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## A Socio-Legal Analysis of Grandparents' Rights in Iran

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### I. Introduction

In the Civil Code of the Islamic Republic of Iran, grandparents who are defined as the fathers of the fathers, also known as paternal grandfathers (*jad*), are considered legally responsible vis-à-vis their grandchildren.<sup>1</sup> Grandparents' rights and responsibilities in the Iranian legal system stem from the Islamic concept of guardianship in the *Shia* tradition. This chapter focuses on *Shia* or Twelvers Islamic juristic discourse,<sup>2</sup> especially in modern Iran, as well as in post-revolutionary court practice. The traditional jurists and modern codification of Islamic law are compared with contemporary issues around gender and the best interests of the child. This discourse examines overall themes relating to guardianship of grandparents, as well as tensions between classical Islamic law, gender and child-centred international standards.

Classical Islamic jurisprudence makes a clear distinction between 'custody', which means generally the nurturing of children, and 'guardianship', which is defined as caring for the child's property and education. The concept and conditions of grandparents' guardianship over grandchildren are closely related to custody, and both have been codified within family law in classical Islamic legal doctrine. In modern statutory legislation, the dynamic between custody and guardianship of grandparents has not changed as much, and no contemporary concept of guardianship has been codified within the civil law tradition to which Iran adheres. Here, it is important to understand to what extent the courts in Iran have deviated from applying the classical Islamic law of *wilayat* (guardianship) where grandparents are involved.

<sup>1</sup> The Civil Code of the Islamic Republic of Iran, 1935, Art 1194.

<sup>2</sup> Also known as *Ithna Ashariyyah* or *Imamya*, it is the official religion of Islamic Republic of Iran as stated in the 1979 Constitution.

Section II examines the historical development of the concept of *wilayat*<sup>3</sup> in Iranian family law, especially regarding grandparents. In section III, post-revolutionary legislation is examined to understand the nature of grandparents' rights in Iran. That section also reviews the main provisions concerning the best interests of the child principle in relation to grandparents.

## II. Historical Overview of Guardianship Law in Iran

In Islamic juristic debate in the pre-modern period, before the early nineteenth century, there was a clear distinction between rights and responsibilities, which in Western legal tradition are known as 'physical custody' and 'legal custody'.<sup>4</sup> Physical custody refers to nurturing a child, having custody and managing the child's property, and legal custody refers to caring for a child's education and guardianship. It seems that the child's most basic needs, such as access to adequate food, shelter and health, have been prioritised over the child's best interests.<sup>5</sup>

The concept of natural guardianship, as it is known today, had been widespread among Arabian tribes before the rise of Islam. Post-Islam, the concept was endorsed by Muslim jurists, but still, there is no information about who first referred to natural guardianship.<sup>6</sup> Among others, Ibn Junaid Eskafi, a jurist of the fourth century, spoke of the guardianship of fathers and grandfathers.<sup>7</sup> Paternal grandfathers are the guardians of their grandchildren in the absence or death of the fathers. Ali added that guardianship is the absolute right of the father, allowing him to intervene in any of his children's affairs, including their right to life.<sup>8</sup> It seems that, in the case of the death or absence of fathers, the same authority could be attributed to grandfathers.

The Iranian Civil Code, governing personal status law (*ahwal shakhsiyya*), was first codified in 1934–35 based on the *Shia* jurisprudential school (as the official religion of the country<sup>9</sup>) and the modern legal system (French Civil Code). These

<sup>3</sup> Guardianship.

<sup>4</sup> A Ibrahim, *Child Custody in Islamic Law: Theory and Practice in Egypt since the Sixteenth Century* (Cambridge, Cambridge University Press, 2018).

<sup>5</sup> Muslim scholars define custody as the action of raising, educating and taking care of a minor's basic needs, such as housing, food, clothes and body care. More examples of domestic laws about the best interests of the child can be found in this interesting comparative study: N Yassari, L-M Möller, and I Gallala-Arndt (eds), *Parental Care and the Best Interests of the Child in Muslim Countries* (The Hague, TMC Asser Press, 2017).

<sup>6</sup> Some jurists believe that the term 'natural guardianship' has not been used in *Shia* jurisprudence and that its first use dates to the adoption of the Civil Code of the Islamic Republic of Iran in 1935. H Safaai and A Emami, *A Concise Family Law* (Tehran, Mizan, 1997) 371.

