

## Disparity of Religious Court Judges' Decisions Regarding Distribution of Rights of an Adopted Child in a Mandatory Will

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### Article Info

#### Article history:

Received July 1, 2024  
Revised August 9, 2024  
Accepted September 14, 2024

#### Keywords:

Adopted Children  
Justice  
Wajibah Wil

### ABSTRACT

This study aims to determine and describe the chronology of the distribution of obligatory wills for adopted children in decision no. 5203/Pdt.G/2019/PA.Tgrs, Decision no. 1277/Pdt.G/2016/PA.Tng and Decision no. 1926/Pdt.G/2020/PA.JU as well as the judge's considerations in determining the adopted child's share of the three decisions. The type of research used is qualitative, namely collecting data with the aim of interpreting the phenomena that occur using a normative juridical analysis approach, through studying the decisions of the Religious Courts regarding cases of obligatory wills for adopted children with data sources in the form of research libraries, court decisions, statutory regulations, and books and interviews with the judge who decided the case. The results of the research show that there are differences in the share of adopted children from the inheritance of their adoptive parents. The difference occurs because the heirs left behind are different, such as husband and biological father, so that adopted children get 1/6 of the share, while replacement heirs get 2/3 jointly, and 1/10 when the heirs are siblings. These three decisions can be included in the concept of Islamic justice. It means giving something that is rightfully yours in a balanced manner. Balanced means that everything that exists is accepted at the proper level and not at the same level. However, one large part and one small part can be determined by the expected function.

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### INTRODUCTION

In Indonesia, it is currently institutionalized for a boy or girl who is adopted/adopted to be placed in the family environment of the adoptive parents. This adoption was carried out based on moral considerations such as helping orphans. A family can adopt a child with the legal consequence that the child, whether male or female, will have the same rights before the law as a legitimate child.

Children are the only successors of the nation. Therefore, there are several regions that recognize adoption. Adoption of a child is a legal act, as such, it will certainly give rise to legal consequences, including the rights obtained and obligations that must be fulfilled by both parties, namely the adopted child and the adoptive parents.

This effort must be made due to the fact that in all societies that practice adoption, adoptive parents always think about the welfare of their adopted children when they die. Thus, it is common practice for adopted children to receive a share of the inheritance from their parents through gifts that can provide security in life.

In Indonesia, the inheritance of adopted children is regulated in the Compilation of Islamic Law<sup>10</sup> in accordance with Presidential Instruction no. 1 of 1991 by giving a "Wajibah Will" of up to 1/3 (one third) of the inheritance of his adoptive parents. That if there is a dispute regarding the status of an adopted child, it must be proven by a court decision. In fact, the decisions at the Religious Courts regarding the obligatory portion of the will for adopted children are different even if the adoptive parents do not have biological children.

In the decision of case no. 5203/Pdt.G/2019/PA.Tgrs which was decided in the deliberation of the Panel of Judges at the Tigaraksa Religious Court on Monday 24 February 2020 by Drs. Akhmadi M.Sy as Chair of the Assembly, Drs. Ahmad Nur, M.H and Drs. Hasan Hariri, each as member judge, stated that adopted children as recipients of a will must receive 1/6 (one sixth) of the tirkah. In this case, the heirs consist of a husband, an adopted child and a biological father. Because the biological father had died, the biological father inherited the heirs, namely 3 children who were the Heir's siblings.

In the decision of case no. 1277/Pdt.G/2016/PA.Tng which was decided on Monday 15 May 2017 by the Panel of Judges consisting of Drs. Moch Tadjuddin as chief judge and Dra. Marfu'ah and Drs. Masgiri MH, each as member judge, that the adopted children receive 1/3 of the inheritance as a mandatory will. in accordance with the provisions of Article 209 paragraph (2) Compilation of Islamic Law. The heir in this case is an adopted child and a replacement heir for the Heir's 10 older siblings.

