



**Mediation in the Settlement of Joint Marital Property Disputes:
A Study at Tanjung Karang Religious Court, Lampung**

Ermi Suhasti Syafei

Universitas Islam Negeri Sunan Kalijaga Yogyakarta

Siti Djazimah

Universitas Islam Negeri Sunan Kalijaga Yogyakarta

Email: ermi.syafei@uin-suka.ac.id

Abstract: In general, after a divorce, there are frequent disputes relating to joint marital property. The settlement of joint marital property disputes can be carried out by means of mediation applied through litigation (court) and non-litigation (outside court). The settlement of joint marital property disputes is one of the absolute jurisdictions of Religious Courts. However, the number of joint marital property cases successfully mediated in Religious Courts throughout Indonesia was 6.2% in 2018 and 5.5% in 2019. This paper describes the factors that cause unsuccessful mediation in settling disputes over joint marital property at Tanjung Karang Religious Court, Lampung. This empirical study utilizing a qualitative analysis and a normative juridical approach interviewed mediator judges, disputants, and advocates. The results showed that mediation in the settlements of joint marital property disputes at Tanjung Karang Religious Court in the last four years reached 15.1%, or in the low category. Factors that influenced the unsuccessfulness of mediation in joint marital property disputes at Tanjung Karang Religious Court consisted of the absence of the parties, the object of the disputes, and the intervention of third parties (families, friends, and lawyers).

Keywords: Mediation, Dispute, Joint Marital Property, Religious Court

Abstrak: Pada umumnya setelah adanya perceraian sering terjadi sengketa yang berkaitan dengan harta bersama. Penyelesaian sengketa harta bersama dapat dilakukan melalui proses mediasi yang dapat diterapkan melalui litigasi (pengadilan) dan nonlitigasi (luar pengadilan). Penyelesaian sengketa harta bersama termasuk salah satu kewenangan absolut Pengadilan Agama. Jumlah perkara harta bersama yang berhasil dimediasi di Pengadilan Agama se-Indonesia tahun 2018 sebanyak 6,2%, tahun 2019 sebanyak 5,5%. Tulisan ini mendeskripsikan factor-faktor penyebab ketidakberhasilan mediasi dalam penyelesaian sengketa harta bersama di Pengadilan Agama Tanjungkarang, Lampung. Penelitian empiris dengan analisis kualitatif dan pendekatan yuridis normatif ini mewawancarai hakim mediator, pihak yang bersengketa dan

advokat. Hasil riset menunjukkan bahwa implementasi proses mediasi dalam penyelesaian sengketa harta bersama di Pengadilan Agama Tanjungkarang dalam empat tahun terakhir sebesar 15,1%, termasuk kategori rendah. Faktor yang mempengaruhi ketidakberhasilan mediasi dalam perselisihan harta bersama di Pengadilan Agama Tanjungkarang adalah ketidakhadiran para pihak, objek sengketanya dan intervensi pihak ketiga (keluarga, teman dan pengacara)

Kata Kunci: Mediasi, Sengketa, Harta bersama, Pengadilan Agama.

Introduction

Joint marital property is property that are obtained jointly in marriage.¹ Joint marital property in the jurisprudence of the Religious Courts is the property acquired during the marriage period.² The principle of joint marital property in Indonesia is regulated in the 1974 Marriage Law, which is still applied in the Religious Courts and the District Courts.³

Disputes over joint marital property or personal property of the husband and wife shall be resolved by the Religious Courts (Article 88 of the Compilation of Islamic Law). Disputes in court that are resolved through mediation are assisted by a mediator judge from the court or a mediator from outside the court. In Islam, any peace effort involving third parties is called *taḥkim*. Article 4 paragraphs (1) and (2) of the Supreme Court Regulation Number 1 of 2016 state that the decision process which has permanent legal force shall be resolved through mediation. The obligation to undergo mediation aims to provide a solution based on the interests and needs of the parties involved. The implementation of mediation in court is guided by the Supreme Court Regulation No. 1 of 2016.⁴

Research on the effectiveness of mediation to resolve joint marital property disputes is very necessary considering the role of mediator judges in dealing with the disputes is not yet optimally performed. In 2018 only 6.2% of joint marital property cases were successfully mediated in Religious Courts throughout Indonesia.⁵ Various studies have discussed various ways to resolve

¹ Sudarsono, *Kamus Hukum*, Jakarta: Rineka Cipta, 2013, p. 160; Sayuti Thalib, *Hukum Kekeluargaan Indonesia*, Jakarta: UI Press, 1986, p. 84.

² Abdul Manan, *Aneka Masalah Hukum Perdata Islam Di Indonesia*, Jakarta: Kencana, 2006, p. 108.

³ Mark E. Cammack and R. Michael Feener, "Joint Marital Property In Indonesian Customary, Islamic, and National Law," in Peri Bearman, Wolfhart Heinrichs, Bernard G. Weiss (eds.), *The Law Applied: Contextualizing the Islamic Shari'a, a Volume in Honor of Frank E. Vogel*, London: Tauris, 2008, p. 92.

⁴ Supreme Court, Supreme Court Regulation of the Republic of Indonesia Number 1 of 2016 concerning Mediation in Court Procedure, (2016).

⁵ Tim Pokja Laporan Mahkamah Agung RI, *Laporan Tahunan Mahkamah Agung Republik Indonesia Tahun 2019*, Jakarta: Mahkamah Agung, 2019, p. 122. The number of cases

joint marital property disputes after a divorce. Judges' *ijtihad* (independent reasoning) to resolve joint marital property disputes at the Banda Aceh Sharia Court is subject to the Marriage Law No. 1 of 1974 and the Compilation of Islamic Law. In addition, the judges also based their decisions on the Qur'an and hadith, the opinion of the *fuqaha*' (Islamic jurists), the sociological conditions of the Acehnese people, the needs of the wives and children, and the agreement of the two litigants.⁶

However, there was a mediation process to resolve joint marital property disputes that followed the Supreme Court Regulation Number 1 of 2016, but it ended with mediation failure. The failure was mostly influenced by factors such as substance, structure, and legal culture.⁷ Veny reveals that disputes over joint marital property can be resolved through mediation, which can be carried out fast at a low cost.⁸ Still, the failure of the mediation process in joint marital property cases is often due to the lack of certified mediators in the Religious Courts. The large number of cases handled by the mediator judges has caused the mediation process fails to gain maximal results. Most mediator judges have not taken proper mediation training held by the Supreme Court of the Republic of Indonesia.⁹ Ideally, a mediator should have good communication skills and techniques so that the disputing parties are convinced with their abilities.¹⁰ There are only a few judges certified as mediators in every court in Indonesia.¹¹

In this case, Bahrn concludes that the role of the mediator judges at the Sharia Court of Banda Aceh City in handling joint marital property disputes after divorce was not optimally performed. The ability of the mediator judges to bridge the interests of the parties has not been maximized due to internal and external obstacles. The internal obstacles include high number of cases, limited

successfully mediated in 2018 was 4,258 of 68,475, in 2019 was 3,677 of 66,959 in religious courts throughout Indonesia.

⁶ Mursyid, "Ijtihad Hakim dalam Penyelesaian Perkara Harta Bersama di Mahkamah Syar'iyah Banda Aceh (Analisis dengan Pendekatan Ushul Fiqh)," *Ar Raniry: International Journal of Islamic Studies* 1, no. 2 (December 1, 2014), p. 317–46, <https://doi.org/10.20859/jar.v1i2.21>.

⁷ Abu Rahman Baba, "Efektifitas Mediasi Dalam Penyelesaian Sengketa Harta Bersama Di Pengadilan Agama Makassar," *Jurnal Syariah Hukum Islam* 1, no. 1 (2018), p. 1–15, doi.org/10.5281/zenodo.1242531. Access 20 September 2018.