<sup>7</sup> Recited in H Sadeqi, *A New Approach to Compulsory Guardianship of Children in Jurisprudence and Civil Law (with the views and opinions of Imam Khomeini)* (Tehran, Research Institute of Imam Khomeini, 2002) 64.

<sup>8</sup> J Ali, *The History of The Arabs Before Islam*, vol 5 (Beirut, Dar El Ilm Lilmalayin, 1970) 528.

<sup>9</sup> Constitution of the Islamic Republic of Iran, 1979, modified in 1989, Art 12.

two important resources played different roles in drafting the Iranian Civil Code. While the French Civil Code has been applied to the structure, chapters and articles of the Iranian Code, the contents were founded on the *Twelvers*<sup>10</sup> Jurisprudence or *Shia*. Thus, the legal relations of grandparents and grandchildren have their roots in *Immamiya* and Twelver Shia, or the *Twelver Ja'fari* school (*Ithna 'Ashariyyah*) as the principal branch of the Shia school of thought. The followers of other recognised religious groups, such as the Sunni Muslims, Shia Muslims belonging to the Zaydi sector as well as Zoroastrian, Jewish and Christian Iranians, are allowed to have certain and common rules and customs of their sectors applied to them in all matters about their personal status, such as marriage, divorce, inheritance, wills, etc.<sup>11</sup> This system is based on the Islamic law notion that non-Muslim citizens of the 'Islamic state' (*dhimmiyyin*) enjoy autonomy in their religious and personal affairs.<sup>12</sup> In the Civil Code, the term 'natural guardian', as in the common law tradition, refers to a presumptive guardian (*wali*). This assumption of male power in natural guardians as *wali* and the concept of *qayyem* or judicial designation used by jurists show that male-dominated guardians have variable powers over the child. For example, in all matters about the estate and the civil and financial concerns of the child, *wali* is his or her legal representative.<sup>13</sup>

### III. Family and Guardianship

There is no specific definition of 'family' in Iranian law and its codified legislation. One common understanding is that family is a union of people who, because of kinship, are dependent on each other. Kinship is created by marriage or blood. This definition is based on the Iranian Civil Code, especially the law on inheritance,<sup>14</sup> which enumerates a group of persons who inherit from each other and includes the following categories: (i) father, mother, children and their children; (ii) grandparents, sibling, and their children; (iii) uncles, aunts and their children.<sup>15</sup>

The definition of family is limited to a heterosexual marital union and does not apply to cohabitation outside marriage. Therefore, in legal terms, family is usually

<sup>10</sup> *Imamiya* Jurisprudence, also known as *Shia*, is a school of thought following the descent of divine revelation through Prophet Muhammad's family line over accounts of his life and teachings as passed down by his companions. The Islamic Law sources in *Shia* jurisprudence are the Qur'an (divine revelation as recited to the Prophet), Sunnah (the customary example of the Prophet), Hadith (reports of what he said), Consensus (agreement between the jurists) and the intellect (wisdom).

<sup>11</sup> Constitution of the Islamic Republic of Iran, Arts 12 and 13.

<sup>12</sup> J Moussa, 'Egypt' in N Yassari (ed), *Parental Care and the Best Interests of the Child in Muslim Countries*, (Asser Press, The Hague, 2017) 4.

<sup>13</sup> The Civil Code of the Islamic Republic of Iran, 1935, Art 1183.

<sup>14</sup> *ibid* Art 1032.

<sup>15</sup> N Katouzian, *Civil Law: Family Law*, vol I (Tehran, Ganje Danesh Press, 1999) 1–2.

understood as including the husband and wife, and children if they are under the protection and guardianship (*wilayat*) of their father. By including guardianship in the above definition based on Iranian laws, the definition should be construed in a way to cover paternal grandparents as well.<sup>16</sup> According to the Iranian Civil Code, 'grandchildren are under their fathers and paternal grandparents' guardianship'. This definition of grandparenthood is deep-rooted in Islamic law kinship norms. In Islamic law, the family is considered a social unit and is something more than the group of people who form it; members of a family are responsible for each other in different ways, such as through providing for economic needs, providing education, etc.<sup>17</sup>

