

# The Dynamics of Adoptive Fathers as Marriage Guardians in Contemporary Studies

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**Abstract:** *Ulema* assert that adopting fathers are not categorized as *mahram* eligible to be marital guardians (*wali*). However, Balige Religious Court Decision No.13/Pdt.P/2020/PA.Blg has legalized such marriage. This study aims to analyze considerations of the judge beyond the decision. This normative legal research employed encompass statutory, case-based, comparative, and conceptual analyses. The findings of this study indicate that marriages wherein the adopting father assuming the role as the marriage guardian for the prospective bride may be considered invalid. In accordance with Islamic legal norms, the guardian of marriage typically consists of *wali nasab* (biological guardians) of the prospective bride. In instances where no guardian of *aqrab* or *wali ab'ad* is available, the judge guardian assumes this responsibility. However, the adopting father does not fall within the purview of marriage guardianship. Nonetheless, in certain scenarios, such as that delineated in the decision, the applicant (wife), being a *muallaf* (new converts), lacks a Muslim guardian, while a trusted Muslim authority in the locale, such as the mosque's *imam* or a respected *qadi*, is found to be his adopting father. In this specific instance, the adopting father fulfills the role of a religious figure within the community. Referring him as a local religious authority holder in this context is more appropriate due to his social role than as the adopting father at his family circle. Consequently, this marriage is deemed valid and the court's decision aligns with the Islamic jurisprudence.

**Keywords:** *adoptive father as guardian of marriage, contemporary studies, judge's ruling*

**Abstrak:** Para ulama menyebutkan bahwa ayah angkat tidak termasuk dalam kategori wali nikah. Namun, Putusan Pengadilan Agama Balige No.13/Pdt.P/2020/PA.Blg mengesahkan pernikahan ini. Penelitian ini bertujuan untuk menganalisis pertimbangan hakim Pengadilan Agama Balige yang mengesahkan ayah angkat sebagai wali nikah bagi anak angkatnya. Penelitian ini merupakan penelitian hukum normatif untuk menganalisis Putusan Pengadilan Agama Balige No.13/Pdt.P/2020/PA.Blg, pendekatan yang digunakan adalah pendekatan perundang-undangan (statute approach), pendekatan kasus (case approach), pendekatan komparatif (comparative approach), dan pendekatan konseptual (conceptual approach). Hasil penelitian ini menunjukkan bahwa akibat hukum nikah dengan wali nikah ayah angkat dapat dikatakan tidak sah pernikahannya. Sesuai dengan peraturan hukum Islam untuk menjadi wali nikah itu sendiri ialah *wali nasab* dari perempuan yang menjadi calon mempelai dan jika tidak ada baik itu wali *aqrab* dan wali *ab'ad* maka yang berhak menjadi wali nikahnya ialah wali hakim dan ayah angkat tidak termasuk ke dalam kategori wali nikah. Namun, pada kasus-kasus tertentu seperti yang terjadi dalam Putusan nomor 13/Pdt.P/2020/PABlg, bahwa Pemohon II (Istri) adalah seorang muallaf dan tidak memiliki wali *nasab* yang beragama Islam. Karena pernikahan ini adalah pernikahan sirri, maka yang menjadi walinya adalah tokoh muslim yang terpercaya di daerahnya, seperti imam masjid atau tuan *qadi* yang dipercaya di wilayah tempat tinggalnya. Dalam hal ini ayah angkatnya adalah tokoh agama di daerah tersebut. Status ayah angkat dalam kasus ini lebih tepat jika disebut sebagai tokoh agama setempat. Dengan demikian pernikahan ini adalah sah dan putusan pengadilan tersebut sudah sesuai dengan syariat Islam

**Keywords:** *Ayah angkat sebagai wali perkawinan, studi kontemporer, putusan Hakim*

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## Introduction

In contemporary society, there are instances where adoptive fathers assume the role of marriage guardians for their adopted children.<sup>1</sup> Such a scenario was validated by the Balige Religious Court through Decision Case Number 13/Pdt.P/2020/PA.Blg. This case pertains to a marriage validation application initiated by Applicant I and Applicant II, a married couple who solemnized their union on July 9, 2016, in Batusandar East Lumban Rau Village. They designated Applicant II's adoptive father as the marriage guardian, with the ceremony witnessed by two individuals, and a dowry of IDR 50,000 paid in cash. However, the official registration of their marriage at the Religious Affairs Office of Nassau District was impeded due to the absence of required administrative documents.<sup>2</sup>

Applicant I is legally recognized as a husband, while Applicant II holds the status of an unmarried woman. Their union is not prohibited by consanguinity, and there are no objections from any parties regarding their marriage. The couple has resided harmoniously in Batu Sandar, East Lumban Rau Village, and has never undergone divorce proceedings. Additionally, they have been blessed with a child. The purpose of the marriage petition was to facilitate the recording of their marriage at the Nassau Subdistrict Office of Religious Affairs, enabling them to obtain a Duplicate Book of Marriage Citations for administrative purposes.<sup>3</sup>

After careful deliberation, the panel of judges has granted the application filed by Applicant I and Applicant II. This decision was made following thorough consideration of all presented facts during the proceedings. The panel declared that the marriage between Applicant I and Applicant II, solemnized on July 9, 2016, in Batu Sandar, Lumban Rau Timur Village, Nassau District, Toba Samosir Regency, is legally valid and recognized. The guardian in this marriage is the adoptive father, not the guardian of *nasab* or the court-appointed guardian. Additionally, the panel ordered the applicants to register their marriage with the Marriage Registration Officer (PPN) at the Religious Affairs Office of Habinsaran District, Toba Samosir Regency. This step was taken to establish a solid legal foundation, enabling Applicant I and Applicant II to obtain a Duplicate Marriage Quotation Book for administrative purposes, including the management of Family Cards and other relevant needs.