⁸ Veny Rizky Indahsari, "Penyelesaian Sengketa Harta Bersama Melalui Mediasi," 2014, 14.

⁹ Muharromah Muharromah, Haerany Husaini, and Budimah Budimah, "Efektifitas Mediasi Dalam Perkara Pembagian Harta Bersama Akibat Perceraian Di Pengadilan Agama Palu Kelas 1A," *Jurnal Kolaboratif Sains* 1, no. 1 (October 15, 2018), <https://doi.org/10.31934/jom.v1i1.467>.

¹⁰ Reza Ahmad Zahid and Ahmad Badi', "Peranan Mediator Dalam Penyelesaian Sengketa Harta Gono-Gini Akibat Kasus Perceraian," *Legitima: Jurnal Hukum Keluarga Islam* 2, no. 2 (June 2020), p. 270–287. <https://doi.org/10.33367/legitima.v2i2.1247>.

¹¹ Interview with Joni Jidan on August 23, 2019.

number of mediator judges, lack of judge competence, and inefficient time for mediation, whereas the external obstacle is the lack of support from the involved parties and advocates. Efforts to prevent and overcome these obstacles in the settlement of joint marital property cases are disseminating mediation in accordance with the Supreme Court Regulation No. 1 of 2016 and participating in mediation training.¹²

There is a difference in the size of the joint marital property from one region to another. If there are differences of opinions and disputes regarding joint assets, the settlement must be submitted to the Religious Courts. At the Tanjung Karang Religious Court, the cases of joint marital property seem to follow the trend of the ever-increasing divorce rate, from 2 cases in 2016, 2 cases in 2017, 12 cases in 2018, to 17 cases in 2019. However, only a small proportion of joint marital property disputes could be resolved through a trial at this Court.¹³

Dispute on Decision No. 181/Pdt. G/2013/PA.Yk was resolved based on the concept of *sulh* of Al-Hujurat (49:10) and An-Nisā' (4:114 and 128), and the concept of *hakam* of An-Nisā' (4:35). The settlement of the case did not refer to Islamic inheritance law, but is resolved through *takharruj* or *taşāluh* based on the sincerity and consensus of the parties.¹⁴

The provisions of joint marital property in polygamy are regulated in Article 65 paragraph 1 of the Marriage Law; if a husband is polygamous, then his wives and children are obliged to get the same life guarantee. The second, third, and so on are not entitled to any existing property owned before marriage with the respective second, third, or subsequent wife. These wives only have the same rights over the property owned since their respective marriages. If the husband or wife is not responsible for or harms the joint marital property, then Article 95 paragraph 1 of the Compilation of Islamic Law stipulates that one person may request a religious court to place a confiscation of the property without a divorce application. During the bail period, the religious court allows one person to sell joint marital property for the benefit of the family.¹⁵

Djuniarti's research examined the provisions of the marriage law regarding joint marital property. Article 124 paragraph (1) and paragraph (2) of

¹² Bahrn Bahrn, Syahrizal Abbas, and Iman Jauhari, "Peranan Hakim Mediator dalam Penyelesaian Sengketa Harta Bersama Pasca Perceraian Di Mahkamah Syar'iyah," *Syiah Kuala Law Journal* 2, no. 3 (2018), p. 371–87, <https://doi.org/10.24815/sklj.v2i3.11718>.

¹³ SIPP - Sistem Informasi Penelusuran Perkara," n.d., http://sipp.pa-TanjungKarang.go.id/list_perkara/search.

¹⁴ Rini Fahriyani Ilham and Ermi Suhasti, "Mediasi dalam Penyelesaian Sengketa Waris: Studi Putusan No. 181/Pdt. G/2013/PAYk," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 9, no. 1 (2017), p. 67–86, <https://doi.org/10.14421/ahwal.2016.09105>.

¹⁵ Etty Rochaeati, "Analisis Yuridis Tentang Harta Bersama (Gono Gini) Dalam Perkawinan Menurut Pandangan Hukum Islam dan Hukum Positif," *Jurnal Wawasan Yuridika* 28, no. 1 (2015), p. 650–61, <https://doi.org/10.25072/jwy.v28i1.61>.

the Civil Code stipulate that a husband is obliged to handle his own marital property, and he may sell and transfer it without the intervention of his wife. Evi concludes that the premarital property obtained by a husband or wife before marriage can be used for the needs of the family. Premarital property is the right of each husband and wife and cannot be combined and cannot be owned.¹⁶

To date, research on mediation in the settlement of joint marital property disputes at Tanjung Karang Religious Court has not been carried out. The data used in this study include records of interviews with mediator judges, judges who handle joint marital property disputes, parties who carry out mediation, trial records, and decisions of the Tanjung Karang Religious Court. This study, collecting the data from 2016–2018, examined the factors that influenced the unsuccessful settlement of the joint marital property cases at Tanjung Karang Religious Court. The study used the juridical-normative approach with qualitative analysis.

Mediation in the Judiciary

In *Kamus Besar Bahasa Indonesia* (The Big Indonesian Dictionary), mediation is the process of resolving a dispute involving a third party. According to several conflict resolution experts, mediation is a process of agreement between the parties that involves a third party as a mediator.¹⁷ In the mediation process, a third party shall be neutral (impartial), so that the involved parties believe in the mediator's ability to determine a satisfactory agreement.¹⁸ Wirawan is of the view that mediation is a negotiation process between the conflicting parties who are assisted by a third party to seek mutual agreement.¹⁹ The Supreme Court Regulation of the Republic of Indonesia No. 1 of 2016 Article 1 paragraph (1) defines mediation as an agreement process between the parties that involves a third party as a mediator to resolve the dispute.²⁰

Based on several definitions of mediation presented, mediation can be defined as a conflict resolution process in which the disputing parties take the initiative to seek an agreement by involving a third party as a mediator. The third party shall be neutral or impartial to accommodate the needs of the parties, thus facilitating the mediation process. Mediation can foster trust so that the parties arrive at a mutually beneficial agreement. Mediation can be practiced in

¹⁶ Evi Djuniarti, "Hukum Harta Bersama Ditinjau dari Perspektif Undang-Undang Perkawinan dan KUH Perdata," *Jurnal Penelitian Hukum De Jure* 17, no. 4 (2017), p. 445–61, <https://doi.org/10.30641/dejure.2017.V17.445-461>.

¹⁷ Syahrizal Abbas, Agustina Arida, and Luthfi Aunie, *Mediasi Dalam Perspektif Hukum Syariah, Hukum Adat & Hukum Nasional*, Cet. 1, Jakarta: Kencana, 2009, p. 4.

¹⁸ Abbas, *Mediasi Dalam Hukum Syariah*, ..., p. 5.

¹⁹ Wirawan, *Konflik Dan Manajemen Konflik Teori, Aplikasi Dan Penelitian*, Jakarta: Salemba Humanika, 2013, p. 200.

²⁰ Supreme Court, Supreme Court Regulation of the Republic of Indonesia Number 1 of 2016 concerning Mediation in Court Procedure

civil cases such as in the areas of business, banking, contracts, family law, and inheritance.

