

## Review of Mother's Guardianship

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### Abstract

Guardianship, in law, is the power and authority granted to a person by law to care for an incompetent or his/her property. In Islam, a child's guardianship has a different concept from custody and one can declare that the two terms, although very similar, are in need of revision in the legislation process. It must be noted that according to law, the people having guardianship are the father and the paternal forefather and there is no place for mother in the vital matter of guardianship. According to arguments, such a concept can be deployed for the mother too because the verses in Quran and the accounts which prioritize the forefather's guardianship over that of the mother are those regarding the marriage of a virgin girl and so generalizing this point to other areas is open to criticism and we can permit such a right for the mother in other areas other than marriage.

**Keywords:** guardianship, custody, child, mother, father, paternal forefather

## Introduction

Mother is the painter of the child's personality and even his creator. Motherhood is a state that knows all the exquisite traits of beauty in a child's upbringing and sacrifices all her personal facilities and domains in this regard.

A mother can educate her child only when her spiritual and mental peace is provided for at home. Clearly, the nature of a woman is such that she is prepared for accepting the responsibility of a child's upbringing and if we prevent her from this action, she will suffer from physical and psychological illnesses because her essence and nature is based on love and affection and this affection reaches its peak in her love towards her children. As God has placed this love and sacrifice in mothers, there is naturally an attachment placed in the child and this attachment is such that the child cannot pass a moment without his mother during the first years of life.

It is clear that the absence of mother will result in great damage in the child because during the first years the child thinks of the mother as his only support and role model.

In families where the mother and father live together, the child does not suffer irreplaceable damages of lack of parents but when the matter of divorce and separation is raised in a family or a child is placed in the situation of losing a parent due to a parent's death and the problems among families, very serious spiritual damages are brought upon the child. So the aim of this article is to state the reduction of children's problems after divorce and presenting techniques for better supporting the foundation of a family and the vital role of family in the child's upbringing and we will deal with the state of a mother's guardianship and custody in this regard.

To this end, the concept of guardianship, responsible people, a guardian's responsibilities and then a mother's guardianship are investigated under a few headings:

## Research Methodology

This research is carried out in analytic-descriptive mode: meaning that in order to describe qualitatively and objectively, the concepts' substance is stated in a systematic way. In this research we are after analysis and definition of the items. In content analysis, the desired elements and items are gathered and classified and then analyzed. In this method, as in other research methods, the subject is recognized and defined, a hypothesis is formulated, data are gathered, arranged and classified and finally the data are analyzed and a conclusion is reached: such that after study and note taking, compilation begins. In this research, after studying the present material and notes, the definition of the subject is presented and then with regard to the explanation of its derivatives, the heading is clarified and explained and if there is disagreement in the subject under question, the views are presented and summed up in the end if necessary.

## Definition of Guardianship ("velayat")

"Velayat" in Arabic means to rule, control, love, help, possess and achieve and the word "ghahri" means compulsory and urgent. (Gorgi, first print 1384, p. 470; family law; Safai and Imami, second print 1376, vol. 2/ P. 160)

As a legal term, "velayatghahri" (compulsory guardianship) is a duty imposed on the guardian with the law's direct order and irrespective of the guardian's will or decision. (same, first print 2005, p. 471)

And this guardianship is the power and authority transferred by law to a qualified person to manage the affairs of an incompetent. (Safai and Imami, second print 1378, P. 370-371)

### **The Relationship Between Guardianship and Custody**

The domain of custodianship relates to the keeping and upbringing of the child while in the domain of compulsory guardianship includes all financial matters and the management of the ward's (child's) properties. So, by documenting the right of custody one cannot control a child's financial matters, purchase or sell anything and... while according to article 1183 of the Civil Law: "in all matters related to the ward's properties and financial rights, the guardian is his legal representative". The compulsory guardian can perform all financial matters in the best interest of the child provided that the minor's benefit is considered; the legal actions of the compulsory guardian are valid.