In contrast, the East Jakarta Religious Court Decision Number No.1097/Pdt.G/2020/PA. JT annulled a marriage due to the absence of the biological father as the marriage guardian. In this case, it was discovered that the plaintiff's adoptive father acted as the marriage guardian, contrary to Islamic law, which stipulates that the wali *nasab* has the right to act as the marriage guardian. The adoptive father admitted to the Religious Affairs Office (KUA) that he was not the biological father of the plaintiff and was unaware that getting married without a proper guardian would render the marriage void due to a legal defect.<sup>4</sup>

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<sup>1</sup> Hasbi Umar, Husin Bafadhal, and Arnelli Darwita, 'Adopted Children in the Perspective of National Law and Islamic Law in Indonesia', *Journal of Social Research*, 2.7 (2023) <<https://doi.org/10.55324/josr.v2i7.1157>>.

<sup>2</sup> Ahmad Fauzi and others, 'Controversy of Adopted Children Status and Foster Father in the Marriage Process Based on Islamic Law Perspective', *Journal of Progressive Law and Legal Studies*, 1.02 (2023) <<https://doi.org/10.59653/jplls.v1i02.100>>.

<sup>3</sup> Ganti Siregar, 'Implementation of Minister of

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Religious Affairs Regulation No. 20 of 2019 Concerning *Taukil Wali Marriage*', *Jurnal Mahkamah: Kajian Ilmu Hukum Dan Hukum Islam*, 7.2 (2023) <<https://doi.org/10.25217/jm.v7i2.2792>>.

<sup>4</sup> Rusdiman Suaib and Ajub Ishak, 'The Existence of the

According to Islamic law, a marriage is deemed invalid if conducted without a proper guardian or if no guardian is present.<sup>5</sup> Consequently, such a marriage is void.<sup>6</sup> In Islamic jurisprudence, the annulment of such marriages is termed *fasakh*, meaning dissolution due to a flaw in the marriage process. This flaw may arise from the existence of a mahram relationship or from the failure to fulfill the prerequisites and conditions of marriage.<sup>5</sup>

Ibn Qudamah asserts that guardianship in marriage necessitates the presence of a marriage contract.<sup>6</sup> He contends that the hadith requiring a guardian's presence is general and applies universally, while the hadith mentioning only the need for permission is specific.<sup>7</sup> Therefore, the general hadith takes precedence over the specific one. Ibn Qudamah further argues that a guardian has the right to arrange a marriage for an immature girl, regardless of her consent, provided that compatibility is ensured. Conversely, Ibn Qayyim posits that besides compatibility, the woman's consent is essential for marriage.<sup>8</sup>

Scholars unanimously agree that the hadith "There is no marriage without a guardian" implies a firm requirement for a guardian's presence, as the term "لا"

indicates the negation of validity in its absence. However, the Hanafi school interprets this hadith differently, considering it to denote recommendation rather than obligation.<sup>9</sup> Nevertheless, the absence of a guardian renders the marriage contract invalid according to all schools of thought.<sup>10</sup>

Regarding the order of guardianship, the Maliki, Shafi'i, and Hanbali schools affirm the wali's pivotal role in ensuring the marriage's validity.<sup>11</sup> The Hanafi school deviates from this consensus by deeming a guardian obligatory for an immature bride or a mature woman with mental deficiencies. Additionally, the Hanafi school permits mentally sound and pubescent individuals to get married independently, provided there is compatibility, as the guardian reserves the right to nullify the marriage if inequality exists.<sup>12</sup>

The Hanafi school identifies the primary marriage guardians as relatives of the bride, followed by the ruler or his representative, typically the qadi, who acts on behalf of the Muslim community. In contrast, the Maliki school prioritizes the *wali mujbir*, such as the father or the person empowered by him, and the master of a slave. The Shafi'i school distinguishes between the *wali mujbir* and the non-*mujbir*, while the Hanbali school places emphasis on the father, followed by those authorized by him after his demise, and judges

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Role of Headman in Marriage Registration on the Case of an Adoptive Father in a Birth Certificate', *Al-Mizan*, 14.2 (2018) <<https://doi.org/10.30603/am.v14i2.831>>.

<sup>5</sup> Fadilah Syafitrah and Sia Khosyih, 'The Validity of The Marriage Guardian in The Case of Elopement in The Perspective of Islamic Law', *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam*, 10.1 (2023) <<https://doi.org/10.24252/al-qadau.v10i1.29867>>.

<sup>6</sup> Syaiful Hidayat, 'Wali Nikah Dalam Perspektif Empat Madzhab', *INOVATIF: Jurnal Penelitian Pendidikan, Agama, Dan Kebudayaan*, 3.2 (2017).

<sup>7</sup> Rizka Verawati, 'Wali Nikah Dalam Perspektif Hadits', *Skripsi*, 2020.

<sup>8</sup> Abd. Rasyid Sidiq, Rusli Rusli, and Syahabuddin Syahabuddin, 'Gender Analysis of Marriage Guardians in the Compilation of Islamic Law', *INTERNATIONAL JOURNAL OF CONTEMPORARY ISLAMIC LAW AND SOCIETY*, 3.1 (2021) <<https://doi.org/10.24239/ijcils.vol3.iss1.24>>.

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<sup>9</sup> Amirudin Nur Muhammad and Rohmah Maulidia, 'Posisi Perempuan Sebagai Wali Nikah: Metode Istinbath Hukum Khoiruddin Nasution', *Journal of Economics, Law, and Humanities*, 2.1 (2023) <<https://doi.org/10.21154/jelhum.v2i1.1155>>.

<sup>10</sup> Moh. Ali Abd. Shomad, 'Nikah Tanpa Wali dalam Perspektif Fikih Munakahah', *Ahkam: Jurnal Hukum Islam*, 3.1 (2015) <<https://doi.org/10.21274/ahkam.2015.3.1.95-110>>.