The implementation of mediation in court is based from several articles: 154 RBg, 130 HIR, and 31 Rv which regulate the institution of peace. The mediation procedure was first regulated through the Supreme Court Regulation No. 2 of 2003. However, this regulation is considered imperfect because the judge examining the case is not allowed to be a mediator in the case he/she is handling. The Supreme Court Regulation No. 2 of 2003 was then amended into the Supreme Court Regulation No. 1 of 2008.²¹ Yet, this regulation still failed to meet expectations as the role of mediation was not optimal, and thus the Supreme Court Regulation No. 1 of 2016 was promulgated. This latest regulation aims to optimize the role of mediation in the litigation process in court to further success and especially to reduce the accumulation of cases in court.²²

The Supreme Court Regulation No. 1 of 2016 is expected to help the mediation process achieve justice and reach a settlement that is acceptable to both parties. The process and results of mediation use a consensus approach towards the disputing parties, and the mediator as a third party has no authority to impose a settlement. The civil procedure law (Article 130 HIR) clearly states that before examining a case, the judge examining the case is ordered to firstly conduct mediation (peace).²³

The Qur'an and hadith recommend a way to resolve such cases, which is through peace (*sulh*).²⁴ *Sulh* is an attempt to end the dispute by way of peace, which can be done in court (litigation) or out of court (non-litigation). *Sulh* can embody justice, satisfaction, and comfort in which neither side wins nor loses.²⁵ *Sulh* can be in a variety of forms including mediation, arbitration, negotiation, and adjudication, among others.

In Islam, *sulh* is a peaceful effort to resolve the dispute between the conflicting parties, as explained in the word of Allah in Surah Al-Hujurat (49:10).²⁶ Peace or *sulh* will process the settlement of cases faster because the parties themselves make the decisions (consensus) and there is no element of pressure or coercion from any third party. *Sulh* is a good way to resolve disputes

²¹ Rachmadi Usman, *Mediasi Di Pengadilan Dalam Teori Dan Praktik*, Jakarta: Sinar Grafika, 2012, p. 6.

²² Supreme Court, Supreme Court Regulation of the Republic of Indonesia Number 1 of 2016 concerning Mediation in Court Procedure

²³ Ibid.

²⁴ Syahrizal Abbas, *Mediasi Dalam perspektif Hukum Syariah...*, p. 157.

²⁵ Ibid., p. 159-160.

²⁶ Al-Hujurat (49:10)

إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا بَيْنَ أَخَوَيْكُمْ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُرْحَمُونَ.

Translation: The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy.

because it contains a noble value and includes actions that are approved and promised a great reward from Allah swt, based on Surah An-Nisa' (4:114).²⁷

One of the hadiths of the Prophet Muhammad explains that, “*Sulh* (peace) is something that shall exist among Muslims, unless peace that allows the forbidden or otherwise peace that forbids the allowed, and Muslims are bound by their promises, except promises that forbid the allowed or otherwise promises that allow the forbidden (At-Tirmidzi).”²⁸

The existence of *sulh* (peace) is also mentioned in Surah An-Nisā' (4: 128)²⁹ and (4:32),

وَلَا تَتَمَنَّوْا مَا فَضَّلَ اللَّهُ بِهِ بَعْضَكُمْ عَلَى بَعْضٍ

When a dispute occurs between humans, then the settlement through peace is better even though in their hearts there is still resistance to the decisions taken. However, peace does not produce feelings of resentment and emotion between the parties.

The mediation process assisted by a third party in Islam is known as *hakam* as stated in the word of Allah in Surah An-Nisa' (4:35). The verse recommends that in dispute resolution there is an intermediary or a third party as a mediator. The presence of a third party is very crucial in connecting the litigants. *Asbab an-nuzul* of this verse was a family dispute, but the concept of *hakam* can be practiced in other civil cases related to human rights such as inheritance cases.

Mediation in the Regulations of the Supreme Court No. 1 of 2008 and of 2016

As the implementation of mediation in the Supreme Court Regulation No. 1 of 2008 was considered not optimal, the Supreme Court Regulation No. 1 of 2016 came into force. In the Regulation No. 1 of 2008, the judges require the parties present at the first trial to carry out mediation. The parties shall determine the mediator at least two days after the trial. It is expected that the settlement of this case can be carried out quickly at an affordable cost. The

²⁷ An-Nisā' (4:114)

لَا خَيْرَ فِي كَثِيرٍ مِّنْ نَّجْوَاهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَاحٍ بَيْنَ النَّاسِ ۗ وَمَن يَفْعَلْ ذَلِكَ ابْتِغَاءَ مَرْضَاتِ اللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا

Translation: No good is there in much of their private conversation, except for those who enjoin charity or that which is right or conciliation between people. And whoever does that seeking means to the approval of Allah - then We are going to give him a great reward.

²⁸ Hadith Narrated by Tirmidzi 1370

²⁹ “An-Nisā' (4:128), ... وَالصُّلْحُ خَيْرٌ وَأُحْضِرَتِ الْأَنفُسُ الشُّحَّ ...”

mediator selected by the parties can originate from the court (a judge who is not a case examiner) or from outside the court (an advocate).³⁰

Mediation in the case examination is of high importance, and therefore, judges will always provide the parties the opportunity to carry out the mediation stage.³¹ The parties with good intentions are the main cause for successful mediation.³² In contrast, parties with ill intentions will delay the agreement during the mediation process. Thus, the parties need to gain insights and awareness that mediation will benefit them. Mediation involves two stages, namely pre-mediation and mediation process.

As the initial stage, pre-mediation includes the mediator prepares and organizes the steps in mediation. The steps prepared by the mediator are: contacting, coordinating, and explaining information about mediation to the parties; determining attendance, purpose of meeting, and time and place; and building rapport between the parties.³³

On the other hand, the steps of the mediation process involves the introduction of the mediator, presentation of the parties, problem identification, negotiation, provision of several alternatives, agreement, and closing the mediation process.³⁴ The mediator, with the agreement of the parties, can present an expert to help explain and direct if there are differences of opinions, and the expense is charged based on the agreement of the parties.³⁵

Mediation generally takes place for forty working days, and may be extended to fourteen working days with the agreement of the parties.³⁶ The results of the agreement are signed by the parties and strengthened in the form of a peace deed.³⁷ The final outcome of mediation can be applied following the agreement that the parties reconcile. The implementation of the agreement can be pursued through the court if one of the parties rejects the signed agreement. Yet, if the parties find it difficult to reconcile and there is no agreement, the dispute will proceed to the trial stage. At each stage of the trial, the judge shall recommend the parties to make peace before a decision is made. Opportunities for peace can be reached by the parties in the court of first instance,³⁸ the level of appeal, cassation, and review as long as the case being examined has not been

³⁰ Supreme Court, Supreme Court Regulation of the Republic of Indonesia Number 1 of 2008, Article 8.

³¹ Supreme Court, Article 7 Paragraphs (2) and (5).

³² Supreme Court, Article 12 Paragraph 1.

³³ Syahrizal Abbas et al., *Mediasi Dalam Perspektif Hukum*, ... p. 37.

³⁴ *Ibid.*, p. 44.

³⁵ Supreme Court, Supreme Court Regulation of the Republic of Indonesia Number 1 of 2008, Article 16 Paragraph 1.

³⁶ Supreme Court, Article 13 Paragraph 4.

³⁷ Supreme Court, Article 17.

³⁸ Supreme Court, Article 21 Paragraph 4.

decided.³⁹ Such mediation lasts for fourteen days.⁴⁰ If peace is reached, then the peace deed is drawn up by the court of first instance, ratified with the signature of the appellate panel, cassation and review within a maximum of 30 (thirty) working days from the date it is recorded in the case register.

