

# **THESIS**

## **THE LIABILITY OF A NOTARY IN MAKING FOUNDATION DEED WHICH THE ORGAN ARE NOT UNDER THE LAW**

Submitted by:

Muhammad Arya Putera Rahman

NIM. B011191288



**LEGAL STUDY PROGRAM  
FACULTY OF LAW HASANUDDIN UNIVERSITY  
MAKASSAR**

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**TITLE PAGE**

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FOUNDATION DEED WHICH THE ORGAN ARE NOT  
UNDER THE LAW**

Submitted as one of the requirements for achieving a bachelor's  
degree In the Bachelor of Law Study Program

Submitted by:

Muhammad Arya Putera Rahman

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**LEGAL STUDY PROGRAM  
FACULTY OF LAW HASANUDDIN UNIVERSITY  
MAKASSAR  
2024**

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Truly declare that the writing of the thesis entitled The Liability of A Notary in Making Foundation Deed which The Organ are not Under The Law is truly my own creation. As for what isn't my work in writing this thesis is marked with citation and shown in the bibliography.

If in the future it is proven that my statement is not true then I am willing to accept sanctions in accordance with Ministerial regulations National Education of the Republic of Indonesia Number 17 of 2010 and Applicable Laws and Regulations.

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## FOREWORD

Bismillahirrahmanirrahim

Assalamu'alaikum Warahmatullahi Wabarakatuh.

All praise and gratitude to the presence of Allah SWT for His blessings, grace, guidance and gifts, in the form of health and knowledge so that the author is given ease and smoothness in completing this thesis, entitled "**The Liability of a Notary in Making Foundation Deed Which The Organs Are Not Under The Law**" which is the final assignment as a requirement for completing undergraduate education (S1) and obtaining a Bachelor of Laws degree at the Faculty of Law, Hasanuddin University. May prayers and greetings always be poured out on the Prophet Muhammad SAW, who is a role model for mankind. Hopefully what the author has done in writing this thesis will be of worship value and useful for readers.

The succes of preparation of this thesis is was accompanied by encouragement, assistance and guidance from various parties whom the author appreciates and is grateful for, so that this thesis can be prepared well and smoothly. Therefore, on this occasion the author would like to express his highest gratitude and appreciation to:

1. Mr. Prof. Dr. Ir. Jamaluddin Jompa, M.Sc. as Chancellor of Hasanuddin University, Prof. drg. Muhammad Ruslin, M.Kes., Ph.D., Sp.BM(K) as

Deputy Chancellor for Academic and Student Affairs, Prof. Subehan, S.Si., M.Pharm., Sc., Ph.D., Apt. as Deputy Chancellor for Planning, Development and Finance, Prof. Dr. Farida Patittingi, S.H., M.Hum. as Vice Chancellor for Human Resources, Alumni and Information Systems, Prof. Dr. Eng. Adi Maulana, S.T., M.Phil. as Deputy Chancellor for Partnerships, Innovation, Entrepreneurship and Business, Prof. Ir. Sumbangan Baja, M.Phill., Ph.D. as University Secretary

2. Prof. Dr. Hamzah Halim, S.H., M.H., M.A.P. as Dean, assisted by Prof. Dr. Maskun, S.H., LL.M. as Vice Dean for Academic and Students Affairs, Prof. Dr. Iin Karita Sakharina, S.H., M.A. as Vice Dean for Planning, Resources and Alumni Affairs, and Dr. Ratnawati, S.H., M.H. as Vice Dean for Partnerships, Research and Innovation Affairs.

3. The author's parents, namely Mr. Dr. Liong Rahman S.H., M.Kn. and St. Aminah, who with all sincerity, patience, love and affection has raised the Author all this time, and continues to provide support and prayers for the Author in completing this thesis, as well as for other Author's families who have provided support and prayers to the Author.

4. Mr. Dr. Muhamad Ilham Ari Saputra, S.H., M.H. as the head of Bachelor Law Program.

5. Mrs. Dr. Aulia Rifai, SH., M.H as the head of Civil Law Department and Mrs. Amaliyah, S.H., M.H. as secretary of Civil Law Department.



6. Mr Dr. Winner Sitorus S.H., M.H., LL.M. as the main supervisor and Mrs. Andi Suci Wahyuni S.H., M.Kn. as a Co-Supervisor because in the midst of their busy, schedule and activities, they always patiently provides instructions, supports and guidance to the author until the completion of this thesis.

