

## Right to Manage Children's Property in Iranian Positive Law

Ali Esfahanian

Ph.D. student of jurisprudence and legal practices, Faculty of Theology, North Tehran Branch, Iran.

### ABSTRACT

Due to body and mind weakness and inability, children are prohibited from managing their own property and have been under tutelage and guardianship for comprehensive care and support so that all matters and issues related to them (maintenance, training, education and management of property) have been assigned to their supervisor and protector; however, the main and essential element to intervene and protect by natural guardian is the child's best interests in the way the child is affected by his guardian's action and intervene. The indubitable evidence of reason and narration proves the importance and validity of guardianship over children.

### KEYWORDS

Children's Property, Iranian Positive Law

### ARTICLE HISTORY

Received 20 February 2017

Revised 28 April 2017

Accepted 9 April 2017

### Introduction

Since children have not reached the legal age, they need to be protected; according to Iranian law, 18 years of age is considered as the legal age.<sup>1</sup> Therefore, minor actions, whether discerning or in-discerning are null and void to the extent that they are related to his property and financial rights. According to "Article 212" of Civil Code, a trade conducted by a non-mature person is void but except in terms that the minor does not get any damage through gratuitous possession.<sup>2</sup> Child property needs to be managed and the law has created some restrictions to protect minors and even other wards. The

<sup>1</sup>Shahidi, M. (2004), Civil Rights 3, Tehran: Majd, P. 42.

<sup>2</sup>Imami, H. Civil Rights, Vol. 1, P. 205.

**CORRESPONDENCE** Ali Esfahanian

✉ aliesfahanian@gmail.com

© 2017 Esfahanian

Open Access terms of the Creative Commons Attribution 4.0 International License apply. The license permits unrestricted use, distribution, and reproduction in any medium, on the condition that users give exact credit to the original author(s) and the source, provide a link to the Creative Commons license, and indicate if they made any changes. (<http://creativecommons.org/licenses/by/4.0/>)

origin of such supports is to maintain the property and have no power in the management of property by which due to lack of capacity to exercise rights, the minor is prohibited from unlawful possession of property and financial rights (objective and subjective rights). Regarding the category of capacity, according to Article 956 of Civil Code, capacity for having rights is started by human born and ended by his death. Article 958 of Civil Code also provides that any man would enjoy civil rights; however, no one can enforce his own rights unless he has the capacity required. According to Article 1207 of Civil Code, the minor is prohibited from disposing of his property and financial rights. Based on the above-mentioned categories, capacity stated in Articles 956 and 958 is intended to be capacity to acquire rights but the Article 1207 of Civil Code is related to capacity to exercise rights considering a minor as a ward.

Article 1240 of Civil Code refers to situation when the ward property enters into guardian ownership. This injunction is to prevent the guardian abuse which may be done without observing the interests of ward.<sup>3</sup> It should be said that guardianship is an authority given to parents to manage the affairs of children. According to Imamite jurists, father and paternal grandfather are natural guardians of a child and in the absence of natural guardians, the guardian appointed by them will be considered as child guardian.<sup>4</sup> However, if the natural guardian trades against the ward interests, so that he sells the ward property at a low price or purchases a property at an exorbitant price, or rents his house lower than imputed rent, what civil remedies will be specified for such legal acts; invalidity or lack of influence?

It can be said that the guardian act is invalid and ward after reaching the legal age or someone else who then becomes responsible for the ward and his property can ratify or reject the trade by observing ward's interests. If the natural guardian does a trade with no authority, his act will be considered intrusive and invalid according to Article 247 of Civil Code and if his owner or guardian gave permission after the transaction, the trade would be valid and legal. Since the word invalidity may mean nullity and lack of influence as its certain meaning in Islamic jurisprudence, it is not exactly clear what it means by speaker. However, it seems that invalidity is more consistent with ward's interest and more compatible with the category of lack of influence in legal principles.

Imami states that if lawyer takes the interests of the client into account, but after transaction it is determined that it has been acted contrary to his interests, this contract will be correct.<sup>5</sup> In actions conducted by natural guardian on behalf of the ward and observing his interest, if the guardian makes a mistake in discriminating interest, so that the result is contrary to his expectation and leads to the ward's loss, it will be fair that such trades will be valid which have done in conventional way by the guardian and with the aim of maintaining the ward's interest and the guardian makes necessary attempts to respect his rights and interests.

