

Scope and Authorities of a Natural Guardian in Non-Financial Affairs of a Ward

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ABSTRACT — Legal representative refers to a representation which is created according to law for certain individuals due to their specific conditions including minors, insane, fools who cannot take care of their affairs themselves and therefore, all their duties and powers will be controlled by The natural guardian and based on it the management of all financial and non-financial affairs are assigned to their father or the grandfather. But our discussion here is about the scope of the authorities of the natural guardian in non-financial affairs of the ward and since, the ward himself/herself to some extent can intervene in his/her non-financial affairs including marriage, appointing heir and ..., therefore, the authority and responsibility of the natural guardian becomes limited in this area which is due to the reason that the legislator has limited the authority and responsibility of the natural guardian for a minor who had come to age and who can intervene in his/her own non-financial affairs and finally, in general we address this issue that in case of incurring damage and loss to another person, whether we should take the ward liable against the third party or the natural guardian should be taken liable in this regard, due to the fact that it is possible that the damage and loss has been occurred due to the fault of the natural guardian in taking care of the ward and in any case, how this damage and loss should be compensated that according to article 7 of civil liability law, compensation for loss is determined with considering of the degree of affordability.

KEYWORDS: *Natural guardian, non-financial affairs, ward*

Introduction

Family is the smallest unit in a society and is the main core and fundamental pillar of it. Studying the issues related to family has a significant importance and requires a great deal of care. Natural guardianship is one of the issues that results from family ties and natural guardian is a person who is appointed as per the law and is directly appointed by the law and his guardianship is a social and family obligation or in other words, it is compulsory and hence, it is termed as natural guardian. In all countries, the person or persons who are more close to the minor and are attached to him/her, take the responsibility of taking care of him/her and managing all his/her affairs, because human nature requires that the guardianship of a minor would be placed on his/her close relatives, specially his/her father. Guardianship of the father on his minor child is not only limited to the management of financial affairs of the child, but also includes non-financial affairs such as parenting and guiding the child of spiritual matters such as education, knowledge and following religion and respecting its rules and regulations and permission to marry. However, civil law doesn't have any clarification in this regard and this has caused a number of Commentators of the Civil Code to limit the scope of the authorities of a guardian to only management of the financial affairs of the ward with considering article 1183 of civil law. However, considering the concept of natural guardianship and its scopes in Jurisprudence, especially guardianship on the marriage of the minor which is one of the facts in Religious jurisprudence, indicated that civil legislators due to negligence and lack of clarification in this area (non-financial affairs) have committed negligence. Anyway, for presenting a general rule for father's guardianship in non-financial affairs, it can be commented that here, father as legal and religious guardian of the minor person for taking care of him/her and based on benevolence and keeping the best interest of his child, should perform all the necessary and correct actions and should take appropriate measures and extend his support and supervision to his child. It should be mentioned thought, that mother also as the deputy of the father should aid him in this relationship. In this article, we have tried to name the matters included in non-financial affairs and the fact that to what extent a natural guardian play a role in them and whether he can intervene in all these non-financial affairs and whether there is any enforcement for him, in case that he has acted contrary to the interests of the ward and in addition, we have tried to address appropriate legal solutions in this regard.

Results and Analysis

1. Criminal nature of the fault of the guardian

If the fault of the guardian has a criminal nature and due to his a damage or loss is incurred by the minor or the demented person to another person, as per clause 2 of article 1 of the law about Financial convictions approved on 1972, guardians will be liable

and this is clear from the above mentioned article (Adinevand, 2004, p. 87). Clause 2 of article 1 of financial convictions states: "in cases of loss and damage resulting from criminal nature, the courts condemn all the accomplices in the crime proportional to the liability of each for them to compensate for the incurred loss and damage; however, the defendant has to a partnership liability to compensate all the loss and damage incurred and in case, that some of the accomplices are minor and also in the events of death or insanity or forgiveness or Cash suspension penalty, their share of the penalty is deducted from the total amount and others together should pay the rest of the cash penalty. In the event of an arrest, each of the defendants only will be arrested against their share of the cash penalty or the proportion of the damage and loss they have incurred." A good example in this regard, is the liability of the guardians of incapacitated or insane individuals at the time of swimming in a pool. If the guardian of a minor or insane person will fail to take care of his ward and the minor in the swimming pool will push someone else in the water and the lifeguard also fails to perform his duties and due to this event some damage or loss is incurred to another, in this case, both he and the lifeguard are responsibilities and since this liability is considered to be a partnership liability, because it is the result of fault and failure which is considered a crime in the eyes of the law (Ghoochani, 2011, p. 82).

