

ESTABLISHMENT OF A LIMITED LIABILITY COMPANY BY HUSBAND AND WIFE USING JOINT ASSETS BASED ON THE PRINCIPLE OF CORPORATE SEPARATE LEGAL PERSONALITY

Dwi Fatma Antika¹, Dominikus Rato², Muhammad Ali³

¹ Faculty of Law, Jember University, Indonesia. E-mail: dwifatma13@gmail.com

² Faculty of Law, Jember University, Indonesia. E-mail: dominikusrato.fh@unej.ac.id

³ Faculty of Law, Jember University, Indonesia. E-mail: ali.fh@unej.ac.id

Abstract: The objective the research is to evaluate the legitimacy of a married couple's limited liability company. using joint assets, based on the principle of corporate separate legal personality, as well as the couple's liability concerning joint assets used as capital in the establishment of the company. This study implements a normative legal methodology combined with a conceptual and legislative approach. The first result discloses that the limited liability corporation created using joint assets is invalid, because these assets belong to a single legal entity, namely the husband and wife, as per Article 35(1) of the Marriage Law. Conversely, the law stipulates that a minimum of two distinct individuals is necessary to establish a limited liability company. Moreover, the company is a capital association, linked to the principle of corporate separate legal personality, which separates the founders' assets from the company's assets. When the couple uses joint assets as capital to start the business, the capital partnership fails to materialize. Second, the couple's liability for using joint assets as capital has legal implications for the founders' liability. Article 3 of the Limited Liability Company Law defines two types of liability: limited and full liability. The legal subject and capital partnership requirements are not met, so full liability is imposed.

Keywords: Limited Liability Company, Joint Property, corporate separate legal personality

INTRODUCTION

The economic growth of a country is influenced by the number of business increases by the community so that, to maintain economic stability, it is necessary for the state to establish legal regulations to provide certainty for business actors. Business activities by business people can be carried out independently or in groups in order to obtain a profit by creating a business entity. There are 2 (two) types of business entities, namely business entities in the form of legal entities, such as Limited Liability Companies and Cooperatives and not legal entities, such as Firma (Fa), Comanditter Vennootschap (CV) and Trade Enterprises (UD). The forms of business entities carried out by

business actors vary according to the interests of the founder. The limited liability company as a forum for business actors has advantages for running its business, including capital divided into shares, shares can be traded and the wealth of the legal entity is separate from the founder. First, the business capital consists of shares with a clear division, the form of these shares can be money or tangible or intangible objects that have value and have been recognized by the limited liability company. Secondly, these shares have a selling and buying value so as to facilitate the rotation of the economy in a limited liability company. Third, the separation between the personal wealth of shareholders and the wealth of the

company results in the application of the principle of corporate separate legal personality, where the responsibility of shareholders is only limited to the capital that has been deposited, thus protecting their personal assets from the risk of loss due to the company's debt.

The minimum number of founders required to establish a Limited Liability Company is two persons, evidenced by a notarial deed in Indonesian language in line with the provisions of Article 7 paragraph (1) of Law No. 40 of 2007 on Limited Liability Companies (Limited Liability Company Law). The meaning of "person" is a person in the sense of a human being with the status of Indonesian citizenship or the status of a foreign citizen, as well as a person in the sense of a legal entity of Indonesian or foreign origin. The principle in the establishment of a limited liability company emphasizes that there must be more than one shareholder whose legal act of establishing the company is proven by an authentic deed of establishment made by a Notary. This provision only explains people as humans and legal entities, however, it does not explain further regarding who is allowed or prohibited to become a founder. This minimum requirement of 2 (two) legal subjects is intended to provide capital into a single entity as a form of capital alliance based on an agreement.

Along with its development, a family business requires good management so that it is not uncommon for husband and wife to establish a limited liability company to develop their business image. The juridical consequence of this marriage has an impact on the property owned during the marriage bond is interpreted as joint property in line with the provisions, Article 35 paragraph (1) of Law Number 1 Year 1974 concerning Marriage (Marriage Law). The use of joint property resulting from marriage must have the consent of the husband and wife. This shows that

collectively the joint property belongs to the husband and wife so that its use must also be mutually known and agreed between the two parties.

