

The Legal Strength of the Separation of Joint Assets for the Establishment of a Foundation

Elyana Novira

Universitas Bung Hatta, Indonesia

Email: elyana.novira@bunghatta.ac.id

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ABSTRACT

This study examines the legal strength of separating joint marital assets (*harta bersama*) for the establishment of a *yayasan* (foundation) under Indonesian law. The primary focus is on the legality and validity of asset separation in situations where one spouse allocates a portion of the jointly acquired property (*harta bersama*) to form a *yayasan* without obtaining prior consent from the other spouse. Employing a normative juridical approach, supported by statutory, case, and doctrinal analysis, this research analyzes the relevant legal framework, including *Undang-Undang Perkawinan* No. 1 Tahun 1974 (Marriage Law), *Undang-Undang Yayasan* No. 16 Tahun 2001 (as amended), and pertinent judicial decisions. The findings indicate that unilateral separation of joint assets (*harta bersama*) can be subject to legal challenge, particularly when such actions infringe upon the principle of equal rights (*kesetaraan hak*) of both spouses over shared property. The establishment of a *yayasan* using *harta bersama* requires mutual agreement (*persetujuan bersama*) to prevent potential legal disputes and to ensure the legitimacy of the foundation's legal standing. This study underscores the necessity for legal certainty and spousal consent (*persetujuan suami-istri*) in the management of assets for philanthropic purposes, in accordance with the prevailing legal doctrines and statutory provisions.

INTRODUCTION

Foundations (*yayasan*) are community institutions that function to achieve various social, religious, and humanitarian goals. In Indonesia, *yayasan* have grown rapidly with increasingly diverse forms. The Indonesian Civil Code contains several articles that touch upon foundations, including Article 365, Article 899, Article 900, and Article 1680; however, these provisions do not define what constitutes a foundation. Article 1680, for instance, states that transfers to public or religious institutions do not have legal consequences except those made by the President or by officials appointed by him. Before the enactment of *Undang-Undang Yayasan* No. 16 of 2001, later amended by *Undang-Undang* No. 28 of 2004, foundations had already been recognized by Indonesian society as part of the *living law*. Nevertheless, until the passage of this legislation, foundations were often regarded as both business and social institutions (Musahiddinsyah, 2020; Nani Mulyati, 2024; Warsifah, 2021; Wulandari, 2016; Zuri Alvino, 2024).

The Law on Foundations was enacted on August 6, 2001, and came into force on August 6, 2002. Subsequently, it was amended by *Undang-Undang* No. 28 of 2004 to ensure legal certainty and order, and to provide the public with a clearer understanding of foundations so that these institutions could fulfill their roles as legal entities in achieving specific social, religious, and humanitarian objectives. Several principles are set forth in the Foundation Law and its amendments, including: (1) the foundation as a non-profit organization; (2) declarative establishment; (3) the possibility of establishment by a single legal subject (individual or civil legal entity); (4) the requirement for establishment by notarial deed; (5) acquisition of legal entity status upon approval from the Minister; (6) joint and several liability of management for legal acts performed on behalf of the foundation prior to obtaining legal entity status; (7) the immutability of the foundation's purpose; and (8) the non-transferability of the foundation (i.e., it cannot be inherited, traded, or granted).

According to Article 1 paragraph (1) of the Foundation Law, a foundation is defined as a legal entity consisting of separated property intended to achieve certain goals in the social, religious, and humanitarian fields, and which has no members. In line with the Foundation Law, the purpose of establishing a foundation is to serve social, religious, and humanitarian interests. The existence of foundations is intended to meet the community's expectations for institutions that serve these purposes and contribute to the welfare of society at large (Asyadie, 2019; Meliala, 2019; Pangabean, 2012).

The establishment of a foundation begins with the separation of the founder's assets (*harta pendiri*) to be included as the foundation's assets (*harta yayasan*). This separation cannot be interpreted as an investment, as the foundation is established on a non-profit basis. Therefore, the Foundation Law serves to: (1) guarantee legal certainty and the realization of law enforcement within foundations; (2) provide a legal umbrella that protects the existence and activities of foundations; and (3) serve as a basis for imposing sanctions if the management (organs and employees of the foundation) misuse the foundation or its activities for personal interests that are contrary to its original purpose (Handayani, 2018).