2. Non-criminal nature of the fault of the guardian

In a case in which the fault of the guardian doesn't have a criminal nature, if multiple guardians are responsible for the occurrence of the damage and loss to another by the minor, their liability is a joint one against the compensation of the loss and damage and not a partnership one. Article 403 of the commercial law states: "in all the cases in which accordant to rules and regulations or as per private contracts, the liability is considered as a partnership one, the creditor can refer to the main Guarantor and principal debtor collectively or after referring to one of them and not being able to collect all his debt and refer to others for collecting the rest of his debt". This article indicated that partnership liability is caused in two cases:

1) Where law has clearly stipulates it; and

2) Where according to the contract between the parties considers it as a partnership liability, other than these two cases, the liability would be a joint one. In the topic of laity, Shiite jurisprudence contrary to public jurisprudence, consider liability as an obligation which is transferred from the third party to the guarantor, without any liability remaining for the third party due to the Payment guarantee (Najafi, 1412, p. 151). Civil law of Iran also has accepted the transfer to responsibility and liability following the Shiite jurisprudence in article 698 and statement of multiple responsibilities are against the Legal principle and in partnership liabilities which are against the principle and have only been clarify by law or contract, we should suffice to what is necessary (Safae, 1996, p. 242). In this study, since nowhere, in law the liability of guardians is considered as a partnership one, hence, we also consider it as a joint liability. It should be mentioned that this doesn't apply to multiple guardians, b

3. Negligence and failure or fault from the side of guardian

With reference to the existing law in our country, we can see that in so many cases, fault is the basis of liability and in the event of committing a mistake and fault in performing duties, people are responsible for their action and if due to the fault a damage is incurred on another person, it should be compensated. It should be mentioned thought, that accepting the theory of fault doesn't have an absolute nature, but in some cases, the legislator doesn't follow the theory of fault and considers the incurring of loss and damage as an absolute matters, however, it should be mentioned that liability without fault is an exceptional liability which requires legal clarification and the event of the absence of this legal clarification, the presence of fault is necessary. This has good outcomes which indicates that among a series of causes, the cause is taken as the responsible one which has caused the fault (Katouzian, 1995, p. 141). As article 335 of civil law also indicates to the same matter, in the event of two ships, two trains or two vehicles accident and so on, liability is considered for the party that accident has occurred to his intention or negligence and". The necessity of considering the natural guardian as the liable party, is to prove his fault or prove the existence of a causal relationship between his fault and occurrence of loss and damage and the meter existence of fault of the mere occurrence of loss and damage to a third party will not be enough for proving the liability of the guardian. It is possible that the guardian has committed a fault in performing his duties related to his ward or has incurred loss to a third party due to this fault or from the ward to a third parts, in which case there should be a causal relationship between the loss that has been incurred and the fault of the guardian. The burden of proving the existence of the casual relationship is apart and separate from the burden of proving the commitment of fault and mistake. The causal relationship also should be proved and it should be proved by the Claimant who is usually the person who have born damage and loss. Therefore, the person who has born damage and loss in addition to prove the fault of the guardian, should prove the causal relationship between damage and fault as well and in case he fail to prove any of these, not liability will be placed on the guardian (Katouzian, 1995, p. 271).

4. In the case that the person under the protection and care of the guardian is an obsolete person

According to article 7 of civil liability law, the incurred damage should be resulted from the action of an insane or minor individual, so that the guardian will be taken as liable. It appears that minor here refers to someone who both can recognize good and bad for himself or who cannot recognize good and bad for himself and that the above mentioned articles is not only applicable to a minor who can't recognize what is good and what is bad for him. However, some of the Law professors (Fadaee, 1996, p. 84) have attributed the rule mentioned in clause 1 of article 7 to an insane person and a minor who cannot recognize what is good and what is bad for him and have justified it in this way that if a minor who cannot recognize what is bad and what is good for him will incur a damage or loss to another person due to the fault of his guardian, in fact, his guardian is the cause of damage and according to article 332 of the civil law, he is liable and not the ward. In addition, a minor who cannot recognize what is good and what is bad for him, is considered as an animal and as per article 334 of civil law, the liability resulting from his