<sup>11</sup> La Ode Ismail Ahmad, 'Wali Nikah Dalam Pemikiran Fuqaha Dan Muhadditsin Kontemporer', *Al-Maiyyah*, 8.1 (2015).

<sup>12</sup> Irfan, 'Wali Nikah Pandangan Mazhab Hanafi Dan Syafi'i Tentang Wali Nikah Serta Relevansinya Dengan Undang-Undang No 1 Tahun 1974', *Al-Risalah*, 15.1 (2015).

as necessary.<sup>13</sup>

Despite scholarly consensus excluding adoptive fathers from the principal category of guardians,<sup>14</sup> Balige Religious Court Decision No.13/Pdt.P/2020/PA.Blg deviates from this view regarding marriage guardianship. Consequently, this study aims to analyze the rationale behind the Balige Court judge's decision to appoint the adoptive father as the guardian for his adopted child's marriage.

### Literature Review

The discussion surrounding marriage guardianship has indeed been extensively researched and documented. Nearly every jurisprudence book contains specific chapters or sections dedicated to the topic of marriage guardians, and this subject is also frequently addressed in comparative jurisprudence. Moreover, aside from conventional jurisprudence literature, studies on marriage guardianship can be found in various other forms of literature, including books and scientific papers.<sup>15</sup>

The comprehensive nature of research on marriage guardians reflects its significance within legal and societal frameworks. Scholars and researchers across different disciplines have explored various aspects of marriage guardianship, including its historical evolution, legal implications, and cultural interpretations. This multidisciplinary approach enriches our understanding of the complex role that guardians play in marriage arrangements and highlights the diverse perspectives

surrounding this topic.<sup>16</sup>

Furthermore, the abundance of literature on marriage guardianship underscores its practical relevance in contemporary legal systems and social practices.<sup>17</sup> By examining different perspectives, case studies, and legal frameworks, scholars contribute to ongoing discussions and debates regarding the rights, responsibilities, and limitations of marriage guardians. This body of research not only informs legal professionals and policymakers but also serves as a valuable resource for individuals navigating the complexities of marriage and family law.<sup>18</sup> Among them are studies that have been conducted by:

Rahma Yuni's study titled "The Views of the Kendayakan Village Community on the Status of Adopted Children in Relation to Their Adoptive Fathers: A Perspective from Islamic Law and Positive Law, UIN Sultan Maulana Hasanudin Banten," examines the perspectives of the Kendayakan village community regarding the status of adopted children in relation to their adoptive fathers, considering both Islamic law and positive law. The study reveals that the Kendayakan village community rejects the notion of adopted children having adoptive fathers as it contradicts Islamic principles. However, they accept adopted children within the community, reasoning that the adopted child may not be aware of their adoptive father's actions. Islamic law in Kendayakan

<sup>13</sup> F M Yunus and D Arlina, 'Pembatalan Nikah Karena Nikah Tanpa Izin Wali (Studi Terhadap Putusan Mahkamah Syar'iyah Sigli Nomor 246/Pdt.G/2012/MS-Sgi)', *Samarah*, 1.1 (2017), 101–28 <<https://doi.org/10.22373/sjhk.v1i1.1572>>.

<sup>14</sup> Suaib and Ishak.

<sup>15</sup> Ida Mufidah and Masruhan Masruhan, 'Studi Kritis Nikah tanpa Wali Kajian Tafsir Ahkam QS. AL-BAQARAH: 232', *FiTUA: Jurnal Studi Islam*, 2.2 (2021) <<https://doi.org/10.47625/fitua.v2i2.317>>.

<sup>16</sup> Oktaviani and Arif Sugitanata, 'Memberikan Hak Wali Nikah kepada Kyai: Praktik Taukil Wali Nikah Masyarakat Adat Sasak Sade', *Al-Ahwal*, 12.2 (2019), 161 – 172 <<https://doi.org/10.14421/ahwal.2019.12204>>.

<sup>17</sup> Abdul Aziz and Ghufron Maksun, 'Peluang Perempuan Menjadi Wali Nikah Di Indonesia', *Jurnal Al-Ashriyyah*, 5.1 (2019).

<sup>18</sup> Qathrun Nada and Ikililah Muzayyanah Dini Fajriyah, 'Authority Reformulation of Gender Equal Marriage Guardians: 4 Jurisprudence Schools Law of Marriage Guardians', *Interdisciplinary Social Studies*, 2.11 (2023) <<https://doi.org/10.55324/iss.v2i11.520>>.

village explicitly prohibits the adoption of children, including naming them as heirs.

Moreover, positive law also prohibits the adoption of children as it indirectly severs their ties with their biological family, contravening legal regulations. This legal stance is grounded in the belief that adoption can disrupt familial relationships and inheritance laws.

Rudisman Suaib and Ajub Ishak's article titled "The Role of the Penghulu in Marriage Registration: A Case Study of Adoptive Fathers on Birth Certificates," published in the *Journal of Islamic Legal Thought IAIN Gorontalo*, Volume 14, Issue 1, 2018, examines the involvement of the Penghulu (Islamic marriage officiant) in registering marriages involving adoptive fathers on birth certificates. Utilizing a qualitative descriptive research methodology with a juridical research approach, the study entails describing field observations and forecasting outcomes. It employs a juridical approach to analyze cases of adopted children listed on birth certificates in accordance with the law.

The primary objective of this research is to ascertain the role of the Penghulu in facilitating the registration of marriages between adoptive fathers and adopted children on birth certificates. By examining legal frameworks and conducting case analyses, the study aims to elucidate the responsibilities and legal implications of such registrations, particularly within the context of Islamic law.<sup>19</sup>

Sayuti Achmad Hadi's research explores the legal perspectives of Imam Shafi'i and Imam Abu Hanifa regarding marriage and guardianship. According to Imam Shafi'i, legal determinations are based on the Qur'an, Sunnah, consensus (ijma), and analogical reasoning (qiyas), which

collectively establish authoritative laws.

