant commitment to the principle of the best interests of the child. The deferral of joint property distribution until the child reaches adulthood represents tangible recognition by the Supreme Court of children's rights following parental divorce. By refraining from immediately distributing the jointly owned property, in this case a residence, the child is allowed to continue residing in the home until adulthood. This policy provides additional protection for the child and considers their need for a stable environment during the transitional period. It further indicates that the Supreme Court takes child welfare into account in legal decision-making.

Child protection encompasses a series of measures aimed at guaranteeing and safeguarding children and their rights, enabling them to live, grow, develop, and participate optimally in accordance with human dignity. Such protection also includes preventing all forms of violence and discrimination.⁵⁴ The principle emphasizes the importance of providing a safe and supportive environment for children, ensuring that they are treated fairly and equally regardless of their background or status.

According to Van Apeldoorn, the primary purpose of law is to regulate human social interaction peacefully. In other words, law aims to create a secure and harmonious social environment.⁵⁵ Law is directed at protecting diverse human interests, including honor, freedom, life, and property. This reflects the fundamental principles of justice, equality, and the protection of individual rights within the legal system.⁵⁶ By safeguarding these interests, the law seeks to prevent conflicts and disputes among members of society and to provide a clear and predictable framework for social interaction.⁵⁷ Thus, law serves as a critical instrument in ensuring public order and societal peace.⁵⁸

⁵³ Syahan Nur Muhammad Haiba, and Anjar Sri Ciptorukmi Nugraheni. "Penetapan Hak Asuh Anak Pasca Perceraian Berdasarkan Asas Kepentingan Terbaik Anak." *Aliansi: Jurnal Hukum, Pendidikan dan Sosial Humaniora*, Vol. 1, No. 2 (2024), hlm. 153.

⁵⁴ United Nations Committee on the Rights of the Child, *General Comment No. 13 on the Right of the Child to Freedom from All Forms of Violence*, CRC/C/GC/13 (2011).

⁵⁵ Natalia Ningsih, I. Made Arya Utama, and I. Made Sarjana. "Kekuatan Mengikat Akta Notariil Perjanjian Perkawinan Terkait Harta Bersama yang Dibuat Pasca Pencatatan Perkawinan Acta Comitatus, Vol. 1, No. 2, 2017, hlm. 16.

⁵⁶ Ahmad Yani, *Filsafat Hukum: Teori dan Praktik*, (Jakarta: Rajawali Pers, 2012), hlm. 48–50.

⁵⁷ Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, (Edward Elgar Publishing, 2008), hlm. 12–14.

⁵⁸ Lon L. Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1969), hlm. 33–36.

The decision to defer joint property distribution under SEMA No. 1 of 2022 underscores a strong commitment to children's welfare and the principle of the best interests of the child in the context of divorce or marital separation. Such deferral constitutes a judicial measure to accommodate the needs and interests of children following parental divorce. It recognizes that immediate division of joint property may create uncertainty and disruption in the child's life, with potential negative consequences for their well-being.

By postponing the distribution of joint property, courts allow the parties additional time to reach a more equitable agreement while taking into account the child's interests more comprehensively. During this deferral period, the court may consider various factors, including childcare needs, financial requirements, and other elements affecting the child's welfare.

Consequently, the deferral of joint property distribution as provided in SEMA No. 1 of 2022 can be viewed as an effort to prioritize the welfare of the child and the principle of the child's best interests in divorce or marital separation proceedings. This demonstrates the Supreme Court's awareness of the importance of child protection and welfare amid the dynamic changes in family life resulting from divorce.

The best interests of the child in the division of joint property between divorcing parties can be realized if the residence, as the sole asset, is not immediately distributed to either spouse. By delaying distribution until the child reaches a stage of independence, the property can be divided more equitably, minimizing adverse effects on the child. This approach ensures that the child maintains equitable access to the resources left by their parents and reduces potential conflicts between the parties involved.

Conclusion

The regulation of deferred distribution of joint property in Indonesia, particularly concerning property affecting children following parental divorce, is of critical importance and warrants reformulation into formal legislation. Currently, children receive insufficient attention in the aftermath of parental divorce, despite being directly affected by such events. This concern is particularly acute when the jointly owned property consists solely of a single residence; if this property were to be divided equally between the husband and wife after divorce, it could have detrimental effects on the child. At present, provisions regarding the deferral of joint property distribution are found only in Supreme Court Circular Letter (SEMA) No. 1 of 2022. This circular regulates the postponement of joint property division, particularly concerning property acquired during the marriage, such as the residence occupied by the spouses and their child. SEMA No. 1 of 2022 stipulates that, in cases involving the division of joint property, the court may decide to defer the distribution. The primary objective of this provision is to ensure the continuity of the child's life, preventing the loss of a stable residence as a consequence of property division.

Deferring the distribution of joint property while allowing the child to remain in the family home can be regarded as a measure to uphold the principle of the best interests of the child, as mandated under the Child Protection Law. The child is permitted to continue residing in the home even though, legally, the sole jointly owned property has been apportioned between the spouses; however, the execution of this division may only occur

once the child reaches adulthood. This deferral mitigates the psychological and emotional impacts that arise from divorce or the dissolution of marriage. Accordingly, the regulation of deferred joint property distribution as set forth in SEMA No. 1 of 2022 can be considered a measure consistent with the principle of the child's best interests, as it effectively safeguards the stability and well-being of the child in the context of an unstable family environment.

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