

# Artikel 2

*by* Ru'fah Abdullah

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# The Judge's Decision in Resolving the Marriage Problems of the Adhal Guardians (Case Study at the Religious Court of Serang Banten)

**Ru'fah Abdullah**

Sultan Maulana Hasanudin State Islamic University (UIN) Banten, Indonesia

Email : [rufahabdullah58@gmail.com](mailto:rufahabdullah58@gmail.com)

### Abstract

The position of the guardian in marriage is mandatory, so that a marriage cannot be carried out, or the marriage is invalid due to the absence of a guardian, because the guardian is a pillar that must be fulfilled in the marriage contract, even though some scholars say that the guardian in a marriage contract is not a pillar that must be fulfilled, fulfilled, but it is only sunnah and a marriage that is carried out without the presence of a guardian in the marriage contract is not a legal defect, the marriage is still valid and does not become null and void. However, because Indonesia is specifically based on the Syafii madhab, and is supported by legislation in article 14 of the KHI, that among the pillars of marriage is the presence of a guardian. syara or not fulfilling the syara, even though the daughter still insists on marrying the man of her choice, in this case the judge can change the position of the guardian, due to the fact that the guardian. In deciding the case the judge is very careful, based on an agreement with the member judges, the judge must consider that between the applicant and the candidate there is no blood relationship, breastfeeding, it is not illegal to marry, both have persuaded the applicant's parents to marry off, the prospective applicant is already working, the applicant with the candidate kufu. There is a marriage refusal letter issued from the KUA, arguing that the guardian does not exist. The absolute power of judges is the authority of the Religious Courts in accordance with their absolutes, to settle cases of marriage, divorce, especially guardians of adhal. In principle, the Court is the end of solving problems in the family, especially in society so that when the problem is not resolved at home and in the extended family, the spearhead of the problem is brought to the Religious Courts, although the settlement must be through mediation.

**Keywords:** *Guardian and Wali Adhal, Petitioner, Judge's Decision*

### A. Introduction

The debate about guardians of marriage in a marriage contract has long been discussed by experts in Islamic law, especially in the position of guardians in marriage contracts. According to Muhammad Jawad Mughniyah.<sup>1</sup> What is meant by a guardian in marriage is a shari'a power or authority over a group of people that is delegated to a perfect person because of certain shortcomings in the person who is controlled for his own benefit.

<sup>1</sup>Muhammad Jawad Mughniyah, *Al-Fiqhu Madzahibil al-Khamsah*, terjemahan Afif Muhammad. Cet, ke.I, Basrie Pers, Jakarta, 1994. halm:35

Asyafi'i as quoted by Sayyid Sabiq argues that the marriage of a woman cannot be carried out except with the statement of a guardian close to the prospective bride, if there is no close guardian, then the guardianship moves to a distant guardian. Meanwhile, according to Zahri Hamid<sup>2</sup> he explained that a marriage guardian is a man who in a marriage contract has the authority to permit the marriage of the prospective bride, the existence of a marriage guardian is a pillar that is fulfilled in a marriage contract. The position of a marriage guardian is very important and determines the validity of a marriage and an invalid marriage without a marriage guardian. However, because the guardian does not want to marry off his daughter or adhal, the power of the close guardian is transferred to the guardian judge. The transfer of the close guardian to the guardian judge must be in front of the court. The legal basis used by the Religious Courts in the guardian adhal case is the provisions of Article 2 paragraphs (1 and 2) Regulation of the Minister of Religion of the Republic of Indonesia No. 30 of 2005, Article 23 paragraph (1) Compilation of Islamic Law (KHI).

Guardian judge is a marriage guardian appointed by the Minister of Religion or an appointed official or an official appointed by him, who is given the right and authority to act as a marriage guardian (Article I (b) KHI, but in its implementation, the District Office of Religious Affairs (KUA) or The head of the marriage registrar/employee, who acts as the guardian of the judge in the implementation of the marriage contract for those who do not have a guardian or adhal (reluctant to marry off their daughter).

Article 23 of the Compilation of Islamic Law confirms: (1) The guardian of the judge can only act as a marriage guardian if the kinship person is not present or it is impossible to present him or his place of residence is unknown or invisible or adhal or reluctant. Paragraph (2) reads: if the guardian is adhal or reluctant, the guardian judge can only act as marriage guardian after there is a decision by the Religious Courts regarding the guardian.

Based on the research background above, the identification in this study is as follows :

- a. What are the factors that influence the emergence of adhal guardians at the Serang Religious Court ?
- b. What is the Judge's Consideration in Granting Wali Adhal at the Serang Religious Court ?

