



Representation of Mother for Guardianship of the Child in Iranian and French Laws

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Abstract

The French law, contrary to the Iranian law, has given the mother a kind of representation for guardianship and training of the child. This is a development that was established in France in 1970, and in Article 6 of the Iranian Family Protection Act of 2012, the granting of representation to the mother over the legal procedure for demand of the child or the incompetent has been entrusted. There are two different attitudes in the interpretation of this article; some of which are considered as "establishment of the notion of the guardianship" for the mother, while others believe that this article constitutes a kind of representation to the mother as a lawyer or guardian.

The present article uses an analytical-descriptive method to explain the nature and principles of the representation of the mother for guardianship of the child. The result of the article suggests that the Iranian legislator's purpose of the assignment of representation to the mother in accordance with Article 6 of the Family Protection Law of Iran, adopted in 2012, is not to prove the guardianship for the mother like French law, but merely to grant representation and the right of the legal procedure for demand of the alimony of the child or the incompetent, maintaining the interests and observing their desire.

Key Words: Child, French, Guardianship, Iran, Law, Mother.

*Please cite this article as: Ahangaran MR, Hosseini VS. Representation of Mother for Guardianship of the Child in Iranian and French Law. Int J Pediatr 2019; 7(3): 9125-31. DOI: [10.22038/ijp.2018.35520.3106](https://doi.org/10.22038/ijp.2018.35520.3106)

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Received date: Jul.14, 2018; Accepted date: Nov. 12, 2018

INTRODUCTION

According to the principles of Iranian law, no one has the right to take the possession of someone *else's property* and to make it obligatory for someone else or transfer his or her property to another unless he is allowed by the owner like the attorney or he has the right of ownership by the law like the guardian of a child. Accordingly, based on Imamites jurisprudence and the civil code the lack of guardianship is a principle. However, there is an exception to the principle of lack of guardianship: the legislator confers the right of supremacy and authority of the incompetents to the father, grandfather, executor, or the ruler. For mother, however, with respect to guardianship no right has been anticipated. But in the current situation of Islamic Republic of Iran, considering the article 6 of the Iranian family protection law of 2012, which grants representation to the mother in the hearing session, the expectation and demands of families proceeds toward assigning more rights and privileges to the mothers in as much as some Iranian lawyers interpret granting of representation to mother according to the article 6 of the Iranian new family protection act of 1633 as the mother's guardianship of the child.

The French law grants guardianship to the mothers just like the father. However, this viewpoint is opposed to the Iranian principle of no creation of guardianship for mother so it has many gaps and challenges. Thus, it seems that the challenging point of the matter which has different legal effects is whether the mother can bring a lawsuit as the original guardian of the child or whether she can file a lawsuit merely as a representative of the minor or incompetent child under the article 6 of Iranian family protection law of 2012? In other words, does the aforementioned article aim to fabricate the institution of the guardianship for mother just like that of father and grandfather, or it does it mean to confer a

conventional guardianship to the mother like that of proxy? It seems that if the juridical and legal principles for the verification of the representation of mother in proceeding for her child's alimony are established in Imamites jurisprudence, and rules and regulations of Islamic Republic of Iran, there will be no need for the verification of the creation of guardianship for mother. Therefore, the present paper analyzes the views and the arguments of the pros and cons of granting representation to the mother for guardianship of the child from the viewpoint of Iranian and French law.

I. Mother's Representation for Guardianship of the Child in Iranian Law

The fabrication of guardianship by nature is to secure the interests of the person under the custody of said parents. The interests encompass maintaining and increasing of the financial or non-financial affairs of the child. The holy Legislature has defined and determined guardianship and the parents for securing financial or non-financial interests of the incompetents. Firstly, the father and grandfather have guardianship over the child. The majority of Imamites jurists hold that the father and grandfather have the right of guardianship over the child (1). Thus, they hold it as unlawful for the mother to have guardianship over the child and deemed it a necessary requirement for the guardian to be a male person. In order to prove the necessity of the guardianship of the father and the lack of guardianship of the mother over the children's marriage, they rely on a number of reasons including the principle in compliance with rejection of guardianship [This is an original principle of guardianship that no one has the right of guardianship over another, unless there is a reason; considering that there was no reason among jurists and their inference of the women's issues to prove the women's guardianship (although there is no reason to reject it too, it is enough not to be able to prove it), consensus [In

the Imamites jurisprudence, like other religions, there is a consensus on the mother's lack of guardianship over the soul and the property of her child and only the father and the grandfather are named as the compulsory guardians. For this reason, the majority of the jurists believe that the mother has no right of guardianship over her younger children after the death of her husband and the paternal grandfather takes the responsibility of their custody], and the verses of the Quran [Like the holy sura of Nisa (Women), verse 34 "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other"] (1-2).