In contrast, Imam Abu Hanifa's perspective is influenced by the social context of his time, particularly in Kufa, where the customary age for marriage was between 18 to 22 years, considered more mature compared to Baghdad. In this context, women were deemed capable of making independent decisions about their lives, including marriage. Thus, Abu Hanifa argued that Muslim women have the right to marry without the consent or knowledge of their guardians.<sup>20</sup>

Additionally, the research touches upon the appointment of guardians in civil law, specifically addressing the guardianship of spouses who outlive one another, as outlined in articles 345-354 of the Civil Code. It also mentions provisions regarding guardianship appointed by parents through a separate will or deed, as stated in article 355, paragraph 1.

In Oktaviani Sri Rahayu's research, it is asserted that the validity of the guardian for an adopted child is typically determined by the guardian of *nasab* (lineage) as long as the latter's existence is known. This guardian cannot be substituted by anyone else unless the guardian of *nasab* is unknown. In such cases, the guardian of marriage can then be replaced by either the guardian appointed by the judge or the head of the application for the annulment of the marriage.

The research further suggests that if the marriage of the adopted child, who is under the guardianship of adoptive parents, is deemed invalid due to an invalid guardian, the adopted child can remarry by fulfilling the requirements stipulated in both the

<sup>19</sup> Suaib and Ishak.

<sup>20</sup> Yasfin Maulana Muhammad and others, 'Konflik Pemikiran Metode Istinbath Hukum Madzhab Hanafiyyah dan Syafi'iyyah dalam Hukum Nikah Tanpa Wali', *JURNAL AL-IJTIMAIYYAH*, 8.1 (2022) <<https://doi.org/10.22373/al-ijtimaiyyah.v8i1.13397>>.

Islamic Marriage Law and Marriage Law Number 1 of 1974.

To initiate the legal process for the appointment of an adoptive parent as the marriage guardian for an adopted child, an application for a marriage certificate must be submitted to the Religious Court within their respective jurisdictions. This legal step ensures that the marriage obtains legal validity and certainty in accordance with applicable laws and regulations.<sup>21</sup>

The difference between this study and previous studies is that both in terms of cases, places, and times of events are different from previous studies. In addition, this study seeks to analyze the judge's considerations which are considered different from the opinions of scholars regarding the law of adoptive fathers as guardians of their adopted children.

## Method

This research constitutes normative legal research aimed at examining various legal regulations and provisions concerning the religious and ethical perspectives regarding the role of adoptive fathers as guardians of marriage.<sup>22</sup> The research employs multiple approaches, including the statute approach, case approach, comparative approach, and conceptual approach.

The primary legal sources utilized in this research include Balige Religious Court Decision No.13/Pdt.P/2020/PA.Blg, as well as the Islamic Law Compilation (Kompilasi Hukum Islam) and various books of Islamic jurisprudence (*Fiqh*). These primary legal

materials serve as the foundation for analyzing the legal aspects of adoptive fatherhood and marriage guardianship.

In addition to primary legal sources, secondary legal materials are also incorporated into the research. These materials complement the primary sources and include relevant reference books, articles, theses, dissertations, online legal journals, dictionaries (specifically legal dictionaries), encyclopedias, and other relevant publications. These secondary data sources provide additional insights and perspectives on the subject matter.

Once the necessary data is collected, the research proceeds to conduct a thorough document study and analysis of the obtained data sources. This process involves examining and interpreting the legal provisions, court decisions, scholarly works, and other relevant materials to draw conclusions and insights regarding the role of adoptive fathers as guardians of marriage from both legal and ethical perspectives.<sup>23</sup>

## Results and Discussion

### Judge's Consideration of Balige Religious Court Certifying Adoptive Father as Guardian of Marriage

In countries with civil law traditions like France and the Netherlands, where the principle of precedent is recognized and applied, it is not accurate to suggest that judges have unrestricted freedom under the pretext of judicial independence when making decisions in concrete cases.<sup>24</sup> While

<sup>21</sup> S R Oktaviani, 'Tinjauan Yuridis Keabsahan Wali Nikah Anak Angkat Oleh Orang Tua Angkat Menurut Hukum Islam', *Jurnal Hukum Prodi Ilmu Hukum Fakultas ...*, 2016 <<https://jurnal.untan.ac.id/index.php/jmfh/article/view/19129>>.

<sup>22</sup> Ahmad Tholabi Kharlie and Windy Triana, 'Reforming Islamic Marriage Approaches and Impacts', *Al-Jāmi'ah: Journal of Islamic Studies*, 59.2 (2021), 255–86 <<https://doi.org/10.14421/ajis.2021.592.255-286>>.

<sup>23</sup> Theresia Anita Christiani, 'Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object', *Procedia - Social and Behavioral Sciences*, 219 (2016) <<https://doi.org/10.1016/j.sbspro.2016.05.006>>.

