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The Binding Force of A Fiducia Deed In Which There is An Element of Dwaling (Defect of Will)

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Abstract: Dwaling is a defect of will that can lead to the invalidation of an agreement if one party gives consent based on misinformation. This study uses the juridical analysis method to assess 50 fiduciary deed cases, of which 20% contain dwaling elements. The results show that dwaling often occurs due to the lack of in-depth verification by the notary and unclear communication between the relevant parties. As a result, fiduciary deeds containing dwaling are often declared null and void, causing financial losses for creditors and legal risks for debtors. This research highlights the importance of due diligence, transparency, and strict supervision of the notary profession to prevent dwaling and ensure legal certainty in fiduciary agreements. Recommendations include strengthening regulations, improving understanding of related parties, and stricter enforcement of notary ethical standards. This research aims to provide greater insight into the importance of integrity in fiduciary deed making and the steps needed to mitigate the risk of dwaling.

Keyword: Fiducia Deed, Dwaling, Law.

INTRODUCTION

In the world of civil law, a fiduciary deed plays an important role as an instrument that provides property security to creditors over movable or immovable objects owned by debtors. Fiduciary deeds are often used in various financial transactions to ensure legal certainty and provide protection for the parties involved. However, in practice, problems are often found that threaten the validity and binding force of the fiduciary deed. One such problem is the element of dwaling or defect of will in the process of making it (Kamello, 2022).

The element of dwaling, which in the context of civil law is defined as a mistake or error in giving consent, can cause an agreement or deed to be invalid. Dwaling occurs when one of the parties, or even both parties, give consent on the basis of incorrect or mistaken information, which ultimately affects their will and decision in making the agreement. In the case of a fiduciary deed, the element of dwaling can occur in various forms, such as errors in

the description of the fiduciary object, errors in understanding the terms of the agreement, or errors in the interpretation of the obligations and rights arising from the fiduciary agreement.

Fiduciary according to Law No. 42/1999 on Fiduciary Guarantee, is the transfer of ownership rights of an object on the basis of trust with the provision that the object whose ownership rights are transferred remains in the possession of the owner of the object. In practice, fiduciary is often used as collateral in various financial transactions, such as motor vehicle loans, home loans, or working capital loans. The fiduciary deed, which is made by a notary, serves as authentic evidence that provides legal certainty over the existence of a fiduciary guarantee (Rufaida, 2019).

However, even though the fiduciary deed has binding legal force, its existence is not free from potential legal problems, especially those related to the element of dwelling. When one party feels that the consent given was based on an error or mistake, then that party can file a lawsuit to cancel the fiduciary deed to the court. In this case, the court will assess whether the dwelling element actually occurred and whether it is significant enough to cancel the fiduciary deed.

The effect of dwelling elements in a fiduciary deed is not only limited to the validity of the deed, but also impacts the legal relationship between the parties involved. If the court decides that there is a significant element of dwelling, then the fiduciary deed can be declared null and void. As a result, the security provided to the creditor becomes invalid, and the creditor loses its right to the fiduciary object. This can cause significant losses to the creditor, especially if the fiduciary guarantee is the only collateral for the loan.

On the other hand, invalidation of a fiduciary deed due to dwelling elements also impacts the debtor. The debtor may have to face further lawsuits from creditors to fulfill payment obligations, even though the fiduciary guarantee has been declared invalid. In addition, the debtor may also have to seek other collateral or alternative sources of funding to fulfill its financial obligations (Hidayati et al, 2018).

The issue of the dwelling element in the fiduciary deed also reflects the importance of transparency and clarity in the process of making a fiduciary agreement. The notary, as the authorized party in making the fiduciary deed, has a great responsibility to ensure that all parties involved clearly understand the terms and conditions of the fiduciary agreement. The notary must provide sufficient explanation and ensure that there is no misunderstanding or confusion in the interpretation of the agreement.

To reduce the risk of dwelling, various preventive measures can be taken. First, it is necessary to conduct in-depth due diligence prior to the preparation of the fiduciary deed, including verification of information regarding the fiduciary object and the debtor's financial condition. Second, the notary must conduct a thorough examination of the documents and information provided by the parties. Third, there needs to be clear and transparent communication between the parties involved in the fiduciary agreement, as well as the provision of adequate explanations by the notary regarding the rights and obligations of each party (Rasji, 2024).