And in case the compulsory guardian does not consider the child's best interest, he will be dismissed according to article 1184 of the Civil Law and he will be prohibited from manipulating the minor's properties.<sup>1</sup>

The important point here is that guardianship of a child is always accompanied by his custodianship. (Katouzian, first print 1389, vol. 2/ p.187-188)

And this is in cases where guardianship and custodianship are conforming to one person. If custody is with another person, for example mother and compulsory guardianship with the paternal grandfather, conflicts will be formed which can be sometimes elevated by the parties' participation. Meaning that the mother is responsible for keeping and raising the child until the age of 7 and the compulsory guardian manages the financial matters.

Sometimes conflicts precede a mother's right meaning that after the age of custody by mother, the compulsory guardian takes over custody too.

So it can be said that if a person is not prior to compulsory guardian regarding custody, both custody and guardianship are with one person and if a person is prior, the guardianship remains and custody is postponed to another time.

### **Persons Responsible**

Article 1180 of the Civil Law states: "a minor is under the compulsory guardianship of his father and paternal grandfather and so is an underage or insane child if his lack of growth or insanity is related to minority".

In religious texts, father is the person to whom the child's lineage descends to according to the religious law. (Bohrani, 1990, vol. 3, p. 274) In jurisprudence's discussions, the paternal grandfather is the same as the father's father, father's grandfather, grandfather's grandfather and so on.(MousaviBojnourdi, first print 1386, p. 61 [quoted Najafi, 1981, vol. 29 / P. 171])

According to this article, the compulsory guardianship of the child is with the father and the paternal grandfather. Of course there are different views regarding the paternal grandfather. Some canonists believe that the guardianship of the father and the grandfather are equal and say that they are alongside each other.

And some believe that there is order in the guardianship of the father and the grandfather and when the father is alive and competent the grandfather does not gain compulsory guardianship.(Gorgi, first print 1384, p. 483)

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<sup>1</sup>Article 1184 of the Civil Law: if the compulsory guardian of the child does not consider the benefit of the minor and performs actions which lead to the loss of the ward, on the request of a relative or head of jurisdiction and upon confirmation, the court will dismiss and prohibit the guardian from manipulation of the minor's properties and appoint a competent person as guardian and for the management of the child's financial affairs. Also if the compulsory guardian is not able to manage the ward's properties due to old age or illness and the like and does not appoint a person for this either, according to the rules of this article a person will be assigned as a trustee in addition to the compulsory guardian.

There is also a third view which gives priority to the paternal grandfather.(same, P. 483)

Today with the change in the trend and style of life in society it can be said that the family is not under the authority of the paternal grandfather and today with the decrease in familial relations and the spread of urbanism and separate lives, the paternal grandfather is no longer involved in the affairs of his son's children and the paternal grandfather will gain control of affair only when the child's father has passed away or is denied compulsory guardianship. Therefore, in such conditions the paternal grandfather will be responsible instead of the father and although it is stated in article 1181 of the Civil Law: "the father and the paternal grandfather both have compulsory guardianship regarding their children". We may be able to deduct the equality of the father and the grandfather's guardianship from this article but it can somehow be noted that with regard to today's conventions, this guardianship is ordered and has transposition.

Although the father and the paternal grandfather have guardianship while alive, they can appoint someone as executor to deal with the affairs of the ward and if ever there is no compulsory guardian or appointed executor, guardianship is with the judge.

### **Persons under Compulsory Guardianship**

The law has determined limits for the compulsory guardians regarding the domain of the liable people. So the compulsory guardians are bound with constraints like age, capability and ...

Article 1180 of the Civil Law states: "a minor is under the compulsory guardianship of his father and paternal grandfather and so is an underage or insane child if his lack of age or insanity is related to minority".

So the child's age, minority-related insanity and minority-related lack of age are among criteria for acceptance of guardianship.