The concept of the family in Iran has also been considered by sociologists. Some claim that this concept is under the influence of social development.<sup>18</sup> Social development is, in their view, a process of transition from traditional societies to modern ones. Urbanisation, the higher education of women and increased employment of women are among the indicators of this development.<sup>19</sup> For example, regarding higher education and the employment of women, statistics show that Iranian women are more willing to go to university.<sup>20</sup> It means that, nowadays, many mothers are more educated than their husbands, let alone their parents or parents-in-law. This fact, on its own, could have positive effects on the raising of children. However, it may cause legal problems when it comes to a court's deciding who, rightfully, ought to be the natural guardian of a child. According to Iranian Civil Law, along with fathers, paternal grandparents are the natural guardians of their grandchildren. They are preferred to mothers, irrespective of any priority a mother might have based on her education or social position.<sup>21</sup>

Among the results of this social development is the transformation of family structures, with statistics showing a decline in the more traditional extended family and the emergence of a variety of nuclear families.<sup>22</sup> Nevertheless, grandparents, especially maternal grandparents, may still play a vital role in bringing up and looking after their grandchildren, especially where both parents go out to work.<sup>23</sup> Public legal culture recognises grandparents as 'family pillars' or 'stabilisers', especially during times of family crisis such as parents' divorce or death.

<sup>16</sup> *ibid* 3–4.

<sup>17</sup> *ibid* 8.

<sup>18</sup> S Mohammadi, 'Preference of Mother Guardianship to Grandfather Guardianship' (2017) 98 *Legal Justice* 179. In Persian.

<sup>19</sup> *ibid*.

<sup>20</sup> Studies show that 'Overall, this increase in women in higher education has contributed to the rise of Islamic feminism and an intrinsic movement of Iranian women pursuing the advancement of their legal and social status'; see, eg, MK Winn, 'Women in Higher Education in Iran: How the Islamic Revolution Contributed to an Increase in Female Enrollment' (2016) 10 *Global Tides* 10.

<sup>21</sup> Art 1183 Civil Law.

<sup>22</sup> H Sarai, 'Family and evolution in the context of the demographic transition in Iran' [2007] *Journal of Population Association of Iran* 37.

<sup>23</sup> A Tavassoli, 'Investigating the degree of dependence of the nuclear family on paternal and maternal families among students' (2018) 7 *Sociology of Education* 12.

The rights and relationships of grandparents on divorce, however, are controversial, especially with the rise in the divorce rate among women.<sup>24</sup> Culturally speaking, societal disapproval of divorce is often embodied by grandparents, leading to disruption of grandparent–grandchild relations. According to formal statistics, in 2020 there were 183,193 divorces, while a year earlier there were 176,814.<sup>25</sup> Informal statistics show that in by the Spring of 2021 alone, the divorce rate had increased by 16.4 per cent in comparison with the same time in 2020.<sup>26</sup> According to the Iranian Civil Code, in divorce, parties cannot deprive the other of visitation rights.<sup>27</sup> Discussion of the nature of grandparent visitation rights is included in section III.A following.

### A. The Nature of Grandparents' Rights

The exercise of guardianship of grandparents over a child can be analysed from two perspectives: financial and non-financial concerns. As mentioned earlier, in all matters regarding the estate and financial concerns of the child, the guardian will be his or her legal representative. Accordingly, all of the guardian's actions with regard to, and transactions of, the estate of the ward are considered valid if they conform with the best interests (*maslehat*) of the child.<sup>28</sup> That is, the guardian should act in the interests (well-being) of the child.<sup>29</sup> Nevertheless, some believe that although the guardian's legal transactions need not be profitable, it should not result in a loss to the ward (*massage*). This requirement<sup>30</sup> is also inferred from the wording of Article 1184 of the Civil Code, which provides if the guardian does not respect the interests of the child, he will be dismissed. Moreover, a uniform judicial precedent provides in this respect that a person such as a father or paternal grandfather who acts on behalf of a ward should reasonably respect the ward's benefits and interests. This precedent not only makes it clear that the powers of natural grandparents are limited to the interests and benefit of the child,<sup>31</sup> but

<sup>24</sup> S Jaber et al, 'Iranian Women's Divorce Style: A Qualitative Study' (2022) 61(1) *Family Process* 436.

<sup>25</sup> Published in the Statistical Centre of Iran as the main organisation for statistics in Iran at [www.amar.org.ir/](http://www.amar.org.ir/) (accessed 10 May 2022).

<sup>26</sup> More figures are available at [www.imna.ir/news/547856/](http://www.imna.ir/news/547856/) (accessed 5 May 2022).

<sup>27</sup> Art 1174 Civil Code.