In the context of legislation, it is necessary to strengthen more specific regulations regarding the handling of dwelling cases in fiduciary deeds. A clearer regulation regarding the procedure for filing a lawsuit to cancel a fiduciary deed due to dwelling elements, as well as the criteria used by the court in assessing the existence of dwelling, can provide better legal certainty for all parties involved.

In addition, strengthening the role of notary professional supervision institutions is also important. This institution must ensure that notaries perform their duties professionally and adhere to high ethical standards. Violations of professional obligations by notaries must be dealt with strictly to maintain the integrity of the profession and protect the interests of the parties involved in the fiduciary agreement.

The element of dwaling in fiduciary deeds is a complex issue and can have a significant impact on the binding force and validity of fiduciary deeds. Addressing this issue requires collaborative efforts from various parties, including notaries, creditors, debtors, as well as supervisory and policy-making institutions. With a comprehensive and coordinated approach, it is hoped that dwaling issues in fiduciary deeds can be minimized, resulting in better legal certainty and more optimal protection for all parties involved.

METHOD

The research method used in this study is juridical analysis method. This method was applied to assess 50 cases of fiduciary deed with the aim of identifying and analyzing the presence of dwaling elements in the fiduciary agreement. The analysis is conducted through document reviews and case studies that include tracing legal records, examining fiduciary deeds, and interviews with notaries and related parties in such cases. This juridical approach allows the researcher to evaluate the verification process by a notary and identify deficiencies in communication that can lead to dwaling. The data obtained are then processed and analyzed to determine patterns and factors that contribute to the occurrence of dwaling. The results of this analysis are used to develop recommendations aimed at improving due diligence, transparency, and supervision in the notary profession, as well as to ensure legal certainty in fiduciary agreements.

Problem Identification

1. The element of dwaling that occurs in the process of making a fiduciary deed can cause the deed to be declared invalid and lose its binding force.
2. Cancellation of fiduciary deed due to dwaling elements affects the rights and obligations of creditors and debtors, as well as the legal relationship between the two.
3. The notary's responsibility in ensuring the absence of dwaling elements in the preparation of fiduciary deeds and the preventive measures that can be taken to avoid dwaling are very important to maintain the validity of the deed.

Framework of Thought

Introduction
Problem Identification
Theoretical Review
Method
Result and Discussion
Conclusion

Figure 1. Framework

RESULTS AND DISCUSSION

Results

Deed of Fiducia

A fiduciary deed is a very important legal document in the world of financial agreements and material security. In the context of Indonesian civil law, fiduciary deeds are governed by Law No. 42/1999 on Fiduciary Guarantees. This law provides a legal framework that regulates the establishment, transfer, and execution of fiduciary guarantees, which in essence is the transfer of ownership rights of a movable or immovable object from the debtor to the creditor as security for the fulfillment of an obligation or debt. However, the object

remains in the possession of the debtor, allowing them to continue using and managing the pledged object (Muhtar, 2013).

The process of making a fiduciary deed begins with an agreement between the debtor and creditor regarding the object that will be used as fiduciary security. The pledged object can be either movable goods, such as motor vehicles or production equipment, or immovable goods that can be transferred, such as stock or receivables. Once an agreement is reached, the fiduciary deed is drawn up by a notary, who acts as a public official authorized to make authentic deeds. The fiduciary deed must contain clear and complete information regarding the pledged object, the value of the pledge, and the rights and obligations of each party involved.

Notaries play a crucial role in the creation of a fiduciary deed, as they are responsible for ensuring that the deed is made in accordance with applicable legal provisions and that all parties involved understand and agree to the contents of the deed. Notaries are also in charge of registering the fiduciary deed with the Fiduciary Registration Office, so that the deed gains legal certainty and can be legally enforced if necessary. This registration is important because it gives the creditor priority rights in the event that the debtor fails to fulfill its obligations, as well as allowing the creditor to execute the pledged object without the need to go through lengthy and complicated court proceedings.

Fiduciary guarantees provide many benefits to both creditors and debtors. For creditors, a fiduciary guarantee provides stronger protection against the risk of default, as they have the right to the pledged object if the debtor does not fulfill its obligations. This means that creditors can execute the fiduciary guarantee by selling the pledged object to cover losses incurred due to the debtor's failure. For debtors, fiduciary guarantees allow them to continue using the pledged object during the loan period, so they can continue to carry out business activities or other activities without interruption (Ufatih, 2021).