According to Article 1217 of Civil Code, one of the most important duties of the parents is to manage their children's property; they are considered as natural

<sup>3</sup>Imami, H. Civil Rights, Vol. 2, *ibid*, P. 384.

<sup>4</sup>Refer to Katuzian, N. Family, Vol. 2, *ibid*, p. 202-241.

<sup>5</sup>Imami, H. Civil Rights, Vol. 2, *ibid*, P. 224.

guardian. Also, according to Article 1184 of Civil Code, natural guardian should observe interests of the minor child in all circumstances. All jurists believe that natural guardian has the right to possess the ward's property and this possession should not damage the ward.<sup>6</sup> Property should be managed properly and optimally, but it is difficult to identify and measure it; furthermore, the sanction of transactions made by him against the minor's interest has not been determined and on the other hand, natural guardian may damage the minor's property secretly and far from the eyes of others. It seems to say that there are specific criteria and standards, for example, capital sustainability and categories of loss and gain are important in material possessions, and criteria such as health, optimal physical and mental development and formation of favorite personality are important for care and custody of the child. Meanwhile, certain status of the ward (child), time and place conditions, and social and cultural circumstances should be also considered. It may be compatible with the child's interest to possess his property in a certain condition; however, it may be against his interest in other time and condition and it is advised to leave it, certainly, it will be necessary to inform parents and guardians of children in this regard in other time and condition.

### Guardianship over Children

Regarding the child's interests in natural guardianship it seems that father or paternal grandfather are primarily responsible for minor's affairs and property, then their executor will be responsible for them and in their absence, his representative (guardian) will take this responsibility. Of course, guardianship and supervision is a natural affair and at first stage is the responsibility of father and paternal grandfather; Articles 1180 and 1181 have referred to it.

Guardianship is a legal entity by which minor's assets, properties and financial affairs are managed appropriately by guardian on behalf of the minor. According to Article 1194 of Civil Code, father and paternal grandfather appointed by one of them are called specific guardian. Individuals under guardianship called wards are divided into two groups of minors and idiot or insane persons who their insanity and madness are not connected to their childhood. Based on Article 1183 of Civil Code, natural guardian is considered as legal representative in all matters related to ward's property and financial rights. Article 73 of Non-Litigious Jurisdiction Act states that if the ward has executor and guardian, the prosecutor and the court will have no right to interfere in his affairs. The executor can sell minor's property when his interest requires, although it is immovable and permission of the prosecutor will not be necessary because as it was mentioned, the executor is guardian's representative and guardian does not need the prosecutor's permission in his actions.

The guardian guardianship should be applied in line with ward's interests. For example, he can sell ward's immovable properties with no permission of judicial authorities (Articles 81 and 83 of Non-Litigious Jurisdiction Act), and is able to entrust jewellery and valuable documents to another one and deposit his money

---

<sup>6</sup> A Group of Researchers under the Supervision of HashemiShahradi, M. (2002), *Encyclopedia of Islamic Jurisprudence in Accordance with the Doctrine of Ahl al-Bayt*, Vol. 2, Qom: Institute of Encyclopedia of Islamic Jurisprudence in Accordance with the Doctrine of Ahl al-Bayt, P. 72.

<sup>7</sup> Imami, H. Civil Rights, Vol. 3, *ibid*, P. 144.

into banking account (Article 94 of Non-Litigious Jurisdiction Act). He has the right to terminate all claims related to the ward peacefully and mortgage his property and or do a transaction by which owes the ward.<sup>8</sup> However, guardian is not permitted to act against ward's interest. For example, he cannot sell ward's property at low price or purchase a property higher than common price or do a trade on behalf of ward which is commonly harmful, or he cannot donate ward's property to another one.

Insane, unconscious and drunk people (if his drunkenness causes irrationality) cannot have guardianship over minor.<sup>9</sup> Because they are incapable of perception and comprehension and are not able to respect interests and perform affairs related to the category of guardianship.<sup>10</sup> Despite the popularity and wide range of custody of minors, natural guardian is not able to act based on his own desire and make any decision about the ward's affairs and his property. According to many commentators, natural guardian is obliged to observe the ward's interests in such decisions and possessions and he should not act against his interests.