The establishment of a Limited Liability Company by a husband and wife raises problems in practice because there are differences in principles held in the UUPT which requires a minimum of 2 (two) different legal subjects to fulfill the elements of the agreement and capital alliance in line with the principle of corporate separate legal personality whereas, the Marriage Law regulates the unification of property during marriage into joint property owned so that it becomes a single legal subject in the ownership of that property. Thus, a more in-depth study is needed regarding the validity of the use of joint assets in the establishment of a limited liability company and the responsibility for the use of joint assets used as capital for the establishment of a limited liability company by husband and wife.

The following previous research as reference material, namely first, research results from Ermia Zanasri, Zainul Daulay, Busyra Azheri 2019 with the title "Legal Implications of Limited Liability Companies Established by Husband and Wife Against Joint Assets in Marriage" the focus of this research is the establishment of a limited liability company by a husband and wife can be done on condition that there is a marriage agreement that regulates to separate assets so that they become 2 (two) legal subjects to fulfill the requirements in the UUPT and the position of the husband and wife's assets in a limited liability company in the event of divorce if there is a marriage agreement, limited to the amount of capital deposited at the beginning of the establishment whereas, in the absence of a marriage agreement, it is personally responsible, if someone dies, the shares can be inherited to one of the husbands or wives if both die,

inheritance occurs to the heirs. Second, research by Widya Elfareda Putri, Hamida and Sumriyah entitled “Establishment of a Limited Liability Company by Husband and Wife with Joint Assets Capital and Its Legal Effects” 2024, the focus of this research is the legal implications that arise when a husband and wife do not have a marriage agreement, namely both will be considered as one legal subject who is fully responsible for all legal consequences of the company's activities.

METHOD

Studies, therefore using a statutory approach and conceptual approach as a basis for solving legal issues by examining applicable regulations linked to the legal concepts behind them. The statutory approach is an approach that uses laws and regulations by examining all existing laws and regulations which are then related to the legal issues that occur. Conceptual approach is an approach that makes concepts as a reference for research by not deviating from the applicable laws and regulations. This research uses descriptive analysis techniques which, to analyze by being linked to the issue being studied.

ANALYSIS AND DISCUSSION

A. Legality of Limited Liability Company Established by Husband and Wife using Joint Assets based on the Principle of Corporate Separate Legal Personality

Perseroan Terbatas originated from the composition of 2 (two) phrases “company” and “limited”, the phrase company is interpreted as sero-sero or shares as the embodiment of further capital, the phrase limited shows the responsibility of shareholders to the company is narrow which is only the entire nominal value of the shares owned. The shareholder is the person who owns the

shares while the company is the company that issues the shares. Limited Liability Company is defined as a form of legal entity from capital formed from the participation of a number of shareholders, with the characteristics of limited liability of shareholders which is only up to the nominal amount of shares owned, including the authorized capital that has been placed and paid up.

The Limited Liability Company Law, in particular Article 1 point 1 explicitly sets out the criteria that must be met by every Limited Liability Company legal entity, including: the existence of a capital alliance, its establishment is based on an agreement, has business activities to obtain profit, capital is in the form of shares and all of these are regulated in this law itself and the implementing regulations. The legal entity in the form of a Limited Liability Company in legal science is referred to as a legal subject that has rights and obligations as a human legal subject, this is supported by “persona standi in judicio” which means that the company can stand alone with inherent rights and obligations to do something and has personal wealth like a human being as a person. The provisions of Article 7 of the Company Law stipulate a number of requirements that must be met for the validity of the establishment of a Limited Liability Company, among others:

- 1) Requires that there be at least two founders;
- 2) There is an agreement
- 3) The establishment is bound through a notarial deed in Indonesian language;
- 4) The acquisition of shares by the founders is done when the company is established;

- 5) Obtain authorization from the Minister of Law and Human Rights.