And in the decision of case no. 1926/Pdt.G.2020/PA.JU in the deliberation meeting of the Panel of Judges which took place on Thursday 25 March 2021 by Drs. Amri, SH.MH., as Chairman of the Assembly and Drs. Agus Abdullah, MH and Hj. Shafwah, SH, MH., each as Member Judge, decided that the Defendant's nephew was the Heir's adopted child with the Defendant and received a mandatory will of 2/20 of the deceased Heir's inheritance. The heirs in this case consist of 1 heir's wife, the heir's 7 siblings and 1 adopted child of the heir and the heir's wife.

From the three decisions described above, there are similarities in terms of the status of adopted children in each family, namely that the adopted child is the only child the Heir has. The heir does not have biological children with his partner. However, with this status, each adopted child in the decision determined by the Panel of Judges gets a different share.

The differences in each part of an adopted child's obligatory will decided by the Panel of Judges need to be examined which is a matter for the Judges to consider in making their decision. Because if there are no adopted children, it means that the share of each heir is clear according to faraidl rules. However, having an adopted child will be a different consideration and will influence inheritance calculations.

Cases regarding mandatory wills in the Religious Courts are very rare, for this reason the author feels it is necessary to examine the differences in decisions so that the strong legal bases that form the Judge's argument can be answered.

## RESEARCH METHODS

This type of research is qualitative research. Qualitative research is collecting data in a natural setting with the aim of interpreting the phenomena that occur. The results of qualitative research emphasize meaning over generalization.

The approach method used is normative. Normative research is legal research carried out by examining library materials. The normative approach is further specialized in the normative juridical approach, which is carried out through a literature study which examines data in the form of Legislative Regulations relating to the problem under study, the case approach is carried out by examining cases relating to the issue at hand which has become court decisions have permanent legal force.

## RESULTS AND DISCUSSION

### 1. Lawsuit Number 5203/Pdt.G/2019/PA.Tgrs

#### a. Case Position

The case in this decision is an inheritance case consisting of a 54 year old plaintiff with the status of the husband of the deceased Heir. Against the 57 year old Defendant's status as the deceased Heir's sibling.

#### b. Sitting Matters

That the Plaintiff's wife, namely the Heir, has a father and a mother. And the Heir's father has 4 children, namely, the Defendant, the 2nd child, the Heir and the 4th child.

On June 10, 1982 Pewaris' mother died. Then on March 15 2009 Pewaris died. Then on February 13 2018 Pewaris' father died.

The Plaintiff and the Heir were married on June 13 1993. Their marriage did not produce any children. Then on January 23 2003 the Plaintiff and the Heir adopted a child.

After the death of the Testator, the Plaintiff has carried out his obligations as an heir in managing the body. Because the Testator's biological father had died, the Plaintiff had good intentions to divide the inheritance from the Testator to the heirs of the biological father, namely the Defendant and the Testator's siblings.

The Plaintiff has tried to ask the Defendants (the Heir's siblings) to settle the inheritance amicably but the Defendants have refused.

In his lawsuit, the Plaintiff asked to designate land measuring 194 m<sup>2</sup> and land measuring 292 m<sup>2</sup> as joint property. Determine the Plaintiff (husband) and biological father as the Heir's heirs. Legally determine that the Heir's biological father died on February 13 2018. Determine the Defendant (Heir's sibling) and 2 of the Heir's siblings as heirs of the Heir's biological father. Determining the adopted child as the recipient of the obligatory will of the Testator.

Determine the distribution of the inheritance of the deceased's respective heirs to the Plaintiff and Defendants in accordance with the provisions of Islamic law.

#### c. Decision No. 5203/Pdt.G/2019/PA.Tgrs

In decision no. 5203/Pdt.G/2019/PA.Tgrs, adopted children receive a share of 1/6 of the inheritance. In the Judge's consideration, when the Testator died, the Testator's father was still alive but the inheritance had not been divided. Meanwhile, when the inheritance is to be divided, the Heir's father has died and the remaining heirs are the Heir's siblings. Therefore, the Panel of Judges distributed the heirs, namely the husband and biological father, as well as the recipients of the obligatory will, namely the adopted children. The testator's husband gets a share of 3/6 or the equivalent of 1/2. Dad gets 2/6 or the equivalent of 1/3.

