

## NOTARIAL RESPONSIBILITY FOR GENDER-SENSITIVE PROTECTION IN POST-DIVORCE JOINT-PROPERTY AGREEMENTS

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### Abstract:

The formal expression of consent in post-divorce joint-property agreements does not necessarily eliminate concerns regarding its freedom and validity, particularly where the parties occupy unequal bargaining positions. This study examines the scope of notarial responsibility in such agreements and the conditions under which notarial conduct may give rise to civil liability. It also formulates a gender-sensitive framework for protecting valid consent within contemporary notarial practice. It employs normative legal research using statute and case approaches to analyze Indonesian marriage law, contract law, notarial law, judicial decisions, and relevant scholarship. The findings show that a notary is not responsible for guaranteeing a predetermined distributive outcome or numerical equality in the division of joint property. Notarial responsibility is directed toward the legality and integrity of the consent-forming process, including compliance with statutory formalities, legal capacity and authority, proper formulation of declarations, and the freedom and validity of consent. Civil liability requires a cumulative showing of breach attributable to the notary, fault or negligence, actual legally recognizable loss, and causation. As its normative contribution, the study proposes a graduated procedural model consisting of ordinary verification, enhanced clarification when procedural red flags arise, and legally justified refusal where unresolved legal obstacles remain. This model reconciles gender-sensitive protection, party autonomy, notarial impartiality, and professional accountability without transforming the notary into an adjudicator of distributive fairness.

**Keywords:** Gender-Sensitive Protection; Joint Property; Notarial Responsibility; Free and Valid Consent

### INTRODUCTION

Divorce not only terminates the personal relationship between spouses but also alters the legal relationship concerning property acquired during marriage. Across different legal systems, matrimonial property regimes determine how the parties' economic and non-economic contributions are recognized upon the dissolution of marriage. Ashiru demonstrates that apparently neutral rules on property division may still generate inequality where women occupy a weaker economic position during marriage.<sup>1</sup> In the Indonesian context, Rouf, Mufidah, and Mahmudi emphasize that the division of joint property should take account of

<sup>1</sup> M. O. A. Ashiru, "Gender Discrimination in the Division of Property on Divorce in Nigeria," *Journal of African Law* 51, no. 2 (2007): 316–331, <https://doi.org/10.1017/S0021855307000320>.

variations in spousal roles and contributions, including domestic work and caregiving that are not always reflected in formal ownership.<sup>2</sup> This issue becomes particularly relevant where contributions within the household are not entirely converted into income or registered ownership. Post-divorce property division therefore concerns the legal status of assets, the parties' respective contributions, and the legal mechanisms through which those interests are resolved.

Under Indonesian law, the legal status of matrimonial assets and their division are regulated as distinct matters under Law Number 1 of 1974 on Marriage. Article 35(1) provides that property acquired during marriage constitutes joint property, while Article 36(1) requires the consent of both spouses for legal acts concerning such property. Article 37 does not prescribe a fixed ratio of division but leaves the matter to the applicable law governing the parties.<sup>3</sup> For Muslim spouses, Article 97 of the Compilation of Islamic Law establishes an equal one-half share for each divorced spouse as the general point of departure, unless otherwise stipulated in a marital agreement. Judicial practice, however, recognizes different allocations. In Supreme Court Decision Number 266 K/AG/2010, the wife received three-quarters and the husband one-quarter because the joint property had been generated by the wife while the husband had failed to provide maintenance for his wife and child for eleven years.<sup>4</sup>

The issue becomes more specific when joint property is not divided by a court but is instead allocated through an agreement between the parties and embodied in a notarial deed. In this context, the parties' autonomy to determine the contents of their agreement intersects with the notary's professional duties to exercise due care and remain impartial. Article 15 of the Notary Office Law authorizes notaries to execute authentic deeds and provide legal counseling in connection with the preparation of such deeds, while Article 16(1)(a) requires them to act in a trustworthy, honest, careful, independent, and impartial manner and to safeguard the interests of parties involved in the relevant legal act.<sup>5</sup> Dwiandi, Yahanan, and Hamid recognize the notary's role in formalizing agreements concerning the division of joint property, while Enggawita and Prihatini emphasize the importance of spousal consent in legal acts involving joint property.<sup>6</sup>

The limits of those duties become problematic when an agreement on joint property is formed under conditions of unequal bargaining position. Differences in access to information, economic dependence, psychological pressure, or the dominance of one party do not automatically render an agreement invalid, but they may affect the quality of consent where such circumstances are exploited to obtain the other party's assent improperly. In Indonesian

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<sup>2</sup> Abd Rouf, Mufidah Ch, and Zaenul Mahmudi, "Joint Property Division in Indonesia: A Gender Equality Viewpoint," *De Jure: Jurnal Hukum dan Syar'iah* 15, no. 2 (2023): 230–250, <https://doi.org/10.18860/j-fsh.v15i2.23050>.