7. Mrs. Kurniawati S.H., M.H as the Examiner 2 and also Mrs. Dr. Oky Devianty S.H., .H. as Examiner 1 who has provided input, suggestions and criticism to the Author during the Proposal examination and Author Results Seminar.

8. Author's friends: Kiky, Nata, Aul, Fira, Agiz, Puji, Jihad, Rafly, Aghil and the extended family of the International Class of 2019 and others who I cannot mention one by one. Thank you for accompanying the author in every process.

9. Friends in arms: Kiky, Nata, Fira, Aul, Agiz, Ifah, etc. Thank you for always supporting each other during the writing of this thesis.

That's all and thank you, Wassalamualaikum Warahmatullahi Wabarakatuh.

Makassar, January ...2024

Author,

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## ABSTRACT

**MUH ARYA PUTERA RAHMAN (B011191288) LIABILITY OF A NOTARY IN MAKING FOUNDATION DEED WHICH THE ORGAN ARE NOT UNDER THE LAW.** Supervised by Winner Sitorus as Main Supervisor and Andi Suci Wahyuni as Assistant Supervisor.

This research aims to analyze and determine the responsibilities of a notary in making a foundation deed whose organ structure does not comply with the law and the validity of the deed that has been made.

This research uses normative legal research methods by organizing research through legislation and conceptual approaches. In solving the legal issues of this research, the primary legal materials used come from statutory provisio. Collection of legal materials is done through literature study. Non-legal materials are materials that contain explanations of primary and secondary legal materials. The problems studied are analyzed prescriptively and systematically, thereby providing arguments to answer the legal events that occurred in this research.

The results of this research show that the Deed of Establishment of a Foundation that was drawn up but did not comply with statutory provisions was deemed to contain legal defects. This is in accordance with the provisions of Article 7 of Law no. 30 of 2014 concerning Government Administration that General Officials are required to carry out government administration in accordance with statutory regulations. Paragraph 2 letter (a) obliged Notary make Decisions and/or actions in accordance with its authority, comply with the AUPB and in accordance with the provisions of laws and regulations, so that sanctions should be given to the Notary in accordance with the provisions of Article 16 Paragraph (1) letter (g) that Provide services in accordance with the provisions of the law so that it is appropriate for the Notary to be given a sanction, written warning or dismissal. Even though the establishment made by law is considered to contain legal defects, the deed is considered valid and still has legal force based on the principle of presumption of legitimacy or *Presumptio Lustae Cause* as long as there is no court decision stating otherwise and has permanent legal force.

**Keywords:** *Foundation, Notary, Validity, Public Official, Deed*

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## **CHAPTER I**

### **INTRODUCTION**

#### **A. Background of The Problem**

The increasing development of society demands an increase in services in all fields, including the service field. One of them is the field of legal services, especially in civil law. To fulfil civil legal relations in society, especially in carrying out legal relations between individuals, between people and legal entities, between legal entities and other legal entities and so on. So to fulfil this, the State appoints a public official with the authority to make the agreement desired by the parties called Notary.

Article 1 Law Number 30 of 2004 regarding Notary Office Law which was then Amended to Law Number 2 of 2014 regarding the Amendment of Law Number 30 of 2004 (hereinafter abbreviated as UUJN) defines that a Notary is a public official authorized to make authentic deeds and has other authorities as referred to in this Law or based on other laws. Article 15 UUJN stipulates that a Notary has the authority to make authentic Deeds regarding all actions, agreements and stipulations that are required by laws and regulations and/or that are desired by interested parties to be stated in authentic Deeds, guarantee the certainty of the date of making the Deed, save the Deed, provide grosse, copies and excerpts of the Deed, all of that as long as the making

of the Deed is not also assigned or excluded to other officials or other people determined by law.

The essence of using an authentic deed, namely a notarial deed, has perfect evidentiary power. In an authentic deed, three proofs must be met, one of them is material proof (*materiele bewijskracht*) is certainty about the material of a deed because what is stated in the Deed is valid evidence of the parties making the Deed or those who have rights and applies to the public unless there is evidence to the contrary.<sup>1</sup>

Article 1868 of the Civil Code defines an authentic deed; that is, an authentic deed is a deed drawn up in the form determined by law, made by or before the public official in charge where the Deed was made. In carrying out its authority, a Notary in making a Notary Deed as stipulated in Article 1868, must comply with the procedures and forms of the Deed determined by law. The making and form of the Notary Deed are further regulated clearly in Article 38 UUJN. In addition, the Law also requires that in making the Deed of the parties, the Notary is obliged to explain the parties' legal acts.