In accordance with the background and identification of the problem, the objectives of this study are :

- a. To find and analyze the factors that influence the emergence of wali adhal in the Serang Religious Court.
- b. To find and analyze the Judges' Considerations in Granting Wali Adhal at the Serang Religious Court.

## B. Method

This research is a doctrinal legal research, the doctrinal law research in question is research that places the law in a construction of a norm system in accordance with

<sup>2</sup>Zahri Hamid, *Beberapa masalah Tentang Hukum Islam dan undang-undang Perkawinan secara sosiologis Hukum*, PT Pradnya Paramita, Cet. Ke I. 1987, hlm: 29

legal norms that apply to positive legal provisions, namely the *Ius Constitutum* principle by using a normative juridical approach, namely inventorying, reviewing and analyzing and understanding the law as a set of rules or positive norms in the legal system that regulates human life which is colored by various symptoms and facts contained in social life in depth.

### **C. Results and Discussion**

#### **1. Analysis of Wali Adhal Factors in PA Serang**

The author tries to take a sample of 4 determinations that were set in 2017 from 18 cases that were entered (the Wali Adhal Case) for further analysis. The data obtained from Bu Futhihat the Registrar at the Serang Religious Court include :

1. On January 6 2017 the application for guardian Adhal was submitted by the applicant to the Serang Religious Court due to the applicant's desire to marry the prospective husband of his choice. In this case, which has been submitted and decided at the Serang Religious Court regarding the application for guardian Adhal submitted by the applicant Rt.N binti Tb.A.M binti Tb.A.M who is 21 years old, Islam religion, elementary education, job not working and guardian Tb.A.M bin Tb.KH.H. In this application it is stated that the applicant is the biological child of a married couple between Tb.A.M bin Tb K.H and S.I bint H.S, the applicant submits this application because the applicant's prospective husband has proposed to the applicant 3 (three) times the applicant's father but the applicant's guardian still refuses on the grounds that they have their own choice to become the applicant's prospective husband, therefore the applicant's guardian remains in his position not to marry his child to his future husband and the applicant remains in his position to continue to marry the man of his choice even without the consent and blessing from the applicant's parents on the grounds that the relationship between the applicant and the applicant's prospective husband is responsible for providing hi applicant, so that the applicant and the applicant's prospective husband have met the requirements for marriage both according to applicable law and according to Islam, one of which is *sekufu* and between the two there are no prohibitions to carry out marriage either according to the provisions of Islamic law or applicable laws. the other is not related by blood or milk, then there is no prohibition for them to marry. In case no. 0030/pdt.P/2017/ Pa.Srg the applicant's request was granted by the panel of judges in determining the date.
2. On January 23, 1917, the application for guardian Adhal was submitted by the applicant to the Serang Religious Court due to the applicant's desire to marry the prospective husband of his choice. In this case, which has been submitted and decided at the Serang Religious Court regarding the application for guardian Adhal submitted by applicant R.R binti M.N.H who is 23 years old, Islamic religion, high school education, occupation of Private Employees and Guardian M.N. 45 years old, Islamic religion, junior high school education, self-employed. This application contains that the applicant is the biological child of a married couple between M.N.H and N, the applicant submits the same application as above. the applicant and the applicant's prospective husband have met the requirements for

marriage both according to applicable law and according to Islam, one of which is sekufu and between the two there are no prohibitions to hold a marriage both according to the provisions of Islamic law and applicable laws, one of which does not have blood relationship or breastfeeding, then there is no prohibition for them to marry. In case no. 0005/pdt.P/2017/ Pa.Srg the applicant's request was granted by the panel of judges in determining the date.

3. On 27 March 2017 the application for guardian Adhal was submitted by the applicant to the Serang Religious Court due to the applicant's desire to marry the prospective husband of his choice. In this case, which has been submitted and decided at the Serang Religious Court regarding the application for guardian Adhal submitted by the applicant S binti S who is 30 years old, Islamic religion, S1 education, work of housewife and guardian S (late). this application is the same as number I. the applicant has met the requirements for marriage both according to applicable law and according to Islam, one of which is sekufu and between the two there are no prohibitions for marriage either according to the provisions of Islamic law or applicable laws. the other is not related by blood or milk, then there is no prohibition for them to marry. In case no. 0180/pdt.P/2017/Pa.Srg the petitioner's request was granted by the panel of judges in determining the date.
4. On May 16, 2017, the application for guardian Adhal was submitted by the applicant to the Serang Religious Court due to the applicant's desire to marry the prospective husband of his choice. In this case, which has been submitted and decided at the Serang Religious Court regarding the application for guardian Adhal submitted by applicant W binti H who is 28 years old, Islam religion, S1 education, occupation of teacher and guardian H bin N who is 50 years old, Islamic religion, education Elementary school, self-employed job, this application is the same as number I. both of them are not prohibited from getting married, both according to the provisions of Islamic law and applicable laws, one of which is not related by blood or breastfeeding, so there is no prohibition for them to marry. case no. 0401/pdt.P/2017/ Pa.Srg the applicant's request was granted by the panel of judges in determining the date.