<sup>3</sup> Indonesia, *Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan*, Lembaran Negara Republik Indonesia Tahun 1974 Nomor 1, Tambahan Lembaran Negara Republik Indonesia Nomor 3019, arts. 35–37, <https://peraturan.bpk.go.id/Details/47406/uu-no-1-tahun-1974>.

<sup>4</sup> Indonesia, *Kompilasi Hukum Islam*, art. 97, disebarluaskan melalui Instruksi Presiden Nomor 1 Tahun 1991 tentang Penyebarluasan Kompilasi Hukum Islam, <https://peraturan.bpk.go.id/Details/293351/inpres-no-1-tahun-1991>; Mahkamah Agung Republik Indonesia, *Putusan Nomor 266 K/AG/2010*, July 12, 2010, [https://jdih.mahkamahagung.go.id/storage/uploads/produk\\_hukum/file/266\\_K\\_AG\\_2010.pdf](https://jdih.mahkamahagung.go.id/storage/uploads/produk_hukum/file/266_K_AG_2010.pdf).

<sup>5</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris*, Lembaran Negara Republik Indonesia Tahun 2014 Nomor 3, Tambahan Lembaran Negara Republik Indonesia Nomor 5491, arts. 15 and 16(1)(a), <https://peraturan.bpk.go.id/Details/38565/uu-no-2-tahun-2014>.

<sup>6</sup> Ricky Dwiandi, Annalisa Yahanan, and Kms. Abdullah Hamid, "Status Hukum Harta Bersama Akibat Putusnya Perkawinan karena Perceraian," *Repertorium: Jurnal Ilmiah Hukum Kenotariatan* 6, no. 2 (2017): 170–179, <https://doi.org/10.28946/rpt.v6i2.306>; Bifi Enggawita and Farida Prihatini, "Tanggung Jawab Notaris dan PPAT terhadap Jual Beli dan Hibah Hak atas Tanah sebagai Harta Bersama Akibat Perceraian," *Kertha Semaya: Journal Ilmu Hukum* 9, no. 11 (2021): 2012–2032, <https://doi.org/10.24843/KS.2021.v09.i11.p03>.

contract law, this issue is related to defects of consent and the development of the doctrine of abuse of circumstances (*misbruik van omstandigheden*). Putra situates economic duress and abuse of circumstances within the development of defects of consent where economic or psychological superiority is used to influence agreement improperly.<sup>7</sup> Mustafida further demonstrates that the doctrine of abuse of circumstances has been applied in cases involving the annulment of notarial deeds.<sup>8</sup> The legal question therefore concerns the extent of a notary's duty to identify circumstances capable of impairing free consent before an agreement is embodied in an authentic deed.

Previous studies have addressed different components of this issue but have generally done so through separate analytical frameworks. Dwiandi, Yahanan, and Hamid examine the legal status of joint property and the notary's role following divorce; Enggawita and Prihatini analyze transfers of joint property made without spousal consent; and Kurniawan considers the proportionate division of joint property based on the respective contributions of spouses.<sup>9</sup> Mustafida examines the application of *misbruik van omstandigheden* to the annulment of notarial deeds, Afifah addresses the requirements for a notary's civil liability arising from deeds they execute, while Rouf, Mufidah, and Mahmudi approach joint-property division from the perspective of gender equality.<sup>10</sup> These six studies provide important foundations concerning joint property, defects of consent, and notarial responsibility, yet none specifically examines the limits of a notary's duties where a post-divorce joint-property agreement is formed under unequal conditions capable of affecting the parties' freedom of consent.

