Authority scope of natural Guardianship in managing the ward’s affairs in Iran Law

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ABSTRACT: In Islam religion and our civil law, interdicted people and children are being supported. Part of this support is as invalidity and lack of penetration of legal rights of children. Moreover, children expediency offers another people execute their legal affairs as their representative to do so, the legislator has anticipated some institutions, is guardianship that observes the financial and non-financial affairs and executing the legal affairs of children. In this research, definition of guardianship, kinds of guardianship and people who have guardianship power, their condition and guardianship domain, different dimensions of guardianship and termination of guardianship have been studied.

Key words: guardianship, execution of task, infant law, children expediency and welfare, kinds of guardianship and it's domain and limit, supervision and support, precedence, ward, father and grandfather guardianship and their conflict, relation of parents and children and obstacles of execution of guardianship, responsibility.

INTRODUCTION

One of main social problems, is disregarding the individual's justice in family environment in different parts of the life, especially in childhood that, individual has no defense power for his/her rights directly disregarding the right in this time of life will cause irrecoverable damage to child's personality and future of the society. one of the main reasons of this problem, is unawareness of human rights in different parts of the life especially in family and this unawareness manifests as the form of disorder in family member relations especially relations among parents and children. Knowing and obligation of regarding the child and parent's rights, can lead the society to the moral and behavioral justice and balance. In our civil law, the child's expediency and welfare are parents' preference basis; not protecting mother or providing father's presidency on family. About power issue, the fathers' right and task are mixed. The parents' rights are their tool to execute their tasks.

The authority of the court in determining who is the child's guardian, regarding the child expediency is the preference basis; not mother or father's right. It means that it is nothing but task; and when we talk about the right, we mean ability and power that the law has granted to the mother and father to do their task; because executing any task. Requires having authority and this authority continues until the child needs it, so, the main basis of the discussion in this paper, is guardianship and issues about it, like: kinds of guardianship, who has eight to be the guardian, it's condition, dominant and different dimensions and termination of guardianship.

Discussion (definition and concept)

There are different lexical meanings of law in Persian that some of the most important meanings are these

The law is a set of regulations that rule the social relations among people.
Law means the right ; for example right to live.
Sometimes the purpose of the "law" means law sciences in our discussion. We mean its second meaning; as all kinds of right. The lexical meaning of law is proof and constant.

The term law is a valid issue that due to it, an individual or a group of people have lawful authority to do external or valid possession on something or someone and it's requirement is a concession for the rightful person on the others and giving the right to the person who has a just claim(Katuzian, 2008) but the right and the task are
together and wherever there is right, the others mustn't violate it and unlike when a task is proved, there is a right for people or the society.

Task definition: it means what an individual must do it and when does despite it, he/she will be punished.

**Definition of guardianship**

The lexical meaning of guardianship, is closeness and proximity and friendship, the enterprise, to rule and domination and another meanings; because there is a kind of stewardship and connection in them (Gorji, 1997).

**Terminology of guardianship**

Guardianship in general means a dominance that the person has on other's properties and body and includes prophet, the judge and grandfather's guardianship. But in family relation, it means the power and authority that the legislator granted to the father and grandfather to support, protect, look after and manage financial and non-financial affairs of the child or insane or foolish who their disability belongs to the time of childhood and in law terminology the guardianship means the power, authority and dominance that the law gives it to someone to do affairs related to the other and who has authority to do so, is called the guardian (Emami, 1999).

The guardianship has some kinds including

natural guardianship
2-the executor guardianship appointed by father or grandfather (testament) 3-judge and mandatory guardianship(mandate) natural guardianship that is called compulsory and essential guardianship, is the guardianship that is because of affection and interest among the father and the child, because when the baby is born, he/she is under guardianship of father and grandfather who have guardianship condition, by god command and it doesn't need appointment or (validation). The guardian cannot refuse inter in affaire related to the child, such as his/her properties, taking care and protection. so, the father and grandfather are called natural guardian or compulsory guardian.

