

## **THE APPOINTING OF A LEGAL GUARDIAN BASED ON *AUDI ET ALTERAM PARTEM PRINCIPLE* AND ONLY ONE GUARDIAN PRINCIPLE**

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**Abstrak.** *This study examines and analyzes the dispute resolution of appointing a legal guardian based on the audi et alteram partem principle and only one legal guardian principle. This research combines normative juridical and empirical research methods. The types and sources of data used in this research are primary and secondary data. The primary data were collected using direct interviews with an informant. While the secondary data was collected using literature study techniques on primary, secondary, and tertiary legal materials. The data obtained in this research were then analyzed juridically qualitatively. The results show that implementing the dispute resolution of appointing a legal guardian through a lawsuit realizes the principle of audi et alteram partem. Furthermore, with the realization of the audi et alteram partem principle, it will also directly realize the principle of only one guardian or what is known as the principle of one and indivisible. Therefore, it is recommended that the Government make amendments to Government Regulation No. 29 of 2019. In this case, explicitly and regulated disputes over guardianship rights should be examined through the jurisdictio contentiosa mechanism. Thus, anyone has the right to apply as a legal guardian, as long as they meet the requirements, have closeness, and the Child's willingness.*

**Keywords:**  
*Audi et Alteram Partem;*  
*Guardianship;*  
*Lawsuit;*  
*Only One Guardian.*

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## **INTRODUCTION**

Parents have a very significant role in a child's life.<sup>1</sup> Even the laws and regulations accommodate this by regulating the duties and responsibilities of parents towards their children.<sup>2</sup> Article 26 section (1) of Law of the Republic of Indonesia Number 17 of 2016 on Enactment of Government Regulation in Lieu of Law Number 1 of 2016 on the Second Amendment to Law Number 23 of 2002 on Child Protection Into Law (hereinafter referred to as Law No. 17 of 2016), regulates that parents are obliged and

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<sup>1</sup>Abubakar, M. (2020). Meningkatkan Cerai Gugat pada Mahkamah Syar'iyah. *Kanun: Jurnal Ilmu Hukum*, 22(2), pp. 313-314.

<sup>2</sup>Rahman, S., et al. (2020). Efektivitas Pembagian Harta Bersama Pasca Perceraian: Studi Kasus Perkawinan Poligami. *SIGn Jurnal Hukum*, 1(2), p. 105.

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responsible for:

- a. caregiving, nurturing, educating, and protecting a child;
- b. growing and developing a child in line with their competencies, talent, and interest;
- c. deterrent the occurrence of marriage at the age of a child; and
- d. provide character education and inculcate moral values in a child.

However, not all children are lucky to be cared for and raised by their parents. Some children live without their parents. In this case, the child's parents died, disappeared, or their custody was repealed. Therefore, Article 57 section (2) of Law of the Republic of Indonesia Number 39 of 1999 on Human Rights (hereinafter referred to as Law No. 39 of 1999), regulates that:

*"Every child has the right to get an adoptive parent or legal guardian based on a court decision if both parents have died or because of legal reason cannot do their obligations as parents."*

From the provision above, it can be understood that if a child is not under the protection of their parents or guardian, then it is appropriate, and the child should have an adoptive parent or legal guardian. In this case, Article 57 section (3) of Law No. 39 of 1999 regulates that *"an adoptive parent or legal guardian, as referred to in section (2), must conduct the obligations of an actual parent."* Therefore, Article 8 of Government Regulation of the Republic of Indonesia Number 29 of 2019 on Terms and Procedures for Appointing a Legal Guardian (hereinafter referred to as Government Regulation No. 29 of 2019), regulates that *"Appointing a Legal Guardian conducted based on a Parent's request or testament."* Furthermore, Article 9 section (4) of Government Regulation No. 29 of 2019 regulates that *"a person or legal entity is declared a Legal Guardian after obtaining an enactment from the Court."* In contrast, the habit of the broader community is that candidates for adoptive parents or legal guardians submit applications voluntarily.

On the other hand, if there is a person who has compassion for the orphan's future while the child does not have adoptive parents or legal guardians. In this case, the person may ask the Judge to appoint a Legal Guardian. In addition, if a Judge knows that an orphan is still neglected, the Judge can hold a trial, enact, and appoint a Legal Guardian.<sup>3</sup> In the trial, the Judge conducts an examination unilaterally or ex parte and only enacts the Legal Guardian on undisputed requests.<sup>4</sup> So that enactment in *jurisdictio voluntaria* does not involve another party as the defendant.<sup>5</sup> Therefore, it can be understood that there is a difference between the Judge's enactment and the Judge's decision. In this case, the Judge's decision contains sanctions for the losing party. The sanctions can be in the form of fulfilling achievements or compensation to the winning party at trial.<sup>6</sup>

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<sup>3</sup>Subekti, R. (1990). *Ringkasan tentang Hukum Keluarga dan Hukum Waris*. Jakarta: Intermasa, p. 18.

<sup>4</sup>Fahmi, I. (2019). Yuridiksi Kontentiosa dalam Penanganan Perkara Permohonan Pemeriksaan terhadap Perseroan Terbatas. *Jurnal Surya Kencana Satu: Dinamika Masalah Hukum dan Keadilan*, 10(1), p. 82.

<sup>5</sup>*Ibid.*

<sup>6</sup>Sarwono. (2011). *Hukum Acara Perdata: Teori dan Praktik*. Jakarta: Sinar Grafika, p. 53.