Problems often arise in practice, as illustrated by a case in Bukit Tinggi, where the buildings and educational facilities owned by the XXX Foundation were situated on land partially belonging to the founder. On this land, both a Senior High School (*SMA*) and a Vocational High School were constructed. When the principal of the Vocational High School proposed that the land be donated to the foundation, the founder refused. Disputes such as these have reached the cassation stage at the Supreme Court, for example in Supreme Court Case No. 2179.K/Pdt/1999, dated 7 June 2000, where the chairman of the YPSJ Foundation Board and his wife were alleged by other YPSJ administrators to have entered into a sale and purchase agreement for YPSJ land, while the chairman claimed the land was his personal property.

Studies by Wijaya (2019) and Anwar (2021) have explored the legal challenges faced by foundations, particularly regarding asset ownership and the responsibilities of founders and managers. Wijaya (2019) found that the lack of clarity regarding asset ownership often leads to disputes between foundation management and the founder's family. Similarly, Anwar (2021) highlighted that legal uncertainties in the process of separating personal and foundation assets can result in conflicts that undermine the foundation's ability to achieve its intended social purposes. This research addresses the gap in understanding the legal framework surrounding foundation asset management, particularly when personal assets are involved, and suggests that clearer regulations and better enforcement mechanisms are needed to avoid such conflicts.

This study aims to explore the legal complexities in the establishment and management of foundations in Indonesia, particularly in the context of asset ownership and disputes between founders

and managers. By focusing on legal provisions, operational challenges, and case law, this research seeks to contribute to improving the regulatory environment for foundations in Indonesia, thereby ensuring better protection for founders, managers, and the long-term sustainability and social impact of foundations.

METHODS

This research was normative juridical, which was carried out by examining documents available in the library. The study was descriptive in nature. Data were obtained accurately from secondary data sources, which meant data were collected indirectly from the object being studied. Primary, secondary, and tertiary legal materials were included as part of the secondary data. To support the secondary data, an interview was conducted with notary Yesika Samial SH., Mkn.

The legal materials were analyzed systematically to uncover patterns, themes, and insights related to the legal issues surrounding the management and ownership of assets within foundations. In addition to content analysis, the data were cross-referenced with existing literature and legal practices to assess the consistency and applicability of the law in real-life scenarios. This analysis allowed for the identification of gaps in current legal frameworks and offered recommendations for improving the legal regulations surrounding foundation asset management in Indonesia. Through this process, the study provided a thorough understanding of the legal challenges and contributed to enhancing legal certainty and governance of foundations in the country.

RESULTS

Foundation Establishment

Each foundation must have its own name. Other foundations may not use names that have been registered in the register of foundations; The word "Foundation" can only be used as a legal entity, and the word "Foundation" must be listed in front of the Foundation's name.

If the name of the foundation is the same as the name of another foundation that has been registered in the list, or if it is contrary to ethics or general manners, then the use of the name will be rejected. After the deed of establishment of the foundation is ratified by the Minister, the name of the foundation will be registered in the register of the foundation. Foundations established by Indonesians must have an initial wealth of at least Rp. 10,000,000 (Ten Million Rupiah), while foundations established by foreigners must have an initial wealth of at least Rp. 100,000,000 (One Hundred Million Rupiah). To separate the estate, there must be evidence and a statement from the founder that ensures that the property was not acquired through a violation of the law, such as corruption or money laundering. The evidence is part of the foundation's financial documents.

The value of the separated property is Rp. 10,000,000 (Ten Million Rupiah) or if it is not in the form of rupiah money, the value is equivalent to that value. If the property comes from a foreign founder or a foreigner who established a foundation with an Indonesian, the value of the property is equal to Rp. 100,000,000 (One Hundred Million Rupiah).

To obtain the legal status of the foundation, the founder or its legal representative, through a Notary who makes the foundation founding deed, and submits an application for ratification of the deed of establishment to the Minister. This application must be attached with the following documents:

- a. Copy of the foundation deed of establishment
- b. Copy of NPWP that has been legalized by a Notary

- c. A statement letter about the location where the Foundation is located which must also include the full address of the foundation signed by the foundation management and known by the village head or village head in the area.
- d. Proof of deposit, bank statement of the name of the foundation, or written statement from the founder explaining the amount of money raised as initial capital to establish the foundation.
- e. A statement made by the founder regarding the validity of the initial wealth.
- f. Proof of deposit, foundation endorsement and announcement fees

To obtain the status of a legal entity of the foundation, an application for ratification of the deed of establishment must be submitted to the Minister within 10 (ten) days from the date the deed of establishment of the foundation is signed. In the Articles of Association, a foundation can be established for a certain period of time. The foundation management can apply for an extension of the period to the Minister of Law no later than 1 (one) year before the end of the period. After being legalized as a legal entity, the deed of establishment of the foundation must be announced in the Supplement to the State Gazette of the Republic of Indonesia.