The authority granted to a Notary is an attribution authority, because this authority is granted by UUJN and other laws. The authority that exists in a Notary does not come from other government agencies, but authority that is based on and granted by law. Therefore the authority

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<sup>1</sup> Habib Adjie, 2002, *Hukum Notaris Indonesia (Indonesian Notary Law)*. Cetakan Ketiga (printed-3), Refika Aditama, Surabaya. P. 18

possessed by a Notary is the authority of Attribution. Article 7 of Law Number 30 of 2014 concerning Government Administration emphasizes that Government Officials are obliged to carry out Government Administration in accordance with the provisions of laws and regulations, government policies, and General Principles of Good Governance (hereinafter abbreviated as AUPB). Based on the explanation of this article, the authority granted by a Notary is solely to carry out government activities which are regulated by law and do not have the authority to act outside of the attribution. One of the powers granted by law is the authority to make deeds related to the establishment of foundations.

The existence of foundations in Indonesia before the enactment of Law on Foundations was only based on customary practices in society and Supreme Court precedents.<sup>2</sup> People who will establish a foundation are only based on their organ or institutional structure, as in institutions or associations in general. In its development, establishing a foundation often needs to be addressed when it comes to status, especially if the foundation already has a lot of assets. In establishing a foundation, the Founder thinks that the foundation is their own so that it can be passed on to their heirs. It triggers a lot of disputes within the foundation. At that time, foundations' status in Indonesia was still determined by whether they were legal entities. Still, based on custom, the Deed of the establishment was

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<sup>2</sup> Yetty Komalasari Dewi, dalam Makalahnya Analisis dan Evaluasi Terhadap Peraturan Perundang-undangan Tentang Yayasan (Yetty Komalasari Dewi. Analysis and Evaluation of Laws and Regulations concerning Foundations p. 22)



drawn up in a notarial deed and registered in the district court where the foundation was domiciled. Due to problems with foundations, both in terms of management and those related to foundation assets, prompted the government to issue regulations regarding foundations as stated in the preamble considering the Law Number 28 of 2004 concerning the Amendment of Law Number 16 of 2001 regarding Foundation.<sup>3</sup> One of the problems that are known is that the founder used the Foundation as a tool for personal profit which is the Article 5 generally stipulates that organs are legal to take wages, salary and honorarium with exception.

From the basis of the considerations on Law on Foundation, it can be seen that validity of the foundation and the position of the organs of the foundation, it is necessary to regulate provisions on foundation that can provide guarantees and legal certainty, both for foundation's validity and for its organs.

Article 1 Number (1) of Law on Foundation explicitly defines that a foundation is a legal entity that has assets separated from its founders and is designated as a non-profit organization or its purpose is not to make a profit and generally engaged in the social, religious and humanitarian fields. For this reason, the establishment of a foundation is not intended to be used as a place of business, and a foundation cannot carry out business activities directly but must be through the business entity it

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<sup>3</sup>Konsideran menimbang Undang Undang No. 16 Tahun 2001 Tentang Yayasan (Preamble considering Law no. 16 of 2001 concerning Foundations)

establishes or through other business entities, which include the foundation and its assets.<sup>4</sup> The assertion that foundation assets are separate assets from the Founder is to avoid the assumption that foundations are privately owned. By separating the assets of the founders that have been included and becoming the foundation's assets, these assets are no longer related to the founders' assets. Likewise, if the Founder of the foundation dies, it is not by law that his heirs will inherit it. The Law on Foundations indirectly regulates the prohibition against a person or group establishing a foundation for a business or seeking profit that their heirs can inherit. Article 5, 28, 31, 37 of Law on Foundations generally explains about the prohibition of the organs that could probably transferring the foundation's assets to personal assets.

The provisions of Article 28 Paragraph (1) of the Law on Foundations stipulate that in implementing a Foundation, a foundation has organs consisting of Board of Trustees, Management and Supervisors. Board of Trustees, as organs of the foundation, have authority that is not delegated to Management or Supervisors. It is further stipulated that those who can be appointed as Trustees are individuals as founders of the foundation or those who, based on the decisions of the Board of Trustees meeting, are considered to have high dedication to achieving the goals and objectives of the foundation.