So incompetents under the compulsory guardianship are classified into 3 groups:(Safai and imami, 1376, p. 162)

- Minor: in the past minor was a person under the age of 18 and the legislator did not differentiate between girls and boys in this regard, but with the Civil Law reform in 1982, according to revised article 1210<sup>1</sup>, a girl is considered minor until she reaches the age of 9 complete lunar years and a boy is considered minor until he reaches the age of 15 complete lunar years.
- An underage person: in other words an insane person whose lack of growth (sanity) is related to state of minority, meaning he or she has had insanity before the age of 9 or 15 (unable to rationally manage properties) and this state has continued after the age of 9 or 15, use of the term "underage child" in article 1180 of the Civil Law<sup>2</sup> is open to criticism because the person under question is a person of 9 or 15 complete lunar years but his or her lack of growth is related to his or her childhood and so ascription of the word "child" is not correct.
- Insane: if his or her insanity is related to minority, meaning children whose insanity has occurred before the age of 9 or 15 and this state has continued after the age of 9 or 15.

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<sup>1</sup>Article 1020 of the Civil Law: "no one is to be considered incompetent due to insanity or lack of age unless this insanity or lack of age is proved. In supplementary proviso 1 of article 1210 is stated that adolescence in boys is at the complete age of 15 and for girls at the complete age of 9.

<sup>2</sup>Article 1180 of the Civil Law: "a minor child is under compulsory guardianship of father and paternal grandfather and so is an under-grown or insane child provided that his/her lack of growth or insanity is related to minority.

### **Responsibilities of a Compulsory Guardian**

Since the source of compulsory guardianship is the law, there are rules and limitations set for the guardian, so guardianship has a vast domain including management of the child's assets, his nurturing and instruction, his education and permitting his/her marriage. This matter has led to more precision in separating guardianship from custodianship. In article 1183 of the Civil Law it is stated: "in all matters related to the ward's assets and financial rights, his/her legal representative is his/her guardian". According to the mentioned article the responsibility of a compulsory guardian is exclusive to management of the minor's financial affairs but according to article 73 of the non-litigious legal affairs: if the minor has guardian or executor, the public prosecutor and the court are not entitled to custody of his/her affairs". According to this article, in addition to financial affairs, management of personal affairs, in other words safekeeping of the ward is the responsibility of the guardian.(Safai and imami, second print 1378, p. 377-378))

And the important point in this regard is that if it is stated that the compulsory guardian is responsible for the safekeeping of the ward, it means that he is responsible for all the financial and non-financial affairs. If the child is under the custody of a person other than his/her compulsory guardian, the non-official affairs are not the responsibility of the compulsory guardian.

Citing article 1184 of the Civil Law: "if the compulsory guardian of the child does not consider the benefit of the minor and performs actions which lead to the loss of the ward, on the request of a relative or head of jurisdiction and upon confirmation, the court will dismiss and prohibit the guardian from manipulation of the minor's properties and appoint a competent person as guardian and for the management of the child's financial affairs" it can be noted that the only issue limiting the responsibilities and authority of the compulsory guardian is the minor's prudence and the guardian cannot perform actions contrary to his/her prudence or incompatible with the law and conventions.

The compulsory guardian's authority is general and he can perform any action he believes to be in the best interest of the child unless he is clearly deprived of this right by the law.(Ebadi, fourth print, 1375, vol. 1 / p. 42-43)

### **Cases where Compulsory Guardianship is annulled**

By investigating through legal books it can be inferred that compulsory guardianship is not a life-long responsibility and if the compulsory guardian does not perform according to the law he will be dismissed from guardianship.

According to article 15 of the Family Law Act<sup>1</sup> of year 1974, cases of annulment of the compulsory guardianship include:(Safai and imami, 1378, 384)

- Treason: if the compulsory guardian's betrayal is proven such that it becomes evident that he has misused the minor's assets or manipulated them towards his own interest and against that of the ward, the court will dismiss him.
- Lack of power and competence: the compulsory guardian may not have betrayed the minor but it may be proven that he is not capable or qualified to manage the minor's affairs;



such that the compulsory guardian is a drug addict and not able to manage the minor's affairs as they should be and there is possibility of the minor being addicted or the guardian is unable to manage the ward's affairs due to old age or illiteracy or lack of knowledge; in such cases the court can dismiss the guardian.