The majority of Sunni jurists hold that the mothers are not granted the right of guardianship over the marriage of the children and other incompetents like the majority of Imamites jurists who maintain that mothers have no right of guardianship over the marriage of child whether a mature or minor child (3-4). Only Ibn Jonaid Eskafi approved mother's guardianship of the child and Ibn Aghil Amani did not approve the grandfather's guardianship of the child ["Al-Walī allazī huwa awlā bi nikāḥahunna huwa al-ab dūna ghayrahū min al-awliya' wa lā wilāyata liljadd" /cont] (5). Therefore, the issue of taking possession of the assets of the child and managing his or her financial rights is an essential right of the child. Most of the Islamic jurists and lawyers hold that the father is the only one who has been given this right which is called the by nature guardianship over the properties of the child. Regarding the fostering, custody, and taking care of the child according to the article 1169 of Iranian civil code, the custody of the child is granted to the mother until the age of 7 and after reaching the age of 7 the court decides to hand him/her over to the father or mother with respect to the interests of the child. If the child is handed over to the mother, the father has the responsibility to afford the costs and expenditures associated with the alimony of the child. Since owing to Imamites jurisprudence and Iranian law, the father holds the responsibility for

meeting the needs of the child like food, housing, medical, and educational needs and generally all the conventional material needs of the child. Thus, it can be said that the policy of securing the alimony of the child by the father removes a significant part of the challenges and difficulties of the mother who has the custody of the child (6). Based on the article 6 of the Iranian family protection law of 2012, the mother or any person who holds the custody of the child can sue for the alimony of a child and the court reconsiders the necessity and the lawsuit of the claimant. Therefore, it can be said that the legislator, in light of article 6 of the family protection act of 1633, has granted to the mother a kind of representation for taking legal action toward demanding the alimony of the child in her custody. However, considering all the above-mentioned matters and pursuant to the viewpoint of the majority of Imamites jurisprudence, no right of guardianship is held for the mother in the Iranian law system. Of course, in contrast, some lawyers believe that the mother, just like the father and grandfather, has guardianship over the incompetents (7-8). To prove the mother's guardianship, they have distorted the principles of guardianship upon which all the Imamites jurists and most of the Sunni jurists have agreed, without any thought, research, or consideration of the jurisprudential and legal sources and principles; in order to present a method, that, in their own opinion, is closer to the rights of the mothers and is less opposed to the clear-cut juridical principles. The most significant reasons of the proponents of the theory of the mother's guardianship is as follows. In the next parts, their opinions will be discussed and also criticized.

1. Mother, just like the father and grandfather, can have the right of guardianship over the soul and the property of the child. This viewpoint

invariably existed within Imamites jurisprudence and has been attributed to Ibn Jonaid Eskafi who held that mother has the right of guardianship. Based on the Hanafi School of jurisprudence, in the case of the absence of the male relatives of the child, the mother has guardianship of the child. Among *Shafi'ies*, Abu Saeid Estakhri holds this right for mother due to the excessive kindness and the affection of the mother toward the child (9). Some of the Hanbalies also have accepted the mother's guardianship right over the soul of the child (10). To criticize this argument, it should be said that the matter that the mother has no right of guardianship must be taken into consideration within Imamites jurisprudence that is the basis for most of the law cases in Iran. In the case where it is relied on the Sunni school of jurisprudence, it is to emphasize on the matter; it does not mean that whenever we do not find any proof for our claim in Imamites jurisprudence, we use the Sunni school of jurisprudence that is sometimes different from the principles of Imamites jurisprudence and prove a subject rejected by Imamites jurisprudence. Meanwhile, the majority of Sunni jurists do not hold the guardianship right for mother. For this reason, no right of guardianship is given to the mother in most Islamic countries (11).