From the description above, it can be understood that appointing a Legal Guardian was enacted through the *jurisdictio voluntaria* mechanism and not through the *jurisdictio contentiosa* mechanism. However, there is still a dispute, so appointing a Legal Guardian is decided through the *jurisdictio contentiosa* mechanism. In this case, the Decision of the District Court of Purwokerto Number 45/Pdt.G/2020/PN Pwt (hereinafter referred to as Decision No. 45/Pdt.G/2020/PN.Pwt) contains a dispute between the plaintiff and the defendant who both want Legal Guardian status. So Decision No. 45/Pdt.G/2020/PN.Pwt contradicts appointing a Legal Guardian enacted through the *jurisdictio voluntaria* mechanism as regulated in Article 9 of Government Regulation No. 29 of 2019.

There have been several previous studies that have a discussion theme similar to this study. Kudubun researched the reasons, terms, and procedures for appointing a legal guardian through court enactment based on Law No. 1 of 1974 and the Civil Code.<sup>7</sup> Prasetyawati, *et al.*, researched the factors and consequences of appointing a legal guardian based on the Decision of the District Court of Tanjung Karang.<sup>8</sup> Lestari & Khisni researched application procedures and responsibilities for managing child property sales permits in legal guardians based on the Decision of the District Court of Jepara.<sup>9</sup> Sihaloho researched the determination and responsibilities of legal guardianship from marriages between Indonesian citizens and foreign nationals who broke up due to divorce.<sup>10</sup> Farah & Yunanto researched the implementation of legal guardianship by orphanages as legal entities without the enactment of judges.<sup>11</sup> Hartati, *et al.*, researched who is more competent and carries out responsibilities as legal guardians due to the death of a child's parent.<sup>12</sup>

The previous studies above focused more on the process and terms in implementing the application for appointing a legal guardian in the District Court and Religious Courts. In addition, previous studies also focused on the analysis of liability after appointing a legal guardian. In contrast, this research focuses more on appointing a legal guardian through a lawsuit mechanism linked to the *audi et alteram partem* principle as an essential principle in civil procedural law. Furthermore, the analysis of this study also focuses on the principle of only one legal guardian as a principle in guardianship.

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<sup>7</sup>Kudubun, T. (2014). Penetapan Pengadilan Mengenai Penunjukan Wali Anak. *Lex et Societatis*, 2(6), p. 83.

<sup>8</sup>Prasetyawati, E., *et al.* (2022). Analisis Permohonan Wali dan Kuasa dari Ahli Waris Pemohon yang Belum Dewasa Guna untuk Mengambil Jaminan Sertifikat Rumah. *Jurnal Pendidikan, Sosial, dan Humaniora (PESHUM)*, 1(3), pp. 182-183.

<sup>9</sup>Lestari, D. I. & Khisni, A. (2021). Tinjauan Yuridis Permohonan Perwalian dalam Pengurusan Izin Jual Harta Anak di Bawah Umur di Pengadilan Negeri Jepara. *Prosiding Konstelasi Ilmiah Mahasiswa Unissula Klaster Hukum (KIMU)*, 7, pp. 24-25.

<sup>10</sup>Sihaloho, T. (2015). Penetapan Hak Perwalian Anak di Bawah Umur pada Kasus Perceraian dalam Perkawinan Campuran Warga Negara Indonesia dan Warga Negara Asing. *Premise Law Jurnal*, 9, pp. 6-7.

<sup>11</sup>Farah, A. & Yunanto, R. A. (2016). Pengaturan dan Pelaksanaan Perwalian oleh Lembaga Kesejahteraan Sosial Anak Berdasarkan Hukum Perdata Indonesia (Studi Kasus di Panti Sosial Asuhan Anak Aisyiyah Semarang). *Diponegoro Law Journal*, 5(3), p. 4.

<sup>12</sup>Hartati, R., *et al.* (2021). Perwalian Anak Akibat Meninggal Kedua Orang Tuanya (Studi Kasus Gala Sky Anak Pasangan Artis Vanessa Angel dan Febri Ardiansyah). *Pamulang Law Review*, 4(2), p. 215.

Based on the description above, this study examines and analyzes the dispute resolution of appointment of a legal guardian based on the *audi et alteram partem* principle and only one legal guardian principle.

## **METHOD**

This research combines normative juridical and empirical research methods. Normative juridical research analyzes legal problems by referring to and originating from legal norms.<sup>13</sup> In this case, laws and regulations are positive law and court decisions with permanent legal force.<sup>14</sup> In contrast, empirical is research whose object of study includes the provisions of laws and regulations (*in abstracto*) and their application to legal events (*in concreto*).<sup>15</sup> This research was conducted in May 2022 at the District Court of Kabanjahe. The informant in this study consisted of a judge who was selected with a purposive sampling technique based on competence related to the dispute of appointing a legal guardian. The types and sources of data used in this research are as follows:

1. Primary Data is data obtained directly from informant based on sample determination;
2. Secondary Data is data obtained from searching legal literature, including laws and regulations, references, legal scientific journals, legal encyclopedias, and texts or official publications.

The primary data were collected using direct interviews with an informant. While the secondary data was collected using literature study techniques on primary, secondary, and tertiary legal materials. The data obtained in this research were then analyzed juridically qualitatively to conclude the relationship between applicable positive law and the practice of appointing a legal guardian in court.

## **RESULTS AND DISCUSSION**

### **A. Application for Appointing a Legal Guardian Based on Indonesian Positive Law**

Guardianship can be defined as the protection of the interests of the child person using caregiving, nurturing, educating, and inculcating moral values in a child. The definition of guardianship is based on Article 50 of Law of the Republic of Indonesia Number 16 of 2019 on Amendment to Law Number 1 of 1974 on Marriage (hereinafter referred to as Law No. 16 of 2019), which regulates that:

- (1) A child who has not reached the age of 18 (eighteen) years or has never been married, who is not under the authority of his parents, is under the authority of a legal guardian.