Against this research gap, this study focuses on the limits of a notary's duties where an agreement concerning the division of joint property is formed under conditions of inequality between the parties. Rather than treating any particular allocation ratio as the sole measure of justice, the analysis examines the relationship between the legal status of joint property, freedom of contract, validity of consent, the principle of due care, and notarial impartiality.<sup>11</sup> Two research questions follow. First, what are the limits of a notary's duties in ensuring that an agreement on the division of joint property is formed through valid and free consent? Second, under what circumstances may a notary's act or omission in preparing the deed constitute a basis for civil liability where one party suffers loss? The latter question is examined through a framework requiring proof of loss, fault attributable to the notary, and a causal relationship between the act and the resulting loss.<sup>12</sup>

## METHOD

This study employs normative legal research with a doctrinal orientation to examine the legal boundaries of notarial duties in post-divorce joint-property agreements.<sup>13</sup> It applies a statute

<sup>7</sup> Fani Martiawan Kumara Putra, "Paksaan Ekonomi dan Penyalahgunaan Keadaan sebagai Bentuk Cacat Kehendak dalam Perkembangan Hukum Kontrak," *Yuridika* 30, no. 2 (2015): 232–253, <https://doi.org/10.20473/ydk.v30i2.4658>.

<sup>8</sup> Latifa Mustafida, "Penerapan Doktrin *Misbruik Van Omstandigheden* terhadap Pembatalan Akta Notaris Berdasarkan Putusan Pengadilan," *Lex Renaissance* 2, no. 1 (2017): 64–84, <https://doi.org/10.20885/JLR.vol2.iss1.art5>.

<sup>9</sup> Dwiandi, Yahanan, and Hamid, "Status Hukum Harta Bersama," 170–179; Enggawita and Prihatini, "Tanggung Jawab Notaris dan PPAT," 2012–2032; Muhamad Beni Kurniawan, "Pembagian Harta Bersama Ditinjau dari Besaran Kontribusi Suami Istri dalam Perkawinan," *Jurnal Yudisial* 11, no. 1 (2018): 41–53, <https://doi.org/10.29123/jy.v11i1.224>.

<sup>10</sup> Mustafida, "Penerapan Doktrin *Misbruik Van Omstandigheden*," 64–84; Kunni Afifah, "Tanggung Jawab dan Perlindungan Hukum bagi Notaris secara Perdata terhadap Akta yang Dibuatnya," *Lex Renaissance* 2, no. 1 (2017): 147–161, <https://doi.org/10.20885/JLR.vol2.iss1.art10>; Rouf, Mufidah, and Mahmudi, "Joint Property Division in Indonesia," 230–250.

<sup>11</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014*, arts. 15–16.

<sup>12</sup> Afifah, "Tanggung Jawab dan Perlindungan Hukum," 147–161.

<sup>13</sup> Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 45–47.

approach and a case approach. The statute approach examines the legal framework governing joint property, contractual consent, notarial authority and duties, and civil liability under the Marriage Law, the Notary Office Law, the Indonesian Civil Code, and the Compilation of Islamic Law. The case approach analyzes the *ratio decidendi* and legal reasoning of relevant court decisions concerning joint-property division, defects of consent, abuse of circumstances, and notarial liability.<sup>14</sup> Primary legal materials are supported by peer-reviewed journal articles and established legal scholarship. These materials are analyzed qualitatively through legal interpretation and examination of the relationship between statutory norms, legal doctrine, and judicial reasoning to identify the scope and limits of notarial duties and the circumstances under which civil liability may arise.

## ANALYSIS AND DISCUSSION

### The Scope of Notarial Duties in Safeguarding Free and Valid Consent in Post-Divorce Joint-Property Agreements

When joint property is divided by agreement rather than by judicial determination, the central legal issue shifts from the court's allocation of shares to the validity of the parties' agreement and the notary's role in formalizing it. Article 15(1) of the Notary Office Law authorizes a notary to execute authentic deeds concerning legal acts and agreements required by law or desired by interested parties, while Article 38(3)(c) expressly provides that the body of the deed contains the intentions and wishes of the interested parties.<sup>15</sup> A deed of agreement on the division of joint property therefore constitutes a *partij acte*: its substantive declarations originate from the parties, whereas the notary gives those declarations the form and evidentiary character prescribed by law. This distinction is important because it prevents notarial authority from being construed as authority to determine the parties' economic entitlements or to substitute the notary's assessment of fairness for the parties' own legally permissible choices.<sup>16</sup>

The parties' autonomy, however, does not reduce the notary to a passive recorder of declarations. Article 16(1)(a) requires a notary to act in a trustworthy, honest, careful, independent, and impartial manner and to safeguard the interests of parties involved in the relevant legal act.<sup>17</sup> These obligations concern the manner in which the notarial office is exercised rather than guaranteeing the material truth of every statement made by an appearer. Putera and Sudantra distinguish the notary's responsibility for the formal aspects of a *partij acte* from the material truth of factual statements supplied by the parties, while Surjani similarly emphasizes that a notary is not a party to the transaction recorded in such a deed.<sup>18</sup> The distinction is not absolute, however: a notary remains responsible for compliance with statutory formalities, the proper formulation of declarations presented before the notary, and violations attributable to the notary's own conduct in preparing the deed.