Shared Wealth

Marriage is an important thing for humans because it allows a person to achieve social, biological, and psychological balance in his life. By getting married, a person can meet all his biological needs. In addition, a married person has mental or spiritual control over his or her sexual desires. Marriage, according to Islam, is a strong sacred covenant to live together that is happy, safe, calm, and loving to one another. One of the human natures is to get married to show the love and affection of God Almighty to his servants.

Marriage, according to Article 1 of Law No. 1 of 1974, is an innate bond between a man and a woman as husband and wife with the aim of forming a happy and lasting family (household) on the basis of the One Godhead. A bond is an informal and invisible relationship. However, because the innate bond forms the foundation for forming and building an eternal family, marriage must exist because without it it would be fragile. This means that marriages must last a lifetime and should not be broken off just like that.

According to Article 2 Paragraph 1 of Law No. 1 of 1974, marriage is said to be valid if it is carried out according to the religious law of each person of his or her belief. Thus, it can be concluded that the religion adhered to by the bride-to-be determines whether a marriage is valid or not. Even so, the marriage must be recorded in accordance with the applicable laws and regulations.

Marriage law adheres to the following legal principles:

- a. Marriage, which is an innate bond, must be based on the principle of consent of both parties who will perform the marriage, without coercion from either party.
- b. Based on the principle of proportionality, the position of husband and wife is equal in domestic life and cohabitation in society; Each party has the right to perform legal acts with the division of duties, with the husband acting as the head of the family and the wife acting as the housewife.
- c. Based on the principle of no unity of property, all property obtained during marriage is joint property of the husband and wife whose use must be agreed by one of the parties, while the property brought by the husband and wife before marriage is the property of each other. The basis of a round union was abolished with the enactment of the Marriage Law.

According to the Civil Code (KUHPercivil) and the Marriage Law, marriage has legal consequences for property as well as marital relationships and the position of children. Article 119 of the Civil Code states that, from the moment the marriage takes place, the unanimous union of the property of the husband and wife is valid for the sake of the law, as long as there are no other provisions in the marriage agreement. With the consent of the husband and wife, the marriage may not be dissolved or

altered. Marriage has four possible impacts on wealth. The possible impact or consequences are described below.

- 1) There is a circular separation
- 2) There is absolutely no association
- 3) Association of results and opinions
- 4) Profit and loss union.

However, based on the Marriage Law, property obtained during marriage is considered joint property, while the inherited property of each husband and wife, and the property obtained by each as a gift or inheritance are owned by each husband and wife, as long as the parties do not specify otherwise. Husbands and wives each have the full right to perform legal acts with respect to their property, in the case of their respective inherited property. In the decision No. 443 K/Pdt/1984 dated September 26, 1985 and No. 3272 K/Pdt/1987 dated June 29, 1989, the Supreme Court has made a decision on the word "may" in terms of the arrangement of common property. Two Supreme Court rulings show that the wife's consent is required for the encumbrance or sale of joint property. For additional information, see Article 92 of the Compilation of Islamic Law, which stipulates that without the consent of the other party, a husband or wife may not sell or transfer joint property.

If the marriage must be decided through divorce, then the joint property is regulated according to their respective laws. The Marriage Act provides for the following in cases where the husband has more than one wife:

- a. Husbands are obliged to guarantee the same life for all their wives and children.
- b. The second wife and so on have no right to the joint property that existed before the marriage with the second wife or thereafter occurred.
- c. All wives have the same right to joint property obtained since their respective marriages.

Separation of joint assets for the establishment of the foundation.

There are two reasons why foundations are important. First, the foundation was established with the aim of managing commercial activities under the auspices of the foundation, even if it developed into a business empire engaged in education. A person forms a foundation so that his business activities are not subject to taxes related to the business. They believe that foundations will be tax-exempt if they do business. Second, not everyone establishes an educational foundation for charitable purposes; Instead, many of them do so with the primary goal of enriching themselves, administrators, and supervisors. Actually, foundations are organizations that have the main goal of realizing social concern for the community.