<sup>28</sup> H Emami, *Civil Law*, vol V (Tehran, Eslamiyeh, 1992) 213.

<sup>29</sup> According to a consultative opinion of the Judiciary's Legal Department, *qebte* means the material benefit or the interests of the ward in administering his or her property and related contracts (*Civil Law Revision Collection*, (Tehran, Deputy for compiling, revising and publishing laws and regulations, 2020)357.) Also see M Langroodi, *Legal Terminology* (Tehran, Ganj-e Danesh, 1993) 487; Emami (n 28) 213.

<sup>30</sup> A Helli, *TahrirAhkam e Shariie ala mazhabeEmamaya*, vol 1 (Qom, Aal al-Bayt Institute, 2000) 220.

<sup>31</sup> Revocation of title deed due to non-observance of minor benefits by the natural guardian, Minutes of the Judicial Session, Bojnood, Khorasan, 27 November 2007, at [www.neshast.org/Home/GetPublic/SessionTranscript/8aa5a8a7-78d6-4e21-96d3-08d601ea40a4](http://www.neshast.org/Home/GetPublic/SessionTranscript/8aa5a8a7-78d6-4e21-96d3-08d601ea40a4) (accessed 10 March 2022).

indicates that both terms have an identical meaning.<sup>32</sup> In summary, guardians can sell, rent or change the property of the child, or transact business on behalf of the child, if those actions are deemed to be in the favour of the ward. They are also responsible for ensuring that the ward has appropriate living conditions. To this end, and to manage the child's property, guardians are allowed to engage nurses, maids or even employees. They can even pay a fee to themselves from the child's accounts or belongings.<sup>33</sup> The only area in which both maternal and paternal grandfathers and grandmothers are involved is in maintenance. It is an enforceable<sup>34</sup> legal obligation of close relatives towards each other, by which well-off relatives provide maintenance for poor ones.<sup>35</sup> The obligation to provide maintenance is subject to the existence of kinship, the financial resources of one relative and the indigence of the other.<sup>36</sup> To determine the available financial resources of a family member, his obligations and his manner of life must be taken into consideration.<sup>37</sup> To establish indigence, the family member should not be able to find an appropriate normal job.<sup>38</sup> According to the definition, maintenance consists of the provision of a dwelling, clothing, food and furniture to the extent regarded as covering the bare necessities, and is subject to the means of the person providing the maintenance.<sup>39</sup>

A consensual legal provision<sup>40</sup> in this regard states that relatives by blood in the direct line (ascending or descending) are under a reciprocal obligation to provide maintenance for each other.<sup>41</sup> As far as the present discussion is concerned, the following order should be applied with regard to providing maintenance: for a child whose father is dead or unable to maintain him or her, this duty devolves to the paternal grandfather, the nearest male next of kin.<sup>42</sup> In the absence of a paternal grandfather, or in the event of his incapacity, the duty of maintenance devolves to the mother. If the mother is dead or is also unable to maintain the child, the duty

<sup>32</sup> The majority holds that 'benefits' and 'interests' have an identical meaning. However, some argue that a child's benefit is different from his or her interests. In their view, a benefit is not a requirement; and for the legal transactions of guardians to be valid, the interests of the ward are the only requirement. According to this view, non-profitable transactions that are also contrary to the interests of the ward are invalid, but non-expedient and non-harmful ones remain valid. Ayatollah Naraqi, *Javaher-al-Kalam [Theological Jewels]*, vol 22, 322.

<sup>33</sup> This is inferred from Art 1246 of the Iranian Civil Code, which allows *qayyem* to ask for fees for the fulfilment of his duties, and is *a fortiori* applied to natural guardians. Although the above-mentioned view is supported by some jurists, there are lawyers who argue that the guardian is not allowed to receive fees from the ward's property because it is against his social duties *via-à-vis* his children or grandchildren (the only exception in this regard is relatives maintenance, which will be discussed further below). See N Katouzian, *Civil Law: Family Law*, vol II (Tehran, Ganje Danesh Press, 1999) 229.

<sup>34</sup> The Civil Code of the Islamic Republic of Iran, Art 1205.

<sup>35</sup> See N Katouzian, *Civil Law: Family Law*, vol II (Tehran, Ganje Danesh Press, 1999) 330.

<sup>36</sup> *ibid* 333.

<sup>37</sup> The Civil Code of the Islamic Republic of Iran, Art 1198.

<sup>38</sup> *ibid* Art 1197.