The Notary Office Law provides procedural mechanisms through which these professional duties operate. Article 15(2)(e) authorizes notaries to provide legal counseling in connection with the preparation of deeds, while Article 16(1)(m) requires the deed to be read

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<sup>14</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, rev. ed. (Jakarta: Kencana, 2017), 133–181; Muhaimin, *Metode Penelitian Hukum*, 56–58.

<sup>15</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014*, arts. 15(1) and 38(3)(c).

<sup>16</sup> Herlien Budiono, *Dasar Teknik Pembuatan Akta Notaris* (Bandung: Citra Aditya Bakti, 2013); Putu Aristia Anggara Putera and I Ketut Sudantra, "Peran Notaris dalam Proses Pembuktian pada Sengketa Hak atas Tanah di Pengadilan," *Acta Comitas: Jurnal Hukum Kenotariatan* 8, no. 2 (2023): 366–375, <https://doi.org/10.24843/AC.2023.v08.i02.p12>.

<sup>17</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014*, art. 16(1)(a).

<sup>18</sup> Putera and Sudantra, "Peran Notaris dalam Proses Pembuktian," 366–375; Surjani, "Perlindungan Hukum terhadap Notaris Terkait dengan Akta yang Dibuat Dihadapannya Manakala Terjadi Sengketa antara Para Pihak (Studi Kasus Putusan Mahkamah Agung No. 1519 K/Pdt/2007)," *Notarius* 4, no. 1 (2013): 35–48, <https://doi.org/10.14710/nts.v4i1.5709>.

before the appearers in the presence of witnesses, subject to the statutory exceptions.<sup>19</sup> Legal counseling under Article 15(2)(e) is textually a notarial authority rather than an independent obligation to direct the substantive outcome of an agreement. Nevertheless, when read together with the duties of care and impartiality under Article 16(1)(a), it enables the notary to explain the legal nature and consequences of the transaction being documented. Reading the deed similarly performs more than a ceremonial function: it provides an opportunity for the appearers to understand and confirm the declarations incorporated into the instrument before signing it. These mechanisms preserve party autonomy while reducing the risk that an authentic deed records a legal declaration that an appearer does not understand.

The validity of that declaration must then be assessed within the general law of contract. Article 1320 of the Indonesian Civil Code requires consent, capacity, a certain subject matter, and a lawful cause for a valid agreement, while Article 1321 provides that consent has no legal effect when it results from mistake, duress, or fraud. Indonesian contract doctrine has further developed *misbruik van omstandigheden*—abuse of circumstances—to address agreements formed through exploitation of another party’s economic or psychological vulnerability. Putra places economic duress and abuse of circumstances within the development of defects of consent, whereas Mustafida identifies the doctrine’s application in judicial disputes involving the annulment of notarial deeds.<sup>20</sup> An unequal bargaining position, economic dependence, or unequal access to information therefore does not itself invalidate an agreement. Its legal relevance arises when the inequality is exploited in a manner that impairs the formation of genuine and voluntary consent.<sup>21</sup>

This distinction also defines the limits of what may reasonably be required from a notary. The Notary Office Law does not expressly impose a general duty to investigate the material truth of every factual statement submitted by the parties. Academic writing remains divided on the extent to which material verification should form part of notarial prudence. Asfiati argues for stronger efforts by notaries to examine material accuracy, but simultaneously acknowledges the need for further regulatory support concerning such obligations.<sup>22</sup> By contrast, studies of *partij actes* generally locate the notary’s primary responsibility in formal validity and in ensuring that the deed accurately records what the parties declared.<sup>23</sup> Accordingly, the duty of care should not be transformed into an unlimited investigative obligation. Where inconsistencies or legal defects are apparent from documents, declarations, capacity, authority to act, or the notarial process itself, however, the duty to act carefully requires the notary to resolve matters within the scope of the notarial function before completing the deed.

The same limitation applies to refusal of notarial services. Article 16(1)(e) establishes the general duty to provide services in accordance with the Notary Office Law, “unless there is a reason to refuse them.”<sup>24</sup> The provision therefore does not grant a free-standing discretion to reject an agreement merely because the notary considers its economic allocation unequal. A division of joint property in a ratio other than one-half to one-half cannot, by itself, constitute

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<sup>19</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014*, arts. 15(2)(e) and 16(1)(m).