### **Role of the Mother**

The foundation of a mother's job starts from the moment she is pregnant until the end of the main stage of nurturing and during this time the mother is responsible for his physical, mental, emotional and ethical education and the important issues in this process are qualities and habits and awareness of educational, health, mental and social matters.

The effect of a mother's behavior on the child is scientifically proven. Today, science relates the quality of a child's manner and his/her traits to the mother and believes that her lessons and influences will set an example for the rest of the child's life and what is emphasized more by science is the child's spirits, emotional aspects and feelings, most of which are received from the mother: scientifically speaking, the relationship between mother and child is a kind of leader and follower relationship: the law of inheritance believes many moods of the child to unconsciously arise from the mother and from the social aspect it is said that the mother and her manner in confronting a matter is like a testament for the child.(Ghaemi, Undated, pp. 38-39)

So it can be said that mothers are the builders of the society's ethical foundations and it is her that strengthens the moral foundations in the child's mind and binds the child with principles by showing him the good and the evil, or beauty and vice.

The child is under a mother's leadership from birth and usually during the first year the child has a severe state of submission and obedience and from about the age of two the grounds for thought and reflection and its use starts forming in the child: he tries to find a solution to a problem. But what can be called "childish thought" begins from around the age of three and at this age rudiments of the child's thoughts are not yet developed and transformed and it is locked up in the child's mind and are guided and developed under a mother's care. At this age, questions start to form and through the answers he receives, the child builds a world for himself which he is not able to analyze and evaluate; therefore he accepts anything the parents, especially the mother, tell him.(Ghaemi, undated, p. 129-130)

A mother's role is more vital for a girl than it is for a boy because she must too become a mother one day and continue her mother's way. If you want her to be the perfect mother, she has to be perfect herself. Daughters usually imitate their mother's way and the boys that of the father. Sometimes a mother may behave in such a way that her daughter becomes disgusted with motherhood and never thinks of forming a family of her own. Little girls are more than anything occupied with the thought of future life, continuance of generation and a peaceful life environment; they unconsciously prepare themselves for motherhood and naturally the experience taught to them by the mothers are greatly effective in this regard. The mother teaches housekeeping to her daughter by her actions. If she performs her motherly duties with love and willingness the daughter will too become strong like her and if she whiningly accepts her life, nothing can be expected from her daughter; so it can be said that negativities, arrogance, and ill temper are passed on to the children from mothers (Ghaemi, undated, p. 126).

### **Mother's Guardianship**

Granting a child's custody to the mother for the first years of life is a natural and logical matter because a mother's love and sacrifice and her care and protection towards the child is more than anyone and at this age the child needs her mother more than anyone else. (Safai and Imami, second print 1376, vol. 2 / p. 124)

So long as the mother is alive and sane, the paternal grandfather is not entitled to the child's custody and accepting custody is canonically an obligatory duty. (Ebadi, fourth print, 1375, vol. 1 / P. 37)

The challenging and questionable subject is whether a mother can be granted compulsory guardianship or not?

In Islamic law, compulsory guardianship of the mother is not recognized and accordingly, the Civil law has assigned compulsory guardianship to the father and paternal grandfather and not for the mother; although it has allowed for the mother to act as executor or trustee to manage the minor's affairs. (Safai and Imami, second print 1378, pp. 376-377, Gorgi, first print 1384, p. 485)

Some believe that, because a mother is granted guardianship due to the request of the prosecution and court approval, a mother's guardianship and status is not compulsory. (Gorgi, first print 1384, p. 487)

Others say a mother's guardianship to be compulsory and similar to that of the father and believe that method of determining and identifying a mother's guardianship with the court's order is declarative and confirmatory meaning that the court determines the enforcer of compulsory guardianship and no position is established for the mother or the paternal grandfather. (Gorgi, first print 1384, p. 488)