Of the 4 (four) Judges at the Serang Religious Court and Interviews with Religious Court Judges, it turns out that the factors that influence the community to apply for Wali Adhal in Serang PA are: The guardian already has a prospective husband of his own choice, Feelings of dislike for his daughter's future husband. The guardian's desire is for his daughter to finish her studies first. No Sekufu, can't make her daughter happy because her income is not adequate, her morals are not good.

## 2. Judges' Considerations Granting Wali Adhal at the Serang Religious Court

### a. In case No. 0005/pdt.P/2017/ Pa.Srg.; 0030/pdt.P/2017/Pa.Srg.; 0180/pdt.P/2017/ Pa.Srg.; 0401/pdt.P/2017/ Pa.Srg.

#### 1) Presiding Judge (Drs H. Akhmadi)

Judge Akhmadi's consideration in granting Wali Adhal's case, first saw that the Wali (daughter) and her future husband were not related by blood, there was no prohibition for them to marry. Both parties were equally trying to ask their guardians to marry them. Third, see or consider the reasons why the guardian is reluctant to



marry off his daughter, and see whether the guardian's reluctance is based on sharia or not. But the judge must still try to persuade his parents to take care of him.

2) Judge's Consideration (Drs. Dudih Mulyadi)

In deciding cases the judge is very careful because the legal considerations in the decision are the crown of the judge, granting the case of the guardian of Adhal, is because first, regarding absolute power, namely the authority of the Religious Court in accordance with its absolute, namely resolving marriage cases, divorce especially regarding guardians of adhal. The legal considerations that include the guardian adhal himself.

**First**, the judge asked the guardian's reluctance why he did not approve of the relationship between the candidate and the applicant, **the second** asked whether the prospective husband and the applicant were related by blood or had a milk relationship, and **thirdly**, he ensured that the prospective husband and applicant had tried to the guardian in marriage because the guardian guardian had to marry him off. As for why the guardian's refusal must be proven in court because according to article 2 of Law no. 1.In 1974, marriages will be valid if the marriage is in accordance with their respective religions.

3) Judge's Consideration (Muhammad Ridho, S.Ag)

In deciding the case, the judge must act with high prudence, because the legal considerations in his decision affect the fate of the 2 large litigating families, to grant the case of the Adhal guardian, the consideration is because. **First**, the judge asked the guardian's reluctance why he didn't approve of the relationship between the candidate and the applicant, **the second** asked whether the prospective husband and the applicant were related by blood or milk, and **thirdly**, he ensured that the prospective husband and applicant had tried to get the guardian to marry him off. **Fourth**, whether the candidate already has a fixed income, other than evidence.

In this case, in the form of letters and witnesses, the main documentary evidence in the wali adhol case is a marriage refusal letter issued by the local KUA where the applicant registers his marriage, while witnesses are people who know the matter. Lastly and the essence of the stipulation of Adhol is the opinion of Hakim. In accordance with the decision of the Panel of Judges, if it is granted, the guardian is the Guardian Judge.

4) Judge's Consideration (Agus Faisal, S.Ag)

The consideration given by Judge Agus Faisal is also almost the same as the decisions of other judges, because the decisions taken are the result of an agreement from the panel of judges who handle the cases being handled. The considerations are the same as the judges above, if the reason is in accordance with the provisions then the case is immediately rejected if it is not in accordance with the syar'i then it is still considered by the judge and is most likely granted and the judge will become the judge's guardian. Fourth, Kufu but the kufu here is the Judge's very last consideration.