The Company is valid and obtains legality as a legal entity if the conditions for establishing a limited liability company have been fulfilled. These requirements are not alternative but cumulative, i.e. they are mutually relevant. If one of these requirements cannot be fulfilled then, the establishment of this Limited Liability Company has no legal force, due to the non-fulfillment of the requirements for the formation of a legal entity.

The establishment of a Limited Liability Company begins with a minimum number of founders of 2 (two) people jointly establishing a limited liability company by making an agreement. Husband and wife are 2 (two) legal subjects, namely individuals who are bound in a marital relationship. Marriage has legal consequences, one of which is property in marriage as stipulated in Article 35 paragraph (1) and Article 36 paragraph (1) of the Marriage Law, which basically means that the wealth obtained during the marriage bond has a joint ownership status so that the husband and wife use the wealth based on their agreement. The legal concept of joint property comes from an alliance built through marriage, during marriage the property obtained becomes a unit that is jointly owned therefore, it is considered as a single legal subject.

Agreement is the legal basis for the establishment of a Limited Liability Company, detailed arrangements regarding the establishment agreement there are no specific rules within the framework of the Civil Code (KUHPerdata) however, the scope of the agreement is regulated in Book III of the Civil Code. An agreement is made by at least 2 (two) persons who are willing to be bound by each other's actions. This confirms that the legal action is carried out

by only one person or one legal subject, so the elements of the agreement are not fulfilled so that it cannot be said that the action is a binding agreement. The basis for binding the parties is the equality of purpose or will as part of the conditions for the validity of the agreement stipulated in Article 1320 of the Civil Code as follows: agreement of the parties, the capacity to perform, certain things, and halal causes. In the context of the establishment of a Limited Liability Company, the agreement is an agreement between the parties to form a capital partnership in order to run a joint business. The use of joint property of husband and wife to establish a limited liability company without the consent of one of the parties is clearly contrary to the terms of this agreement, strengthened by an agreement that is born on the basis of agreement or consensus. The birth of an agreement is carried out by a minimum requirement of two people, namely husband and wife, without the separation of assets or a marriage agreement resulting in one legal subject acting so that it does not meet the requirements for the validity of the agreement.

A legal entity that has a personality like a human being and has independent wealth for the benefit of a limited liability company is a privilege with other forms of business entities. The principle of corporate separate legal personality in a limited liability company indicates a strict separation between the company's assets and the personal assets of the shareholders and management. Separate entity (separate entity) from the assets of a limited liability company results in liability in the event of a loss limited to the assets of the company itself not personally the assets of the founders or management of the company. Based on the description above, the principle of corporate separate legal personhood means that the company is an independent personality, has independent wealth, acts on its own behalf,

separate from the personal interests of the founders. The implementation of the principle of corporate separate legal personality is reflected in Article 3 paragraph (1) of the Company Law which states that on behalf of the company that acts and suffers losses, the responsibility of a shareholder or founder is only up to the nominal amount of shares owned and does not exceed this value.

The separation of wealth between the shareholders and the limited liability company is intended to anticipate the actions of the shareholders to abuse the authority for the personal interests of the founders if it is related to husband and wife using joint property is explicitly not prohibited in the UUPT, the problem was born because the legal consequences of marriage on property during marriage become joint property so that it does not meet the requirements for the establishment of a Limited Liability Company. The ownership status of joint property can be changed to private ownership through arrangements in a marriage agreement. Based on the opinion of Soetojo Prawirohamidjojo, a marriage agreement is a pre-marital contract or during marriage with the purpose of making it regulate all matters, both and obligations related to property. The marriage agreement in Article 29 of the Marriage Law paragraph (1) is implemented before the marriage bond, however, there are changes after the birth of the Constitutional Court Decision No.69 / PUU-XIII / 2015 the marriage agreement may be implemented during the marriage.