– Some state that the mother may be competent enough to be assigned compulsory guardianship otherwise she would be prohibited and deprived of this position by the legislator and lawgiver. On the other hand there is legally and canonically no difference between man and woman regarding custody and upbringing of a child. Besides, an adult, mature woman is competent to manage her own and other people's assets and she is not incapable or minor in this regard. There is no legal restraint for the mother to act as appointed executor by the father or paternal grandfather and become a guardian; also there is no legal restraint for a mother to be appointed as guardian by the court for management of the child's and other manors' affairs and in both cases the responsibility and authority of managing the minor's affairs are assigned to her (same, p. 485). According to article 1194 of the Civil Law, the father and paternal grandfather and the executor appointed by them is called exclusive guardian of the child. But compulsory guardian includes the father and paternal grandfather whose position is not established by appointment of another position. According to article 1180 of the Civil Law: "a minor is under compulsory guardianship of the father and paternal grandfather". And since the father and paternal grandfather's guardianship is compulsory they cannot resign. The judicial precedent number 518 dated February 7<sup>th</sup> 1989, implicitly states: compulsory guardianship of the father towards the child is specified in article 1180 of the Civil Law which continues until adolescence.

The important point in the above views is that whether compulsory guardianship can be assigned to the mother? Or can the mother accept a kind of guardianship as an executor or trustee? And in such cases do the father's and the paternal grandfather's compulsory guardianship dominate that of the mother's?

According to article 1180 of the Civil Law: "a minor is under compulsory guardianship of the father and paternal grandfather". Compulsory guardianship is assigned to the father and

paternal grandfather but the notable point is that today, the paternal grandfather does not have full command on the family and their affairs and is not able to consider the child's interests and advantages and due to the increase of the women's scientific and intellectual level in society it can be said that in case compulsory guardianship is assigned to the mother no problem would occur for the child; in other words simulating compulsory guardianship for the mother is possible at present because the verdict of compulsory guardianship is not a submissive but a rational verdict.

To investigate simulation of the mother's guardianship, the matter can be analyzed from various aspects:

- From social aspect, since guardianship is among matters which puts great responsibilities on the bearer, It can be said that if guardianship is assigned to the mother, the heavy responsibility of temporary marriages are also on the mother and the fathers' responsibilities decrease towards this matter and this issue leads to great social problems for the women and the decrease in responsibilities of men leads to damages and problems in the society.

- From a mother's emotional aspect, simulation of guardianship for the mother leads to the mother and the child's peace of mind and if the child is under compulsory guardianship of the father and paternal grandfather, other people of the father's family are involved in the child's management which leads to the child becoming multi-disciplinary. But if the child is with the mother and all his/her affairs are supervised by the mother, there would be no disturbance in the child's mental and physical state.

- From the Islamic and religious aspect, since the women do not have financial duties and another person is responsible for their financial affairs, if they are to accept their children's financial duties it would contradict God's wisdom. And when a mother accepts guardianship of one or more children her chances for remarriage after divorce or death of a husband are reduced and since a mother cannot tolerate her children's lack of financing, she may act on unsuitable and improper actions to respond to her child's needs

Different views exist regarding the assignment of guardianship to the mother.

- a) One group do not accept a mother's guardianship: the context of this theory is that the mother and her ancestors have no guardianship towards the child and to prove their claim they hold reasons like verses from the Quran and accounts and the principle of consensus, the prominent word of Imamiyeh clerics is lack of guardianship of the mother and her ancestors. (Najafi, 1404 AH, vol. 29 / p. 170; toosi, 1407 AH, vol. 4 / p. 250; Hindi, 1416 AH, vol. 7 / P. 58)

This group state the reasons below for their claim:

- **Quran verses:**

Men are in charge of women (An-Nisa, 34, 4)

In this verse's commentary it is stated that the word "ghavam" is an overstatement and implies predominance of men's power over women's affairs and that women must be dominated by men and cases of submission include: tactics and castigation, instruction and... and this is due to the abundance in men's wisdom, tact and knowledge and also for the dowry and alimony they pay to the women (TabarsiVaziri, 1959, vol. 5, p. 132).