<sup>20</sup> Putra, “Paksaan Ekonomi dan Penyalahgunaan Keadaan,” 232–253; Mustafida, “Penerapan Doktrin *Misbruik Van Omstandigheden*,” 64–84.

<sup>21</sup> Putra, “Paksaan Ekonomi dan Penyalahgunaan Keadaan,” 232–253; Mustafida, “Penerapan Doktrin *Misbruik Van Omstandigheden*,” 64–84.

<sup>22</sup> Siti Khanifah Asfiati, “Upaya Notaris dalam Menggali Kebenaran Materiil di Setiap Pembuatan Akta,” *Officium Notarium* 2, no. 1 (2023): 21–29, <https://doi.org/10.20885/JON.vol2.iss1.art3>.

<sup>23</sup> Putera and Sudantra, “Peran Notaris dalam Proses Pembuktian,” 366–375; Surjani, “Perlindungan Hukum terhadap Notaris,” 35–48; Primistha Elsyanita Devi, “Tanggung Jawab Notaris dan Kekuatan Hukum dalam Pembuatan Akta Konsen Roya,” *Officium Notarium* 1, no. 2 (2022): 335–343, <https://doi.org/10.20885/JON.vol1.iss2.art13>.

<sup>24</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014*, art. 16(1)(e).

a legal ground for refusal, particularly because Indonesian law does not establish a universally mandatory 1:1 allocation in every post-divorce situation. The relevant inquiry concerns whether the requested legal act can lawfully be performed, whether the parties possess the necessary capacity and authority, and whether the agreement can validly express their consent. Where a legally relevant defect cannot be remedied within the notarial process, refusal may become necessary; where the agreement remains legally permissible, the notary cannot replace party autonomy with a personal conception of distributive justice.

The first research question can therefore be answered by locating notarial responsibility principally in the integrity of the legal process rather than in a predetermined economic outcome. The notary must comply with statutory formalities, act carefully and impartially, accurately formulate the parties' declarations, explain relevant legal consequences within the scope of notarial authority, and refrain from completing a deed when a legally sufficient obstacle prevents the requested act from being lawfully performed.<sup>25</sup> This responsibility does not make the notary a guarantor of material equality between former spouses or an investigator of every hidden aspect of their relationship. Inequality between the parties becomes relevant to the notarial function only insofar as it bears upon legally cognizable matters such as capacity, authority, legality, or the freedom and validity of consent. This boundary preserves both dimensions of the notarial office: respect for private autonomy and professional responsibility for the lawful formation of an authentic instrument.

### **Civil Liability of Notaries in Post-Divorce Joint-Property Agreements**

Civil liability must be distinguished from the legal consequences affecting the deed itself. The annulment, nullity, or evidentiary impairment of a notarial deed does not automatically establish personal liability on the part of the notary. In a *partij acte*, the substantive declarations principally originate from the appearers, whereas the notary bears responsibility for duties that the law attaches to the exercise of the notarial office. Consequently, liability requires identification of a specific act or omission attributable to the notary rather than mere proof that the agreement later became disputed or legally defective. Afifah formulates this distinction through the requirements of loss, a causal relationship between the loss and the notary's conduct, and fault or negligence attributable to the notary.<sup>26</sup> The legal inquiry must therefore separate defects originating from the parties or the underlying transaction from breaches occurring within the notary's own sphere of professional responsibility.

The principal basis for such civil liability is provided by Articles 1365 and 1366 of the Indonesian Civil Code. Article 1365 requires compensation where an unlawful act causes loss to another person, while Article 1366 extends responsibility to loss caused by negligence or carelessness.<sup>27</sup> Applied to notarial activity, these provisions require more than a finding that the deed contains a defect. The claimant must identify conduct attributable to the notary that contravenes a legal obligation governing the exercise of the office. Article 16(1)(a) of the Notary Office Law is particularly relevant because it requires a notary to act in a trustworthy, honest, careful, independent, and impartial manner and to safeguard the interests of the parties involved.<sup>28</sup> Anjarsari and Santoso similarly relate unlawful conduct

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<sup>25</sup> Afifah, "Tanggung Jawab dan Perlindungan Hukum," 147–161; Putera and Sudantra, "Peran Notaris dalam Proses Pembuktian," 366–375. Afifah emphasizes that civil liability requires a loss, an unlawful act or negligence attributable to the notary, and a causal relationship between the conduct and the resulting loss.