Based on this category that criterion in observing interests is ward's real interest not one which is considered by the guardian as interest, some legal experts state that such actions have no legal validity.<sup>11</sup> While it will be fair to state that such transactions conducted by the natural guardian conventionally to maintain interests of the ward and make necessary attempts to respects the ward's interests and rights will be valid, especially if the general rules governing the guardianship in transactions is considered. According to some experts, natural guardian like any other representative or faithful one has an obligation to maintain the common interests of the ward and he is not expected more than of this. In other words, natural guardian's commitment is means-based not outcome-based<sup>12</sup> one. Therefore, it should be considered as the main criteria to maintain conventional behavior and take action to respect the ward's interests, although, it does not reach the desired result in practice. As a result, only in cases where the father act with no regard of child's interests to achieve his own profit and other personal purposes, his act is deemed to be intrusive due to lack of observing ward's interests and guardianship responsibility in managing property. It should be said that the guardian withdrawal is opposite to the principle which requires to be proved.

If natural guardian is unable to manage the ward's property, his legal guardianship will be void. According to Article 1184 of Civil Code and subsequent amendments, if the natural guardian of a child does not deserve to manage the ward's property or becomes guilty of embezzlement, in case of proven unreliability and infidelity, legal guardianship of guardian will be void. Regarding the ways to prove this behavior, it has not been predicted through a monitoring center or reference reporting such infidelity and behavior.

Also, father and paternal grandfather are not the only ones who have the guardianship right at the time of their life, because this authority will be continued after the death of one of them by a sole parent. According to Article

<sup>8</sup>Imami, H. Civil Rights, Vol. 2, *ibid*, P. 336.

<sup>9</sup>Helli, A. J. H., *ibid*, P. 278.

<sup>10</sup> Ansari, GH., Children's Rights and Provisions in Islam, *ibid*, P. 70.

<sup>11</sup>Imami, H., Civil Rights Era, Vol. 5, *ibid*, P. 213.

<sup>12</sup>Katuzian, N. Civil Rights and Family, Vol. 2, P. 225.

1118 of Civil Code, it is predicted that each of fathers and paternal grandfathers can appoint an executor for his children to maintain their interests and train them and manage their property after his death. According to Article 826 of Civil Code, above mentioned legal action would be considered as contractual will stipulating that contractual will means that a person appoints one or more other individuals to do some affairs and other possessions.

It should be noted that natural guardian can determine custody for his child when he does not have mother, or his mother does not deserve and is not qualified to maintain him. Otherwise, according to Article 1171 of Civil Code, in case of death of one of the parents, the one who is alive will be responsible for child's custody, although his father has been died and appointed a guardian for child. It seems that guardian means executor in this Article because his determination is the court responsibility and natural guardian cannot appoint him.

Guardianship over orphans' marriage can be proved. It can be explained in this way that undoubtedly, evidence which signifies such decree contains categories which have been permitted by the God and the obliged one can do it and marriage of orphans is one of these matters, of course with regarding the necessity and observing interests. Due to this subject that orphan has no guardian except legitimate ruler, legitimate ruler or someone who has been permitted should interfere in this matter. Khuyi states that marriage of orphan and insane one is a necessity and should be done, of course with regarding interests; a person should be responsible for it. When there is no guardian, the ruler will be responsible because he has undoubtedly this authority to take this responsibility. It should be noted that there is no discussion about the executor guardianship and ruler (the court and prosecutor) on orphans' marriage in Civil law.<sup>13</sup>

### Observing Interests in Ward's Affairs

The category of observing ward's interests is clearly stipulated in provisions stated in Articles from 1182 to 1187 of Civil Code as well as Articles 79, 80, 81 and 83 of Non-Litigious Jurisdiction Act. In this regard, it can be also referred to Article 667 of Civil Code related to advocacy. Hence, despite father's widespread guardianship authority over his minor child, the scope and territory of his guardianship can be limited and disciplined by observing child's interests. Of course, it should be said that there is no regular criterion and measure for child interests; it is a relative and varied concept which is categorized by certain circumstances and conditions. The wise men and tradition are competent authorities to diagnose it.