**b. Legal Basis and Arguments Used by Religious Courts**

In the case of Wali Adhal, namely Considering whereas therefore the applica<sup>3</sup>'s application has complied with the provisions of Article 2 paragraphs (1 and 2) of the Regulation of the Minister of Religion of the Republic of Indonesia number 30 of 2005 Article 23 paragraph (1) of the Compilation of Islamic Law. Considering in line with the provisions of Islamic sharia as follows :

- 1) Hadits Rasulullah SAW.
- 2) The rule in the book I'anaatut Talibin juz 3 page 319 which reads :  
*"if it is clear that the guardian is hiding or rebelling, then the judge will marry him."*
- 3) The rule in the book Mughnil Muhtaj juz 3 which reads :  
*"Likewise, being married off by a judge, if the guardian of his lineage is adhol, even though he is forced or reluctant to marry her."*

The marriage of the applicant with his prospective husband can be carried out with his future husband, it can be carried out with a guardian judge.

### 3. Relevance of Decisions with Islamic Law on Marriage by Guardian Judges Due to Adhal's lineage of guardians

Case No. 0005/pdt.P/2017/ Pa.Srg.; 0030/pdt.P/2017/ Pa.Srg. ; 0180/pdt.P/2017/ Pa.Srg.; 0401/pdt.P/2017/Pa.Srg. concerning Wali Adhal IT IS APPROVED that the legal basis used by the judge in determining the guardian of adhonya wali is to see that between the Petitioner and his prospective husband there is no prohibition against marriage, ensuring that on the part of the applicant and his prospective husband has tried to persuade his guardian to trust him and ascertain the reasons for the guardian's reluctance in accordance with the provisions of the Shari'ah.

Examination of the application for guardian adhal in the Religious Courts is basically the same as examination of applications or other voluntary cases. The difference is that it is necessary to hear a statement from the guardian of the female candidate (the applicant) to find out the reluctance and the reasons for it. However, most of these adhol guardian cases are parents (guardians) who do not appear before the court even though they have been properly summoned, the consequence of the absence of the applicant's guardian in the trial without a valid reason after being properly summoned is the loss of the right to answer and the person concerned can be categorized as dzalim to the court. valid, but this does not necessarily make the judge qualify the guardian as adhol, because the applicant must still prove that the reason for his guardian's refusal is not justified by syara'.

The evidence in this case is in the form of letters and witnesses. The main documentary evidence in the adhol guardian case is a marriage refusal letter issued by the local KUA where the applicant registers his marriage, Identity Card, Quotation of birth certificates on behalf of the applicant's and the respondent's children and 2 (two) witnesses where the witnesses are people who know These problems with their own sight and hearing witnessed the real incident.<sup>3</sup>

#### a. According to Juridical Review

In the context of legal positivism, the adholnya of lineage guardians must be determined by the Religious Courts as stipulated in the Minister of Religion Regulation No. 30 of 2005 which regulates Guardian Judges. Minister of Religion Regulation no. 30 of 2005 Article 2 paragraphs (1 and 2) are as follows :

- 1) For the prospective bride who will marry in the territory of Indonesia or outside the territorial territory of Indonesia, does not have an eligible lineage guardian or her lineage guardian does not meet the requirements or maqfud or is unable or adhol, then the marriage is carried out by a guardian judge.

<sup>3</sup>Hasil Wawancara dengan Hakim M. Ridho pada tanggal Sept 2018 di Pengadilan Agama Serang

- 2) Specifically for declaring the adholnya of a guardian as referred to in paragraph (1) of this article, it is determined by a decision of the religious court/syar'iyah court which is in charge of the place of residence.
- 3) bride.<sup>4</sup>  
And strengthened by article 23 of the Compilation of Islamic Law which contains:
  - a) The new guardian judge can act as a marriage guardian if the lineage guardian is not present or it is not possible to present him or his place of residence is unknown or magical or adhol.
  - b) In the event that the guardian is adhol or reluctant, the guardian judge can only act as a guardian after there is a decision by the religious court regarding the guardian.<sup>5</sup>

In article 22 of Law No. 1 of 1974 concerning Marriage, marriage must be in accordance with each other's religion and must be recorded according to the legislation, from the above regulations it is clear that the conclusion we get is that the guardian of the judge has the right to be a guardian when the guardian's lineage is adhol

#### **b. According to Sociological Review**

In a sociological review in general, they see the fact that between the prospective groom and the bride is not only a dynamic in the internal family of each candidate, but has entered into the structure of social dynamics in their community, because the love relationship that is forged between them is already known. the surrounding community, in such conditions it becomes something very complicated, if the marriage that has been scheduled for both is not approved, it is not impossible that it will cause sharp friction, not only between the candidate and his parents and family, it can even involve elements of society who already believe that both is the ideal partner. In determining the adholnya of a guardian, the religious court sees the refusal of the guardian, besides that it also considers the benefits and harms that will arise from the decision.

