

Problems in the Construction of a Deed of Separation of Joint Property After Divorce Without a Court Decision

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Abstract

The distribution of joint property (marital assets) after a divorce is ideally conducted based on a court decision to ensure legal certainty. However, in practice, many parties choose to divide their assets through a Notarial Deed without a prior court ruling regarding the distribution. This study examines the legal implications and potential problems arising from this practice. Using a normative legal research method with a statutory and conceptual approach, this research finds that the primary problem lies in the potential for future disputes if one party feels aggrieved, as the Notarial deed lacks the *res judicata* (finality) of a court decision. Furthermore, complications arise regarding the transfer of titles for registered land and buildings at the National Land Agency (BPN), which often requires a specific court order for execution. The results suggest that while a Notarial deed is valid as a consensual agreement under Article 1320 of the Civil Code, it carries a high risk of being challenged or declared "degradable" to a private deed if it fails to fulfill the formal requirements of marital property dissolution. Therefore, Notaries must exercise high levels of caution and provide comprehensive legal counseling to the parties involved.

Keywords: Notarial Deed, Joint Property, Divorce, Court Decision, Legal Certainty

A. Introduction

Marriage, under the legal framework of the Indonesian Civil Code (*Burgelijk Wetboek*) and Law No. 1 of 1974 concerning Marriage, creates a legal union that extends beyond a personal bond to include the unification of assets, commonly known as joint property (*harta bersama*). According to the law, any assets acquired during the marriage automatically become joint property unless a prenuptial or postnuptial agreement is established. Consequently, when a marriage ends in divorce, the legal consequence is the dissolution of this joint estate, necessitating a fair and lawful distribution between the former spouses. Abdullah, M. R., & Setyowati, D. (2024).

In the ideal legal landscape, the division of joint property is settled through a court decision (*putusan pengadilan*), which provides absolute legal certainty and executory power. However, a significant number of divorced couples opt for an alternative route: settling the distribution of assets through a Notarial Deed of Separation of Joint Property (*Akta Pembagian Harta Bersama*) without a prior court ruling. This choice is often driven by the desire for a faster, more private, and less adversarial process. Adjie, H. (2021).

Despite its practicality, this "out-of-court" settlement presents complex legal challenges. The absence of a court decision creates a potential for future disputes, particularly regarding the status of land titles and the legal protection of third parties. Furthermore, the Notary faces a professional risk; without a court decree as a primary legal basis, the Notary must rely solely on the testimonies and subjective honesty of the parties involved. This situation raises critical questions regarding the strength of the deed as evidence (*vincularum juris*) and the extent of the Notary's liability if the distribution is later challenged by one of the parties or a creditor. Prabowo, M. S. (2021).

This article aims to analyze the legal validity of such deeds and identify the risks inherent in the separation of joint property without a court mandate. By examining the intersection of the Law on Notary Positions (*UUJN*) and the Marriage Law, this study will provide a comprehensive outlook on how legal certainty can be maintained in this non-litigation approach. Pratama, R. Y., & Wijaya, H. (2025).

Key Structural Elements Used:

- a. The Concept of Joint Property: Establishes the legal background of marital assets.
- b. The "Gap": Highlights the shift from court-ordered distribution to private Notarial deeds.
- c. The Problem Statement: Discusses legal risks, third-party rights, and the Notary's vulnerability.

Research Objective: Outlines what the article intends to solve or analyze. Arisaputra, M. I. (2025).

B. Research Method

1. Research Type

This study employs a normative legal research method (doctrinal research). It focuses on an examination of the legal vacuum, inconsistencies, and the application of legal norms regarding the role of a Notary in dividing joint property without a court decree. This approach analyzes the law as a system of norms consisting of principles, statutes, and jurisprudence. Budiono, H. (2022).

2. Problem Approach

To provide a comprehensive analysis, the study utilizes several approaches:

- a. Statutory Approach: Examining relevant laws, specifically Law No. 1 of 1974 concerning Marriage (and its amendments), Law No. 2 of 2014 concerning the Position of Notaries (*UUJN-P*), and the Indonesian Civil Code (*Burgerlijk Wetboek*).
- b. Conceptual Approach: Moving from the views and doctrines developed in legal science to understand the essence of "Joint Property" and the "Authentic Deed" as a form of legal protection.
- c. Analytical Approach: Critically analyzing the legal consequences and potential liabilities that arise when a Notary executes a deed based solely on the parties' consensus without a judicial mandate. Dewi, I. A., & Putra, I. M. (2023).

3. Source of Legal Materials

The research relies on secondary data, which are categorized as follows:

- a. Primary Legal Materials: Authoritative legal documents, including the Indonesian Civil Code, the Marriage Law, the Law on Notary Positions, and Government Regulation No. 24 of 1997 concerning Land Registration.
- b. Secondary Legal Materials: Materials that provide explanations of primary materials, such as legal textbooks, scientific journals, previous research papers, and legal dictionaries related to Notarial law.