action is on his guardian. However, if a minor is able to recognize what is good and what is bad for him, those responsible for caring for him cannot be considered as liable for the damage and loss he has caused and as per civil law, the ward himself is liable for what he has done. This opinion is not free of fault because: First of all, minor is an absolute feature according to article 7 of the civil liability law and includes a minor who is able to recognize what is good and what is bad for him. Second, this article is not based on the rules and regulations of the civil law, but it means to support the person to whom damage has been caused on one hand, and to make the guardian to heed care in performing his duties toward the ward, on the other hand and this requires that regarding the person to whom damage and loss has been caused by a minor who recognizes what is good and what is bad for him, the liability will be placed on the guardian who is responsible to take care of the minor (Safaei, 1996, p. 48). 205 the effects of civil liability of the legal representative of those who have been Abandoned After the occurrence of the damaging accident and after damage and loss has been incurred, if both parties cannot agree on the method and way of compensating the damage and its extent, the person to whom damage and loss has been incurred have to raise a claim in court and has to prove the civil liability resulting from the damage and loss. Hence, here we will first study the conditions for realization and pleading and proving this claim and then we will address the way it should be compensated.

5.1 Claim for damage compensation

5.1.1 Conditions for pleading a claim for damage compensation

It is possible that there is a right which has been violated and finally, a claim has been realized, however, the mentioned claim will be void of any result and outcome. In other words, a claim is recognized when it is raised in Competent judicial courts with full compliance of the required conditions.

The conditions which are required for pleading a claim are:

1) Existence of clear and precise right

Pleading a claim by a claimant is possible when, the claimed right is not dependent on realization of a condition or is not suspended by the occurrence or lack of occurrence of an incidents in future. In other words, the right under claim should be clear, precise and related to present.

2) Existence of title

Title refers to a title that a person with its existence, pleads a claim or responds to a claim. Designation can be of two types: either a person is considered as the original person, that is, the person who is directly beneficial in the claim or is representing the person who is beneficial in the claim such as guardian, attorney and (Fadaee, 1996, p. 93). Article 2 of Civil Procedure Law states: "No court can handle a claim, without a beneficiary person or beneficiary persons or their attorney of asking the court as per the law to do so". Therefore, in civil liability claims, a person cannot raise a claim due to the fact that due to the negligence and fault of the guardian of a minor a damage has been incurred to one of his relatives. However, the person can intervene and raise a claim under the titles of guardian, attorney and ... On the behalf of a beneficiary person. The legislator in Iran in some cases has allowed the creditors of a deceased or an insolvent person to act on behalf of them against those recognized as being indebted to the deceased or an insolvent person and raise a claim. The law of the non-litigious matters states: "Creditors of a deceased person in case that there is not enough heirloom for paying the debts of the deceased person, can plead a claim against a person who is in debt of the deceased".

3) Qualification

Qualification of the parties who have plead acclaim, is the necessary condition to their intervening in the claim. Articles 632 of previous Civil Procedure Law in this regards states: "all individuals who are qualification for pleading a claim can intervene in the claim, whether it has been raised in Court of Justice or no..." Qualification is a jurisdiction that an individual possess for having right and executing this right. Every living human has the qualification of enjoying his/her rights, however, application and execution of these rights requires having the qualification of vindication. Pleading a claim is one of the examples of executing such rights and requires the qualification of vindication and as per the rules and regulations, only a person who is mature and wise and brave has this qualification (article 211 of civil law) and therefore, minor and insane individuals don't have the legal qualification for pleading a claim and lack the necessary qualification for being the party on whom the claim is placed as well. Hence, pleading a claim is performed by their legal representative or against their representative and also, regarding an insane person who is not at the same time a minor. The court will only accept the guardian of the minor or insane person only (Ghoochani, 2011, p. 95).

5.1.2 Proving claims

When a damage has been incurred on another person by a minor or an insane individual, the person who has committed the damaging action is responsible for compensating it, unless the case is covered by article 7 of the civil liability law and it is obvious that if a person claims a damage and loss caused by minors, without proving this in qualified courts cannot claim compensation for this damage and loss and therefore, in claiming civil liability, although the damaging action has been committed from the minor or insane individual, however, considering the lack of qualification of both of these, the claim is raised against their guardians. Article 7 of the civil liability law, considered the basis of the responsibility of the guardian as their fault. This article hasn't considered the presumption of liability for the parents of the child or anyone who is legally or as per a contract responsible for taking care of a minor or insane person. In other words, as per the legal principle of negation, it is assumed that the parents of the minor and the guardian of the insane person are free of fault and proving their fault requires reason and as per the principle of "witness or reason" the person who has incurred loss should provide reason; therefore, only he can demand compensation from the guardian, if he can prove the casualty relationship between these two.