There are several new rules in the Supreme Court Regulation No. 1 of 2016, one of which is the abolition of mediation before the case examination process does not result in the decision being null and void as stated in Article 2 paragraph (3) of the Supreme Court Regulation No. 1 of 2008. Article 4 of the Supreme Court Regulation No. 1 of 2016 details the cases that must be mediated and their exceptions, whereas the Supreme Court Regulation No. 1 of 2008 only mentions the types of cases in general in. In Article 4, exception cases can be resolved through voluntary reconciliation referred to in Articles 33 and 34.⁴¹ Mediation cannot be carried out if the case involves the authority of the ministries/institutions/agencies and state-owned/regional-owned enterprises (BUMN/BUMD) as the litigants, unless there is written consent to mediate.⁴²

The implementation of closed mediation between the parties is made easier through communication tools.⁴³ This can prevent those who do not attend the mediation process for reasons of long distance. In these provisions, during mediation, the parties are required to play an active role in attending the meeting in person.⁴⁴ The reasons for the absence of the parties can only be accepted if they are ill, under care, on professional duties, or are abroad.⁴⁵ Additional rules in this Regulation No. 1 of 2016 are: the good faith of the parties in the mediation process (Article 7), their legal representatives (Article 18), and the legal consequences if the parties have no good intentions (Articles 22 and 23). Mediation fees shall be paid by the parties with ill intentions as a sanction given by the panel of judges in the trial. If during the mediation process both parties show an attitude of not having good intentions, then the lawsuit submitted cannot be accepted.⁴⁶

In the Regulation No. 1 of 2008, mediators are performed by advocates, legal academics, and court employees such as clerks, secretaries, substitute clerks, bailiffs, substitute bailiffs, prospective judges, and other employees. This Regulation also rules the management of mediation in court to maximize the existence of mediation as an effort to resolve disputes. The mediator judge who

³⁹ Supreme Court, Article 21 Paragraph 1.

⁴⁰ Supreme Court, Article 22 Paragraph 1.

⁴¹ Supreme Court, Article 4 Paragraph 4.

⁴² Supreme Court, Article 32 Paragraph (2) Letter b.

⁴³ Supreme Court, Article 5 Paragraph 3.

⁴⁴ Supreme Court, Article 6 Paragraph 1.

⁴⁵ Supreme Court, Article 6 Paragraph 4.

⁴⁶ Supreme Court, Article 23 Paragraph 8.

succeeds in reconciling the parties will get more added value as a motivator for other judges to carry out their duties as a mediator optimally.

The provision for the length of the mediation process is shortened to 30 (thirty) working days, but the extension of the mediation is increased to 30 (thirty) days to provide an opportunity for parties who have not succeeded in reaching an agreement.⁴⁷ If the parties make peace, the agreement can be confirmed in the peace deed, or if the parties want the agreement not to be stated in writing, the lawsuit can be withdrawn. In this Regulation No. 1 of 2008, there are a total peace agreement and a partial peace agreement. The partial peace agreement occurs when some of the defendants agree with the plaintiff. Mediation is considered a failure if the plaintiff only partially agrees with the defendant.⁴⁸

The explanation above shows that there are differences between the implementation of mediation in the Supreme Court Regulation No. 1 of 2008 and that in the Supreme Court Regulation No. 1 of 2016. First, in terms of the implementation of mediation, the Regulation No. 1 of 2008 lasts for 40 days while that in the Regulation No. 1 of 2016 takes places for 30 days. Second, in terms of the presence of the parties, the Regulation No. 1 of 2008 states that the parties must attend mediation, whereas the Regulation No. 1 of 2016 states that the parties shall attend mediation, unless sick, under care, or living abroad because of duty (of the state) and professional demands. Third, in terms of good faith and sanctions, the Regulation No. 1 of 2008 has no provisions for good faith and sanctions, whereas the Regulation No. 1 of 2016 provides rules on good faith and sanctions for ill intentions.

Joint Marital Property in Positive Law and Islamic Law

1. Joint marital property in the Marriage Law No. 1 of 1974

Any asset acquired during marriage, either acquired by the husband or by both husband and wife, becomes joint marital property. The provisions for joint marital property are regulated in the Marriage Law No. 1 of 1974.⁴⁹ Premarital property is any asset obtained by either husband or wife before being bound by marriage, as gifts or inheritance. Article 35 paragraph (2) explains that each party has the right to use and seek premarital or inherited assets as well as to control their own assets even though the parties are bound as husband and wife in a marriage bond. Article 37 regulates joint marital property in the event of a divorce due to the dissolution of the marriage.

A wife is not required to accumulate wealth, but she is obliged to act in accordance with what her husband expects. In marriage, the integrity and

⁴⁷ Supreme Court, Article 24 Paragraphs (2) and (3).

⁴⁸ Supreme Court, Article 32.

⁴⁹ Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fiqh Munakahat Dan Undang-Undang Perkawinan*, Jakarta: Kencana, 2006, p. 184.

harmony of the family are not only about seeking for conjugal property. If a marriage follows the patrilineal customs, the premarital property of each party cannot be equalized, unless there are special agreements that regulate it.

2. Joint marital property in the Compilation of Islamic Law

The provisions regarding joint marital property are strengthened and detailed in Articles 85 to 97 of the Compilation of Islamic Law. Article 96 paragraph 1 explains that if a death occurs, part of the joint marital property becomes the right of the spouse who lives. Article 97 explains that the widower or divorcee is entitled to one-half of the joint marital property as long as there is no other agreement in the marriage.⁵⁰

The signs and affirmations of Surah An-Nisa' (4:32) are also explained in Articles 85-87 of the Compilation of Islamic Law. Article 85 describes that in joint marital there may be rights that belong to the husband or wife. Article 86 (1) explains that, in fact, in marriage there is no mixing between the husband's property and the wife's property; (2) the husband's property remains the right of and is fully controlled by the husband, and likewise, the wife's property remains the right of and is fully controlled by the wife.

Article 94 of the Compilation of Islamic Law mentions joint marital property in polygamous marriages. Joint marital property of a husband, who is polygamous with more than one wife as referred to in paragraph 1, is calculated at the time of the second, third, or fourth marriage contracts. The calculation aims to prevent any argument between the first, second, third, or fourth wives, and especially to anticipate inheritance disputes in the Religious Courts. However, polygamy without marriage registration will make it difficult for the family. If a dispute occurs, it cannot be processed legally as there is no evidence of the marriage taking place.

If the husband or wife commits an act that endangers or harms the joint marital property (e.g., gambling, drunkenness, or extravagance), one of the parties may request the Religious Court to place a confiscation of the property without a request for divorce. The Religious Court gives permission for the sale of joint marital property during the period of confiscation for the benefit of the family.⁵¹

3. Joint marital property in Islamic Law

Joint marital property in *fiqh* (Islamic jurisprudence) are also known as *shirkah*, which means *al-ikhtilath* (mixing) and partnership. The term "mixing" means that someone mixes his/her wealth with other people's property so that it

⁵⁰ Ibid., p. 185

⁵¹ "Harta Kekayaan dalam Perkawinan | Darmansyahteknisicomp," accessed on September 18, 2018, <https://darmansyahteknisicomp.wordpress.com/2018/04/06/harta-kekayaan-dalam-perkawinan/>.

is difficult to distinguish his/her own property.⁵² *Shirkah* is the partnership of two or more parties in capital and profits.⁵³ The legal basis for *shirkah* is the Qur'an, Sunnah, and *ijma'* (consensus of Islamic scholars) as stated in the word of Allah swt in Surah An-Nisa (4:12), "...they "all" will share one-third of the estate". Further, the Messenger of Allah saw said: "Indeed Allah says, "I am the third party of two people who are in union, as long as one of them does not betray. But if there is a traitor, then I am out of the union of the two." (HR. Abu Dawud)⁵⁴

The law of *shirkah amlak* according to the *fuqaha* means that ownership is individual, adjusted to the right of each. This indicates that a person does not have the right to control or use the property of his/her partner without permission because each has the same right. The law related to *shirkah amlak* is widely discussed in *fiqh* chapters on wills, inheritance, grants, and *waqf* (endowment).⁵⁵

Joint marital property and premarital property need to be distinguished in marriage. This distinction is necessary to determine the husband's or wife's share of the property. In inheritance, it is also necessary to determine the assets that can be categorized as inherited assets.⁵⁶

The term "joint marital property" in marriage, however, is not known in Islamic law although the *fiqh* books of the imams of the *madhhab* discuss the issue of *shirkah*. Islamic law, as described in Surah An-Nisa' (4:34), states that in marriage, a husband is obliged to provide for his wife and family, and a wife shall take good care of what her husband has given her.