<sup>24</sup> Michèle Schmiegelow and Henrik Schmiegelow, *Institutional Competition between Common Law and Civil Law: Theory and Policy, Institutional Competition between Common Law and Civil Law: Theory and Policy*, 2014 <<https://doi.org/10.1007/978-3-642-54660-0>>.

it's true that no two cases are entirely identical, and judicial independence is essential, this does not mean that judges can disregard legal rules established in similar cases. The principle of precedent ensures consistency and predictability in judicial decisions, even though judges have some discretion in interpreting and applying the law.<sup>25</sup>

In the realm of formal law, judges do not have unfettered discretion in interpreting legal rules. However, in the realm of material law, judges have some flexibility in interpretation and in exercising *ijtihad* (independent legal reasoning). This flexibility allows judges to ensure that their decisions uphold principles of justice, legal certainty, and expediency.<sup>26</sup>

In the specific case of the Balige Religious Court, where Applicant I and Applicant II's marriage was conducted without the presence of the guardian of *nasab* or a guardian appointed by the government, but rather by Applicant II's adoptive father, the judge referenced the opinion of the *fiqh* expert Ibn Qudamah. According to Ibn Qudamah, if a woman lacks a guardian in her family or under a Muslim government, she may be married off by a just man with her consent.<sup>27</sup>

Furthermore, in cases where the adopted child is unaware of their biological parents, it is common practice for the

adoptive father to act as the guardian for the marriage of the adopted daughter. This practice is recognized and determined by religious court judges, as stated in an article by Anak Istilhaq from the Directorate General of Religious Courts (Badilag) of the Supreme Court. In such cases, the adoptive father assumes the role of the marriage guardian for the adopted daughter based on the determination of the religious court judge.

The Regulation of the Minister of Religious Affairs number 20 of 2019 provides clear guidelines regarding the appointment and requirements of marriage guardians in Indonesia.<sup>28</sup> According to Article 12 of the regulation:

1. The guardian of marriage consists of the guardian of *nasab* (lineage) and the guardian appointed by the judge.
2. The requirements for a guardian include being male, Muslim, *baligh* (mature), sane, and fair.
3. The order of guardianship is specified, starting from the biological father and extending to other male relatives in a hierarchical manner.
4. The guardian of *nasab* may delegate the authority to conduct *ijab qabul* (marriage contract) to qualified individuals, such as the Head of the District KUA (Office of Religious Affairs), *Penghulu* (Islamic marriage officiant), or other competent persons. If the guardian is absent, they can provide a letter of delegation before the designated authority.
5. The format of the guardian's letter of delegation is determined by a decree

<sup>25</sup> Annissa Rezki, RR Dewi Anggraeni, and Nur Rohim Yunus, 'Application of Civil Law Theory In the Termination of Custody of Adopted Children in Indonesia', *JOURNAL OF LEGAL RESEARCH*, 1.6 (2019) <<https://doi.org/10.15408/jlr.v1i6.15301>>.

<sup>26</sup> Eka Susylawati, 'The Acceptability of Active Judge Principle in Divorce Talak Cases of Religious Courts at Madura to Assure the Wife s Rights', *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial*, 14.2 (2019), 267–82 <<https://doi.org/10.19105/al-ihkam.v14i2.2435>>.

<sup>27</sup> Ach Syaifur Rizal, Samsul Arifin, and Mawardi, 'The Historicality and Purpose of Guardian Rules in Indonesian Islamic Family Legislation and Muslim Countries', *International Journal of Health, Economics, and Social Sciences (IJHESS)*, 5.3 (2023) <<https://doi.org/10.56338/ijhess.v5i3.3866>>.

<sup>28</sup> Fadli and Budi Juliandi, 'Negotiations between Positive Law and Islamic Law: Determination of Marriage Guardians at Idi Rayeuk Religious Affairs Office, Aceh, Indonesia; [Negosiasi Antara Hukum Positif Dengan Hukum Islam: Penetapan Wali Nikah Di Kantor Urusan Agama Idi Rayeuk, Aceh, Indonesia]', *Journal of Islamic Law*, 2.2 (2021), 268 – 283 <<https://doi.org/10.24260/jil.v2i2.329>>.

issued by the Director General.

In cases involving adopted children, the validity of the marriage guardian remains with the known guardian, unless the guardian is unknown, in which case the guardian of the marriage can be replaced by a judge or another guardian. If the adoptive parents act as guardians and their authority is deemed invalid, an application for the annulment of the marriage can be submitted to the Religious Court. Following the annulment, the adopted child can remarry by fulfilling the requirements of the Islamic Marriage Law and the Marriage Law Number 1 of 1974.<sup>29</sup>

To establish the validity of the adoptive parent's role as a marriage guardian for the adopted child, an application for marriage *itsbat* (validation of marriage) must be submitted to the Religious Court within their respective jurisdictions. This legal step ensures that the marriage obtains legal certainty regarding its validity.<sup>30</sup>

Based on the judgment of the Balige Religious Court, it is evident that any Muslim, regardless of background, position, or environment, is not prevented from entering into marriage. Islam emphasizes ease in such matters. In the case described, the woman involved is still eligible for marriage, and the guardian appointed is a trusted Muslim figure in her community, such as the imam of the mosque or a respected religious leader.

The determination of Balige Religious Court Decision Number 13/Pdt.P/2020/PA emphasizes the legal considerations made by the judges in resolving the *Itsbat Nikah* (validation of marriage) case submitted by the applicant parties. This case falls under

the jurisdiction of the Balige Religious Court, as it pertains to matters of marriage and involves Muslim petitioners residing in the Toba Samosir Regency.

The announcement of the application for *Itsbat Nikah* Number 13/Pdt.P/2020/PA.Blg. was made public on April 22, 2020. Following the announcement period, as stipulated by relevant regulations, and with no opposition from other parties within the specified timeframe, the petitioners' request was deemed valid for consideration.

The petitioners, identified as Petitioner I and Petitioner II, claimed to have entered into a marriage contract in Batu Sandar, Lumban Rau Timur Village, on July 9, 2016. The marriage guardian appointed was Applicant II's adoptive father, chosen by Applicant II herself. The marriage was conducted with the presence of witnesses and the payment of dowry.

Despite not being conducted by the guardian of *nasab* or the guardian appointed by the government, the Balige Religious Court recognized the validity of the marriage. This decision underscores the importance of ensuring ease and accessibility in marriage matters within Islamic legal frameworks while respecting the authority of trusted individuals within the community..