Proving the claim in this case is similar to civil liability claims, which have been raised as the result of a damaging action committed by an adult, with only one difference that since, confession is only considered in the claim when the person who has confessed is wise and mature, hence, the confession of a minor or an insane to causing a damage to plaintiff cannot be considered and also, the confession of the guardian also cannot be taken against his ward and in fact, the guardian cannot confess against the interest of his ward ;because confession in this case is equal to confirmation to a right in the interest of another and against the interest of self; therefore, the person on whom the damage has been caused and incurred should make use of other reasons for proving the damage that has been caused to him from the minor or the insane person (Masoudi, 1995, p. 71).

5.2 Compensating damage and loss

With realization of conditions and pillars of civil liability, a debt relationship is created between the person who has caused the damage and loss or his/her guardian and the person on whom the damage has been caused and due to this relationship, the person on whom damage has been caused can demand the compensation of his damage and loss through court and the party who has incurred this damage and loss is obliged to compensate it. Since, minors and insane individuals don't have the qualification of Vindication for their financial rights, hence, as per article 86 of Civil Procedure Law, they cannot be considered as the litigant and the legislator according to article 7 of civil liability law will consider their legal representative liable for compensating the above mentioned damage in case they are found to be faulty. This compensation might take place in two forms (Haji Asadi, 2001, p. 30).

1. Restitution in kind (reparation en nature)

2. Reparation par equivalent compensation

In compensating damage or loss with one of the above methods, the party who have incurred and caused the loss and damage doesn't have freedom of action to choose from one of the above methods. However, it doesn't mean that the parties cannot consent on another option mutually. Clause 1 of article 292 of civil law states: change of obligation can be obtained in the following cases:

1. When both parties' compromises to commit to another option apart from the two options mentioned about due to some reasons, in which case, parties are free from the main and primary commitment. Also the court is obliged to take the appropriate decision in this regard. Article 3 of civil liability law in this regard requires that:

The court will decide regarding the level of damage and the way and quality of its compensation considering the circumstances surrounding the case.

5.2.1 Restitution in kind

This method of damage compensation, is the most complete manners of compensation; because it completely neutralizes the damage that has been incurred on the person, resulting the condition to the time before the damage would occurs, can be performed in one of the following manners:

1. Returning the exact property; 2- eliminating the source of damage

5.2.2 Returning the exact property

Until the time that an exact property exists, neither the guarding can give another property as compensation and nor the affected that demand the payment of another property in this regard from the court. However is rejecting the exact property is demanded for wasting and destructing the price, submitting another property or the equal money is possible. In this regard we can refer to article 311 of civil law which states: "The Usurper should give the exact property to its owners and if the exact property has been destructed, he should give a similar property or its price and if due to another reason, the exact property cannot be rejected, should give a replacement of it". The problem which is raised here is that when a property is damaged due to the damaging action of a ward, whether his guardian can pay the price of that property or a similar property in compensation to the affected? As per article 329 of the civil law, if the propriety can be restored to its first condition, the affected can demand this from the guardian. Article 329 of the civil law stipulates that: "if someone destroys another's house, he should construct and restore it to its primary conduction and if restoring the house is not possible, the person should pay the price for it." Although this verdict is about restoring a destroyed house or building to its original state, however, it can be used as a criterion and indicator for cases in which a person has caused damage to a property. In those cases in which restoring the property to its original state is not possible, the guardian should be able to pay the difference between the original property and the damaged one in terms of money a compensation to the affected party. Article 330 of the civil law confirms this. This article requires: "if a person kills an animal belonging to someone else without his permission, he should pay the difference of price between the live and dead animal and if dead animal doesn't have any price, he should pay the full price for the animal, however, if he has killed or injured the animal in his defense, he shall not be taken as liable".