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<sup>13</sup>Diantha, I. M. P. (2017). *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*. Jakarta: Kencana Prenada Media Group, p. 12.

<sup>14</sup>Soemitro, R. H. (1990). *Metodologi Penelitian Hukum dan Jurimetri*. Jakarta: Ghalia Indonesia, pp. 97-98.

<sup>15</sup>Qamar, N. & Rezah, F. S. (2020). *Metode Penelitian Hukum: Doktrinal dan Non-Doktrinal*. Makassar: CV. Social Politic Genius (SIGn), p. 5.

(2) The guardianship is about the person of the child in question and his property.

Article 1 point 5 of Law No. 17 of 2016 juncto Article 1 point 1 of Government Regulation No. 29 of 2019, explains that “A *legal guardian is a person or entity that in fact exercises a protective authority as a parent to a child.*” Meanwhile, the procedure for appointing a legal guardian has been regulated in various laws and regulations: Colonial Regulations, Staatsblad Number 23 of 1847 on the *Burgerlijk Wetboek voor Indonesie*/the Civil Code (hereinafter referred to as the Civil Code), Law No. 17 of 2016, and Government Regulation No. 29 of 2019 as *lex specialis*.

The procedure for appointing a legal guardian based on the Civil Code is regulated from Article 331 to Article 418A. The Civil Code regulates that guardianship consists of three categories: guardianship based on laws and regulations, guardianship based on Parent’s testament, and guardianship based on Judge enactment. The meaning of guardianship is based on Article 345 of the Civil Code, which regulates that:

*“Following the death of one of the parents, the guardianship of the minor legitimate children is the responsibility of the law of the surviving parent, to the extent that he or she has not been released or dismissed from parental authority.”*

From the provision above, it can be understood that guardianship also occurs due to the parents being divorced, not living in the same house, or not sleeping in the same bed.<sup>16</sup> Furthermore, guardianship based on Parent’s testament is regulated in Article 355 section (1) of the Civil Code. It can be understood that parents can appoint a legal guardian for their children using a testament. In this case, guardianship applies to a person or legal entity after both child’s parents die.<sup>17</sup>

Guardianship due to Judge enactment or *datieve voogdij* is based on Article 359 section (1) of the Civil Code, regulates that:

*“In respect of all minors who are not under parental authority and whose guardianship has not already been provided for by law, a guardian is appointed by the court of justice after having heard or properly summoned the blood relatives or relatives by marriage.”*

Article 359 of the Civil Code states that the Judge has the right to appoint a legal guardian from marriage and blood relatives. Furthermore, this provision can also be understood that the Judge will issue an enactment on the application submitted to the District Court after the Judge summons and legally hears statements from the applicant, guardian, supervisory guardian, blood family, and marriage family.

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<sup>16</sup>Mahmudah, H., *et al.* (2018). Hadhanah Anak Pasca Putusan Perceraian (Studi Komparatif Hukum Islam dan Hukum Positif Indonesia). *Sangaji: Jurnal Pemikiran Syariah dan Hukum*, 2(1), p. 72.

<sup>17</sup>Tutik, T. T. (2006). *Pengantar Hukum Perdata di Indonesia*. Surabaya: Prestasi Pustaka, p. 93.

The procedure for appointing a legal guardian based on Article 33 section (2) of Law No. 17 of 2016 regulates that *“to become a Legal Guardian ... conducted through court enactment.”* Meanwhile, what is meant by this provision is based on Annex of Law No. 17 of 2016, explains that:

*“The courts referred to in this provision are the Religious Courts for those who are Muslim and the District Courts for those of non-Muslim religions.”*

Furthermore, the procedure for appointing a legal guardian is *lex specialis* regulated in Chapter III of Government Regulation No. 29 of 2019. Article 9 section (1) of Government Regulation No. 29 of 2019 regulates that:

*“The application as referred to in Article 8 must meet the requirements as regulated in this Government Regulation and be submitted by a person or legal entity as a candidate for Legal Guardian to the Court.”*

Article 10 section (2) of Government Regulation No. 29 of 2019 regulates that *“appointing a Legal Guardian based on a Parent’s testament ... conducted through court enactment.”*

From the provision above, it can be understood that appointing a Legal Guardian based on a Parent’s request or testament must be through court enactment. As a candidate for Legal Guardian, a person or legal entity must attach a recommendation from the local government social affairs department. Article 12 section (1) of Government Regulation No. 29 of 2019 regulates that:

*“Recommendations from the department carrying out government affairs in the local Regency/Municipal social sector are considered in enactment or repeal as a Legal Guardian.”*

From the description of a series of provisions above, it can be understood that appointing a Legal Guardian must be through court enactment. However, in practice, there are still disputes over the application for appointing a Legal Guardian through the lawsuit mechanism. In this case, the dispute over appointing a Legal Guardian in Decision No. 45/Pdt.G/2020/PN.Pwt. The decision contains the status of a child under the age where no one knows the existence of the biological parent of the child. The adoptive parent then adopts the child. The two adoptive parents later died but did not leave a testament regarding the child’s guardianship. In addition, two adoptive parents’ relatives want to become Legal Guardians for the child. In this case, the plaintiff is the nephew of the adoptive father, and the defendant is the adoptive mother’s brother. On the other hand, the two parties have applied separately to the Purwokerto District Court. However, the application was rejected by each Judge after conducting an examination. In this case, each party is judged as the other party who wants to be a Legal Guardian for the child. Therefore, the plaintiff in this decision filed a lawsuit against the defendant and asked the Judge to appoint the plaintiff as a Legal Guardian for the child.