Because there is the Heir's father and husband here, the adopted child gets a smaller share than Furudhul Muqaddarah. In this case, the Panel of Judges prioritized Furudhul Muqaddarah first. When it has been divided, the adopted child gets ashobah from the inheritance. 144 The ashobah obtained does not exceed Furudhul Muqaddarah's share.

Even though an adopted child is not related to his adoptive parents, he has a close relationship with his adoptive parents who are considered like his own family. However, the 1/3 portion of the inheritance given to adopted children is, in essence, considered too large, because this portion exceeds that of the closest heirs.

In this case the Panel of Judges used analytical techniques in making their decision. By controlling the problem accurately and in real terms, in what year the Heir died, who were the heirs when the Heir died and when distributing the Heir's inheritance, who were the heirs in that year. 146 So the adopted child in this decision was given ashobah or remainder because when The Heir dies, the Heir's father is still alive.

In decision no. 5203/Pdt.G/2019/PA.Tgrs, the judge handed down a ruling that the adopted child gets 1/6 of the inheritance with the calculation status being ashobah from the division of the husband and biological father. Looking from the perspective of justice as al-qist which places greater emphasis on the function of distribution, the author analyzes that the judge first separates the heirs who are dzawil furudh. After that, the adopted child gets a share of the remainder received by the dzawil furudh. According to the author, the judge in handing down his decision prioritized justice, especially the concept of Islamic justice. That the judge gives the share according to the rights of each party and gives the share according to a balanced level.

### 2. Lawsuit Number 1926/Pdt.G/2020/PA.JU

#### a. Case Position

The case in this decision is a case regarding Joint Property and Inheritance Lawsuit. This case consists of 7 Plaintiffs and 1 Defendant, whose identities are as follows:

Plaintiff I, male, has the status of the Heir's younger brother. Plaintiff II, female, has the status of the heir's sister. Plaintiff III is female, has the status of the heir's sister. Plaintiff IV, female, has the status of the heir's sister. Plaintiff V, male, has the status of the heir's younger brother. Plaintiff VI, male, has the status of

the heir's younger brother. Plaintiff VII, female, has the status of the younger sibling of the heir. Meanwhile, the Defendant is a woman, 58 years old, with the status of the heir's wife.

In this case the heir and wife do not have children, but the heir and wife adopt an adopted child.

#### b. Sitting Matters

On March 10, 1985, a marriage took place between the Heir and the Defendant at the Office of Religious Affairs (KUA) as recorded in the Marriage Certificate Excerpt dated March 11, 1985. In their marriage, the Heir and the Defendant were not blessed with children.

That during his lifetime the Heir leaves assets, which are divided into inherited assets and joint assets. Joint assets obtained during the marriage of the Testator and Defendant can be counted as inheritance assets for only half of the total value. The heir's inherited assets are inherited assets because they were purchased before marrying the Defendant.

Since the heir died, the Defendant has always argued and argued that he did not want to continue managing the heir's inheritance. The Plaintiff also realized that the Defendant had changed the certificate of ownership of the inheritance located in Bogor, which was originally in the name of the Heir then changed the name to the name of the Defendant's Nephew, where the Defendant's Nephew was the adopted child of the Heir and the Defendant. The inheritance of the Heir is land covering an area of 172 M2 in North Jakarta, land and a house standing on it covering an area of 118 M2 in Bekasi, a plot of land and buildings covering an area of 18 M2 in Bogor, 1 Innova car and 1 Honda motorbike.

Henceforth, the Plaintiffs in the posita requested to determine as the legal heirs of the Heir, namely; Defendant, as the Heir's wife. Plaintiff IV, as the Heir's eldest brother. Plaintiff II, as the second younger sibling of the Heir. Plaintiff III, as the Heir's third younger sibling. Plaintiff I, as the Heir's fourth younger brother. Plaintiff V, as the fifth younger sibling of the Heir. Plaintiff VI, as the Heir's sixth younger brother and Plaintiff VII, as the Heir's seventh younger brother. Determine that the inheritance from the Heir is the right of the heirs. Half of the joint assets from the testator's marriage to the defendant and the heir's inherited assets.