**Condition of natural guardian**

the jurists agree that the natural guardian must be wise, major and free and if the child is Muslim, natural guardian must be Muslim, too. the child's guardianship with a non-believer father, is granted to the grandfather and if he is non-believer, too, the child's guardianship is due to legal command (Vaziri, 2008).

**Who can be guardian?**

In divine law of Imamia, the child's guardian, is his/her father and grandfather and mother has no authority on managing the child's properties. If there is no father or grandfather or one of father's ancestor, the executor who is appointed by them, is the child's guardian; and there is no especial guardian, the judge is the guardian our civil law acts like this, this regulations was constant until 1353, but, the act number 15 that supports the family criticized the inattention to the mother's authority about his/her managing the child's properties, and made a transformation in this regulation; it interfered mother on child's guardianship.

But after the revision in 1361 and validating previous regulations of our civil law, the impasse condition of guardianship changed into that traditional and historical form and now the child and a disable individual's guardianship that his/her disability is related to his/her childhood is related to the father or grandfather.

**The father's natural guardianship**

The father's natural guardianship on his child is accepted in moral, religious and regulation tradition. When the baby is born in a family, is under his/her father's guardianship. no one can take this post from the father without reason; except by proving disability or treachery or lack of power and authority and disqualification in our civil law, grandfather is father's partner in guardianship and both of them can decide in child's properties and be the child's representative. But grandfather's guardianship has real usage when, father's guardianship terminates and someone must take his place to protect and guard the family children. In Imamia divine law, this problem is proposed and there are three different ideas about it: 1-because both of these guardianship are accepted and none of them has preference to the other, so, if there is conflict among them, both of them must be inactive. 2-grandfather's possession is prior to father's possession in such a way that, he has guardianship to the father, too. 3-father's possession is prior because he is closer to the child. The public compassion in present time, accepts the later idea and thinks that father's possession is prior. This compassion must be respected to, and father is prior because of his closeness in kinship. who is the ward?

Who is the ward?

the child before age of majority
insane who his/her insanity or lack of growing up is related to the childhood (Ragheb isfahani and AGh, 1983).
Natural guardianship dominance

The father and grandfather who are protector of the child's the father and grandfather who are ward's lawful and financial affairs without any legal supervision on their activities. But it doesn't mean that natural guardian's authority field is unlimited and can do everything though in the ward's harm. What limits the natural guardian's extended authority, is the ward's expedience and cannot do something despite his/her expedience. The natural guardian's authority scope is common but limited it is limited because those possessions are active that are based on the ward's expedience and emulation. It is common because the guardian can do what is on the ward's expedience in two financial and non-financial fields. the guardianship in financial affairs can be in different forms like transaction, lease, contract of bailment, loan, peace and.....so, the natural guardian can do any possession that he think is for the ward's expedience and his/her affairs. Guardianship in non-financial affairs can be in different forms, like: education, correct, marriage, demanding the retaliation and...... (Vaziri, 2008).

The guardian's authority and limitation

Act 183 of civil law, natural guardian's presentation is common and does what is on the ward's expedience, except it is forbidden by law. The natural guardian's legal affairs is also lawful after the minor grows up and the ward isn't allowed to cancel it, except he/she can prove that the guardian's authority in non-financial affairs like marriage and divorce is unlike the principals and it's representative when the law let it be valid.

Legal limitation

The natural guardian isn't allowed to agree with the other partners directly or out of the court in distribution of the estate that the ward is partner in it, judicial limitations: the cases that the possessions are for bidden or inactive after proving the natural guardian's bad intention and lack of complying the ward's emulation, we call them judicial limitation because of the court interference necessity.

The natural guardian's right of benefit limitation to the ward's properties:

In Iran law, the parent's right of benefit to the ward's properties isn't recorded. It is permitted when it is necessary in protecting and managing the ward's properties. The legal and moral task that child must do it to his/her parents, is because of their self sacrifice and this is the rental value that society determines for their services (Ragheb Isfahani and AGh, 1983).