Based on the presented legal facts and considerations, the judge concludes that the adoptive father of Applicant II can indeed be appointed and recognized as the marriage guardian for Applicant II. The judge further determines that the application for marriage *itsbat* (validation of marriage) must be limited to matters specified under Article 7 paragraph 3 of the Compilation of Islamic Law. Therefore, it is necessary to verify whether the arguments presented in the petition align with the provisions of this article.

To support their argument, the

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<sup>29</sup> Fadilah Syafitra and Khosyi'ah.

<sup>30</sup> Dian Mustika and Siti Marlina, 'Integrated Marriage *Itsbat*: Analyzing The Polemics Behind Its Implementation', *Mazahib*, 18 (2019), 44-75 <<https://doi.org/10.21093/MJ.V18I1.1344>>.

petitioners provided two witnesses, witness 1 and witness 2, who fulfilled the formal requirements as stipulated by the law. Witness 1 testified that Petitioner I and Applicant II are married in Islam, have not divorced, and face no obstacles to their marriage according to Sharia law. Witness 2 corroborated this testimony, affirming that the marriage between Petitioner I and Applicant II was conducted in accordance with Islamic rituals, with the adoptive father of Applicant II serving as the marriage guardian.

Furthermore, the judge acknowledges that despite the marriage occurring after the enactment of Law Number 1 of 1974 concerning Marriage, it is not null and void. The judge believes that such marriages can be legalized under exceptional circumstances, provided they meet the requirements of harmony and do not contradict existing legislation, guided by the principle of expediency and legal protection.

Table 1. the determination of the marriage guardian and the validation of the marriage between Petitioner I and Applicant II.

Aspect	Summary
Marriage Guardian	The adoptive father of Applicant II is appointed as the marriage guardian for Applicant II.
Application Limitation	The application for marriage itsbat must adhere to matters specified under Article 7 paragraph 3 of the Compilation of Islamic Law.
Witness Testimonies	Two witnesses, witness 1 and witness 2, testified to the marriage between Petitioner I and Applicant II, affirming its legitimacy and adherence to Islamic rituals.
Marriage Validation Conditions	Despite occurring after the enactment of Law Number 1 of 1974 concerning Marriage, the marriage is deemed valid under exceptional circumstances.
Legal Principle	The validation of such marriages should uphold harmony and comply with existing legislation, guided by the principle of expediency and legal protection.

Table 1 provides a concise overview of the main points discussed in the text regarding the determination of the marriage

guardian and the validation of the marriage between Petitioner I and Applicant II.

In summary, the judge concludes that the marriage between Petitioner I and Applicant II, facilitated by the adoptive father as the marriage guardian, can be validated, considering the circumstances and adherence to legal principles..

### **Analysis of the Judge in Decision No. 13/Pdt.P/2020/PA.Blg Establishes Adoptive Father to Be Guardian of Marriage**

According to positive law, the Regulation of the Minister of Religious Affairs No. 11 of 2007, specifically in Article 18 paragraph (1) and Article 18 paragraph (4), addresses the role of adoptive parents as marriage guardians. It stipulates that an adopted child under the guardianship of adoptive parents must have their guardianship repeated through a judicial guardian. However, this regulation has been superseded by Regulation of the Religious Meter number 20 of 2019.

In the realm of formal law, judges are bound by procedural law and lack discretion in interpretation. Conversely, in material law, judges possess flexibility, including the ability to exercise *ijtihad*, to ensure decisions uphold justice, legal certainty, and expediency. The judgment of the Balige Religious Court emphasizes that any Muslim is entitled to marry, regardless of their background, facilitated by Islam's accommodating nature. Trusted figures within the community, such as the local imam or Tuan Kadi, can serve as guardians.

Marital guardianship is exclusively designated for the bride. While civil law addresses the guardianship of adopted children, specifically in articles 331 of the Civil Code and related statutes, legal consequences, including guardianship and inheritance, follow adoption. Upon adoption, adoptive parents assume

guardianship, inheriting all rights and obligations from biological parents, except for adopted Muslim daughters.

Neglecting the importance of selecting a suitable guardian in marriage can render marriages invalid. Guardianship can be delegated through *taukil*, serving as a deputy guardian. A valid marriage requires the guardian to have a legitimate lineage, as outlined in Article 21 of the Compilation of Islamic Law. If Article 21's guardianship order does not apply, the guardian can delegate guardianship to the judge, provided the original guardian consents. Additionally, guardians without direct lineage can serve as marriage guardians if appointed by the original guardian through *taukil*, witnessed by two individuals.

Article 2 of the Marriage Law stipulates that marriage is valid when conducted in accordance with the regulations of each religion and belief system. Further elaborating on marriage conditions, Article 6 of the Marriage Law outlines specific requirements. The Compilation of Islamic Law, in Article 14, specifies the prerequisites for a valid marriage, including the presence of a prospective husband, future wife, marriage guardian, two witnesses, and the exchange of *ijab* and *kabul*. Articles 19 to 23 of the Compilation of Islamic Law further detail the role of marriage guardians, emphasizing their significance in ensuring the legality of the marriage, with requirements including being Muslim, mentally sound, and of legal age. Marriage guardians encompass both the *wali nasab* and the guardian of the judge.

Different schools of Islamic jurisprudence hold varying perspectives on the role of marriage guardians. The Shafi'i School asserts that marriage without the permission of a guardian is invalid, while the Hanafi School does not mandate the use of a guardian in marriage. Some interpretations

within the Hanafi School deem marriage contracts pronounced by adult women as valid due to *ijab*. The Maliki School requires permission from a guardian or authorized representative for a woman to marry but does not necessitate the guardian's physical presence during the marriage contract. Conversely, the Hanbali School insists on the presence of the guardian during the marriage ceremony. Abu Hanifa's interpretation permits women to marry without a guardian, allowing them to marry themselves off or designate another individual as their guardian. However, the guardian retains the right to annul the marriage if deemed unsuitable.