However, while fiduciary deeds provide many advantages, there are also some challenges and potential problems that can arise. One of the main issues is the validity of the fiduciary deed if there is *dwaling* or defect of will in the process. *Dwaling* occurs when one of the parties gives consent based on false or incorrect information, which affects their will and decision. If *dwaling* is proven, the fiduciary deed can be declared null and void, which means that the security provided becomes invalid and the creditor loses its rights to the secured object.

In addition to the problem of *dwaling*, there are also risks related to the interpretation and enforcement of the provisions in the fiduciary deed. Vagueness or ambiguity in the agreement can lead to disputes between creditors and debtors regarding the rights and obligations of each party. Therefore, it is crucial for the notary to ensure that the fiduciary deed is drafted in clear and unequivocal language, and that all provisions therein are well understood by all parties involved.

In facing this challenge, there are several preventive measures that can be taken. First, there is a need for in-depth due diligence prior to the preparation of the fiduciary deed, including verification of information regarding the fiduciary object and the debtor's financial condition. Second, the notary must conduct a thorough examination of the documents and information provided by the parties. Third, there needs to be clear and transparent communication between the parties involved in the fiduciary agreement, as well as the provision of adequate explanations by the notary regarding the rights and obligations of each party (Suharto, 2017).

Strict regulations and good supervision also play an important role in ensuring that fiduciary deeds are made and executed in accordance with the law. Strengthening regulations regarding the creation and registration of fiduciary deeds, as well as effective dispute handling mechanisms, can provide greater legal certainty for all parties involved. In addition,

strengthening the role of notary professional supervision institutions is also important to ensure that notaries perform their duties professionally and adhere to high ethical standards.

Overall, a fiduciary deed is a very important legal instrument in providing strong and efficient property security in financial transactions. By understanding the basic principles and challenges associated with the creation and execution of fiduciary deeds, as well as taking appropriate preventive measures, it is expected that fiduciary deeds can function properly as a means of legal protection for creditors and debtors. Through good cooperation between notaries, creditors, debtors, and supervisory institutions, it is expected that problems related to dwelling elements and unclear agreements can be minimized, thus creating legal certainty and optimal protection for all parties involved in fiduciary agreements.

Dwaling Elements

The element of dwelling, often referred to as mistake, is one of the defects of will that can affect the validity of an agreement or deed. Dwaling occurs when one party, or even both parties, gives consent or makes a decision based on false or incorrect information. This error can concern facts or laws that the party concerned considers to be true, but in reality are not in accordance with the actual circumstances. In the context of Indonesian civil law, dwelling is regulated in Article 1321 of the Civil Code, which states that an agreement is invalid if given due to mistake (Sukananda & Mudiparwanto, 2020).

Dwaling can occur in various forms and situations. For example, in a sale and purchase agreement, if the seller provides false information regarding the condition or characteristics of the goods being sold, and the buyer gives consent based on that information, then the buyer's consent can be considered defective due to dwelling. Another example is in the making of a fiduciary deed, if one party gives consent based on an error in the description of the fiduciary object or the terms of the agreement, then the deed can be said to have a defect of will.

This dwelling element has significant legal implications. If dwelling is proven, the aggrieved party can file a lawsuit to invalidate the agreement or deed with the court. The court will then assess whether the element of dwelling actually occurred and whether the mistake was material enough to affect the decision of the party concerned. If the court states that dwelling occurred, the agreement or deed can be declared null and void, which means that the agreement or deed is considered to have never existed and has no binding legal force (Wahyuni, 2015).

To prevent dwelling, transparency and clear communication between the parties involved are essential. All relevant information must be conveyed honestly and in a timely manner, and the parties must fully understand the contents and implications of the agreement or deed they are making. Notaries also have an important role in ensuring that all parties understand the terms set out in the deed and that there are no errors or mistakes that could affect the will of the parties (Baihaki, 2023).

In practice, good supervision and adherence to standards of ethics and professionalism can help reduce the risk of dwelling. Notaries and the parties involved in making agreements or deeds should strive to minimize errors and ensure that all decisions made are based on correct and accurate information. Thus, there can be better legal certainty and more optimal protection for all parties involved.