Basis of children and parents' relationship

There are a lot of reasoning why father and mother are dominated on children’s pedagogy and properties. Some of writers like Kant say that the father's and child's right are in natural rights and task and some of them like "Hobbies" say that the basis of parents relationship is providing dominance and father or mother's authority in family and in our present law, the right and task are social concepts and our civil law refuses the fathers’ dominance on children as the right, clearly and says that taking care of the child is father and mother's task and duty; but because executing any duty and task needs authority, so father and mother have right to do what they must do (Ragheb Isfahani and AGh, 1983).

The attributions of this relationship and its regulation

Protection and support of the baby isn't specified just to the father. Despite the law of some countries that knew the father's power a function of the husband's authority in family, in Iran law; after Islam, this privilege hasn't been specified just to the husbands. In divine law, the policy that used to rule and adjust the relationship among father, mother and the children, was a policy of protecting the child and providing the family solidarity and woman and the child's civil law is less affected because of husband's authority in family. In support and protection issue, all of jurisprudent have accepted that in sucking time, mother is prior to the father, because she can protect the baby better. After two years, the father is prior to the son and mother is prior to the daughter and this situation exists till 7 years old and maybe 9 years old and after that fathers' will is superior. But after his death, custody of the child is related to the mother and appointed guardian by father or grandfather has no right to batter to her. But unlike, mother has no right in managing the child's properties and the child's father and grandfather or appointed executor can do these affairs.

Because in dividing family chores, the assumption is that, the father has more competency. This order is entered in our civil law, too (acts 1168 to 1194) and was continued until approval of family protection law. About guardianship, according to the act 15 of the same law approved in 1353, the minor baby, is under his/her father's natural guardianship.
"in the case of proving his disability, treachery or disqualification in managing the minor's affairs or father's death, guardianship's right is granted to maternal or paternal grandfather by the prosecutor and the town court approval....."

The fate of this law is vague; the first issues of act 3 of especial civil law bill and verifying the acts related to the guardianship and law custody in revision in 1361, says that contrary regulations to this act is abolished implicitly and our civil law is returned to its first position so, protection of the baby and managing his/her properties in first phase is related to father and grandfathers and in second phase to the mother or maternal grandfathers and we cannot consider father's authority as his direct result of authority in family.

The authority basis that the parents have on their child, is their support, so, this authority continues till the child needs it (when the child becomes major and old, and comes out of supervision and guardianship and if he/she becomes insane or foolish, there will be a protector for him/her).(understood of the act 1168). The act of civil law determines that: (the baby must be his fathers' obedient and respect them in any age.) from the term (in any age) and historical record of the act 1177 (the act 377 of French civil law and Islamic educations related to the necessity of respect to the parents), it is clear that the word (baby) doesn't mean the minor but the child. But, this sentence is moral. After reaching to the adult age or proving it, father and mother have no authority in educating their children or managing the child's properties. So, the regulation about termination of guardianship after growing up, has two exceptions: 1- about insane or foolish that his/her lack of growing up or insanity is related to the minority (act 1180). Therefore, when a child isn’t grown up because of insanity or foolish, will be under guardianship. 2- the act 1043 (marriage of a daughter who hasn’t got married before, though grown up, is marriage’s right). But, this priority doesn’t mean abolition of father or mother’s priority right or invalidating their guardianship, because this priority must be respected before decision of the court and violating it, is considered as a fault and has responsibility (Ragheb isfahani and AGh, 1983).

Domination of mother and father on child's education and pedagogy and managing his/her properties is because of protecting him/her and so, is related to the public discipline. So, a wife and husband can not violate the regulations by private contract in the relationship between themselves or the others, or ask for wage because of their service. The purpose of executing the parents' guardianship right on the children, in the first phase is maintaining the baby's right and personality that as an assumption, will be provided near his/her fathers, better than any other place. So, they can't transact about fate of deposit that the God and society granted to them. But when a wife and husband make an order about priority in paying the child expense, its content is respectful when executing it, isn't harmful to the baby's rights (Ragheb isfahani and AGh, 1983).