So when women are under the guardianship of another and cannot be her own guardian, how can she be granted another person's guardianship?



Criticism: the author of the book "Quran's Lexicon" explains the word "ghavamoun" as: the word ghavam in this verse means trustee, supervisor and having command. (Ghorashi, 1352, vol. 6 / P. 51)

Mr. Bojnourdi states: "this holy verse asserts that man is a leader and he must give command and he is chief in the house and regarding the wife's dignity, while this verse does not mean that by stating logical reasoning is against it. Chief does not mean master and superior; "Sayyed al-ghavamkhademohom" meaning that "the head of the group is their servitor". We must not say the man is more superior and wiser than the other members of the family but the man's headship is something rational and conventional." (Ibn Manzur, Qom, first print 1416 AH, vol. 11 / p. 355-359)

**– Accounts:**

– Muhammad ibn Muslim from Imam Sadiq (as) about a boy who marries the girl asked. The Prophet said: If their fathers, They have two married, it is permissible, but they have exercise of the option after maturity and if after marriage to be satisfied the dowry is the responsibility of father. I asked whether he has the right to divorce his child as a childhood? He said no." (Haramoly, 1376 AH, vol. 12/ p. 208 -209)

– asked About the man who his son has property and his father is in need of it, Said use from that But mother to borrow from it. " (Haramoly, 1376 AH, vol. 12 / p. 196)

– Marriage can not be terminated except by the Father. "(Najafi, 1404 AH, vol. 14 / P.7&214)

Some clergies hold the account above in mother's lack of guardianship. (AllameHelli, 1372 AH, vol. 7 / p. 110)

The most prominent of the Imamiyeh clergies have resorted to consensus regarding lack of guardianship for the mother and they have stated that the mother and her ancestors do not possess guardianship according to this fact and report and consensus. (Fazel Hindi, 1505 AH, vol. 7 / P. 51)

It must be mentioned that this consensus is perceptive and is not valid or valued. (Karami, 1384, p. 111)

Regarding the views of this group and lack of guardianship for the mother it can be said that in case the paternal grandfather's guardianship is granted the problems and issues such as these would occur:

- Today, a family's foundation is different than the past and involvement in and management of a minor's affairs by the paternal grandfather and separation of guardianship and custodianship, after the death of the father, presents many challenges for the mother.

- According to article 73 of non-litigious legal affairs, the prosecutor will announce the grandfather's responsibilities to him but his performance is not supervised and in case of disagreement between the mother and the grandfather, illegal manipulation of the compulsory guardian may follow.

- The compulsory guardian's betrayal is only proven when a bad deal takes place. With regard to validity conditions of a deal, the deal may seem valid and obtaining the imported damages and its confirmation needs a lengthy process of filing a complaint and also proving the betrayal with regard to the guardian's full authority seems very difficult.

B) Another group of people accept the mother's guardianship:

In Islamic canon law, according to most clergies, guardianship is not compulsory for the mother and in return, Ibn Jonaid, a Shiite rationalist clergy and some Shafei clergies assign compulsory guardianship to the mother and believe her to be next in line after the father and paternal grandfather and give her priority over the executor assigned by the father and paternal grandfather regarding management of the assets. This view belongs to Abu-SaeidEstakhri and his argument is the mother's great love and affection towards the child (AllamehHelli, 1993, vol. 2, p. 593). This group states the reasons below for their opinion:

### **Generalities and Attributions of Quran Verses**

In proving mother's guardianship they have inferred to verse 152 of An'am Surah saying: "And approach not the wealth of the orphan save with that which is better"

one cannot manipulate anyone's assets but the reason we are banned from manipulating that of an orphan is because he/she cannot defend his/herself and strangers are covetous of their assets; manipulation of an orphan's asset is permitted on the condition that the manipulator chooses the best possible choice.