However, in the Convention, the Defendant stated that during the marriage, the Heir and the Defendant were not blessed with children, but the Heir and the Defendant adopted a daughter, who is the Defendant's niece, who was raised from infancy until now and lives with the Defendant.

To strengthen the rebuttal argument, the defendant presented several pieces of evidence regarding the adopted child, namely; Resident Identity Card in the name of the Defendant's Nephew, birth certificate in the name of the Defendant's Nephew and Family Card. Apart from written evidence, the Defendant also submitted witness evidence from 2 people who were the Defendant's brothers-in-law who knew that the Defendant's nephew was the adopted child of the Heir and the Defendant who had been cared for since he was a baby and raised together.

#### c. Decision Number 1926/Pdt.G/2020/PA.JU

In case no. 1926/Pdt.G/2020/PA.JU The heir left behind heirs, namely the wife, who in the decision has the status of Defendant, and 7 siblings who have the status of Plaintiff. The Heir and the Defendant were not blessed with children during their marriage, but during the marriage they adopted a child. The adopted child was not adopted through a court order. However, he was cared for from infancy and raised well by the Heir and Defendant.

The testator and the defendant married in 1985, then adopted a child when he was still a baby. The birth certificate number for the adopted child is recorded as 1993. The testator died in 2015. From the data in the decision, it can be seen that the adopted child has lived with the testator for approximately 22 years.

In accordance with MARI Jurisprudence No. 1413 K/Pdt/1988 dated 18 May 1980 which contains legal rules, whether a person is an adopted child or not, does not solely depend on the formalities of adoption, but is seen from the existing reality, namely that he has been cared for since he was a baby, in circumcised and given in marriage by his adoptive parents. 137 Even though the court did not determine the adopted child in this decision, if one looks at the norms and customs existing in society, he can still be considered an adopted child based on the period of time spent with the Heir.

The provision of a mandatory will functions as a transfer of rights to people who are not heirs, in this case adopted children and adoptive parents. In accordance with what is written in the book *Fiqh Mawaris* by Ash-Shiddiqie and T.M Hasbi which is quoted in Ade Kurniawan Akbar's Journal that a mandatory will is given to adopted children to distribute justice. Adoptive parents and adopted children who may have made great contributions to the Heir, however, are not given a share in the provisions of Islamic inheritance law. So in this case, this is achieved by implementing the obligatory will distribution, so that you can receive a share of the Heir's assets.

The provisions of CHAPTER VIII of the Child Protection Law regarding the care and adoption of children in the second part which regulates the adoption of children, in Article 39 paragraph (1) states,

"Adoption of children can only be carried out in the best interests of the child and is carried out based on local customs and provisions of statutory regulations. in force".<sup>139</sup> So in this case, adoption of a child depends on local customs. If in that area a child is adopted by his adoptive parents, then lives in the adoptive parents' house, is raised, sent to school and cared for like a biological child, is known and recognized by the community, then even though he does not have a letter of confirmation he can be said to be an adopted child.

In case No. 5203/Pdt.G/2019/PA.Tgrs, the Pewaris married a man who is referred to in the case as the Plaintiff. The heir and the Plaintiff have no children. Then adopted a child who was recorded on the adoption list in 2003. The testator died in 2009, leaving as heirs a father and a husband. Adopted children do not have an inheritance share, but with witnesses who say that the Heir has an adopted child and is supported by having legal force that the adopted child is registered in the adoption list issued in 2003, then in accordance with Article 209 paragraph (2) KHI that Adopted children receive a share in the form of a mandatory will.