The natural guardian's sickness or old age , the natural guardian's committing treachery , the natural guardian's oppression and dissipation , the natural guardian's absence or imprisonment (Vaziri, 2008).

Causes of guardianship suspension:

1. Natural affection and compassion of father and mother to the child is the best execution guaranty for their moral education, but a natural guardian's sickness or old age, natural guardian's committing treachery, natural guardian's oppression and dissipation, natural guardian's absence or imprisonment.

2. The law custody in revision in 1361, says that contrary regulations to this act is abolished implicitly. And our civil law is rented to its first position. So, protection of the baby and managing his/her properties in first phase is related to father and grandfathers and in second phase to the mother or maternal grandfathers and we can't consider father's authority as his direct result of authority and management in family. At the time that the wife, husband and the children live together, educating and taking care of the children, is their common duty and task. (act 1104). Priority for one of them, mustn't cause in disregarding the other. But there may be a problem in how to look after and educate the children, so, the law must find solution for this problem. In our civil law at the time that the child needs more affection and compassion, mother is prior to the father and at the age that the child's education is more important than his/her taking care, the father is prior to the mother, so, what puts the priority basis on mother or father, is the child's expediency, not, supporting the mother or providing father's authority in family. By analyzing the father and mother's priority, we can easily find out that why the court has authority to give the child to each of couple who is more suitable, at the time that the child's health or moral education is in danger (act 1173).

This authority doesn't mean abolition of father or mother's priority right or invalidating their guardianship, because this priority must be respected before decision of the court and violating it, is considered as a fault and has responsibility (Ragheb isfahani and AGh, 1983).

Guardianship execution problems and obstacles and responsibilities

The guardian's disability, treachery and disqualification of the guardian provided that there be succession in natural guardianship hierarchy, the guardian’s disbelief.

Causes of guardianship suspension:

1. The natural guardian's sickness or old age , the natural guardian's committing treachery , the natural guardian's oppression and dissipation , the natural guardian’s absence or imprisonment (Vaziri, 2008).

2. The child's guardianship and protection isn't father and mother’s right, but, a kind of moral and social responsibility. The act 1178 says that: (the fathers must educate their children in scope of their authority according to the requirement and mustn't neglect it.). about civil execution guaranty and responsibility caused by mother and father's breach, the law is silent. This silence doesn’t mean immunity, but it is because there is no need for it. Natural affection and compassion of father and mother to the child is the best execution guaranty for their moral education, but a natural guardian's sickness or old age, natural guardian's committing treachery, natural guardian's oppression and dissipation, natural guardian's absence or imprisonment.
tasks and duties. Though, if a father or mother doesn’t respect this silence, will be punished by judge; as the act 1172 says that: none of the fathers is allowed to refuse looking after the child, when the child custody is up to him.) And the act 1173 permits the court to give protection to the protector when there is danger for the child in health condition or moral education, because of lack of their suitable care and indecency. The father’s execution guaranty isn’t limited to the disappointing of the God gift. They have civil responsibilities for disregarding their duties and refusal of doing their duties and tasks and must be punished (Ragheb Isfahani and AGh, 1983).

CONCLUSION

The baby grows up in mother and father’s lap and is under protection and guardianship of who accepts this duty and doesn’t regard heartthrob and gees. In our civil law, the relationship among the wife and husband and the rights and duties that they have for their children, are considered and researched in scattered from. Our civil law refuses the father’s dominance on the child is their right and like other rights, the main purpose of it, is to provide the authority of owner of the right. The historical record of our civil law and content of most of them (after 1168 and 1172 and 1184 to 1188) shows that in adjusting the parents and the children’s relationship, the social expedience, manages the regulations; but we mustn’t conclude that the child belongs to the society and the parents ought to educate and protect the child as the government representative. This wrong thought destructs the parent’s guardianship value; because the guardianship is their right and expect some cases that the law doesn’t allow, we can’t deprive them from this privilege.

REFERENCES