When assessing the appointment of a legal guardian based on positive Indonesian law, there is a gap between the implementation of the Civil Code, Law No. 17 of 2016, and Government Regulation No. 29 of 2019 in practice that took place in the District Court. Nababan stated that:<sup>18</sup>

*“Actually, the practice of requesting the appointment of a legal guardian is decided through the *jurisdictio contentiosa* mechanism or through a lawsuit is a common occurrence. Appointment of a legal guardian for a child under age through this lawsuit mechanism is basically made if it involves two parties with the same interest.”*

On the other hand, it was found that appointing a legal guardian through a lawsuit mechanism is implicitly regulated in various Indonesian positive laws. However, the lawsuit mechanism contradicts Article 359 of the Civil Code, Article 33 section (2) of Law No. 17 of 2016, and Articles 8 to 9 section (1) of Government Regulation No. 29 of 2019. In this case, the appointment of a legal guardian is made through the application mechanism. Furthermore, that application is examined and enacted by a Judge.

In contrast, the legal guardian’s authority may terminate due to repealed through court enactment or court decision. In this case, as regulated in Article 49 section (1) of Law No. 16 of 2019 juncto Article 17 section (1) of Government Regulation No. 29 of 2019. Therefore, it is understood that this provision as the basis for appointing a legal guardian can be implemented through a lawsuit mechanism or the *jurisdictio contentiosa* mechanism. In addition, the repealed authority is carried out based on Article 9 section (2) of Government Regulation No. 29 of 2019, which regulates that:

*“The application for appointing a Legal Guardian as referred to in section (1) is submitted together with the request for repeal of a Legal Guardian.”*

From the provision above, it can be understood that repeal of a Legal Guardian, carried out concurrently with appointing a Legal Guardian, contains an element of dispute. In this case, the plaintiff requests that the Judge repeal the authority of a Legal Guardian of the defendant and enactment themselves as a new Legal Guardian. This provision is also in line with Article 41 section (1) of Law No. 16 of 2019, which regulates that:

*“Both mother and father are still obliged to nurture and educate their children solely based on the child’s interests; when there is a dispute regarding authority over children, the Court renders its decision.”*

It should be noted that Law No. 16 of 2019 does not mention if divorce results in guardianship because of the terminology “parental authority” over children. However, it can be understood that divorce results in guardianship as regulated in

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<sup>18</sup>Results of Interview with Deputy Chief Judge in the District Court of Kabanjahe. Cipto Hosari Parsaoran Nababan. May 26, 2022.

Article 355 section (1) of the Civil Code. In this case, parental authority occurs as long as the marriage has not been broken, and if the marriage breaks up, then the authority over the immature child is carried out by the parents as legal guardians.<sup>19</sup>

From the provision of Article 41 of Law No. 16 of 2019, it is understood that the divorce will result in guardianship. Meanwhile, suppose there is a dispute between the father and mother regarding the authority over the child. In that case, they can apply for appointing a Legal Guardian through a lawsuit mechanism or the *jurisdictio contentiosa* mechanism in Court.

In addition to the provisions regarding guardianship above, there is also the Decision of the Supreme Court of the Republic of Indonesia Number 1210 K/Pdt/1985. In this case, it is necessary to examine the case of the application by *jurisdictio contentiosa* if there is an element of dispute. In addition, the Supreme Court Decision also states that if the District Court has examined and decided on the application *jurisdictio voluntaria*, even though it contains an element of dispute, then the decision has no legal basis.<sup>20</sup>

From the Supreme Court Decision above, it can be understood that it is appropriate that the case for appointing a Legal Guardian, which has an element of dispute, must be examined through the *jurisdictio contentiosa*. In this case, the decision will contain a repeal of a Legal Guardian, which is carried out concurrently by appointing a Legal Guardian. In addition, the decision can also contain the struggle for guardianship rights between the plaintiff and the defendant.

## **B. Dispute Resolution Analysis Appointing a Legal Guardian based on *Audi et Alteram Partem* Principle**

The principle of *audi et alteram partem* or *einnes mannes rede, ist keines manne rede, man soll hurray alle beide*. In this case, the Judge may not consider information from one party to be correct if the other party is not heard or does not have the opportunity to express his opinion. In addition to the meaning that both parties need to have their opinions heard, this principle also means that the statements of one party alone cannot be considered valid if the other party's statements have not been heard. Furthermore, evidence can only be admitted when the plaintiff and defendant attend the trial.<sup>21</sup>

The principle of *audi et alteram partem* is also called the principle of equality. In this case, the Judge must hear the statements of the plaintiff and the defendant. Furthermore, the Judge's decision must not be influenced and contested by the related parties. For example, one of the parties has already appeared before the

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<sup>19</sup>Wahyudi, F. (2019). Penerapan Prinsip Prudential dalam Perkara Perwalian Anak. *Mimbar Hukum*, 31(3), p. 375.

<sup>20</sup>Harahap, M. Y. (2016). *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*. Jakarta: Sinar Grafika, p. 32.

<sup>21</sup>Sugeng, B. & Sujayadi, S. (2012). *Pengantar Hukum Acara Perdata dan Contoh Dokumen Litigasi*. Jakarta: Kencana Prenada Media Group, p. 5.



Court.<sup>22</sup>

Wardah & Sutiyoso thinks that the principle of *audi et alteram partem* must be interpreted as a processual balance in the trial process in Court.<sup>23</sup> In this case, the Judge must hear both parties in the trial process: replicate and duplicate, evidence, submission of conclusions, decision, and implementation the decision. The Judge must treat the parties fairly by providing equal and balanced opportunities.<sup>24</sup>

The principle of *audi et alteram partem* in civil dispute trials requires Judge to pay attention and listen to both parties simultaneously.<sup>25</sup> For example, the Judge must listen to all the parties' answers in the replicate and duplicate stages. Judges cannot justify statements from one party without hearing the other party's statements.<sup>26</sup> Even in the evidentiary process, the Judge must examine the evidence presented by each party in a balanced way.