5.2.3 Eliminating the source of damage

In those cases in which a minor or an insane person has committed an action which constantly causes damage to another, eliminating this source of damage would be the best way of compensating it. For example, if a child is using an air gun and with it he is harming others, the best way of compensating this harm and damage is to remove the gun from the child's hands. It should be noted that compensating through restoring the state of the affected person to its original states, can only affect the future and compensation of the past damage has remained still (Ghoochani, 2011, p. 98-100).

5.2.4 Equivalent compensation

Compensation through paying the equivalent is the most common and important method of compensation of the damage that has been incurred in civil liability. Almost in all legal system, this method of compensation is the most important underlying principle of civil liability. As per this principle, the person who has caused a damage is obliged to submit the equivalent for the

damage he has caused to the affected. In the cases of Waste and causality, in most of the times, it is not possible to compensate the affected by restitution in kind and therefore, the only solution is to compensate with the equivalent. The basis of this thinking is that the equivalent value of what has been damaged from the property of the affected will be compensated and added by the person who has caused the damage and to restore his condition as much as possible to the original state. The aim of this method of compensation is to restore the situation to before the occurrence of the damage as much as possible. In most of the legal system, the equivalent value to be compensated is the equivalent money, however, in every legal system there cases also in which compensation is made by giving other non-cash equivalents and hence, equivalent compensation can take two forms:

1- Giving the like; 2- Paying an amount of money (Ghoochani, 102, 2011).

5.2.5 Special method of compensation in article 7 of civil liability law

Article 7 of civil liability law has predicted a special method for the compensation of the damage incurred by a minor or an insane person which is different from other methods of damage compensation and in fact, it can be said that this method is mostly based on the degree of affordability of the person rather than the legal principles governing regulations or justice. As per the above article, in case of lack of affordability of the guardian, the incurred damage by a minor or an insane person is compensated from their own property and money and in any case, this compensation should be made in a way that it will not cause difficulty and poverty to the compensating party. The issue which is raised here is that whether court with reference to this article can reduce the level of compensation or not? In response to this question it can be said that this article includes reduction in compensation as well, however, this answer can be criticized from two aspects:

1. The clause in this article has only talked about the method of damage compensation and hasn't talked about reducing the level of compensation, therefore, the authority of the court is limited to only the method of compensation and not reduction in the level of compensation.

2. Reduction in the level of compensation is against the obvious and in these cases we should suffice to law. It is obvious that the incurred damage should be compensated fully and should restore the situation of the affected to the original state. On the other hand, reducing compensation level has been recognized in article 4 of civil liability law which doesn't include reduction in compensation level and the silence of the legislator cannot be taken equal to the permission of reducing compensation level.

Lack of permission for reduction of compensation level means that the court should not apply installments for the compensation or it cannot give an appropriate deadline to the guardian for paying the compensation. However, permission in this regard depends on the fact that lack of applying installments for the compensation will cause difficulty and poverty for the guardian.

Conclusion

The most important results obtained from the above arguments can be summarized as following: 1. Guardianship on wards is a form of authority and control for governing nonfinancial and financial affairs of the ward, which include minors and insane which have been entrusted to father or grandfather, but Exclusively can transfer these authorities after his death to his Successor. Since, these authorities have been given to fathers and grandfathers, they are known as natural guardians. Among the qualifications for guardianship on Muslim wards we can refer to wisdom, maturity, having parity and having the feature of trust, however, the realization condition for representativeness is to be the natural guardian.

2. Legal actions taken by a minor who cannot recognize what is good and what is bad for him and an insane person in their non-financial affairs are considered as void, even with the permission of the guardian; because they don't have the ability to distinguish what is right and what is wrong, however, legal actions taken by minors who have the ability to recognized what is good and what is bad for them and fools are acceptable only if they are in their own interest.

3. It is accepted that the guardian has unlimited authorities, however, this doesn't apply to non-financial affairs and is limited to financial affairs, such as, an immature person can be married off only with the discretion of the court and regarding the divorce for an immature person, the guardian can decide. Divorce of an insane person also, is decided by the guardian. Qisas (retribution) is a personal right; however, if an immature person wants to settle this matters with paying an amount of money, it can be done with the permission of the guardian.

4. Guardians of obsoletes in addition to other authorities they have, are responsible for some other duties that neglecting them will cause liability for the natural guardian and sometimes even can cause the guardian to be removed from his position or can limit his authorizes. These responsibility are: Custody, alimony payments.

5. Legislator has selected a special method in article 7 of the civil liability law for compensation of damages that in fact is based on the degree of affordability.

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