There are many types of *shirkah* as well as different implementation of the distribution of joint marital property in local customs in Indonesia. In this context, joint marital property is categorized into *shirkah abdan* or *mufawadhah*. In Indonesia, the majority of husbands and wives both work to earn a living for their daily lives, for savings in old age, and for their children once they pass away. Furthermore, joint marital property is *shirkah mufawadhah* because of the cooperation between the husband and wife even though there are no restrictions. Assets acquired during the marriage are included in joint marital property, unless the property is obtained or received as a gift or inheritance. Gifts received by either husband or wife in particular are not included in joint marital property.

⁵² Abdul Ghufon Sapiudin, *Fiqh Muamalat*, Jakarta: Kencana Prenada Media Group, 2010, p. 127.

⁵³ Abdul Zaki, *Fiqh Empat Mazhab*, Bandung: Hasyimi, 2013, p. 251.

⁵⁴ Abid Bisri Musthafa, *Nailul Authar Syarh Muntaqa Al Akhbar Min Ahadits Sayyid Al-Akhyar*, Semarang: CV. Asy Syifa, 1994.

⁵⁵ Abdul Ghufon Sapiudin, *Fiqh Muamalat...*

⁵⁶ Otje Salman and Mustofa Haffas, *Hukum Waris Islam*, Bandung: PT Refika Aditama, 2010.

Partnership, generally, in *shirkah mufawadhah* is prone to fraud. However, partnership between husband and wife recognizes no fraud. This is because the cooperation between husband and wife is not a mere contract (*aqad*) at the time of the marriage agreement (*ijab* and *qabul*), but rather the marriage contract lasting forever. The partnership between husband and wife not only concerns with the material, but also the soul and offspring. There is no limit to the partnership between husband and wife, both in terms of time and efforts made in earnest for the family.

Mediation in the Settlement of Joint Marital Property Disputes at the Tanjung Karang Religious Court, Lampung

The Sharia Court established in 1975/1976 and led by K. H. Syarkawi is located at Jalan Cendana No. 5 Rawa Laut Tanjung Karang. Since 2005, the Tanjung Karang Religious Court has occupied a new building situated at Jalan Untung Suropati No. 2 Kedaton Bandar Lampung. The legal area of the Tanjung Karang Religious Court includes the city of Bandar Lampung, which is divided into 20 sub-districts and 126 urban villages, with a population of 1,167,101 people (based on 2016 data).

The Tanjung Karang Religious Court, a judicial institution under the Supreme Court of the Republic of Indonesia, is the executor of judicial power that administers court to uphold law and justice. Its main task is to adjudicate cases of marriage, inheritance, wills, grants, *waqf zakat*, *infaq*, *shadaqah*, and sharia economics. The Religious Courts at the first level have the authority regulated in Law Number 7 of 1989 in conjunction with Law Number 3 of 2006 concerning amendments to Law Number 7 of 1989 and also Law Number 50 of 2009 concerning second amendments to Law No. 7 of 1989 concerning Religious Courts.

The functions of the Religious Courts consist of: *first*, examining and adjudicating cases at the first level against cases under the authority of the Religious Courts; *second*, overseeing the conduct of the judiciary within its jurisdiction and supervising the behaviors of judges and other judicial officers; *third*, providing legal considerations and advice (Islamic Law) to government agencies, if requested; *fourth*, carrying out general administration, finance, and personnel as well as supporting the implementation of the main technical tasks of the judiciary and the administration of justice; and *fifth*, providing legal counseling, research services, as well as providing *itsbat* testimony for the *rukhat hilal* in determining the beginning of the *hijriyah* month.

The organizational structure of the Tanjung Karang Religious Court includes: *first*, Chief Judge, that oversees the judicial process, supervises the behaviors of judges and clerks, resolves execution problems and reports them to the Supreme Court, receives case handling reports, evaluates and reports to the Supreme Court, requests information on court procedures, fosters, gives

instructions, admonishes if deemed necessary, sets court fees, distributes cases to judges, gives permission to carry out decisions, evaluates reports on case handling carried out by judges and substitute clerks, sends periodic reports and evaluation results to the Religious High Court, and compiles legal data about decisions on important matters; *second*, Deputy Chief Judge, that carries out the duties of the Chief Judge in the absence of the Chief Judge and carries out the tasks delegated to him by the Chief Judge; *third*, Panel of Judges, that is tasked with setting trial days, examining and adjudicating cases, examining and hearing the parties and witnesses, being responsible for the minutes of the trial and signing them, expressing opinions in deliberation. Judges are obliged to sign the decision that has been pronounced in the trial, carry out guidance and supervision on the administration of justice at the Tanjung Karang Religious Court assigned to him, and administ legal decisions received from the Supreme Court and the Tanjung Karang Religious Court judges; *fourth*, the Registrar of the Class 1A Religious Court, that provides support in terms of technical and administrative procedures of the cases and completes letters related to the cases. The Registrar consists of the Junior Clerk of Applications, the Junior Clerk of Lawsuits, and the Junior Clerk of Laws; *fifth*, the Junior Clerk of Applications, that carries out administration related to applications; *sixth*, the Junior Clerk of Lawsuits, that carries out case administration related to lawsuits; *seventh*, the Junior Clerk of Laws, that collects, processes, and presents case data and reporting; and *eighth*, Secretary, that carries out support in terms of administration, finance, human resources, and facilities and infrastructure.

In addition, the Planning, Information Technology, and Reporting Subdivision performs the preparation of materials, programs and budgets, the management of information technology and statistics, and the monitoring, evaluation and reporting of documents; the Sub-Division of Personnel, Organization and Management conducts the preparation of materials for the personnel affairs, organizational arrangements, and administration; and the General and Finance Subdivision carries out preparations for correspondence, archives, equipment, household, security, protocols, libraries, and financial management.

The vision of the Tanjung Karang Religious Court is “to realize the Great Tanjung Karang Religious Court”. The missions include to realize justice that is simple, fast, low cost and transparent; to improve the quality of Judicial Apparatus Resources in the context of improving services to the community; to perform effective and efficient supervision and guidance; to implement effective and efficient judicial administration and management; and to strive for the availability of judicial facilities and infrastructure in accordance with applicable regulations.

Joint Marital Property Cases at the Tanjung Karang Religious Court in 2016-2018

Data from the Registrar of the Tanjung Karang Religious Court in 2019 showed that in a period of three years, from 2016 to 2018, the number of joint property cases resolved by the Tanjung Karang Religious Court was 16 cases, and based on the qualifications of all these cases, there were 3 amicable cases (18.7%), 1 case decided (6.3%), 4 cases rejected (25%), 2 cases not accepted (12.5%), 3 cases dropped (18.7%), and 12.5 cases were revoked (12.5%), while 1 case was deleted from the register (6.3%).

For three years (2016 to 2018), only 3 cases or 18.7% of all cases were successfully reconciled through mediation. Thus, it can be concluded that mediation as a way to resolve joint marital property disputes at the Tanjung Karang Religious Court had been less successful.

1. The Views of Mediator Judges on the Cases of Joint Marital Property

In principle, the parties or the principals have understood about mediation; however, some terms are better known by them as mutual discussion or deliberation. In addition, the motivating factor for the parties to trust and agree with the mediation results from mediator judges is because the parties believe that the mediators have the expertise (training/education) and are under the Judiciary Institution, and therefore, the mediators are more appropriate to mediate or negotiate.⁵⁷

Every case of joint property disputes is required to go through mediation first like any other cases in the Religious Courts. Even though the opposing party is only present at the final trial before the verdict takes place, the case still needs to be firstly mediated as stated in the Supreme Court Regulation Number 1 of 2008 Jo. Supreme Court Regulation Number 1 of 2016.