Right is beneficiary domination and guardianship is the rule of benefiting.<sup>14</sup> Narrations which indicate the mere reign of father over the child and his property should be considered as legal and moral recommendations or be provided in case of father's need and necessity according to certain rules such as rule of domination, respect to people's interests and properties and their loss and

---

<sup>13</sup> Ansari, Gh., Children Rights and Provisions in Islam, P. 68-69.

<sup>14</sup> Amid Zanjani, A. (2000), Political Jurisprudence, Vol. 2, Tehran: AmirKabir Publications, P. 336-337.  
MusaviKhalkhali, M. (2001), Sovereignty in Islam and Islamic Ruler, Translated by Alhadi, J. Vol. 1, IslamicPublishing Office of Qom Seminary Teachers Society, P. 91-93.

damage on others and based on what some contemporary scholars have expressed.

It is said that admissibility of any action is required in order to father be able to reign over his child and his property, in fact, the male child should do his responsibilities against his father and give his property for servicing him, or father can take cost of maintenance from child's property in case of incapacity and necessity, but it is regarded that wisdom of father's guardianship forgery shows that the basis and nature of such decree in fact is to preserve interests of unable individuals such as minors and it is unlikely that the Wise God counterfeits the guardianship over the ward because of observing others' interests. Therefore, natural guardian can never take any action beyond the scope of ward's interest and benevolence.

According to foundations and arguments related to natural guardianship and due to the specific situation of minors, it must be to consider the principle of universality and popularity of guardianship circle except categories which have been specified by valid reason. It is concluded that father as a natural guardian has the right to take any action in all financial and non-financial affairs of his minors children and can possess the ward's assets in every case which is considered appropriately by him.

Since the provision stated in Article 1041 of Civil Code was explicitly provided marriage under the supervision of guardian, this provision was based on Islamic law whereby the minor's guardian would be able to prepare a marriage contract by observing his interests; namely, he can provide marriage circumstance for boy and girl who have not reached puberty. If the ward's interests were observed when marrying, this contract would be valid and minor could not terminate or reject it. But if interests were not observed by the guardian, for example, if marriage portion was given less than the conventional amount or despite having two different suitors, girl married a person who was inefficient commonly; this marriage would be void and invalid.<sup>15</sup> It must be admitted that the involvement of natural guardian in minor's marriage has less supportive aspect and is considered as a branch of paternal authority which is limited to "ward's interest" to diminish risks. Father's authority is relative and limited to child's interest and there is no difference between boy and girl in this regard.<sup>16</sup>

There is disagreement among scholars whether male minors could disrupt marriage contract after puberty or not: famous perspective<sup>17</sup> is that male minor has not the right to disrupt the marriage contract after puberty like female minor because it is assumed that the contact has been done in compliance with interests and correct legal guardianship.

An insane person lacks wisdom and understanding and cannot personally do any legal action; hence, a marriage conducted by him during his insanity is null and void. However, sometimes, it may be necessary and effective on him and observing his interest; in this case, according to doctor, his legal representative can provide marriage contract for him.<sup>18</sup>

<sup>15</sup>Safaei, H. &Imami, A., *ibid*, P. 74.

<sup>16</sup>Katuzian, N. *Family Rights*, *ibid*, P. 70-71.

<sup>17</sup>Helli, H. Y., *ibid*, P. 7.

<sup>18</sup>Safaei, H. &Imami, A., *ibid*, P. 86.

The first part of Article 1184 of Civil Code reformed in 2000 stipulates about observing interest as follows: if the natural guardian of the child does not observe his interest and takes any actions which would be harmful to him, according to the request of one of his relatives or request of head of jurisdiction after proving, the mentioned guardian will be dismissed and prohibited from disposing of minor's property and a competent person will be appointed as his guardian by the court. It is implied in Articles 79, 80, 82 and 83 of Non-Litigious Jurisdiction Act, although it has not been clearly specified. Also, the criterion stated in Article 667 of Civil Code can be attributed in this regard. Furthermore, it can be said that under the rule of reason, if someone acts on behalf of someone else, he should act conventionally, it means observing others' interest when managing their property. However, the only thing which limits the authority of the guardian is minor's interest. Therefore, the guardian should observe the ward's interest and he is not allowed to do against him.