B. Husband and Wife's Responsibility Related to Joint Assets Used as Capital in the Establishment of a Limited Liability Company

Starting a business activity requires capital as well as in the establishment of a

limited liability company to conduct business activities, one of the requirements is capital. The establishment of a limited liability company divides capital into three types, namely authorized capital, issued capital, and paid-up capital. As a condition of establishment, a limited liability company must have capital, the amount and type of which are determined in the articles of association. The definition of the articles of association focuses on the entire amount of capital value as "pure nominal value." Articles 31 and 34 paragraph (1), as well as the explanation of Article 34 paragraph (1), regulate the source of capital in a limited liability company, which is in the form of shares. Shares can come from money or tangible or intangible objects recognized by the limited liability company as something of value.

One of the requirements for the establishment of a company is the existence of authorized capital derived from the total value of shares with a minimum value of Rp.50,000,000.00 (fifty million rupiah). Valid proof of deposit must show the issuance and full payment of at least 25% (twenty-five percent) of the authorized capital that has been issued and fully paid. In addition, any increase in issued capital through the issuance of new shares requires all shares to be fully paid up. Since the enactment of Government Regulation No. 8 of 2021 on the Company's Authorized Capital and Registration of Establishment, Change, and Dissolution of Companies that Meet the Criteria for Micro and Small Enterprises, Articles 32 and 33 of the Company Law have become invalid. The authority to determine the amount of authorized capital rests with the founders of the company, but there is a provision that at least 25% of the authorized capital must be placed and fully paid up within 60

days after the deed of establishment is made. This provision aims to ensure the seriousness of the founders in running the business and provide protection for the company's creditors.

The establishment of a Limited Liability Company capitalizing on joint assets by a husband and wife does not conflict with the Limited Liability Company Law as long as there is a separation of assets contained in a marital agreement, but if there is no marital agreement, if there is a problem, which party is responsible for the problem. The responsibility of a limited liability company is regulated in Article 3 of the Limited Liability Company Law, there are 2 (two) forms of responsibility, namely limited and unlimited responsibility. First, limited liability is intended for the founder only to the extent of the amount of capital invested in the company excluding the founder's personal assets. Second, this limited liability is not absolute due to provisions that lead to unlimited liability, namely:

- 1) Incompleteness of the company's requirements as a legal entity;
- 2) The discovery of bad faith of the shareholders in using the company for personal interests, directly or indirectly;
- 3) Involvement of shareholders in illegal acts committed by the company; or
- 4) Inability to pay off the company's debts due to explicit or implicit actions of the shareholders.

Husband and wife who establish a limited liability company without the legality of a marriage agreement that specifically separates the joint assets when connected with the requirements for the establishment of a limited liability company are not fulfilled because the minimum requirements of 2 (two) individuals and the absence of capital

partnership are not met. In accordance with the conditions of piercing the corporate veil, where the responsibility of limited liability company organs can extend to personal property, especially if there is negligence in carrying out duties and obligations in accordance with the articles of association and laws and regulations, the responsibility of husband and wife who established the company can also be unlimited. The condition of a limited liability company if it suffers a loss or is unable to pay off debts owed to third parties, if the founder does not qualify as a legal entity, the founder as a whole personally owned assets in the context of husband and wife joint assets are included to pay the loss. The Company Law stipulates that, if the number of shareholders of a company is less than two people, a six-month deadline is given for the company to increase the number of shareholders in order to avoid personal liability of shareholders but, within that period, the number of shareholders does not increase, the existing shareholders will bear personal liability and third parties have the right to apply for the dissolution of the company through the court. Legal provisions require that share ownership in a company not be concentrated in one party, especially if the company is established by a husband and wife without a marital agreement. Therefore, shareholders are obliged to diversify share ownership within a period of six months from the establishment if this provision is violated as a result, personal liability will be attached to the shareholders for all obligations of the company.