The steps taken by the mediators in mediating cases of joint marital property disputes include:

1. Reminding the parties of the good times when they were together and happy.
2. Reminding to apologize and forgive each other between the two parties.
3. Providing direction and advice regarding the conditions of the children or the affairs and interests of the children.
4. Reminding and directing that each share does not have to be in an equal amount. For example, 100 million may not be divided by two, but the share may be divided depending on the needs of the one with the heavier responsibility.

⁵⁷ Interview with Joni Jidan (Mediator Judge from 2008 to 2019) on Friday August 16, 2019, 12.30-15.00 at Tanjung Karang Religious Court

The time required in the mediation process is relative, depending on the mutual dispute between the two parties. In this sense, if an agreement is reached when directed once, then one mediation is sufficient. However, if arguments keep occurring, the mediator judge shall mediate for a maximum of three times mediation to get an agreement in the form of a peace deed. If no agreement is reached, then it proceeds to the trial. Mediation can only be performed when both parties are present. If one of the parties is not present until the verdict trial, then the mediation process will not be carried out. Although one of the parties is only present when the verdict is read, mediation must be firstly carried out and then it proceeds with the verdict hearing.

Mediation must always be sought first in the dispute resolution process because, in principle, peace is the main goal of every case or dispute in the Religious Courts. The success of mediation in joint marital property disputes can be achieved when the parties have an agreement, indicating that both parties are not concerned with their respective interests and egos and there is no outside intervention. Nevertheless, the mediation process for joint marital property disputes at the Tanjung Karang Religious Court had been mostly unsuccessful.

Among the joint marital property disputes in 2016, 2017 and 2018, one dispute was successfully resolved through mediation and obtained a peace deed, and one was successfully mediated but did not obtain a peace deed, in which both parties agreed to be together again making the dispute over their joint marital property revoked.

Disputes that can be reconciled through mediation are relatively low in number. This is because many of the parties have a dispute or file a lawsuit based on feelings of disappointment and anger. The majority of the parties feel that they are the most responsible and most influential in obtaining these assets. The selfishness of the parties and the large number of outside interventions have an impact on the lack of agreement through the mediation process in the Court.

The factors that influence the success of the mediation process include:

1. Attendance of the parties.
2. Dispute object.
3. The interests of children and the nature of tolerance of both parties.

The mediators encounter several obstacles in mediating, including: the absence of the parties, wherein not all parties are present during mediation, and thus, this greatly hampers the mediation process because it is carried out for the interests of the disputing parties; the unclear object or property of the dispute; and the intervention of lawyers or other third parties such as families and colleagues, which greatly affects the mediation process.

The mediators' efforts in dealing with these obstacles consist of trying to mediate, even though the parties are still given advice and directions to make peace in the trial, until an agreement is reached. The Court also carries out other efforts to reconcile the disputing parties, such as ordering the families or their

legal representatives (lawyers) to continue trying to reconcile the parties outside the Court.

2. The Views of Judges on Joint Marital Property Disputes

The majority of the parties who filed lawsuits in joint marital property cases to the Tanjung Karang Court in 2016-2018 were husbands. Of the joint marital property disputes registered for the 2017-2018 period, there is one case that was tried/decided, namely Case Number: 851Pdt.G/2017/PA.Tnk.⁵⁸ This particular joint property dispute, which was successfully resolved, obtained a decision after 13 trials with a period of August 21, 2017 – December 18, 2017.

In general, the factors that affect the length of the process of resolving disputes over joint marital property at the Tanjung Karang Religious Court include: *first*, the fast process, in which after deliberation and an agreement is reached outside the Court, legality is obtained in the Court; and *second*, the slow process, in which it is caused by: 1) the influence/intervention of third parties such as families and lawyers, 2) the unclear object in dispute (e.g., the object may belong to a third party/the gift of a third party/inheritance), for instance, the object of joint property is a house, but the building of the house is a gift or property of a third party, either parents, family, or outside parties, and 3) the selfishness of the parties who refuse to give in and still hold on to their principles.

The parties to a dispute are always directed to the mediation process by the judges. Efforts to reconcile remain the main reference for judges in dealing with joint property disputes following the concept of “*as sulhu khair*” (peace is very good, Surah An-Nisa 4:128) wherein the agreement of both parties in the dispute is a form of peace. If no agreement is found between the two, the judges will provide the best, fair and balanced solution or decision by taking into account the arguments put forward, and the authority of the object of the dispute.

The mediation process at the Tanjung Karang Religious Court had not been significantly successful as indicated by the number of cases being tried/decided at the Court. Nevertheless, the significant failure of mediation did not lie on the unsuccessful mediation process; yet, it was mostly caused by the parties or the husbands and wives who still held on to their respective beliefs and also the interventions from outside parties such as families and legal representatives of the parties. In mediation, the opinions and interests of the parties greatly affect the peace agreement; however, when each party cannot be reconciled, the mediator judge cannot enforce the agreement. Afterwards, the dispute is re-processed in court until the verdict is made.

⁵⁸ Interview with the judge of joint marital property dispute, A. Nasrul MD., Friday, July 12, 2019, at 12.00-15.00 at Tanjung Karang Religious Court

The efforts made by the judges to succeed the mediation process, thereby minimizing the settlement of cases of joint marital property disputes through trials at the Tanjung Karang Religious Court, are as follows: *first*, continuous efforts to direct for reconciliation to reach an agreement and peace in the trial, despite having completed mediation process through the mediator judge; and *second*, the effort to instruct the families and their legal counsels not to give directions that can distance the parties from the agreement.

The responses of the parties to the efforts made by the Tanjung Karang Religious Court in resolving joint marital property disputes through mediation are in the following: the parties tend to agree to follow the mediation procedures directed by the judge, and although the mediation obtains no agreement, the parties still accept every decision on the joint property dispute.

In terms of the role and existence of legal counsel for the parties related to mediation efforts in resolving joint marital property disputes at the Tanjung Karang Religious Court, the judges view that some of the lawyers of the parties, in fact, tend to intervene in the principal instead of directing it to peace. In addition, several lawyers often take advantage of longer trial periods because they are purely for profit. This indicates that the lawyers' services are paid by the principal per trial departure.

3. The Views of the Parties on the Case of Joint Marital Property

S (ex-husband) and A (ex-wife) had a number of assets acquired during their marriage. The joint marital property included one house worth around 2 billion rupiah, one house worth around 400 million rupiah (mortgage status and not yet paid off), and one car (unpaid status). After the divorce, the husband filed a joint marital property lawsuit in court.

Initially, S filed a lawsuit to the Court because at that time S wanted to apply for a top up loan at the bank. S had already applied for a loan twice at the bank with the guarantee of the house occupied by S (a house worth 400 million rupiah/mortgage) and was always approved. However, when S wanted to apply for a top up for the third time, the bank refused on the grounds that the house used as collateral was still a joint marital property. The bank would approve the loan if S had obtained the legality of a decision from the Court which stated that the house belonged to/in the name of S.⁵⁹

S hired a lawyer in filing the case with his ideas conveyed to the lawyer. Basically, S filed the lawsuit because he wanted to get legality for the sake of filing a top up at the bank. S only included in the lawsuit the house he currently occupied as S had a legal interest in it. The house occupied by his ex-wife and children was not included in the lawsuit. However, S went through a quite difficult process. Originally, A had wanted S to leave the house. S initially

⁵⁹ Interview with Mr. S (ex-husband) on August 23, 2019 in Bandar Lampung.

requested A to help S pay off the house that S currently occupied, but was flatly refused. S would bequeath the house to the children.

Prior to filing the lawsuit for the joint marital property case, S had conducted mediation to meet with party A. S had even made a statement letter explaining that the house he was currently occupying belonged to S, which was signed by party A. It turned out that the letter was still not valid for filing top up to the bank. The bank still expected a legal decision from the Court stating that the house belonged to and on behalf of S.