The principle of *audi et alteram partem* is also inseparable from the two philosophical values contained in it: the value of justice and the value of balance.<sup>27</sup> The value of justice in question is procedural justice. Dworkin explained that the existence of the principle of *audi et alteram partem* is a form of order to judges as law enforcers to provide equal rights and opportunities for the parties before the trial.<sup>28</sup> This procedural justice is implemented in the implementation until there is a judge's decision as a settlement of civil disputes. The benchmark for the suitability of the implementation of dispute resolution is the dispute resolution procedure in civil procedural law. In this case, procedural justice is the procedure used when resolving disputes.<sup>29</sup>

While the balance value is the equal opportunity and treatment for the parties during the trial.<sup>30</sup> Milton C. Jacobs explained that the value of balance is related to the burden of proof, and judges must adhere to the principle of fair trial and the principle of impartiality.<sup>31</sup> A. Pitlo explained that for the value of balance to be realized, Judges must divide the encumbrance of evidence in such a way.<sup>32</sup> The

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<sup>22</sup>Prasetya, U. (2020). Analisis Asas Audi Et Alteram Partem dalam Proses Persidangan Perkara Perdata (Perkara Nomor 20/Pdt.G/2019/PN Pwr). *Amnesti: Jurnal Hukum*, 2(2), p. 59.

<sup>23</sup>Wardah, S. & Sutiyoso, B. (2007). *Hukum Acara Perdata dan Perkembangannya di Indonesia*. Yogyakarta: Gama Media, p. 303.

<sup>24</sup>Handayani, D. (2020). Kajian Filosofis Prinsip Audi Et Alteram Partem dalam Perkara Perdata (Philosophical Studi of The Principle of Audi Et Alteram Partem in Civil Cases). *Jurnal Ilmiah Kebijakan Hukum*, 14(2), p. 390.

<sup>25</sup>Hidayat, A. S. (2019). Penerapan Asas Audi Alteram Et Partem pada Perkara Judicial Review di Mahkamah Agung. *Mizan: Journal of Islamic Law*, 3(1), pp. 45-46.

<sup>26</sup>Amalia, N. N., et al. (2018). Analisis Yuridis Putusan Hakim No. 3346/Pdt.G/2016/Pa.Sby tentang Ayah sebagai Pemegang Hak Asuh Anak. *Res Judicata*, 1(1), p. 46.

<sup>27</sup>Handayani, D. (2020). *Op. Cit.*, p. 391.

<sup>28</sup>Dworkin, R. (1997). *Taking Rights Seriously*. London: Gerald Duckworth & Co. Ltd., p. 160.

<sup>29</sup>Atmadja, I. D. G. (2013). *Filsafat Hukum: Dimensi Tematis dan Historis*. Malang: Setara Press, p. 76.

<sup>30</sup>Handayani, D. (2020). *Op. Cit.*, p. 394.

<sup>31</sup>Ali, A. & Heryani, W. (2013). *Asas-Asas Hukum Pembuktian Perdata*. Jakarta: Kencana Prenada Media Group, p. 27.

<sup>32</sup>Pitlo, A. (1986). *Pembuktian dan Daluwarsa: Menurut Kitab Undang-Undang Hukum Perdata Belanda* (Trans. by M. Isa Arief). Jakarta: PT. Intermedia, p. 48.

division must be based on the principle of proportionality.<sup>33</sup> In this case, each party can re-evidence if the opposing party provides contradictory evidence. Therefore, when deciding on a dispute, the Judge should provide equal opportunities to the parties regarding evidence.

As for the parties in terms of appointing a Legal Guardian, Article 3 of Government Regulation No. 29 of 2019 regulates that:

- (1) To be appointed as Legal Guardian because Parents are not there, Parents whereabouts unknown, or for some reason Parents are unable to carry out their obligations and responsibilities, someone who comes from:
  - a. Child's Family;
  - b. Siblings;
  - c. other people; or
  - d. legal entity,must meet the requirements for the appointment of a Legal Guardian and through court enactment.
- (2) A person appointed to be a Legal Guardian, as referred to in section (1), is prioritized from the Child's Family.
- (3) If the Children's Family is not there, unwilling, or not meeting the requirements, a Sibling can be appointed.
- (4) If children's families and siblings are not there, not willing, whereabouts unknown, or not meeting the requirements, they can be appointed from other people or legal entities.

From the provision above, it can be understood that there is a hierarchy regarding which party will be prioritized to be appointed as a Legal Guardian. Nababan stated that:<sup>34</sup>

*"The maker of laws and regulations is not arbitrary in regulated appointing a Legal Guardian as based on Article 3 of Government Regulation No. 29 of 2019. An assessment is required based on the close kinship of the child."*

Even though there is a hierarchy as a priority in the appointment of a Legal Guardian, there are still other priority requirements for parties referred to in Article 3 section (1) of Government Regulation No. 29 of 2019. In this case, as regulated in Article 4 section (2), Article 5 section (2), and Article 6 section (2) of Government Regulation No. 29 of 2019, the appointment of a Legal Guardian must have closeness and obtain the consent of the Child. With these requirements, each party referred to in Article 3 section (1) of Government Regulation No. 29 of 2019 still has the same opportunity to be appointed as a Legal Guardian.<sup>35</sup>

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<sup>33</sup>Handayani, D. (2020). *Op. Cit.*, p. 395.

<sup>34</sup>Results of Interview with Deputy Chief Judge in the District Court of Kabanjahe. Cipto Hosari Parsaoran Nababan. May 26, 2022.