The child adoption deed is written evidence that an agreement has occurred that has been agreed upon by the parties, so that the deed here functions as written evidence that has legal force with perfect proof that can be submitted to court. To be used as a basis for consideration in granting legal actions. Having a legal document stating that a legal adoption has occurred is very important in family law, because the legal consequences of adopting a child have far-reaching impacts for several generations of descendants, involving legal aspects of inheritance, legal responsibility and others.

In decision no. 1926/Pdt.G/2020/PA.JU, adopted children receive 1/10 of the assets inherited from their adoptive parents, because there are 8 heirs, namely 1 wife and 7 siblings. According to the author, judges in deciding cases prioritize justice, which is called *alwasath*, which is more about the nature of balanced justice. According to *al-Asfahani*, it is in the middle, balanced, not too far to the right (*ifrath*) and not too far to the left (*tafrith*).<sup>158</sup> That justice is seen as an impartial attitude. All heirs and adopted children receive shares according to their rights and levels. There are many siblings and also adopted children who live with the Heir.

### 3. Lawsuit Number: 1277/Pdt.G/2016/PA.Tng

#### a. Case Position

This case is a decision on a malwaris inheritance lawsuit. This case consists of 10 plaintiffs and 1 defendant. Whose identity is as follows;

Plaintiff I, aged 83 years, has the status of the Heir's Nephew. Plaintiff II, aged 64 years, has the status of the Heir's Nephew. Plaintiff III, aged 81 years, has the status of the Heir's Nephew. Plaintiff IV, aged 53 years, has the status of the Heir's Grandchild. Plaintiff V, aged 77 years, has the status of the Heir's Nephew. Plaintiff VI, aged 49 years, has the status of the Heir's Grandchild. Plaintiff VII, aged 45 years, has the status of the Heir's Grandson. Plaintiff VIII, aged 71 years, has the status of the Heir's Nephew. Plaintiff IX, aged 68 years, has the status of the Heir's Nephew. Against the Defendant, he is 75 years old and has the status of the Heir's adopted son.

#### b. Sitting Matters

Based on the family tree, late. His father Pewaris and his late mother Pewaris had 8 children, namely; The first child to the seventh child is the Heir's sibling and the eighth child or last child is the Heir.

The heir was previously married twice. First marriage divorced and no children. Then he married again and had no children. However, during the second marriage, the Heir and his wife adopted a child called the Defendant.

After 2 years of the Heir's death, the Defendant made a certificate of inheritance dated 3 July 1987 which stated that the Defendant was a child born from the marriage of the Heir and the deceased. His second wife. The Defendant also made a deed of Distribution of Inheritance Property as per the deed of distribution of inheritance dated 29 August 1987 which stated that land measuring 2,700 M<sup>2</sup> was given to the Defendant.

The defendant only claimed to be a biological child in order to control the heir's inheritance. Plaintiff IV made a statement that he had lived and worked at the home of the Pewaris and the deceased. Heir's wife. The heir once said about adopted children and not having children. The facts of the confession from Plaintiff IV can be used as evidence of suspicion by the Panel of Judges.

The two letters, namely the certificate of inheritance dated 3 July 1987 and the deed of distribution of inheritance dated 29 August 1987, are no longer valid with the issuance of the statement of invalidity dated 24 June 2016. That the heir's brother and the heir's half-brother have also died and only their biological children remain. and is now the successor heir.

In their lawsuit, the plaintiffs ask to declare as legal the inheritance certificate dated April 12 2016 which has been signed by the Karang Tengah District Head and recorded in the Karang Tengah District Register book dated May 4 2016 and in the Karang Mulya District Register dated April 19 2016 regarding experts. The successor heirs are as follows; Plaintiff I as the Heir's Nephew, Plaintiff II as the Heir's Nephew, Plaintiff III as the Heir's Nephew, Plaintiff IV as the Heir's Sibling's Grandson, Plaintiff V as the Heir's

Nephew, Plaintiff VI as the Heir's Sibling's Grandson, Plaintiff VII as the Heir's Sibling's Grandson, Plaintiff VIII as the Heir's Grandson, Plaintiff IX as the Heir's Nephew, and Plaintiff X as the Heir's Nephew.