When mediated by the Court, S only needed legality. The ex-wife did not refuse because the value S sued for was smaller than what the ex-wife would gain. S received the Court's decision for three trials. S had then received a deed of decision stating that the house occupied was under S's name.

In this case, S has no particular opinion regarding the result of the Court's decision stating that the house belongs to S. S does not demand much, and there is no dispute from the lawsuit filed by S. Although S personally is not completely sincere about the house occupied by his wife and children, S has learned to let it go. For him, the most important aspect is that his economy has started to improve. The impact of the Court's decision for S is that he can re-apply for a top up, which has been approved, so that the house and car installments have been paid off and S can also pay the school fees for the children and can provide for their children's daily needs.

In terms of mediation, S views that mediation at the Court is not highly significant because the mediation is only a formality and the decision is actually final. S has already known what he wanted. However, he thinks that if the issue is related to a dispute or struggle in the lawsuit, mediation should indeed be needed. In his case, S had already given in, in the sense that S had relented not to sue all the joint marital property, but only sued those of his interests so that mediation did not take too long. If S also sued the house occupied by the ex-wife, then the mediation period would be even longer.

Analysis of Mediation in the Settlement of Joint Marital Property Disputes at the Tanjung Karang Religious Court, Lampung

Mediation is a form of dispute resolution in court before reaching the trial stage. Mediation aims to resolve disputes between the parties with the help of a mediator to realize a peace agreement. As dispute resolution by mediation places both parties in the same position, neither party loses nor wins.

The results of the study showed that within three years, from 2016 to 2018, there were 16 cases of joint marital property resolved by the Tanjung Karang Religious Court. Of 16 cases, three cases were successfully reconciled (18.7%). Thus, this finding suggested that mediation as an instrument in the settlement of joint property disputes at the Tanjung Karang Religious Court had been less successful.

In regard to the unsuccessful mediation, Fanani explains that the efforts to resolve disputes through mediation have several weaknesses, among others: *first*, mediation will only be effective if the disputing parties have the will to resolve disputes by consensus; *second*, the parties with ill intentions can utilize mediation as a tactic to delay dispute resolution; *third*, some cases cannot be mediated, especially those related to ideology and basic values; *fourth*, it is deemed inappropriate to use mediation if the main problem in the dispute is a matter of determining rights because disputes over rights must be decided by a judge, whereas mediation is more appropriate to resolve disputes related to interests; and *fifth*, normatively mediation can only be used in private law, not in criminal law.⁶⁰

When conducting mediation, the mediator judges at the Tanjung Karang Religious Court tend to position themselves as a judge before the trial. These judges have lack of understanding on the duties, roles and functions of mediators. For example, the judges often give a pessimistic attitude toward the mediation process. Some judges even consider that the duties and responsibilities as a mediator are a new burden. The mediator judges reveal that the judges principally have the responsibility to reconcile the parties as mandated in the legislation. However, they do not want to be mediators since the mediation process is generally long and time-consuming, and they also need to juggle between hearing cases and mediating other cases.

The mediator judges emphasize that the process of resolving cases outside the trial was very different from resolving cases in court. Combining the settlement of cases in court and outside of court will certainly requires its own expertise. The mediators at the Tanjung Karang Religious Court are the judges who examine cases, so they sometimes cannot separate their duties as a judge when mediating and during a trial. Although the roles of a mediator and a trial judge are both the responsibility of the judges, they still pose a tough challenge for the judges.

In this context, the judges' expressions are a picture of a lack of understanding about the essence and purpose of mediation. The routine task of judges is to resolve cases through a trial that is adjudicative in nature. As a result, when a judge gets the task to resolve the case through mediation, the judge finds it difficult. Eventually, the mediation process is considered a mere formality to fulfill the provisions of the legislation.

As stipulated in the Supreme Court Regulation Number 1 of 2008 Jo. Supreme Court Regulation Number 1 of 2016, every case submitted to the Religious Courts shall first undergo mediation carried out by a mediator judge, regardless of the issue of whether the mediation process is successful or not.

⁶⁰ Ahwan Fanani, *Pengantar Mediasi (Fasilitatif) Prinsip, Metode, dan Teknik*, Semarang: Fakultas Tarbiyah IAIN Walisongo, 2012, p. 27.

Mediation as one of the processes for resolving joint marital property cases must be conducted at an initial stage. In principle, peace is the main goal of every case or dispute in the Religious Courts which is charged or becomes the main task of the mediator judges or judges who are authorized in the case of the joint property dispute.

Mediation is a form of peaceful dispute resolution, or in other words, mediation is a peaceful effort in the context of resolving disputes between two parties. As a peaceful effort, mediation needs to be performed first before settlement through legal remedies or through a court hearing. In practice, this peace effort is carried out by a mediator judge by involving two disputing parties and/or their legal representatives. As peace efforts should always be carried out, the judge must direct the parties to reconcile even at the beginning of the trial. Regardless of success or failure, this effort is in line with the provisions of the Qur'an, Surah Al-Hujurat (49:10), "The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy".

Peace is one of the dispute resolution systems in Islam known as "*as sulh*", in addition to two other systems, arbitration (*at tahkim*) and court (*al qadha'*).⁶¹ Peace is a good intention in an effort to resolve disputes over joint marital property as there is an element of deliberation to find solutions to problems and provide contentment between the two disputing parties. The goodness of peace is as emphasized in Surah An-Nisa' (4:128), "...and settlement is best. And present in [human] souls is stinginess ..." as well as in the hadith, "*As sulh* (peace) is permissible between (for) Muslims, except peace which forbids what is allowed or allows what is forbidden. And Muslims shall fulfill the conditions that they have agreed upon, except for the conditions that forbid the allowed or that allow the forbidden."⁶²

The peaceful measures conducted by the mediator judges consist of approaching the parties, inviting deliberation, and directing that resolving disputes by taking the peaceful way is better, as well as ordering the families or their legal representatives (lawyers) to always try to reconcile the parties.

Another aspect that affects the mediation process is the intervention of lawyers, families, or friends of the parties who feel an interest in the issue of joint marital property disputes. Ideally, lawyers who are sometimes involved by one or both parties to the dispute should take steps that help their clients' dispute to be resolved quickly. The good intentions of the third party (lawyers or families) should be pursued from the beginning of the peaceful effort in the mediation process. However, due to material benefits, the third party often does

⁶¹ Suhrawardi K. Lubis and Farid Wajadi, *Hukum Ekonomi Syari'ah*, Jakarta: Sinar Grafika, 2012, p. 191-208

⁶² Hadith Narrated by Tirmidzi No. 1370

not take into account the interests of the parties, either in terms of time, material, or non-material (psychic) aspect.

Mediation performed by a mediator judge is carried out three times to get an agreement between the two parties. If an agreement is reached in one mediation, then a peace deed is drawn up. However, if the parties are still adamant about their respective egos, causing an agreement unable to be reached, then the mediation is repeated three times. This is intended as a consideration of the effectiveness and efficiency of various aspects. However, if up to three times a peace agreement is not yet reached between the two parties, the process will be continued in court.

To realize peace between the disputing parties, concrete steps are taken, from reminding the times of togetherness between the husband and wife, reminding to forgive each other between the two parties, directing to pay attention to the conditions and interests of children (if they have children), to reminding and directing that the distribution of joint marital property does not have to be divided equally in two, but rather it is necessary to consider the needs of each party, especially when in marriage they already have children and the children follow one of the parties.

However, not all mediation is a success. In other words, the number of disputes over joint property that have been successfully resolved amicably is still relatively low. This can be seen from the 16 cases of joint marital property disputes that were submitted in 2016 to 2018, only three cases were successfully reconciled with peace deeds made. The failure of these mediation efforts is influenced by several factors, such as the absence of the parties, the object of the dispute, and the intervention of third parties. Mediation involves two disputing parties, in this case the ex-husband and ex-wife. These two parties are one of the conditions that must exist in a contract or agreement. Thus, if one of the parties fails to present, the mediation process cannot run as it should.