<sup>35</sup>Pratiwi, Y. D. (2019). Harmonisasi Perlindungan Harta Kekayaan Anak dalam Perwalian melalui Penguatan Peran Wali Pengawas. *Jurnal Suara Hukum*, 1(1), p. 66.

From the description above, it can be understood that the dispute resolution for appointing a legal guardian based on Article 3 to Article 6 of Government Regulation No. 29 of 2019 has been under the principle of *audi et alteram partem*.<sup>36</sup> In this case, the value of procedural justice has emphasized the existence of justice for the parties in the dispute resolution procedure. Meanwhile, the balance value means an equal opportunity for the parties to be appointed Legal Guardian.

Although appointing a Legal Guardian through a lawsuit mechanism contradicts Article 8 and Article 9 section (4) of Government Regulation No. 29 of 2019, in this case, the process of appointing a Legal Guardian must go through an application mechanism. However, disputes about appointing a Legal Guardian, which involves two parties with the same interest, should be examined through a lawsuit mechanism so that the principle of *audi et alteram partem* can be applied in dispute resolution for appointing a legal guardian. On the other hand, the principle of the *audi et alteram partem* can be implemented more in the dispute resolution for appointing a legal guardian if two parties dispute the right of guardianship. In contrast, the application mechanism for appointing a Legal Guardian can only be carried out properly if there is only one party who wishes to obtain guardianship rights.

Furthermore, suppose the appointment of a legal guardian is not examined through the application mechanism while other parties also want to become guardians. In that case, that party cannot submit a defence or explanation that he is also entitled to be appointed as a legal guardian. In addition, the principle of *audi et alteram partem* cannot be implemented. In this case, it can result in not achieving the value of justice and the balance value contained in the principle of *audi et alteram partem* in appointing a legal guardian appropriate for children. Remembering, basically anyone has the right to apply as a legal guardian, as long as they meet the requirements, have closeness, and the Child's willingness.

### **C. Dispute Resolution Analysis Appointing a Legal Guardian based on Only One Guardian Principle**

The Civil Code contains two essential principles related to guardianship: the principle of one and indivisible and the principle of family agreement. The principle of family agreement is regulated in Article 359 of the Civil Code. In this case, if a child is not under parental authority, the Court must summons and legally hears statements from the Child's blood family and marriage family.<sup>37</sup>

Meanwhile, the principle of one and indivisible or *ondeelbaarheid*, which is also known as the principle of only one guardian. In this case, there is only one

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<sup>36</sup>Putri, E. A. (2021). Perlindungan Hukum terhadap Perceraian Akibat Perselisihan Terus Menerus. *Jurnal Hukum Sasana*, 7(1), pp. 165-166.

<sup>37</sup>Aulia, S. (2020). Advance Pricing Agreement dalam Perspektif Hukum Perjanjian. *Al-Syakhsyiyah: Journal of Law and Family Studies*, 2(1), p. 141.

legal guardian in each guardianship.<sup>38</sup> Article 331 of the Civil Code regulates that:

*“With regard to each guardianship, there shall be only one guardian, except as provided for in Article 351 and Article 361. The guardianship of children with the same parents shall be considered as one guardianship, provided those children have the same guardian.”*

From the provision above, it can be understood that only one guardian principle can be excluded based on Article 351 and Article 361 of the Civil Code. Article 351 of the Civil Code regulates that:

*“If the mother acting as guardian marries, her husband is, unless he has been excluded or dismissed from guardianship, during the marriage, provided that there is no separation from bed and board or of assets between the spouses, be co-guardian by law and is jointly liable together with his wife for all the acts committed after the execution of the marriage. The co-guardianship of the husband is repealed, if he is dismissed therefrom or if the mother ceases to be guardian.”*

From the provision above, it can be understood that the only one guardian principle can be excluded if the mother of the child as the longest living parent (*langs tlevendeouder*) remarries, resulting in her husband becoming a co-guardian (*medevoogd*).<sup>39</sup>

Article 361 of the Civil Code regulates that:

*“If the minor, established within Indonesia, owns assets in the Royal Kingdom of the Netherlands or in one or more of the overseas colonies of the Netherlands outside Indonesia, the management of the assets is entrusted to a trustee in the Kingdom and in each of the Colonies, at the request of the guardian. In this regard, the guardian is not be responsible for the actions of the trustee. The trustee is elected in the same manner as the guardian.”*

From the provision above, it can be understood that if the Child is domiciled in Indonesia but has assets abroad. Meanwhile, the Legal Guardian cannot be responsible for managing children’s assets abroad. Therefore, the exclusion aims to appoint a Legal Guardian to manage the Child’s assets abroad.<sup>40</sup>

On the other hand, the purpose of filing an application or lawsuit for appointing a Legal Guardian is the same: to realize the only one guardian principle regulated in Article 331 of the Civil Code. In this case, the lawsuit carried out to uphold the principle of *audi et alteram partem* also impacts to realize the only one guardian principle.

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<sup>38</sup>Setiawan, E. (2014). *Dinamika Pembaharuan Hukum Keluarga Islam di Indonesia. De Jure: Jurnal Hukum dan Syar’iah*, 6(2), p. 141.

<sup>39</sup>*Ibid.*

<sup>40</sup>Sinaga, G. R. I., et al. (2022). *Inheritance Dispute Resolution Related to the Position of Adopted Son Based on Batak Toba Indigenous Law. SIGn Jurnal Hukum*, 4(1), pp. 2-3.