2. The consensus of the Imamites jurists on the lack of the right of guardianship for the mother was a proof-based consensus and it is not valid (12). To analyze the above-mentioned reason, it can be said that given that the proof-based consensus is correct, the proof must be a valid one based on which the jurists have made consensus; i.e., it is not possible to deem the consensus proof-based and at the same time to assume it can be invalidated.

3. It is not a sound belief that no one has the right of guardianship over another unless it is proved otherwise, but the contrary is true about incompetents

regarding the principle of guardianship, so the mother is also covered by the same principle. To criticize this argument, it should be said that this principle cannot be invalidated in jurisprudence and it is approved among jurists (13).

4. In the modern era, as the foundation of the patriarch system of family gradually weakens and nuclear supported, the article 1180 of the civil code faces serious challenges; perhaps the grandfather and the grandchildren do not live together in a house. Consequently, he is not as interested as the father or the mother of child in his or her fate in order to be equal to the father in administration of the affairs of incompetent, or to have the absolute right of guardianship after the father. Besides, as the level of knowledge and thought of women increase, perhaps it is to the interest of the child that his/her mother, but not the grandfather, is given the right of custody and management of his/her personal and financial affairs specifically because the mother is more affectionate and loyal to his or her child than anyone else. Perhaps this is the reason why in the family protection law of 1974 the guardianship right has been assigned to the father by the legislator and the prosecutor decides the right of the mother and grandfather's guardianship (14). On the other hand, at times of infallible Imams (A.S.), that is, at the time of establishment of primary Islamic rules, the customary norms held that the women have no right of custodianship over their child. Since it was considered that the women themselves were under the guardianship of the others and the women, of course, were engaged in household duties only and did not take part in social activities. Thus, the women were assigned the financial and non-financial affairs of the child, except custodianship. However, in the modern era and the present society of Iran women mostly attend in social activities and play a vital role in community besides household

affairs. Thus, it seems that after the demise of the father or even during the life of the father (in cases of lack of competence of the father), the right of the guardianship as well as the custodianship right must be granted to her (13). In response to these groups of lawyers it must be said that pursuant to Imamites jurisprudence, the guardian by nature is the one who is appointed and takes his or her position directly by the law and his or her guardianship is a type of compulsory but not voluntary social and family duty. Maybe, this is the reason why it is called natural. Even the guardianship by nature has been defined by some lawyers as compulsory guardianship. Jurists have explained in detail the different types of guardianships including the father, grandfather, guardian, ruler, and the Just people, maintaining occasionally that the father and the grandfather have compulsory guardianship. The compulsory guardianship is a legal institution which is rooted in human nature and the social and familial requirements of life (14, 15).

Finally, criticizing the proponents of fabrication of the guardianship for the mother, it can be said that from the viewpoints of Imamites jurisprudence and Iranian civil code, compulsory guardian is only the father and grandfather and the position of the guardianship is not anticipated for the mother. Since, the fabrication of the guardianship for the mother contradicts the maternal role and duty and assigning this duty contradicts the interests of the mother herself; the interest of the mother requires that the father and grandfather be assigned the compulsory guardianship; because the fabrication of the guardianship for the mother puts an excess burden upon the mother. Although there is no legal prohibition for the mother to be appointed as the custodian or guardian for managing the incompetent's affairs.

II. Representation of Mother for the Guardianship of the Child in French Law

In French law, the parents hold the responsibility of the custodianship of the child during their lifetime and they possess the status of the guardianship. The French legislator, in order to prevent, as far as possible, interfering with the sensitive family's internal affairs, has no such rules and regulations for guardianship and trusts more on the natural support of the parents. Meanwhile, the French civil code has established some rules and regulations (article 389 onwards) for the better management of the assets and properties of the minor child by parents, as well as for supporting the individual and education of the minor child. Thus, in the French law, unlike the Iranian law, father and mother are both equal in terms of guardianship. This modification has been created by the French law of 1979. Even now, although the father and the mother should basically hold the responsibility of managing the child's affairs, which is the outcome of the guardianship, and they must perform equally and commonly according to the equity principle in this regard, legal management of the assets of the minor child is granted to the father in the first place which is implemented with the cooperation of the mother. Even no cooperation is needed for the merely administrative affairs, and the father can act independently. Therefore, it can be said that inequity and priority of the father over the mother is still observed in the realm of managing the affairs of the minor child within the French law. This inequity is justified by some experts as follows: in the domain of the management of the properties, the third parties to the contract with the minor child want, in fact, a person holding this responsibility against themselves and it is crucial for the child to have a legal agency to defend his or her interests, especially in the event of the