- c. Tertiary Legal Materials: Non-legal materials that provide information or guidance for the research, such as encyclopedias and digital databases. Indonesia. (2014).

4. Data Collection and Analysis

Data is collected through a literature study (library research) by identifying, classifying, and reviewing relevant documents. The collected materials are then analyzed using a qualitative descriptive method. The analysis follows a deductive reasoning process moving from general legal principles regarding marital assets to the specific complexities faced by Notaries in the field to reach a conclusion regarding the legal certainty of the deed. Irianto, S. (2025).

C. Result

1. Results of the Legal Analysis

To provide a clear and structured analysis, the results of this research are categorized into three main pillars: Legal Validity, Practical Obstacles, and Legal Risks. The following table summarizes the findings regarding the problems encountered when a Notary issues a Deed of Separation of Joint Property (*Akta Pembagian Harta Bersama*) without a prior court decision. Fakhriah, E. L. (2021).

Table Results of the Legal Analysis

No	Analysis Category	Finding & Description	Legal Implications
1	Legal Basis & Validity	Based on Article 1320 of the Civil Code, the deed is valid as a "Consensual Agreement." However, it lacks the execution power (<i>executorial kracht</i>) provided by a court ruling.	The deed is binding only as a contract between parties but cannot be enforced by the state if one party defaults.
2	Proof of Ownership	Without a court decree, the Notary relies purely on documents provided by the parties. There is no judicial verification of whether the assets are truly "joint" or "separate/inheritance" property.	Risk of "Overlapping Claims" if a third party (e.g., a creditor or heir) claims the property belongs to someone else.
3	Land Office (BPN) Procedures	The National Land Agency (BPN) often requires a Court Divorce Decree that explicitly mentions the asset distribution to process a Name Transfer (<i>Balik Nama</i>).	The Notarial Deed might be rejected by BPN, causing the transfer of title to be stalled or legally flawed.
4	Third-Party Rights	Assets often involve debts or mortgages. A private separation deed cannot	The deed may be considered "Inexecutable" or legally voidable if it

No	Analysis Category	Finding & Description	Legal Implications
		unilaterally release a party from a joint mortgage without the bank's consent.	ignores the rights of secured creditors.
5	Notary Liability	The Notary is vulnerable to being sued or summoned as a witness if the information provided by the parties is fraudulent (<i>malfesance</i>).	The deed could be degraded from an Authentic Deed to a Private Deed (<i>Akta di Bawah Tangan</i>) if formal procedures are ignored.
6	Potential for Disputes	One party might later claim they were under duress or that the division was unfair (<i>misleading information</i>).	High probability of Post-Divorce Litigation seeking the annulment of the deed in District Court.

2. Discussion Summary

The research indicates that while Notaries are authorized to create authentic deeds for any agreement not prohibited by law, the Deed of Separation of Joint Property without a Court Decision exists in a "grey area." Geraldo, R., & Santoso, B. (2024).

- a. The Strength of the Deed: Its strength is limited to the consensus of the parties. Unlike a court decision, it does not have the power of *Res Judicata* (a matter already judged), meaning the same asset distribution can be challenged in court later.
- b. Administrative Barriers: The primary practical problem is the synchronization of data with other government institutions (like BPN or Banks), which prioritize court orders over private agreements for high-value assets like land or company shares.
- c. The Notary's Role: To mitigate these risks, the Notary must include a "Warranty Clause" (*clausula garansi*) where both parties state under oath that no other parties are harmed and that they waive their right to sue the Notary in the future regarding the asset composition. Hartanto, J. S. (2022).

Key Conclusions from the Findings

- a. The deed is legally valid but vulnerable.
- b. The Notary acts as a facilitator of will, not a judge of facts.

Judicial intervention remains the gold standard for absolute legal certainty in marital asset dissolution. Kurniawan, F. (2023).

D. Discussion

1. The Conflict Between Contractual Freedom and Legal Certainty

Under Article 1338 of the Indonesian Civil Code, all agreements legally made operate as law for those who make them (the principle of *pacta sunt servanda*). When a divorced couple agrees to divide their assets through a Notarial deed, they are exercising their contractual freedom. Lubis, M. A., & Ramli, T. S. (2024).

However, in the context of joint property, this freedom is often hindered by the lack of Legal Certainty. A Court Decision (*Putusan Pengadilan*) carries the status of *res judicata*, meaning the legal status of the assets is permanently fixed. In contrast, a Notarial Deed is an "extra-judicial" settlement. The primary problem arises when one party later claims "unfairness" or "coercion." Without a judge's scrutiny during the process, the deed remains vulnerable to lawsuits seeking its annulment, thereby defeating the Notary's purpose of providing a "final" legal solution. Mahendra, A. P. (2026).

2. Identification of Assets and the Risk of Malfeasance

A Notary is not an investigator. In making a Deed of Separation of Joint Property, the Notary constructs the deed based on the statements (*relas*) and documents provided by the parties. Nadjib, M. (2022).