CONCLUSIONS

Husband and wife establish a limited liability company using joint assets as long as there is a marital agreement that regulates the separation of assets and fulfills the establishment requirements as stipulated in Article 7 of the Limited

Liability Company Law. The separation of assets has implications for the legal subject of ownership of joint assets, which was previously single because of the unity of assets becoming separate so that legally it becomes 2 legal subjects. This fulfills the principle of Corporate Separate Legal Personality or the separation of the owner's assets with the company, however, it does not meet the criteria for a limited liability company as a legal entity if without a marriage agreement the legal subject becomes one unit and the capital is also sourced from 2 different legal subjects so that it can be said to be a capital partnership. There are two responsibilities of a limited liability company, namely limited and unlimited liability. Because husband and wife use joint property without a marriage agreement to become one legal subject, they meet the criteria for unlimited liability in Article 3 paragraph (2), one of which is not fulfilling the requirements of a legal entity. Husband and wife are fully responsible for the legal problems of a limited liability company up to the personal property, which means the assets of each husband and wife.

SUGGESTIONS

The Government should be able to re-evaluate the Limited Liability Company Law, considering that the Law raises uncertainty about the legal subject of Limited Liability Company Establishment. The urgency of affirming the substance of Article 7 Paragraph (1) of the Limited Liability Company Law is expected to prevent the establishment of companies that violate the provisions of the Marriage Law and provide legal protection for all interested parties. The plan to establish a Limited Liability Company by a husband and wife should be initiated by making and ratifying a marriage agreement to ensure

the separation of assets between them and the fulfillment of the principle of corporate separate legal personality, which separates the assets of the founder from the company, allowing the husband and wife to legally become the founders of a Limited Liability Company recognized by law.

BIBLIOGRAPHY

- Asyhadie, Zaeny and Budi Sutrisno. (2012). *Company Law & Bankruptcy*. Jakarta: Erlangga.
- Marzuki, Peter Mahmud. (2021). *Legal Research Methods Revised Edition*. Jakarta: Kencana.
- Muhammad, Abdulkadir. (1999). *Indonesian Company Law*. Bandung: Citra Aditya Bhakti
- Prawirohamidjojo, Soetojo. (1986). *Pluralism in Indonesian Marriage Legislation*. Surabaya: Airlangga University Press.
- Harahap, M. Y. (2016). *Limited Liability Company Law*. Jakarta: Sinar Grafika.
- Kasih, D. P. D. (2022). "Individual Company Post Job Creation Law: Paradigm Shift of Limited Liability Company as Capital Association". *Arena Hukum*, 15(1): 20-37.
- Sudaryat. (2020). "Liability of Majority Shareholders who Concurrently Serve as Directors for Third Party Losses as a Result of the Company's Unlawful Acts". *Journal of Bina Mulia Hukum*, 4(2) : 313.
- Yusuf, M. S., Gani, A. M., & Siddiq, N. K. (2024). "Limited Liability Company Law and its Development in Indonesia". *Journal of Fundamental Justice*, 5(1) : 31-40.
- Riandini, A. T., & Santoso, B. (2024). "Analysis of the Legality of the Establishment of an Individual Company without a Notarial Deed

- Based on the Job Creation Law”. Notarius, 17(2) :762-779.
- Raissafitri, K. (2023). “The Validity of the Deed of Establishment of a Limited Liability Company with Shares of Husband and Wife's Joint Property in View of the Principle of Acta Publica Proband Sese Ipsa”. Journal of Kertha Patrika, 45(1) :19-34.
- Isfardiyana, Hapsah. (2015). “Responsibility of Directors of Limited Liability Companies in Violation of Fiduciary Duty”. Padjadjaran Journal of Legal Science, 2 (1) : 168-191.
- Men Wih Widiatno. (2022). “Application of Piercing The Corporate Veil in Assessing the Personal Responsibility of Individual Limited Liability Company Founders”, Lex Jurnalica, 19 (1) : 94-108.
- Law No. 1 of 1974 Concerning Marriage
- Law No. 40 of 2007 Concerning Limited Liability Companies
- Government Regulation No. 8 of 2021 Concerning the Company's Authorized Capital and the Registration of Establishment, Amendment, and Dissolution of Companies that Meet the Criteria for Micro and Small Enterprises