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<sup>4</sup> Penjelasan atas undang-undang No. 28 Tahun 2004 Tentang Perubahan atas undang-undang No. 16 Tahun 2001 Tentang yayasan Pasal 3 ayat (1). (Explanation of law Number 28 of 2004 concerning the Amendments to Law No. 16 of 2001 concerning foundations Article 3 paragraph 1)

Article 28 of the Law on Foundations stipulates that Board of Trustees are individuals who are founders of foundations/individuals based on the decision of a meeting of members of the Board of Trustees who have high dedication and authority which is not delegated to Management or Supervisors. This authority includes Amendments to Articles of Associations, appointment and dismissal of Management and Supervisors, ratification of the foundation's work program, establishing the foundation's general policy, and determination of decisions regarding the merger and dissolution of the foundation.

The provisions for Management as foundation organs in Article 31, Paragraph (1) to Paragraph (3) of the Foundation Law are determined as organs of the foundation that carry out the foundation's management. People who can be appointed as Managers are individuals who are capable of carrying out legal acts. Article 32 Paragraph (1) of the Law on Foundations stipulates that the Management of a foundation are appointed by the Board of Trustees based on the decisions of the Board of Trustees' meeting for a period of 5 (five) years and can be reappointed for 1 (one) term of office. The management then consists of 3 parts, namely the chairman, secretary and treasurer..

Furthermore, the foundation's third organ, the supervisor, is tasked with supervising and advising the management in carrying out the foundation's activities. Foundations have Supervisors of at least 1 (one) Supervisor whose authority, duties and responsibilities are regulated in the

Articles of Association. Those who can be appointed as Supervisors are individuals who are capable of carrying out legal actions.

The most significant similarity of these organs are in the prohibition of holding positions, whether it is the Board of Trustee, Management and Supervisors. Each organs are prohibited to hold certain positions even for the Board of Trustees that basically build the foundation.

The prohibition of founders holding positions beside Board of Trustee is intended to prevent conflicts of interest where the Board of Trustees are organs that have the authority to appoint and dismiss Management and supervisors. Article 29 of Law on Foundation rules that members of the Board of Trustees may not concurrently serve as members of the Management and/or supervisory members. Many foundations established by notaries deviate from the provision. The Notary in making the Deed of the establishment of the foundation is only guided by the composition of the organs of the foundation that the appearers have prepared. The Notary who has received information from the appearers regarding the composition of the organs of the foundation should explain to the parties so that the composition of the organs of the foundation can be adjusted to what has been regulated in the law on foundations.

Everything that is formed, owned and will be implemented by the foundation is described in the Foundation's Articles of Association. The Articles of Association are the documents that underlie the establishment

and management of the foundation. Articles of Association generally outlines the legal basis, objectives, organizational structure, and operational procedures for the foundation. Article 14 of Law on Foundations defines that the Deed of incorporation loads the Foundation's Article of Association and other information which is considered needed.

In this case, the making of a foundation deed are different from the provisions stipulated in the Law on Foundation. One of the three founders of the foundation also serve as Management in the same foundation. The provisions of Board of Trustee in Article 29 of Law on Foundation stipulates that Board of Trustees may not concurrently serve as Management or Supervisor. The same prohibitions also applicable for each organs to not holding multiple positions.

Based on the explanation above, the Foundation Law prohibits concurrent positions and bans anyone who can become a Board of Trustee, Management and Supervisor. The case that will be analyse by the author is Foundation ar rahmah lil islam with Registration Number 51/KEP-17.3/II/2017 Located in Makassar. In this Foundation, one of the founders of the foundation also serves as Management in the same foundation.

## **B. Formulation of The Problem**

Based on this description, the problems that can be formulated are:

1. What is the validity of the foundation deed in which the organ are not under the law?
2. What is the liability of a notary in making a foundation deed in which the organ are not under the law?

### **C. Research Purposes**

1. To analyze the legality of the foundation deed in which the organ are not under the Law.
2. To analyze and state the liability of a notary in making a foundation deed in which the organ are not under the law

### **B. Research Benefits**

This research is expected to provide references for officials in making deeds related to legal actions for establishing foundations.

#### **1. Theoretical Aspects**

- a. The results of this research are expected to provide benefits in developing legal knowledge, especially in civil law and specifically in establishing foundation law.
- b. The results of this study are expected to be a reference for further research that will conduct research with a similar topic of discussion.

## **2. Practical Benefits**

This research is expected to provide reference that can become basic information in making decisions, legal opinions and policies for legal practitioners.