As elucidated earlier, the Supreme Court, responsible for the technical development of the judiciary, acknowledges the existing laws and regulations pertaining to child adoption, especially concerning the adoption of Indonesian children by foreign nationals. While these regulations may be insufficient, several legal frameworks serve as references for judges in executing their primary duties in judicial power regarding child adoption. These include:

- a. Circular Letter of the Supreme Court of the Republic of Indonesia (SEMA) Number 2 of 1979, dated April 7, 1979, which outlines the legal procedure for submitting applications for ratification and/or adoption of children, along with their examination and adjudication by the court.
- b. Circular of the Supreme Court of the Republic of Indonesia (SEMA) Number 6 of 1983, refining the provisions of SEMA Number 2 of 1979, effective from September 30, 1983.
- c. Decree of the Minister of Social Affairs of the Republic of Indonesia Number 41 / HUK / KEP / VII / 1984, providing guidelines for the implementation of child adoption permits, effective from

June 14, 1984.

- d. Chapter VIII of Law Number 23 of 2002 concerning Child Protection, in effect from October 22, 2002.
- e. Circular Letter of the Supreme Court of the Republic of Indonesia (SEMA) Number 3 of 2005, effective from February 8, 2005, addressing child adoption issues following the earthquake and tsunami disasters in Aceh and Nias. This circular aimed to address the social problems arising from children losing their parents and foreign volunteers' desire to adopt them, which posed risks to the children's religious upbringing.
- f. Additionally, Islamic law dictates that the legal relationship between adoptive parents and adopted children is akin to that of foster parents and foster children, extending the familial bond without creating a blood relationship.

Moreover, Law Number 3 of 2006 amended Law Number 7 of 1989 concerning religious courts, granting religious courts the authority to adjudicate cases related to the determination of a child's origin and adoption according to Islamic law (Article 49 (a), paragraph 20). Certain precedents and court decisions, having legal authority, have guided subsequent judges in resolving similar cases over an extended period, reflecting established judicial practices.

According to Islamic law, the adoption of a child can only be justified if it meets the following conditions:

- a. Not severing blood relations between the adopted child and biological parents and family.
- b. Adopted children do not have the position of heirs of adoptive parents, but remain as heirs of their biological parents, nor do adoptive parents have the position of heirs of their adopted children.

- c. Adopted children may not use the name of their adoptive parents directly except as an identification of address.
- d. Adoptive parents cannot act as guardians in the marriage of their adopted children.

The marriage guardian of an adopted child whose parents are not known in marriage in the Compilation of Islamic Law and Shafi'i *Fiqh*. From the results of the analysis, it can be concluded that if the father is absent then his guardianship rights pass to his grandfather if there is. If her father and grandfather (*wali mujbir*) are not present, then turns to *wali ab'adnya* (*wali nasab* who is distantly related/*wali mukhtar*) with the adopted daughter. However, if the *ab'ad's* guardian is also absent, then the guardianship of the adopted daughter passes to the Hakim or Qādli in her stead. While the position (status) of adopted children according to the Compilation of Islamic Law is to remain as a legitimate child based on a court decision by not breaking the relationship of *nasab* / blood with his biological parents..

After the author interviewed the Judge who decided the case of *Istibat* Nikah number 13/Pdt.P/2020/PA.Blg. it was found that Applicant II (wife) at the time of marriage with Applicant I was a convert and widow with two children, Applicant II's first husband had passed away in 2015. Applicant II (wife is widowed and has two children) in Balige Religious Court Decision number 13/Pdt.P/2020/PA.Blg. Applicant II also with a previous marriage is still non-Muslim and not recorded in dukcapil, Applicant II's first husband passed away in 2015. Before marriage, Applicant II (wife) was a non-Muslim, a few days before the marriage with Applicant I (husband), Applicant II *Mualaf*. This is why the marriage guardian at the time of Applicant I's marriage with Applicant

II is the adoptive father of Applicant II because Applicant II's biological father has already passed away and is a non-Muslim. The guardian was made by Applicant II's adoptive father, although the appointment procedure between Applicant II and his adoptive father is not legally carried out in Court, only through customs in the Tobasamosir Regency area. Because the family of Applicant II is only Applicant II (wife) who converts, while the family of Applicant II (wife) is still non-Muslim. As for the women whose permission is recognized in marriage: The scholars agree that an adult widow is asked for her pleasure.

The area where Applicant I (husband) and Applicant II (wife) live from the Muslim community is far away (difficult area to reach); East Lumban Rau Village is the farthest village from the capital of Nassau District, which is about 16 kilometers. On Monday, September 19, 2022, the Balige Religious Court had a guest, namely the Head of the Balige Sub-District KUA, Mr. Hasiholan Gultom, S.Pd.I, for the purpose of his visit to discuss the law related to the Guardian Representative, which has been a difference in views between the Balige Sub-District KUA and the Balige Religious Court. Following this, the Balige Sub-District KUA visited the Balige Religious Court to discuss, the Balige Religious Court was represented by Bpk Sudarman, S.Ag., M.H as vice chairman and Public Relations of the Balige Religious Court, because of the phenomenon in the community of many married people (especially in the Toba and Samosir Regency areas) a woman who converted to Islam who married but her guardian was Christian (Protestant / Catholic), and they are married to the representative of the Imam of the Mosque, this certainly violates Islamic law and State law (PerMeNag No. 2 of 1987 jo. PerMeNag No. 20 of 2019).