<sup>26</sup> Afifah, "Tanggung Jawab dan Perlindungan Hukum," 147–161.

<sup>27</sup> Indonesia, *Kitab Undang-Undang Hukum Perdata*, arts. 1365–1366.

<sup>28</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014*, art. 16(1)(a).

by a notary in preparing a deed to Article 1365.<sup>29</sup> Civil liability therefore rests upon the notary's own legally wrongful or negligent conduct, not upon the problematic deed in the abstract.

Fault must consequently be assessed by reference to matters falling within the notary's legally defined responsibilities. False information supplied by an appearer does not by itself establish fault on the part of the notary, particularly where its falsity could not reasonably be identified through the procedures required in preparing the deed. The position differs where the notary fails to perform a mandatory formality, disregards an evident defect in capacity or authority, inaccurately records the parties' declarations, or otherwise fails to exercise the care legally required in the notarial process.<sup>30</sup> The standard should not be expanded into an unlimited obligation to discover every concealed fact concerning the former spouses. As established in the preceding analysis, notarial responsibility concerns the lawful and careful performance of the notarial function. Accordingly, a civil claim must identify the particular conduct that the notary should have performed or avoided and demonstrate why the failure constitutes attributable fault rather than a defect arising exclusively from the parties themselves.

The existence of loss constitutes a separate requirement. A defective or annulled deed does not necessarily mean that one of the parties has suffered damage for which the notary must compensate. Afifah expressly places proof of loss among the prerequisites for imposing civil liability and requires a causal relationship between that loss and the notary's unlawful conduct.<sup>31</sup> This distinction is particularly important in post-divorce joint-property agreements. A party receiving a smaller share does not, solely for that reason, possess a claim against the notary because Indonesian law does not require the notary to guarantee a predetermined distributive outcome. A legally relevant loss must instead be connected to a breach within the notary's professional sphere. Thus, the analytical question is not whether the agreed allocation was economically unequal, but whether an attributable notarial breach caused the party to lose a legally protected interest that would otherwise have been preserved.

Causation is therefore the element connecting professional breach with compensable loss. In a *partij acte*, the parties themselves determine the substantive terms of the joint-property settlement; consequently, an economic consequence resulting from their free and legally valid choice cannot automatically be attributed to the notary who formalized the agreement. Causation becomes relevant where the notary's own breach materially contributes to the occurrence of the loss. This structure is consistent with Priaji's analysis of Supreme Court Decision Number 3390 K/Pdt/2015. Priaji explains that the basis for annulling the deed concerned the defective legal foundation of the underlying grant transaction, while notarial accountability constituted a separate question and could be pursued when negligence attributable to the notary resulted in loss to the parties.<sup>32</sup> The decision should therefore not be read as establishing automatic liability following annulment, but as illustrating the need to distinguish the defect affecting the deed from the conduct attributable to the notary.

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<sup>29</sup> Sita Sesaria Anjangsari and Budi Santoso, "Tinjauan terhadap Perbuatan Melawan Hukum Notaris dalam Pembuatan Akta," *Notarius* 17, no. 1 (2024): 515–530, <https://doi.org/10.14710/nts.v17i1.44898>.

<sup>30</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014*, art. 16(1)(a); Afifah, "Tanggung Jawab dan Perlindungan Hukum," 147–161.

<sup>31</sup> Afifah, "Tanggung Jawab dan Perlindungan Hukum," 147–161.

<sup>32</sup> Sekar Ayu Amiluhur Priaji, "Tanggung Jawab Notaris Atas Karya Yang Tidak Menerapkan Prinsip Kehatian (Studi tentang Gugatan Pembatalan Akta pada Putusan Mahkamah Agung Nomor 3390 K/Pdt/2015)," *Officium Notarium* 2, no. 1 (2023): 40–50, <https://doi.org/10.20885/JON.vol2.iss1.art5>.

Accordingly, civil liability in post-divorce joint-property agreements requires a cumulative analysis of breach, attributable fault, loss, and causation.<sup>33</sup> First, a legal or professional duty falling within the notary's sphere of responsibility must have been breached. Second, that breach must be attributable to the notary through fault or negligence. Third, the claimant must establish an actual legally recognizable loss. Fourth, the loss must have resulted from the notary's breach rather than solely from the parties' own declarations, decisions, or concealed factual circumstances. Unequal bargaining power, an unequal distribution of joint property, or subsequent annulment of the deed may form part of the factual context, but none independently establishes civil liability. The answer to the second research question therefore lies in establishing a demonstrable connection between professional wrongdoing attributable to the notary and the specific loss suffered by the claimant.