Declare that the Religious Court shall divide the shares of each successor heir according to Islamic law or the provisions of the applicable law.

Declare the certificate of inheritance dated 3 July 1987 and the deed of distribution of inheritance dated 29 August 1987 to be no longer valid and have no binding legal force. Sentenced the Defendant to hand over and leave 2,700 m<sup>2</sup> of land located in Tangerang City.

c. Decision Number: 1277/Pdt.G/2016/PA.Tng

In decision no. 1277/Pdt.G/2016/PA.Tng, adopted children receive 1/3 of the tirkah. Meanwhile, the Plaintiffs who are nephews and grandchildren of the Heir receive ashobah from the adopted children's share, namely 2/3 of the share. In its legal considerations, the Panel of Judges was of the opinion that it was in accordance with the regulations in Article 209 paragraph (2) KHI, namely a maximum of 1/3. Then look at the length of time the adopted child lived with the Heir and the services that the adopted child had rendered to the Heir until the Heir died.

The author analyzes in accordance with Article 185 paragraph (2) KHI which states that the share of the successor heir must not exceed the share of the heir who is equal to the one being replaced. 148 It is known that the heirs being replaced are the Heir's biological brothers and sisters. Siblings and siblings get ashobah. Siblings get ashobah because they are with their siblings. The replacement heirs also receive ashobah from the distribution of the inheritance after deducting the adopted child's share.

Then in decision no. 1277/Pdt.G/2016/PA.Tng, adopted children receive 1/3 of the inheritance and nephews and secondary grandchildren receive 2/3 jointly. In Islamic law, justice is not measured by the equality of levels between heirs, but is determined based on the size of the responsibilities carried out. In this decision, the judge used the principle of justice, which is basically fairness in treating someone according to their rights for the obligations they have carried out. In the case, it appears that the person living in the same house as the Heir is an adopted child. Meanwhile, the replacement heirs do not live in the same house as the Heir. Adopted children fulfill their obligations to the Heirs who are adoptive parents by living and caring for adoptive parents until they die. Therefore, the judge calculates the portion of the adopted child first, after which the nephews and grandchildren receive ashobah together.

## CONCLUSION

Adoption of a child is not merely about an official statement issued by an authorized institution, but rather about the child receiving love and a decent life by his adoptive parents. In these 3 decisions, the heir only has children, namely adopted children, and does not have other descendants, such as stepchildren or biological children. Therefore, even if the adopted child does not have an ancestral relationship with the Heir, in accordance with Article 209 KHI, the adopted child has the right to receive a mandatory will from the Heir's inheritance. Then it is also supported by the length of time the adopted child lives with the Heir and has services in caring for the Heir until the Heir dies.

The difference in determining the amount of an adopted child's share is influenced by the heirs left behind by the testator. The heirs are dzawil furudh, namely the biological father, husband/wife. Another decision is that there are substitute heirs, namely the heir's nephews and grandchildren. Another decision of the ashobah is the heir's siblings. The heirs left behind vary in each decision, resulting in differences in calculations. Distribution of obligatory wills for adopted children who do not receive a will in accordance with Article 209 paragraph (2) is a maximum of 1/3 of the inheritance. However, not all of the 1/3 share can be given to every adopted child who receives a compulsory will. In determining inheritance rights, people who are related to the family must take priority. In some cases a 1/3 share is considered too large if the share exceeds the share of the heir who is closer.

The meaning contained in the concept of Islamic justice is placing something in its place, charging something according to a person's carrying capacity, giving something that is rightfully theirs in a balanced manner. Justice here is synonymous with suitability/proportionality. Balance does not require equality in terms of levels in which all parts of the unit must be balanced. Balanced means that everything that exists is accepted at the proper level and not at the same level. However, one large part and one small part can be determined by the expected function. Even though in the three decisions the adoptive parents do not have biological children, and the shares received by the adopted children are different, if we look at the sequence of cases in more detail, it can be seen that the decisions handed down by the three Panels of Judges contain an element of justice.

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