The Constitution regulates efforts to enforce humanity and social welfare. This is realized through the provision of humanitarian and social welfare facilities by utilizing social partnership mechanisms and legal entities by the private sector. One of the efforts taken by the community to contribute to the improvement of social and humanitarian welfare is to establish foundations or other legal entities with reference to the applicable laws and regulations. By establishing a business entity, the foundation functions as a legal entity responsible for social, religious, and humanitarian activities. Although the foundation's law does not explicitly stipulate that the foundation is a non-profit or non-profit legal entity. However, its social, religious, and humanitarian goals make the foundation a non-profit legal entity. Every legal entity that has the legal capacity to be responsible (*rechtsbevoegheid*) must have five main elements of a legal entity, namely:

- 1) Property that is separated from the property belonging to another legal subject.
- 2) Have certain ideal goals that are in line with laws and regulations.
- 3) Have their own interests in legal traffic.

- 4) There is an organized management organization in accordance with the applicable laws and regulations and internal regulations.
- 5) Registered as a legal entity based on valid laws and regulations.

As a legal subject in the form of a legal entity, foundations are given the right and authority to carry out activities such as receiving and controlling their own property, can be prosecuted and prosecuted before a judge. Historically, in Indonesia foundations are recognized as legal entities after going through the following stages:

- 1) Comply with European law as stated in the BW and some of them comply with other laws, such as waqf institutions in Islamic law.
- 2) The court decision that becomes the jurisprudence on the foundation determines the general rules of the foundation. In Indonesia, the Supreme Court takes into account the status of a foundation as a legal entity in its decision. In this case, the Supreme Court affirmed the *judex factie* decision.
- 3) Article 1 number 1 of the Foundation Law also states that the foundation is a legal entity. The enactment of this law is expected to provide legal certainty and legal order related to the existence of foundations and provide a clear understanding for the public about it.

In addition, the community's desire to have a forum or institution with social, religious, and humanitarian purposes is part of the existence of the foundation. Therefore, foundations must be established where their operations can bring benefits and welfare to many people. The establishment of a foundation begins with separating the founder's wealth to be included as the foundation's wealth. All foundation resources, including human, financial, and material resources, must be used efficiently and effectively by good management. This is done to realize the goals that have been determined, increase public trust in the foundation, and reduce the risk of legal problems in the future. Separation of wealth is the main principle that must be considered. When the founder established the foundation, the initial wealth that had been segregated belonged to the foundation. This is because the relationship between the founder and the estate set apart for the foundation has been severed at the time the separation of wealth is done. Therefore, the founder no longer has ownership or rights to the separated property.

Government Regulation No. 63 of 2008 concerning the Implementation of the Law on Foundations in article 6 paragraph (1) stipulates that the amount of initial wealth for foundations established by Indonesians derived from the separation of the founder's personal assets is at least Rp. 10,000,000 (Ten Million rupiah); in paragraph (2) stipulates that the amount of initial wealth of the foundation established by foreigners or foreigners with Indonesians derived from the separation of the founder's personal assets is at least Rp. 100,000,000 (One Hundred Million Rupiah). If the separated assets are not in the form of money, the value of the assets must be equivalent to Rp. 10,000,000 (Ten Million rupiah) or Rp. 100,000.00 (One Hundred Million rupiah). This is the meaning of the phrase 'worth of wealth'.

The founder's wealth is separated from the wealth of the founder or its administrators. To start its operations, this wealth is used as the foundation's initial capital. This separation of assets from the founders is aimed at ensuring that the initial wealth of the foundation does not become part of the founder's personal estate or the common estate of the founder and his family. The foundation's wealth can be obtained from various sources, such as waqf, grants, wills, and other acquisitions that do not violate the foundation's Articles of Association or applicable laws, such as dividends as profits from shares invested in Limited Liability Companies.

An example is the dispute case that occurred between Trisakti University and the Trisakti foundation, where Thobby Mutis, the rector of Trisakti University, changed the status of Trisakti University by removing the name of the Trisakti foundation as the owner. According to H.P

Pangabean's analysis, this dispute occurred because it was unclear whether the foundation's assets were owned by the owner or the foundation, where Trisakti's assets were not clearly separated.

Based on the Foundation Law, the foundation's wealth is sourced from a certain amount of assets belonging to the founder that are separated, either in the form of money or intangible goods. However, Article 499 of the Civil Code defines objects not only as goods but also as rights. Article 499 of the Civil Code explains 2 (two) types of objects, namely:

- 1) Tangible goods or things.
- 2) Rights, including property rights (except property rights) or individual rights (billing rights)

Therefore, it seems impossible to include rights in the Foundation Act. However, if we look further, the contradiction can be seen in Article 14, because verse 2 uses nouns.