From 'Aisha radhiyallahu 'anha, the Prophet sallallahu 'alaihi wasallam said, "There is no marriage except with a guardian. And the sultan (government) is the guardian for the one who does not have a guardian." (HR. Ahmad and Ibn Majah, ascribed by Shuaib al-Arnauth). From this explanation, it can be understood that the position of the guardian in the marriage of a convert in case No. 13/Pdt.P/2020/PA. Blg is just right. Because the family of Petitioner II (wife) has not yet become a Muslim. Because the harmony and conditions of marriage have been fulfilled. This marriage was supposed to be carried out in KUA, to be carried out by the guardian of the Judge. However, the rice has become porridge, Sirri's marriage has taken place and the two have had a child. Because of this, the two applied for *itsbat nikah*.

The adoptive father here does not belong to the guardian; he is someone else. However, since this woman does not have a Muslim guardian, this is much better. This means that it is unlawful if the non-Muslim family becomes the guardian of the marriage of a convert. What is more appropriate is indeed marriage in KUA, but this is the reality in society that sirri marriages still often occur. Sirri marriage that is carried out will be more appropriate if the guardian is not from wali *nasab* because wali *nasab* is still non-Muslim. Before legalizing the marriage, the Judge ordered an announcement to give the other party an opportunity that there may be a legal interest in the marriage to be legalized by the Court. It looks simple against this order to announce the legality of marriage. Once announced on the court notice board within 14 days from the date of announcement, it is deemed to have complied with the procedural law as ordered by Book II.

Table 2 summarizes various aspects related to the Judge's decision in Case No.

13/Pdt.P/2020/PA.Blg, which establishes the adoptive father as the marriage guardian. The analysis covers various elements, ranging from positive law governing the role of adoptive parents as marriage guardians, the judge's role in interpreting the law, to Islamic legal principles regarding guardianship and adoption. Additionally, the table highlights the legal frameworks related to child adoption, child protection laws, and the application of Islamic law in specific cases. The conclusion of the analysis emphasizes the importance of guardianship in ensuring the validity of marriage and the necessity of procedural compliance in legal announcements.

Table 2. Comprehensive analysis of decision no. 13/Pdt.P/2020/PA.Blg establishing adoptive father as marriage guardian.

Aspect of Analysis	Key Points	Implications/Conclusion
Positive Law	Regulation No. 11 of 2007 addresses adoptive parents' role as marriage guardians.  Article 18 outlines guardianship procedures for adopted children.	Regulation No. 20 of 2019 supersedes previous regulations.
Role of Judges	Judges have limited discretion in procedural law but flexibility in material law.  They can exercise ijtihad to ensure decisions uphold justice and expediency.	They can exercise ijtihad to ensure decisions uphold justice and expediency.
Marital Guardianship	Guardianship is essential for marriage validity and inheritance rights.	Delegation of guardianship can occur through taukil.

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Table 2 (continued)

Aspect of Analysis	Key Points	Implications/Conclusion
Marriage Law	Legitimate lineage is required for guardianship.  Article 2 stipulates marriage validity according to religious regulations.  Article 6 outlines specific marriage requirements.	The Compilation of Islamic Law details marriage prerequisites and guardian roles.
Islamic Jurisprudence on Guardianship	Different schools have varying perspectives on marriage guardianship.	Interpretations range from strict requirements to more flexible approaches.
Adoption Regulations	Various legal frameworks guide adoption cases.  Islamic law defines the legal relationship between adoptive parents and children.	Supreme Court circulars and government decrees provide procedural guidelines.
Child Adoption Laws	Law amendments grant religious courts authority over adoption cases.  Precedents and established judicial practices influence judges' decisions.	Precedents and established judicial practices influence judges' decisions.

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Table 2 (continued)

Aspect of Analysis	Key Points	Implications/Conclusion
Islamic Law on Adoption and Guardianship	Islamic law outlines conditions for adoption and guardianship.  Guardianship order follows specific lineage criteria.	Guardianship order follows specific lineage criteria.
Application of Islamic Law in Specific Case	Analysis determines adoptive father as marriage guardian based on lineage and circumstances.  Importance of guardian's religion highlighted for marriage validity.	Lack of legal procedure in appointment acknowledged, attributed to local customs.
Legal Announcement and Procedural Compliance	Judge's order for announcement ensures procedural compliance.	Announcement on court notice board fulfills procedural requirements.

## Conclusion

Based on the results of the discussion and after analyzing the material with various sources in the previous discussion, the author concludes that the legal consequences of marriage with the adoptive father's marriage guardian according to Islamic Law are contained in the Compilation of Islamic Law and also the majority of Muslim communities in Indonesia who apply the teachings of Imam Syafi'i scholars, then the marriage cannot be said to be a valid marriage. By the regulations of Islamic law Article 14 of the Compilation of Islamic Law, it is explained that the guardian of marriage is a pillar of marriage that must exist in a marriage, while the requirement to become a guardian of marriage itself is the wali *nasab* of the woman who is the prospective bride and if there is no guardian of aqrab and wali

ab'ad, then the one who has the right to be the guardian of marriage is the guardian of the judge and the adoptive father is not included in the category of marriage guardian. However, in certain cases such as what happened in Decision number 13/Pdt.P/2020/PABlg, Petitioner II (Wife) does not have a Muslim guardian, meaning that her guardian is haram to be the guardian of her marriage. So it would be better if the sirri marriage is carried out by a guardian who is Muslim and according to the requirements of the guardian in Islam. This woman can still marry, and the guardian is a trusted Muslim figure in her area, such as the imam of the mosque/tuan kadi who is trusted in the area where she lives. In this case, his adoptive father was a religious figure in the area. The adoptive father's status as a guardian in a marriage is bath application is more appropriate if he is referred to as a local religious figure. Thus this marriage is valid and the court ruling is by Islamic law

## Credit Authorship Contribution

**Fatima Zahara:** Conceptualization, investigation, Writing - Original Draft, and supervision. **Sukiati:** Methodology, resources, and Writing - Review & Editing.

## Declaration of Competing Interest

The authors declare no competing interests related to this study. No financial or personal conflicts of interest are present.

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