### **A Gender-Sensitive Framework for Notarial Practice in Post-Divorce Joint-Property Agreements**

A gender-sensitive approach to notarial practice should not be understood as requiring the notary to favor one former spouse, impose substantive equality, or determine what distribution of joint property is economically fair. Such an interpretation would conflict with the notary's statutory duty of impartiality and with the parties' autonomy to determine legally permissible terms. The relevant concern is narrower: whether apparently neutral procedures are sufficient to protect the capacity of each party to express a legally valid and genuinely autonomous will. Article 16(1)(a) of the Notary Office Law requires the notary to act carefully and impartially, while CEDAW recognizes equal legal capacity in civil matters and equal rights concerning property during marriage and upon its dissolution.<sup>34</sup> These norms operate at different levels. CEDAW does not create a specific notarial procedure; rather, it provides a normative framework for understanding procedural equality in the exercise and disposition of property rights.

This distinction requires notarial impartiality to be separated from professional passivity. Impartiality means that the notary must not represent the interests of either former spouse or substitute a personal conception of justice for their agreement. It does not mean that circumstances relevant to legal capacity, authority, understanding, or freedom of consent must be ignored. The Notary Office Law already requires careful conduct and authorizes legal counseling in connection with the preparation of deeds.<sup>35</sup> These provisions do not establish a general duty to investigate the former spouses' private relationship, but they provide a legal basis for responding to uncertainties that emerge within the notarial process itself. Economic dependence, unequal education, or unequal control over family information therefore should not be treated as presumptions of invalid consent. Their significance arises only when they coincide with indications that one party may not understand the transaction or may not be expressing an autonomous legal will.

For that reason, this study proposes the concept of procedural red flags. The term does not denote a statutory category and should not be confused with proof of coercion or abuse of circumstances. It refers to observable circumstances that justify greater professional attention during deed preparation. Such circumstances may include material

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<sup>33</sup> Afifah, "Tanggung Jawab dan Perlindungan Hukum," 147–161; Anjangsari and Santoso, "Tinjauan terhadap Perbuatan Melawan Hukum Notaris," 515–530.

<sup>34</sup> Indonesia, *Undang-Undang Nomor 7 Tahun 1984 tentang Pengesahan Convention on the Elimination of All Forms of Discrimination Against Women*, Lembaran Negara Republik Indonesia Tahun 1984 Nomor 29, Tambahan Lembaran Negara Republik Indonesia Nomor 3277, <https://peraturan.bpk.go.id/Details/46978>; *Convention on the Elimination of All Forms of Discrimination against Women*, arts. 15(2), 16(1)(c), and 16(1)(h).

<sup>35</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014*, arts. 15(2)(e) and 16(1)(a).

inconsistencies between documents and declarations, uncertainty regarding ownership or authority over the relevant assets, contradictory explanations concerning the agreement, inability of an appearer to explain the principal consequences of relinquishing a right, or apparent pressure affecting the communication of consent.<sup>36</sup> These indicators do not authorize the notary to declare that *misbruik van omstandigheden* has occurred. Putra and Mustafida demonstrate that abuse of circumstances concerns the improper exploitation of economic or psychological superiority in the formation of consent, a matter whose ultimate legal determination belongs to judicial assessment where a dispute arises.<sup>37</sup> Procedural red flags therefore perform only a preventive function.

Where such indicators appear, the appropriate response is not immediate refusal but what this study terms enhanced clarification. This concept likewise constitutes a proposed analytical model rather than an express category under the Notary Office Law. Enhanced clarification requires the notary to examine more carefully matters already falling within the notarial function: the parties' capacity and authority, the status of the property, the consistency of documents and declarations, the meaning of material clauses, and the legal consequences of the proposed disposition. Article 15(2)(e) authorizes legal counseling, while Article 16(1)(m) requires the deed to be read before the appearers in accordance with statutory procedure.<sup>38</sup> Asfiati advocates stronger prudential examination in deed preparation, including careful scrutiny of supporting documents, while simultaneously acknowledging the need for clearer regulation of the scope of material verification.<sup>39</sup> Enhanced clarification should therefore remain confined to matters reasonably accessible within the notarial process rather than becoming an unrestricted investigation of private facts.