The subject of the verse is general and is directed at the public and the good thing about manipulation is that it is not restricted to men and women and mothers can manipulate the assets of an orphan and accept its management if they consider the child's best interest because the mother, like the father, can provide the needs of a child and protect his/her financial and non-financial interests better than anyone else.

- "Some of the believers are the heads of others": command of persuading the good and dissuading from the evil is a general command pertaining to all Muslims towards each other and there are verses and accounts about the rights of children and such that exist in Islamic resources; from all of which one can infer that a person is most responsible towards his/her spouse and children and he must try his best for their education and upraising, prevent them from sins and encourage them to do good and to not only emphasize on feeding their bodies and this responsibility is on fathers and mothers (MakaremShirazi, 1987, vol. 24, p. 293).

Parents are both responsible for the child's upbringing and the mother's role is more noted in this regard and since she is entitled to upbringing, assignment of authority and guardianship to her is not contrary to the child's best interest.

Verse 233, Baqarah Surah: Mothers shall suckle their children for two whole years; (that is) for those who wish to complete the suckling. The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child. No-one should be charged beyond his capacity.

in this verse a series of educational responsibilities are placed on the mother of which the man is deprived and during the nursing period, the mother is to protect herself and the child from thoughts, foods, behaviors and... which directly affect the child and this shows the sublime grandeur and dignity of the mother.

### **Accounts:**

Imam Sadiq (AS) was asked about an absent man who was married by his mother? He responded that marriage is permissible, he can also accept and reject and if he dismiss her dowry is the responsibility of mother. (Horumly, 1376 AH, vol. 12 / p. 208)

- Education accounts: these accounts are related to the education of the child which assumes the child's education to be a right of the parents.

- Responsibility accounts: these accounts relate to willingness to accept responsibility and women are directly addresses in these accounts:

- Knows all of you are responsible, Imam is responsible of community ...Man is responsible to feed their families ... The woman is responsible to her husband and children ... " The sense of this hadith indicates that both parents are responsible for the upbringing of children and their affairs, the mother is also responsible for their children, which involves having authority over the children. (Noori, 1408 AH, vol. 14/ p. 248)

Imam Khomeini states: "you are responsible to supervise him with good upbringing and guiding him towards his God and helping hi, towards obeying God regarding yourself and him. and you will be rewarded or punished for his actions so be such that he is impressive in this world for you to adorn yourself with and be exempt by God for your performance towards him and the result you obtained" (Khomeini, 1986, vol. 6, pp. 261-262).

Moaviye bin jaheme said: to the Prophet (PBUH) came and said: I want jihad with you in Allah's way and hereafter life. He said: 'Is your mother alive? I said yes. He said: stick to her feet that the heaven is there. (Reyshahri, 1363, vol. 10 / p. 720)

So it can be acknowledged that although participation in Jihad<sup>1</sup> is emphasized and there is much virtue in Islam regarding this action, the prophet (PBUH) believe a mother's beneficence and status to be higher.

In many accounts, the word guardian is used in a general manner and investigations regarding these accounts show that the accounts present in books implicitly state mother's guardianship because if we consider the time when these accounts were issued and investigate the state of women at that time, we can easily understand that simulating guardianship for the mother was not possible back then. The important and mentionable point is that in conventional and rational orders and matters there is no need to search for religious reasons because simulation of some orders at the time of religious conversion was not possible due to the conventions present at the time. But today, with regard to convention, time, place, increase in mothers' awareness and ... official recognition of a mother's guardianship seems imperative (Karami, 2005, p. 125).

### **Common Sense:**

The people believing in the mother's right to guardianship state that the main and major part of upbringing is performed by the mother and with the increase in women's abilities, a mother can be assigned guardianship in all conditions and the subject of compulsory guardianship in protecting the minor is not specific to Islam and exists in rational societies and the sacred legislator has signed this as the head of the wise and at the moment, after the father, the mother can better provide for the needs and interests of the child.