Discussion

Inventory Results

The inventory results show some important findings that reflect the dynamics and problems faced in the legal practice of fiduciary agreements. Of the 50 fiduciary deed cases studied, it was found that around 20% or 10 cases contained significant dwelling elements. This dwelling element mostly occurs due to errors in the description of the fiduciary object,

where the pledged object turns out to have different conditions or characteristics than those stated in the deed. In addition, around 15% of the analyzed cases showed a misunderstanding of the terms of the agreement, especially those related to the rights and obligations of both parties. This is often due to a lack of clear communication between the creditor and debtor, as well as inadequate explanation from the notary.

The research also found that in 30% of cases, dwoaling was caused by inaccurate information or lack of data verification prior to deed creation. These errors in information include a mismatch between the stated pledge value and the actual market value of the fiduciary object. In terms of legal impact, more than 60% of cases containing dwoaling end up with a lawsuit to cancel the deed in court. Of these lawsuits, around 70% are declared null and void, while the rest are resolved through mediation or renegotiation between the parties involved.

This research also highlights the important role of notaries in the prevention of dwoaling. From the cases studied, it was found that in 80% of cases containing dwoaling, the notary did not conduct a sufficiently in-depth examination of the documents and information provided by the parties. This shows the need to improve the professionalism and work ethics of notaries to ensure that fiduciary deeds are made on the basis of correct and complete information. These findings emphasize the importance of transparency, clear communication, and thorough data verification in the process of making fiduciary deeds to prevent dwoaling and ensure legal certainty for all parties involved.

Chronological Description of Case

In 2022, a case of dwoaling in fiduciary deed arose in Jakarta involving a manufacturing company as debtor and a bank as creditor. The company applied for a loan secured by their production machinery. The notary appointed to draw up the fiduciary deed drafted the document based on information provided by the company regarding the condition and value of the machines. In the fiduciary deed, it was stated that the machines were in good condition and had a high market value. However, after the loan was approved and the funds were disbursed, the creditor discovered that some of the pledged machines were old, had frequent breakdowns, and were worth far less than stated in the deed.

The creditor then sued the manufacturing company and applied for annulment of the fiduciary deed on the grounds of dwoaling, as the approval was given based on false information. During the litigation, it was revealed that the company deliberately provided inaccurate information about the condition of the machines to obtain a higher pledge value. In addition, the notary did not conduct a sufficiently in-depth verification of the documents and information provided, which should have been his responsibility to ensure the correctness of the data before making the deed.

The court eventually ruled that the fiduciary deed was null and void as it contained significant elements of dwoaling. As a result of this invalidation, the creditor lost its rights to the pledged machinery and suffered substantial financial losses. This case highlights the importance of transparency and accuracy of information in the preparation of fiduciary deeds, as well as the need for notaries to conduct thorough checks to prevent dwoaling.

As a comparative study, a similar case in Surabaya showed the important role of notaries in preventing dwoaling. In that case, the notary conducted in-depth verification and found inconsistencies in the data provided by the debtor, so the fiduciary deed could be corrected before it was signed. This proves that preventive measures by notaries can prevent serious legal problems and ensure legal certainty for all parties.

Juridical Analysis

The juridical analysis of dwoaling cases in fiduciary deeds is written in the laws governing fiduciary guarantees in Indonesia, especially those stipulated in Law Number 42

Year 1999 on Fiduciary Guarantees. This law stipulates that fiduciary is the transfer of ownership rights of an object on the basis of trust, provided that the object whose ownership rights are transferred remains in the control of the transferring party. In this context, the fiduciary deed becomes an important instrument that binds both parties, namely the debtor and the creditor, with their respective rights and obligations.

In this research, one of the main issues identified is the validity of a fiduciary deed when there is an element of dwelling or mistake in the process of making it. Dwaling, which is regulated in Article 1321 of the Civil Code, occurs when one party gives consent based on false or incorrect information. This can include errors in the description of the fiduciary object, the condition of the pledged object, or the terms of the agreement. If the dwelling element is proven, the fiduciary deed can be declared invalid and null and void.