#### **c. According to the Philosophy Review of Islamic Law**

In considering the reality of society that still underestimates the existence of a guardian in marriage, so to maintain the sacredness of a marriage, legal considerations originating from religious teachings should be used in determining guardian judges for adhol lineage guardians. The thought underlying this consideration is the theory of the creed or creed which was formulated or put forward by Imam Shafi'i which requires the implementation of Islamic law for those who pronounce the two sentences of creed as a logical consequence of pronouncing his creed.

One of the powers of the Religious Courts is to provide legal and justice services for those who are Muslim, so the basis of consideration used to resolve a case is Islamic law. That is why the guardian's case is handled in the religious court so that the community is not arbitrary in determining the guardian, so that the determination of the guardian is For guardians who are reluctant or Faskh can be administratively orderly and orderly.

The author is of the opinion that the judge's consideration of the cases handled has been in accordance with the laws and regulations in granting the applicant's

<sup>4</sup><https://kemenkumham.go.id>, di download pada tanggal pada jam

<sup>5</sup>Suparman Usman, *Hukum Islam: Asas-asas dan Pengantar Studi Hukum Islam dalam Tata Hukum Indonesia*, Jakarta, Gaya Media Pratama, 2011 hlm 230-231



request by giving the determination of the adhol guardian, because the reason for the guardian's reluctance is not in accordance with the applicable syara provisions in the provisions of Islamic law.

The author also considers that the Serang Religious Court Judge granted this case because between the applicant and the prospective sekufu applicant and have fulfilled the requirements to carry out their marriage, they should not be delayed any longer because they are in a state of willingness and steadfastness according to the hadith which states that they should not delay marriage when both of them are already married.

Sekufu here means the same or equivalent in the book of Fiqh Sunnah written by Sayyid Sabiq, the things that become the measure of sekufu are descent, independence, Muslim religion, work and wealth and are not disabled. However, each madhhab has its own criteria for the size of this sekufu.<sup>6</sup>

Based on the above discussion, it can be concluded that in the consideration of the panel of judges regarding this adhal case, in accordance with the Islamic law review and juridical review, the case will be granted if the reluctance of the adhol guardian is in accordance with the provisions of syara, if the reluctance is in accordance with the provisions of syara then it is unlikely that the case will be granted if not in accordance with the provisions of the syara or the reasons are subjective, the judge is still considering those reasons in order to grant the applicant's request.

According to a sociological review, if the case occurs, it is not impossible that it will cause a dispute, not only between the candidate and his parents and family, but even involving elements of society who already believe that they are the ideal partner. Meanwhile, according to a philosophical review, the case of guardian adhal is required to go through the Religious Court so that marriage by the guardian judge because the guardian of his lineage is more orderly in administration and orderly rules.

#### D. Conclusion

From the results of research with interviews and observations conducted at the Serang Religious Court, conclusions can be drawn :

1. Marriage settlement in Wali Adhol according to Islamic Law
2. The legal decision in the marriage of the Adhol guardian in PA Serang was correct and in accordance with Islamic law, in article 232 and in accordance with the Regulation of the Minister of Religion number 30 of 2015. Because based on the facts obtained during the trial it was proven that the guardian's reason was not according to the shari'a'. The Panel of Judges is of the opinion that the applicant's application has been proven according to the law in accordance with the articles mentioned above.
3. Factors that become legal considerations in marriage regarding Adhol guardians. In deciding cases the judge is very careful because the legal considerations in the decision are the crown of the judge, granting the case of the guardian of Adhal, the consideration is because *first*, regarding absolute power, namely the authority of the Religious Courts in accordance with their absolute, namely resolving cases of marriage, divorce, especially regarding this adhal guardian. and

<sup>6</sup>Sayyid Sabiq, Fiqh Sunnah 7, hlm. 42

others. **Second**, regarding the domicile of the applicant, the applicant must be domiciled around the jurisdiction of the Court. **Third**, regarding the legal basis of the case.

The legal considerations that include the guardian adhal himself. First, the judge asked the guardian's reluctance why he did not approve of the relationship between the candidate and the applicant, the second asked whether the prospective husband and the applicant were related by blood or had a milk relationship, and third, to ensure that the prospective husband and applicant had tried to the guardian in marriage because the guardian asked him to marry him off.

As for why the guardian's refusal must be proven in court because according to article 2 of Law no. 1 of 1974, marriage will be valid if the marriage is in accordance with their respective religions, Islam requires a guardian in marriage, because guardianship is a condition for a valid marriage, therefore guardians cannot be with just anyone and must be recorded.

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