So we can conclude that it is possible in today's world to simulate compulsory guardianship for the mother because the compulsory guardianship verdict is not submissive but is a rational verdict (same, p. 126) and in today's society, in addition to being a homemaker, the women participates in business too and has gained many skills and experience.

Therefore it can be said that lack of guardianship authorities for the mother contradicts with the increase in the domain and right of custody and a mother's power regarding an underage child is limited and this can cause adversity among the mother and the compulsory guardian in for example: opening bank accounts and ...

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<sup>1</sup>Holy war

### Conclusion and Suggestions

- In Imamiyeh canon law and Iran legal code there are two subjects of custody and guardianship for a child's protection and each bear specific rules and are similar in some aspects and measures.

- According to article 1180 of the Civil Law: "a minor is under the compulsory guardianship of his father and paternal grandfather"; compulsory guardianship is assigned to the father and paternal grandfather but a notable point is that today, the paternal grandfather is not in full command of the family and their affairs and he is not able to consider the child's best interest and since the women's scientific and intellectual levels in society have increased it can be said that in case compulsory guardianship is assigned to the mother, the child will not experience any great problems and it can be noted that today it is possible to simulate compulsory guardianship for mothers because it is not a submissive verdict, but rather a rational one.

- Of course it is important to note that to assign compulsory guardianship on any person including the father, paternal grandfather, mother, there is need for someone as supervisor so that in case the child's interests are not considered and responsibilities are not undertaken, the guardianship can be dismissed.

- Imamiyeh clergies resort to some accounts regarding the matter of marriage to provide reason for the paternal grandfather's guardianship and also they mention consensus but they don't present any accounts regarding the paternal grandfather's possession of the assets. In Imamiyeh the paternal grandfather is mentioned as one of the parents under the discussion relating to marriage but the paternal grandfather's guardianship regarding marriage is only determined through accounts and also the accounts provided are specific to the matter of marriage and clergies generalize the guardianship from marriage to financial matters due to priority. Therefore the only reason clergies have to prove the grandfather's guardianship is consensus and accounts which since consensus is evidential, it cannot be definitive revelations of a saint (PBUH) and it seems that we cannot accept the absolute guardianship of the grandfather while the father is present because the only reason for the grandfather's guardianship is specific to marriage so in the matter of the grandfather's guardianship if we suffice to text and combine marriage and assets, this is a comparison which is not considered a scale for religious conversion in view of the Imamiyeh clergies (MousaviBojnourdi, first edition, 2007, pp. 61-64).

- Lack of guardianship authorities for the mother, faces her custody rights with challenges because in today's society the meaning of custody has changed and it does not only mean to keep but to educate, raise, develop the abilities, transfer the knowledge... are also the responsibility of the custodian.

To give some examples, in judicial customs selecting a school for the child is of the guardian's responsibilities and the mother is the custodian but the school authorities refuse to give the child's educational records to transfer the child to another school. In case of an accident, the mother accepts treatment expenses but the fine is only paid to the paternal grandfather. If the minor needs an operation, permission of the guardian is needed (Asadi, 2007, no. 35, p. 58).

Therefore presence of interaction between the mother and the paternal grandfather in order to make decisions according to the child's best interest seems difficult and this challenge will escalate with the father's death.

- Transfer of guardianship to the mother upon father's death, in secondary laws, seems necessary with regard to time and place and a competent court's discretion.

- Referring to Quran verses in “...” verse 233 of Baqareh Surah it is stated that harming a child is strictly not allowed, be it on the part of the other or the father, be it regarding custody or anything else. Because dismissal of the child’s custody leads to his lack of safekeeping and this is a harm to the child; according to the religious law: “no harm” in Islam, it can be said that any action or behavior on the part of the parents, be it against the child’s interest, it is subject to the “no harm” rule and their guardianship can be prevented and according to the holy verse this is not allowed, so we conclude that custody is imperative and consequently guardianship becomes necessary too.



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