Likewise, the object of the joint marital property dispute must also be clear, whether it is truly the joint marital property of the disputing parties, or whether there is no connection with other parties. The property shall not be a gift, a grant, or inheritance from parents. If the property is related to other parties, the mediation process cannot proceed as expected.

Conclusion

The number of joint property cases that could be successfully mediated at the Tanjung Karang Lampung Religious Court in 2016 - 2018 is relatively low. Only 3 out of 16 joint marital property cases can be resolved properly through mediation. This resulted in the disputes over the joint marital property to proceed to the Religious Court trial. The failure of this mediation has been affected by several contributing factors including the absence of the parties, the

object of the dispute, and the intervention of third parties (families, friends or lawyers).

The juridical considerations of the mediation in joint marital property cases at the Tanjung Karang Lampung Religious Court in 2016 - 2018 had generally been carried out in accordance with the Supreme Court Regulation Number 1 of 2016 concerning Mediation in Court Procedure. The *as-sulh* approach is a good effort in resolving joint marital property disputes as there is an element of deliberation to find solutions to problems and provide contentment between the two disputing parties.

References

- Abbas, Syahrizal, Agustina Arida, and Luthfi Aunie, *Mediasi Dalam Perspektif Hukum Syariah, Hukum Adat & Hukum Nasional*, Cet. 1, Jakarta: Kencana, 2009.
- , *Mediasi: Dalam Hukum Syariah, Hukum Adat & Hukum Nasional*, Jakarta: Prenada Media, 2017.
- Baba, Abu Rahman. "Efektifitas Mediasi Dalam Penyelesaian Sengketa Harta Bersama Di Pengadilan Agama Makassar." *Jurnal Syariah Hukum Islam* 1, no. 1 (2018).
- Bahrn, Bahrn, Syahrizal Abbas, and Iman Jauhari. "Peranan Hakim Mediator Dalam Penyelesaian Sengketa Harta Bersama Pasca Perceraian Di Mahkamah Syar'iyah." *Syiah Kuala Law Journal* 2, no. 3 (2018).
- Cammack, Mark E., and R. Michael Feener. "Joint Marital Property In Indonesian Customary, Islamic, and National Law." In *The Law Applied: Contextualizing the Islamic Shari'a, a Volume in Honor of Frank E. Vogel*. London: Tauris, 2008.
- Departemen Agama RI, *Al-Qur'an dan terjemahnya*, Bandung: CV Diponegoro, 2010
- Djuniarti, Evi. "Hukum Harta Bersama Ditinjau dari Perspektif Undang-Undang Perkawinan dan KUH Perdata." *Jurnal Penelitian Hukum De Jure* 17, no. 4 (2017).
- Fanani, Ahwan. *Pengantar Mediasi (Fasilitatif) Prinsip, Metode, Dan Teknik*. Semarang: Fakultas Tarbiyah IAIN Walisongo, 2012.
- Darmansyah, "Harta Kekayaan dalam Perkawinan", Accessed on September 18, 2013. <https://darmansyahteknisicomp.wordpress.com/2012/04/06/harta-kekayaan-dalam-perkawinan/>.
- Hadith Narrated by Tirmizi no. 1370.
- Ilham, Rini Fahriyani, and Ermi Suhasti. "Mediasi dalam Penyelesaian Sengketa Waris: Studi Putusan No. 181/Pdt. G/2013/PA.Yk." *Al-Ahwal: Jurnal Hukum Keluarga Islam* 9, no. 1 (2017).
- Indahsari, Veny Rizky. "Penyelesaian Sengketa Harta Bersama Melalui Mediasi," (2014).

- Interview with the judge of joint marital property dispute, A. Nasrul MD., Friday, 12/7-2019, at 12.00-15.00 at Tanjung Karang Religious Court, July 12, 2019.
- Interview with Mr. S (ex-husband) on August 23, 2019 in Bandar Lampung.
- Interview with Joni Jidan (Mediator Judge from 2008 to 2019) on Friday 16/8-2019, 12.30-15.00 at Tanjung Karang Religious Court.
- Lubis, Suhrawardi K., and Farid Wajadi. *Hukum Ekonomi Syari'ah*. Jakarta: Sinar Grafika, 2012.
- Manan, Abdul. *Aneka Masalah Hukum Perdata Islam Di Indonesia*. Jakarta: Kencana, 2006.
- Muharromah, Muharromah, Haerany Husaini, and Budimah Budimah. "Efektifitas Mediasi Dalam Perkara Pembagian Harta Bersama Akibat Perceraian Di Pengadilan Agama Palu Kelas 1A." *Jurnal Kolaboratif Sains* 1, no. 1 (October 15, 2018).
- Mursyid. "Ijtihad Hakim dalam Penyelesaian Perkara Harta Bersama di Mahkamah Syar'iyah Banda Aceh (Analisis dengan Pendekatan Ushul Fiqh)." *Ar Raniry: International Journal of Islamic Studies* 1, no. 2 (December 1, 2014).
- Musthafa, Abid Bisri. *Nailul Authar Syarh Muntaqa Al Akhbar Min Ahadits Sayyid Al-Akhyar*. Semarang: CV. Asy Syifa, 1994.
- Rochaeti, Ety. "Analisis Yuridis Tentang Harta Bersama (Gono Gini) Dalam Perkawinan Menurut Pandangan Hukum Islam dan Hukum Positif." *Jurnal Wawasan Yuridika* 28, no. 1 (2015).
- Salman, Otje, and Mustofa Haffas. *Hukum Waris Islam*. Bandung: PT Refika Aditama, 2010.
- Sapiudin, Abdul Ghufron. *Fiqh Muamalat*. Jakarta: Kencana Prenada Media Group, 2010.
- "SIPP - Sistem Informasi Penelusuran Perkara," [http://sipp.pa-Tanjung Karang.go.id/list_perkara/search](http://sipp.pa-TanjungKarang.go.id/list_perkara/search).
- Sudarsono, *Kamus Hukum*. Jakarta: Rineka Cipta, 2013.
- Supreme Court, Supreme Court Regulation Number 1 of 2008 concerning Mediation in Court Procedure, Jakarta: Mahkamah Agung, 2008.
- Supreme Court, Supreme Court Regulation Number 1 of 2016 concerning Mediation in Court Procedure, Jakarta: Mahkamah Agung, 2016.
- Syarifuddin, Amir. *Hukum Perkawinan Islam Di Indonesia: Antara Fiqh Munakahat Dan Undang-Undang Perkawinan*. Jakarta: Kencana, 2006.
- Thalib, Sayuti. *Hukum Kekeluargaan Indonesia*. Jakarta: UI Press, 1986.
- Tim Pokja Laporan Mahkamah Agung RI. *Laporan Tahunan Mahkamah Agung Republik Indonesia Tahun 2019*. Jakarta: Mahkamah Agung, 2019.
- Usman, Rachmadi. *Mediasi Di Pengadilan Dalam Teori Dan Praktik*. Jakarta: Sinar Grafika, 2012.

Wirawan. *Konflik Dan Manajemen Konflik Teori, Aplikasi Dan Penelitian*. Jakarta: Salemba Humanika, 2013.

Zahid, Reza Ahmad, and Ahmad Badi'. "Peranan Mediator Dalam Penyelesaian Sengketa Harta Gono-Gini Akibat Kasus Perceraian:" *Legitima: Jurnal Hukum Keluarga Islam* 2, no. 2 (June 2020).

Zaki, Abdul. *Fiqh Empat Mazhab*. Bandung: Hasyimi, 2013.