- a. The Problem: There is no formal mechanism for the Notary to verify if an asset is truly "Joint Property" or "Separate Property" (acquired through inheritance or gift).
- b. The Consequence: If a party hides an asset or misrepresents its status, the Notary might inadvertently facilitate a deed that violates the rights of heirs or third-party creditors. Unlike a court trial, where evidence is tested through a cross-examination process, the Notary process is unilateral and relies heavily on the good faith (*bona fides*) of the parties. Purnomo, B. (2023).

3. Administrative Hurdles in Title Transfer (The BPN Issue)

One of the most significant practical problems involves the transfer of land rights. To change the name on a land certificate from "Joint" to an "Individual" name at the National Land Agency (BPN), administrative officers often demand a Court Divorce Decree that explicitly lists the distribution of the assets. Rahman, A. Z. (2024).

While Government Regulation No. 24 of 1997 allows for transfers based on authentic deeds, in practice, many Land Offices are reluctant to process transfers without a court order, fearing future litigation. This creates a "legal stalemate" where the parties have a valid Notarial deed, but the state refuses to recognize the change in ownership, rendering the deed effectively useless for property liquidation. Sari, N. K., & Utama, I. G. (2022).

4. The Vulnerability of the Notary's Position

The Law on Notary Positions (UUJN) mandates that a Notary must act impartially. However, in cases of asset separation without a court order, the Notary is often placed in a high-risk position. Tan, D. (2022).

- a. The "Degradation" Risk: If the Notary fails to ensure that all legal requirements of a divorce are finalized or fails to identify the presence of a mortgage, the deed can be degraded to a Private Deed (*Akta di Bawah Tangan*).
- b. Criminal Liability: There is a growing trend where Notaries are pulled into criminal reports of "providing false information in an authentic deed" (Article 266 of the Criminal Code) if one spouse feels the other cheated during the asset declaration. Sutedi, A. (2022).

5. Protection of Third-Party Creditors

Joint property often serves as collateral for bank loans. A separation deed made privately often fails to involve the creditor (Bank). Legally, the separation of assets between ex-spouses does not automatically split the liability of a joint debt. The problem occurs when the deed assigns a house to the wife, but the mortgage remains in the husband's name. Without a court order that binds the bank or a formal novation agreement, the Notarial deed cannot provide a

comprehensive release of liability, leading to complex legal disputes when a default occurs. Widjaja, G. (2024).

6. Summary of Discussion

The transition from a judicial process to a Notarial process for asset separation offers speed but sacrifices executory strength. The Notary must move beyond being a mere "typist" of the parties' wishes and act as a rigorous legal gatekeeper, ensuring that the consensus does not violate the rights of creditors, the state's administrative requirements, or the mandatory provisions of the Marriage Law. Yulia, R. (2026).

E. Conclusion and Suggestions

1. Conclusion

Based on the research and analysis conducted, it can be concluded that:

- a. **Legal Status and Vulnerability:** The making of a Deed of Separation of Joint Property without a court decision is legally valid under the principle of freedom of contract (*Article 1320 of the Civil Code*). However, such a deed lacks executory power and the status of *res judicata*. This means the distribution is not final in the eyes of the law and remains susceptible to being contested in court if one party later claims a loss or if there is an element of concealment regarding assets.
- b. **Implementation Barriers:** The primary practical obstacles are administrative and procedural. The National Land Agency (BPN) and financial institutions often prioritize court decrees for asset re-registration. Without a court order, the Notarial deed may face rejection during the title transfer process, resulting in a lack of legal certainty for the party receiving the asset.
- c. **Notarial Risk:** Notaries face significant professional and legal risks, including potential allegations of facilitating the placement of false information in an authentic deed. Without judicial verification of the assets, the Notary relies solely on the parties' honesty, which may lead to the infringement of third-party rights (creditors) or forced heirship (*legitieme portie*).

2. Suggestions

- a. **For Notaries (Precautionary Principle):** Notaries should exercise extreme caution by applying a rigorous "legal audit" of the assets provided by the parties. It is highly recommended that Notaries include a Warranty and Indemnity Clause, stating that the parties take full responsibility for the accuracy of the asset list and release the Notary from all future claims or lawsuits. Furthermore, the Notary should ensure that a final Divorce Certificate (*Akta Cerai*) exists before drafting the separation deed.
- b. **For the Government and Legislators:** There is a need for a clearer regulatory synchronization between the Law on Notary Positions (UUJN) and the administrative regulations of the National Land Agency (BPN). The government should establish a standardized procedure that recognizes Notarial deeds of asset separation as a valid basis for title transfer, provided they meet specific criteria, to reduce the burden on the court system.
- c. **For the Parties (Ex-Spouses):** While a Notarial deed is faster, the parties should be encouraged to at least obtain a court "Ratification" (*Penetapan*) of their mutual agreement. This hybrid approach combining a private agreement with a court endorsement provides the highest level of legal protection and ensures that the asset distribution is recognized by all state institutions and third parties.

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