conflict and dispute. Minor child, in French law, contrary to Iranian law, is one who is under the full age of 21 years old. However, the minor may be recognized as mature through marriage or after reaching the full age of 18 his or her maturity may be announced in the court and he/she may enjoy complete legal competence. Of course, in Iranian law also, after the minor child reaches the full age of 15, his or her growth may be confirmed in the court and come out of interdiction (16). In French law, representation of mother for the guardianship and custodianship of the child is part of parental guardianship (L, autorite parentale) referred to in the articles 371 and 387 of the civil code of the country. The new French civil law defines parental guardianship as a set of rights and privileges the law recognizes for the parents in order to perform their duties and responsibilities to the minor child and his or her belongings. Accordingly, the term "parental guardianship" is used in the general meaning of guardianship (17).

In the French civil code prior to 4th June of 1970, the term "guardianship" was used in the context of the child custodianship. The amendment to this part of French civil law on this date changed the title of this chapter into the parental guardianship, and it seems that the custodianship is a duty rather than a personal right. The new French civil law defines of 1970 (the guardianship over the custodianship within the French civil code prior to 4th June of 1970), in addition to adding the articles 371 and 372 to the country's civil code, defines the guardianship as follows: "parental guardianship relates to the parents in order to support and maintain the security, safety, and ethics of the child. The parents have defined rights and duties toward care and education of the child" (18). In this way, based on French law, custodianship is a set of rights and duties of the parents considered for safeguarding the child and his/her properties. In the

French law, guardianship over the child is a right granted to the parents on behalf of the legislator to perform their duties of preservation, caring, and educating the child to the extent that it is regarded by some experts as a duty. The duty is in favor of the child and this is not a permanent duty. Based on the article 372 of French civil code, the child is under the guardianship of his/her parents until the age of maturity or termination of guardianship, which shows the time restriction for the parents' rights (19). In the French law, the guardianship begins when the child is deprived of the parents' custody and support, and terminates through ending interdiction of mental retardation or the maturity of the child. In French law unlike Iranian law, guardianship is not always judicial. Occasionally, the guardian is appointed by father or mother and sometimes through the direct verdict of law (with respect to grandfather or grandmother) or sometimes based on the family council decision or the decree of the court. Thus, in French law unlike the Iranian law, regulations that determine the grandfather's guardianship and executorship and the guardianship by court in the meanings and concepts which are vastly used in Iranian law are similar (in its specific connotation). When the guardianship by court operates, even in the case where one guardian is established or is acting, the guardianship by court is organized through family council. Taking the interest of the child into consideration, the family council, consisting of four members including the guardian or the supervisor of guardian, regulates the general conditions of caring, education, and upbringing of the child. In addition, the judge prevents the paternal or maternal branch of the family council from leaving without any representation (20). As it is seen, there is no variation between father and mother in this subject and French law is more advanced than Iranian law in this regard. Anyway, the major conflict

between French law and Iranian law as well as the law in other Islamic countries is the equal right of father and mother's guardianship in the French law and the priority of father's compulsory guardianship over the mother in the law in Islamic countries.

CONCLUSION

In the Iranian law, the legal institution of mother's representation in the proceedings for alimony of the child is not an issue pertaining to the fabrication of the mother' right of guardianship. The legislator's basis for granting representation and legal right to mother in the proceedings for alimony of the child and legally incompetent is reconciled with the necessity and the rule of concomitant rights on the permit in an issue and the permit in its requirements. The most obvious requirement of the custodianship of the child is to defend the rights of the child and the right of proceeding. Since the mother holds responsibility for taking care and custody of the child, she must be capable of bringing a lawsuit to demand alimony. In addition, when necessary, the mother as the most affectionate and closest one for observing the interests of the child has a priority over others and will have the right to demand the alimony of her child. However, in French law, the parents are basically responsible for the custody of the child in their lifetime and they hold the position of parental guardianship. The French legislator, in order to prevent, as far as possible, interfering with the sensitive family's internal affairs, has few rules and regulations for the parental guardianship and has more trust in the natural support of the parents.

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