## CONCLUSIONS AND SUGGESTIONS

Based on the results and discussion above, it can be concluded that implementing the dispute resolution of appointing a legal guardian through a lawsuit realizes the principle of *audi et alteram partem*. In this case, the value of procedural justice has emphasized the existence of justice for the parties in the dispute resolution procedure. Meanwhile, the balance value means an equal opportunity for the parties to be appointed Legal Guardian. Furthermore, with the realization of the principle of *audi et alteram partem*, it will also directly realize the principle of only one guardian or what is known as the principle of one and indivisible. In this case, by examining the lawsuit for appointing a Legal Guardian, the Judge, based on the *audi et alteram partem* principle, can judge which party is deemed more appropriate to be appointed as a Legal Guardian so that only one guardian principle can be realized. Based on the description of these conclusions, it is recommended that the Government make amendments to Government Regulation No. 29 of 2019. In this case, explicitly and regulated disputes over guardianship rights should be examined through the *jurisdictio contentiosa* mechanism. Thus, anyone has the right to apply as a legal guardian, as long as they meet the requirements, have closeness, and the Child's willingness.

## REFERENCES

- Abubakar, M. (2020). Meningkatkan Cerai Gugat pada Mahkamah Syar'iyah. *Kanun: Jurnal Ilmu Hukum*, 22(2), 301-322. doi: <https://doi.org/10.24815/kanun.v22i2.16103>
- Ali, A. & Heryani, W. (2013). *Asas-Asas Hukum Pembuktian Perdata*. Jakarta: Kencana Prenada Media Group.
- Amalia, N. N., et al. (2018). Analisis Yuridis Putusan Hakim No. 3346/Pdt.G/2016/Pa.Sby tentang Ayah sebagai Pemegang Hak Asuh Anak. *Res Judicata*, 1(1), 34-46. doi: <http://dx.doi.org/10.29406/rj.v1i1.1037>
- Atmadja, I. D. G. (2013). *Filsafat Hukum: Dimensi Tematis dan Historis*. Malang: Setara Press.
- Aulia, S. (2020). Advance Pricing Agreement dalam Perspektif Hukum Perjanjian. *Al-Syakhsyiah: Journal of Law and Family Studies*, 2(1), 134-149. doi: <http://dx.doi.org/10.21154/syakhsyiah.v2i1.2164>
- Colonial Regulations, *Staatsblad* Number 23 of 1847 on the *Burgerlijk Wetboek voor Indonesie*/the Civil Code.
- Decision of the District Court of Purwokerto Number 45/Pdt.G/2020/PN Pwt.
- Decision of the Supreme Court of the Republic of Indonesia Number 1210 K/Pdt/1985.
- Diantha, I. M. P. (2017). *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*. Jakarta: Kencana Prenada Media Group.
- Dworkin, R. (1997). *Taking Rights Seriously*. London: Gerald Duckworth & Co. Ltd.

- Fahmi, I. (2019). Yuridiksi Kontentiosa dalam Penanganan Perkara Permohonan Pemeriksaan terhadap Perseroan Terbatas. *Jurnal Surya Kencana Satu: Dinamika Masalah Hukum dan Keadilan*, 10(1), 75-94.
- Farah, A. & Yunanto, R. A. (2016). Pengaturan dan Pelaksanaan Perwalian oleh Lembaga Kesejahteraan Sosial Anak Berdasarkan Hukum Perdata Indonesia (Studi Kasus di Panti Sosial Asuhan Anak Aisyiyah Semarang). *Diponegoro Law Journal*, 5(3), 1-11.
- Government Regulation in Lieu of Law of the Republic of Indonesia Number 1 of 2016 on the Second Amendment to Law Number 23 of 2002 on Child Protection (State Gazette of the Republic of Indonesia of 2016 Number 99, Supplement to State Gazette of the Republic of Indonesia Number 5882).
- Government Regulation of the Republic of Indonesia Number 29 of 2019 on Terms and Procedures for Appointing a Legal Guardian (State Gazette of the Republic of Indonesia of 2019 Number 76, Supplement to State Gazette of the Republic of Indonesia Number 6339).
- Handayani, D. (2020). Kajian Filosofis Prinsip Audi Et Alteram Partem dalam Perkara Perdata (Philosophical Studi of The Principle of Audi Et Alteram Partem in Civil Cases). *Jurnal Ilmiah Kebijakan Hukum*, 14(2), 385-402. doi: <http://dx.doi.org/10.30641/kebijakan.2020.V14.385-402>
- Harahap, M. Y. (2016). *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*. Jakarta: Sinar Grafika.
- Hartati, R., et al. (2021). Perwalian Anak Akibat Meninggal Kedua Orang Tuanya (Studi Kasus Gala Sky Anak Pasangan Artis Vanessa Angel dan Febri Ardiansyah). *Pamulang Law Review*, 4(2), 205-220.
- Hidayat, A. S. (2019). Penerapan Asas Audi Alteram Et Partem pada Perkara Judicial Review di Mahkamah Agung. *Mizan: Journal of Islamic Law*, 3(1), 37-50. doi: <https://doi.org/10.32507/mizan.v3i1.408>
- Kudubun, T. (2014). Penetapan Pengadilan Mengenai Penunjukan Wali Anak. *Lex et Societatis*, 2(6), 82-94.
- Law of the Republic of Indonesia Number 1 of 1974 on Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to State Gazette of the Republic of Indonesia Number 3019).
- Law of the Republic of Indonesia Number 39 of 1999 on Human Rights (State Gazette of the Republic of Indonesia of 1999 Number 165, Supplement to State Gazette of the Republic of Indonesia Number 3886).
- Law of the Republic of Indonesia Number 23 of 2002 on Child Protection (State Gazette of the Republic of Indonesia of 2002 Number 109, Supplement to State Gazette of the Republic of Indonesia Number 4235).
- Law of the Republic of Indonesia Number 35 of 2014 on Amendment to Law Number 23 of 2002 on Child Protection (State Gazette of the Republic of Indonesia of 2014 Number 297, Supplement to State Gazette of the Republic of Indonesia Number 5606).