The notary establishes the requirements for creating a new foundation, namely:

- 1) The name of the foundation to be checked first by the Notary.
- 2) Photocopy of Identity Card (KTP), Taxpayer Identification Number (NPWP) of all Trustees, Supervisors and Administrators.
- 3) Email addresses and Mobile Phone Numbers of all Coaches, Supervisors and Administrators.
- 4) The initial capital or wealth of the foundation.
- 5) The email address of the foundation.
- 6) Full address of the office and the position of the foundation

After all the requirements are met, it is followed by the making of the Deed of Establishment of the foundation, then followed by the making of a Statement Letter made with a notarial deed. The Statement Letter explains the separation of assets from the founder in the form of money for the establishment of the foundation. The founder who separates the assets in the form of money then makes a power of attorney from the Founder to the chairman of the Board to put the money handed over by the founder to the foundation's account.

If the founder sets aside his property for the establishment of the foundation, then in addition to making a statement in the form of a notarial deed from the Founder, it is followed by the making of a power of attorney by the founder to the Management to change the name of the property. For example, the Founder provides a motor vehicle for the establishment of the foundation, then the power of attorney is in the form of a power of attorney from the Founder to the Management to change the name of the Proof of Ownership of Motor Vehicle (BPKB) from the Founder to the foundation. If the disposal of assets from the Founder in the form of money is also required with proof of deposit of the money into the foundation's account (Arifin, 2017; Hidayati, 2018; Supriyadi, 2021; Wahyuni, 2020).

The separation of assets from the founder of the foundation in the required way, namely in the form of a Notarial Deed, is carried out without a statement of consent or knowledge from the spouse of the founder of the foundation. The husband or wife of the founder of the foundation does not give a signature on the Notarial Deed as proof of approval or proof of knowing that there has been a separation of the estate of the founder of the foundation from the property owned by him. Separated property may come from the inherited property of the husband/wife in marriage or it may come from the joint property in the marriage of the founder of the foundation (Siregar, 2016; Hamid, 2019; Fadilah & Prakoso, 2021; Santoso, 2023).

The assets set aside by the founder of the foundation can be in the form of money or objects. According to Article 499 of the Civil Code (KUHPercivil), the definition of an object or "zaak" is anything that can be an object of property. Property rights objects can be goods and can also be rights, such as copyrights, patents and others. Meanwhile, intangible objects such as copyrights and patent rights are not regulated by the Civil Code, but are regulated in a separate law, namely the Law on the Protection of Intellectual Property Rights (IPR). The handover (levering) of tangible objects

for the establishment of the foundation is carried out by juridical handover (jurisdische levering), namely by changing the name (mutation) or making a deed/PPAT (Nugraha, 2018; Nuraini, 2019; Pratama & Salim, 2022; Widodo, 2024).

The objects or money that are set aside can come from the joint property of the marriage of the founder of the foundation where the separation of assets is a legal act that can cause subsequent legal consequences. A legal act requires a strong legal foundation so that legal order and legal certainty can be achieved and provide many benefits for many people (Lubis, 2015; Ramadhani & Yusuf, 2017; Amalia, 2020; Maulana, 2023).

The separation of the Founder's assets for the initial capital of the Foundation when handed over in the form of money or objects can certainly be understood as a legal institution of Grants or Waqf, but laws and regulations do not further regulate the need to make a Grant Deed or Waqf Deed as a legal step that can provide legal certainty for the Founder and his heirs, including legal certainty for the Foundation as a legal entity.

CONCLUSION

This research concludes that the implementation of the Foundation Law in Indonesia is essential for providing legal certainty and safeguarding the activities of foundations, particularly in the management and ownership of assets. The findings reveal that, although the Foundation Law establishes a robust legal framework and governance structure, practical challenges remain—especially in bridging the gap between legal intent and operational realities, and in preventing the misuse of foundation assets for personal interests. The study emphasizes the necessity of stronger enforcement mechanisms to uphold the integrity of foundation asset management. For future research, it is suggested to conduct empirical analyses on the effectiveness of the Foundation Law in real-world scenarios, focusing on cases of asset mismanagement and legal disputes. Further investigation into the intersection of foundation law with other legal sectors, such as corporate law, and its implications for governance, accountability, and transparency in non-profit foundations, would also be valuable. Additionally, research on potential legal reforms could help enhance asset protection and ensure that the objectives of the Foundation Law are fully achieved.

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