According to legal experts, acts which have been done by natural guardian on behalf of ward in which the ward's interest is not observed can be divided into two main groups:

Actions done by guardian deliberately on behalf of himself and against ward's interest; in this group, undoubtedly the transaction carried out would be invalid because the assumption is that guardian has exceeded the scope of his authority.

Actions done by natural guardian as ward's representative to observe his interest; however, the guardian makes a mistake in distinguishing interests, so that despite his innate wish, the result is contrary to ward's interest. In such cases, some of experts have considered it an intrusive contract and given permission to guardian or ward to ask the court invalidation.<sup>19</sup>

Hence, it can be said that guardian has authority to make any decision regarding ward's all financial and non-financial affairs; however, it should be made based on his interest.

### Conclusion

Law is silent against losses incurred to children's property and jurists believe that such transactions are void and some other consider them invalid and believe that when the child grows up, he can enforce it. The important point is about losses incurred secretly to children's property and no one can defend their rights and law has not made any decision about it. Since children must be protected, their property should be also respected and maintained to be used appropriately by children after reaching the legal age. It is obvious that regarding the authorities of father, they are not so absolute and subjected to his will. In fact, what is the philosophy and wisdom of such authority provides interest and its limitations and scope. For natural guardian, observing interest is to maintain ward's property and it is sometimes conducted to protect property both against total and gradual waste caused by the use of property to meet ward's expenses. The criterion for disposing of ward's property is "lack of corruption" or in other words is to observe interest in its general concept (interest to maintain and increase property). Guardian would be prohibited from possession due to categories of "corruption or financial loss". Guardian's

---

<sup>19</sup> Ansari, Gh., Children Rights and Provisions in Islam, P. 41-42.

prohibition from possessing ward's property depends on two conditions: real corruption and guardian awareness of such corruption.

Natural guardian can never take any action beyond the scope of ward's interest and benevolence. He is obliged to observe ward's interest and should not act against his interest. Furthermore, the origin of provisions such as taking permission and necessity of supervision of ward and incapable people and protecting their property and souls is derived from intellectuals' foundations which have been approved by religion. According to intellectuals, it is clear that the main criterion in this regard is to preserve the interests of people under supervision. Therefore, it must be admitted that the theory based on the necessity of observing ward's interest and guardian's measures and possessions is considered more credible and valid by Islamic jurisprudence.

It seems that some strategies can be offered on children rights and interests and parents' responsibilities. For example, the scope of authorities and family responsibilities and even the government duties are clearly explained and laws which provide some opportunities in which child's right and interest may be limited or spoiled by the family and government can be deleted or modified.

### Notes on contributors

#### Ali Esfehanian

Ph.D. student of jurisprudence and legal practices, Faculty of Theology, North Tehran Branch, Iran.

### References

- A Group of Researchers under the Supervision of HashemiShahrudi, M. (2002), *Encyclopedia of Islamic Jurisprudence in Accordance with the Doctrine of Ahl al-Bayt*, Vol. 2, Qom: Institute of Encyclopedia of Islamic Jurisprudence in Accordance with the Doctrine of Ahl al-Bayt.
- Amid Zanjani, A. (2000), *Political Jurisprudence*, Vol. 2, Tehran: Amirkabir Publications.
- Ansari, Gh. (2013), *Children's Rights and Provisions in Islam*, Qom: A'immahAthar Jurisprudence Center.
- Helli, A. J. H. (1988), *Islamic Laws*, Tehran: Istighlal Publications.
- Helli, H. Y. (1305), *Ershad al-Azhan (Minds Guidance)*, Tehran: Parliament Library.
- Imami, H. (2011), *Civil Rights Era*, Tehran: Islamia.
- Katuzian, N. (1994), *Civil Rights (Family)*, Vol. 2, 4th ed, Publishing Company.
- Katuzian, N. (2001), *An Introductory Course in Family Rights*, Vol. 1, Tehran: Dadgostar Publication.
- Safaei, H. & Imami, A. (2004), *Family Rights*, Vol. 1, Tehran.
- Shahidi, M. (2004), *Civil Rights 3 (Commitments)*, Tehran: Majd.