- Law of the Republic of Indonesia Number 17 of 2016 on Enactment of Government Regulation in Lieu of Law Number 1 of 2016 on the Second Amendment to Law Number 23 of 2002 on Child Protection Into Law (State Gazette of the Republic of Indonesia of 2016 Number 237, Supplement to State Gazette of the Republic of Indonesia Number 5946).
- Law of the Republic of Indonesia Number 16 of 2019 on Amendment to Law Number 1 of 1974 on Marriage (State Gazette of the Republic of Indonesia of 2019 Number 186, Supplement to State Gazette of the Republic of Indonesia Number 6401).
- Lestari, D. I. & Khisni, A. (2021). Tinjauan Yuridis Permohonan Perwalian dalam Pengurusan Izin Jual Harta Anak di Bawah Umur di Pengadilan Negeri Jepara. *Prosiding Konstelasi Ilmiah Mahasiswa Unissula Klaster Hukum (KIMU)*, 7, 11-27.
- Mahmudah, H., et al. (2018). Hadhanah Anak Pasca Putusan Perceraian (Studi Komparatif Hukum Islam dan Hukum Positif Indonesia). *Sangaji: Jurnal Pemikiran Syariah dan Hukum*, 2(1), 57-88. doi: <https://doi.org/10.52266/sangaji.v2i1.263>
- Pitlo, A. (1986). *Pembuktian dan Daluwarsa: Menurut Kitab Undang-Undang Hukum Perdata Belanda* (Trans. by M. Isa Arief). Jakarta: PT. Intermasa.
- Prasetya, U. (2020). Analisis Asas Audi Et Alteram Partem dalam Proses Persidangan Perkara Perdata (Perkara Nomor 20/Pdt.G/2019/PN Pwr). *Amnesti: Jurnal Hukum*, 2(2), 57-75. doi: <https://doi.org/10.37729/amnesti.v2i2.657>
- Prasetyawati, E., et al. (2022). Analisis Permohonan Wali dan Kuasa dari Ahli Waris Pemohon yang Belum Dewasa Guna untuk Mengambil Jaminan Sertifikat Rumah. *Jurnal Pendidikan, Sosial, dan Humaniora (PESHUM)*, 1(3), 173-183.
- Pratiwi, Y. D. (2019). Harmonisasi Perlindungan Harta Kekayaan Anak dalam Perwalian melalui Penguatan Peran Wali Pengawas. *Jurnal Suara Hukum*, 1(1), 61-90. doi: <https://doi.org/10.26740/jsh.v1n1.p61-90>
- Putri, E. A. (2021). Perlindungan Hukum terhadap Perceraian Akibat Perselisihan Terus Menerus. *Jurnal Hukum Sasana*, 7(1), 163-181. doi: <https://doi.org/10.31599/sasana.v7i1.618>
- Qamar, N. & Rezah, F. S. (2020). *Metode Penelitian Hukum: Doktrinal dan Non-Doktrinal*. Makassar: CV. Social Politic Genius (SIGn).
- Rahman, S., et al. (2020). Efektivitas Pembagian Harta Bersama Pasca Perceraian: Studi Kasus Perkawinan Poligami. *SIGn Jurnal Hukum*, 1(2), 104-118. doi: <https://doi.org/10.37276/sjh.v1i2.60>
- Sarwono. (2011). *Hukum Acara Perdata: Teori dan Praktik*. Jakarta: Sinar Grafika.
- Setiawan, E. (2014). Dinamika Pembaharuan Hukum Keluarga Islam di Indonesia. *De Jure: Jurnal Hukum dan Syar'iah*, 6(2), 138-147. doi: <https://doi.org/10.18860/j-fsh.v6i2.3207>
- Sihaloho, T. (2015). Penetapan Hak Perwalian Anak di Bawah Umur pada Kasus Perceraian dalam Perkawinan Campuran Warga Negara Indonesia dan Warga Negara Asing. *Premise Law Jurnal*, 9, 1-16.

- Sinaga, G. R. I., *et al.* (2022). Inheritance Dispute Resolution Related to the Position of Adopted Son Based on Batak Toba Indigenous Law. *SIGn Jurnal Hukum*, 4(1), 1-14. doi: <https://doi.org/10.37276/sjh.v4i1.128>
- Soemitro, R. H. (1990). *Metodologi Penelitian Hukum dan Jurimetri*. Jakarta: Ghalia Indonesia.
- Subekti, R. (1990). *Ringkasan tentang Hukum Keluarga dan Hukum Waris*. Jakarta: Intermedia.
- Sugeng, B. & Sujayadi, S. (2012). *Pengantar Hukum Acara Perdata dan Contoh Dokumen Litigasi*. Jakarta: Kencana Prenada Media Group.
- Tutik, T. T. (2006). *Pengantar Hukum Perdata di Indonesia*. Surabaya: Prestasi Pustaka.
- Wahyudi, F. (2019). Penerapan Prinsip Prudential dalam Perkara Perwalian Anak. *Mimbar Hukum*, 31(3), 368-383. doi: <https://doi.org/10.22146/jmh.44398>
- Wardah, S. & Sutiyoso, B. (2007). *Hukum Acara Perdata dan Perkembangannya di Indonesia*. Yogyakarta: Gama Media.

Amadea, N., *et al.* (2022). The Appointing of a Legal Guardian based on *Audi et Alteram Partem* Principle and Only One Guardian Principle. *SIGn Jurnal Hukum*, 4(1), 124-139. doi: <https://doi.org/10.37276/sjh.v4i1.185>