On that basis, this study proposes a three-stage framework: ordinary verification, enhanced clarification, and legally justified refusal. Ordinary verification applies where the identity, capacity, authority, documents, asset status, and declarations presented to the notary reveal no apparent legal difficulty. Enhanced clarification is triggered where procedural red flags create reasonable uncertainty regarding matters relevant to the validity or lawfulness of the transaction. Refusal constitutes the final stage and is justified only where a legally relevant obstacle remains unresolved or where execution of the requested deed would conflict with applicable law or the obligations of the notarial office.<sup>40</sup> This sequence is deliberately graduated because neither gender inequality nor an unequal property ratio constitutes an independent ground for refusal. A 60:40 or 70:30 allocation may remain valid if freely and lawfully agreed, while a numerically equal distribution may still be vulnerable where consent itself was legally defective.

The framework also clarifies the proper relationship between gender justice and substantive distribution. Rouf, Mufidah, and Mahmudi demonstrate that the fairness of joint-property division cannot always be reduced to numerical equality because the roles and contributions of spouses may differ substantially within marriage.<sup>41</sup> Their argument is relevant to understanding why a purely formal conception of equality can be incomplete, but it does not follow that the notary should determine the appropriate distributive ratio. The

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<sup>36</sup> The category of "procedural red flags" is formulated in this study as an analytical device. Its components are derived from legally relevant concerns regarding capacity, authority, understanding, documentary consistency, and freedom of consent; they are not statutory presumptions under the Notary Office Law.

<sup>37</sup> Putra, "Paksaan Ekonomi dan Penyalahgunaan Keadaan," 232–253; Mustafida, "Penerapan Doktrin *Misbruik Van Omstandigheden*," 64–84.

<sup>38</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014*, arts. 15(2)(e) and 16(1)(m).

<sup>39</sup> Asfiati, "Upaya Notaris dalam Menggali Kebenaran Materiil," 21–29.

<sup>40</sup> Indonesia, *Undang-Undang Nomor 2 Tahun 2014*, arts. 16(1)(a) and 16(1)(e). The three-stage framework formulated in the text is the author's normative reconstruction and is not expressly established by these provisions.

<sup>41</sup> Rouf, Mufidah, and Mahmudi, "Joint Property Division in Indonesia," 230–250.

notarial function remains procedural rather than adjudicative. A gender-sensitive approach should therefore direct attention to whether each party is legally capable of exercising property rights, has sufficient understanding of the legal act being undertaken, and expresses consent without a legally relevant defect. In this construction, gender sensitivity modifies the degree of professional attention required by the circumstances; it does not transfer judicial authority to the notary or transform notarial impartiality into substantive advocacy.

The principal normative contribution of this study is thus a graduated procedural model of gender-sensitive notarial caution. At the *de lege lata* level, the binding duties remain those established by the Notary Office Law, the law of contract, and the legal regime governing joint property. The categories of procedural red flags, enhanced clarification, and the three-stage response are not presented as existing statutory obligations, but as a normative reconstruction derived from those duties. This model integrates the findings of the preceding subchapters: the first established that notarial responsibility concerns the legality and integrity of consent rather than a predetermined distributive outcome, while the second established that civil liability requires an attributable breach, fault, loss, and causation. The proposed framework supplies the missing operational link between those propositions by showing how notarial caution can be intensified proportionately without displacing party autonomy or transforming the notary into an adjudicator of substantive fairness.

## CONCLUSION

This study concludes that notarial responsibility in post-divorce joint-property agreements is directed primarily toward safeguarding the legality and integrity of the process through which the parties' consent is formed and expressed, rather than guaranteeing a predetermined distributive outcome. The notary must respect party autonomy while ensuring compliance with statutory formalities, legal capacity and authority, the proper formulation of declarations, and the freedom and validity of consent; unequal bargaining power becomes legally relevant only when it affects these legally cognizable elements. Civil liability therefore does not arise merely from an unequal allocation of joint property or the subsequent annulment of a deed, but requires a cumulative showing of a breach attributable to the notary, fault or negligence, actual legally recognizable loss, and a causal relationship between that breach and the loss suffered. Based on these findings, this study proposes a graduated procedural model of gender-sensitive notarial caution consisting of ordinary verification, enhanced clarification where procedural red flags arise, and legally justified refusal where an unresolved legal obstacle prevents the transaction from being lawfully completed. As a normative reconstruction rather than an existing statutory obligation, this model offers an operational framework for reconciling gender-sensitive protection, party autonomy, notarial impartiality, and professional accountability without transforming the notary into an adjudicator of substantive fairness.

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