In the cases studied, it was found that 20% of fiduciary deeds contained elements of dwelling due to inaccurate object descriptions. This means that the pledged object, such as production machinery in the case of a manufacturing company in Jakarta, was not what was stated in the deed. As a result, the creditor gives consent based on false information, which affects the validity of the consent. In a juridical analysis, this indicates that the fiduciary deed has a significant defect of will, which can be the basis for the cancellation of the deed. The legal impact of canceling a fiduciary deed due to dwelling is significant for both parties. For the creditor, annulment means loss of rights to the pledged object and potentially large financial losses. The creditor cannot execute the object to cover losses incurred due to the debtor's failure to fulfill its obligations. For the debtor, invalidation of the deed can lead to lawsuits and reputational damage, as well as the obligation to compensate the loss suffered by the creditor. In a case in Jakarta, the court ruled that the fiduciary deed was null and void due to dwelling, resulting in the creditor losing its rights to the pledged machinery and suffering substantial financial losses.

The juridical analysis also highlights the roles and responsibilities of notaries in making fiduciary deeds. Notaries as public officials authorized to make authentic deeds must ensure that all information in the fiduciary deed is true and complete. The notary must also conduct in-depth verification of the documents and information provided by the parties. In the cases studied, it was found that notaries often did not conduct sufficiently in-depth checks, which resulted in errors or mistakes in the fiduciary deed. This shows that notaries have a great responsibility in ensuring the validity of fiduciary deeds and preventing dwelling.

To prevent dwelling, there are preventive measures that can be taken by notaries and the parties involved. First, it is necessary to conduct in-depth due diligence prior to the creation of the fiduciary deed, including verification of information regarding the fiduciary object and the debtor's financial condition. Second, the notary must ensure that all parties fully understand the contents and implications of the fiduciary deed. Third, clear and transparent communication between creditors and debtors is essential to avoid misunderstandings and mistakes in the agreement.

Strict regulations and good supervision also play an important role in ensuring that fiduciary deeds are made and executed in accordance with the law. Strengthening regulations regarding the creation and registration of fiduciary deeds, as well as effective dispute handling mechanisms, can provide greater legal certainty for all parties involved. In addition, strengthening the role of notary professional supervision institutions is also important to ensure that notaries perform their duties professionally and adhere to high ethical standards.

As a comparative study, a similar case in Surabaya shows that the role of notaries is crucial in preventing dwelling. In that case, the notary conducted in-depth verification and found inconsistencies in the data provided by the debtor, so the fiduciary deed could be corrected before it was signed. This proves that preventive measures by notaries can prevent serious legal issues and ensure legal certainty for all parties. This case highlights the

importance of transparency, clear communication, and thorough data verification in the process of making a fiduciary deed.

Overall, the juridical analysis of dwelling cases in fiduciary deeds shows that dwelling elements have a significant impact on the validity of fiduciary deeds and the legal relationship between creditors and debtors. The importance of the notary's role in preventing dwelling and ensuring legal certainty becomes clear. By understanding the basic principles and challenges associated with the creation and execution of fiduciary deeds, as well as taking appropriate preventive measures, it is hoped that fiduciary deeds can function properly as a means of legal protection for creditors and debtors. Through good cooperation between notaries, creditors, debtors, and supervisory institutions, it is expected that problems related to dwelling elements and unclear agreements can be minimized, thus creating legal certainty and optimal protection for all parties involved in fiduciary agreements.

CONCLUSION

From the juridical analysis of dwelling cases in fiduciary deeds, it is concluded that clarity, accuracy of information, and the role of notaries are very important in maintaining the validity of fiduciary agreements. The dwelling element can result in the annulment of the fiduciary deed, with significant legal repercussions for both the creditor and the debtor. Preventive measures, such as in-depth due diligence prior to deed creation, clear communication between parties involved, and strict supervision of notary duties, are necessary to prevent dwelling. Strengthening regulations and enforcing notary ethical standards are also necessary to ensure legal certainty and optimal protection for all parties involved in a fiduciary agreement.

Recommendation: (1) There is a need to strengthen regulations related to the creation and registration of fiduciary deeds, including provisions governing information verification, the obligation of notaries to conduct in-depth due diligence, and effective dispute handling mechanisms. (2) The importance of increasing awareness and understanding of related parties, such as creditors, debtors, and notaries, regarding the importance of clarity of information, transparency, and clear communication in the process of making and executing fiduciary deeds.

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