<sup>39</sup> *ibid* Art 1204.

<sup>40</sup> Emami (n 28) 228.

<sup>41</sup> The Civil Code of the Islamic Republic of Iran, Art. 1196.

<sup>42</sup> *ibid* Art 1199.

will be taken on by any maternal grandfathers and grandmothers and paternal grandmothers who are sufficiently wealthy to provide maintenance, giving preference to the nearest next of kin of the children's father. If several of the grandparents are similar in degree of kinship, the expense of maintenance must be paid by them in equal shares.<sup>43</sup> As may be seen, here the paternal grandfather is in the same line as the maternal grandfathers and the grandmothers.

The expense of maintaining parents, however, must be paid by the nearest related children or grandchildren (either the daughter or son) in the order of kinship. So, if a child is unable to maintain his or her parents, the duty falls to the grandchildren in descending order. If the relatives who are to be maintained are numerous and the supporter cannot pay for all of them, as Article 1202 provides, the maintenance of the children and grandchildren in the descending direct line will be given priority over grandparents in the ascending direct line. This is in opposition to the view of *Shia* jurists, who consider that grandparents in an ascending direct line should be preferred.<sup>44</sup>

The other most significant office is non-financial guardianship. Although Article 1183 of the Civil Code exclusively refers to the responsibility of the guardian for the financial concerns of the ward, some other articles provide for the guardian's duties regarding non-financial issues. Marriage is of utmost importance in this regard. According to Article 1041 of the Civil Code, the marriage of a girl under the age of 13 or a boy under the age of 15 is subject to the permission of the guardian and conditional on taking into consideration the child's best interests under the supervision of competent courts.<sup>45</sup> The marriage of boys is thus merely subject to the permission of guardians up until the age of 15, unless their immaturity or mental unfitness continues past their minority. The marriage of the girls, however, remains at the discretion of guardians for a longer time.<sup>46</sup> In addition to the permission of their guardians for marriage of girls aged under 13, which is a consensual requirement, *Shia* jurists believe that to assure benefit, the marriage of virgin, mentally mature girls, irrespective of their age, should be done only with the consent of the guardians.<sup>47</sup> 'Virgin', in this context, connotes a girl who has not lost her virginity through lawful sexual intercourse.<sup>48</sup> This discriminatory gender rule has been included in the Article 1043 of the Iranian Civil Code, which provides that 'the marriage of a virgin girl is dependent on the permission

<sup>43</sup> The Civil Code of the Islamic Republic of Iran, Art 1199.

<sup>44</sup> Emami (n 28) 230–31.

<sup>45</sup> For years after the adoption of the Iranian Civil Code in 1928, marriage before the age of maturity was allowed by the permission of the guardian and was conditional on taking into consideration the ward's interest (Note to Art 1041). This Note was omitted in 1991.

<sup>46</sup> Boys are presumed to be mentally mature after 15 unless any contrary fact is established.

<sup>47</sup> A Soltani, 'A study of the jurisprudential principles of the father and paternal grandfather in the marriage of a virgin girl' (2015) *The Second International Congress of Religious Thought and Research* 13.

<sup>48</sup> H Al Taha, 'Guardianship in marriage from *Shia's* jurisprudence point of view and the law' (2017) *The Second International Congress of Islamic Sciences and Humanities* 2.

of her father or her paternal grandfather even if she has reached the full age of maturity.<sup>49</sup>

The discriminatory permission requirement can be removed if: (i) both guardians are dead;<sup>50</sup> (ii) both guardians have been disqualified from exercising guardianship.<sup>51</sup> No other permission, whether from the mother or maternal grandparents, is legally required as a prerequisite to marriage.<sup>52</sup> The guardians' permission is replaced by the Court's permission for the marriage if: (i) the father or the paternal grandfather is not present and obtaining their permission is impossible;<sup>53</sup> or (ii) the guardians withhold the permission without any justifiable reason.<sup>54</sup> According to a Uniform Judicial Precedent, marriage celebrated without any of these permissions is void.<sup>55</sup>

In order to understand grandparents' rights in a plural legal system such as Iran's, a useful discussion to have is to analyse some of the eligibility requirements for being a guardian and see how they impact on the best interests of the child. Such a discussion follows in section III.B.

## B. The Competence of Natural Guardians

According to Article 1183 of the Civil Code, in all matters regarding the estate and financial concerns of the child, the guardian will be the child's legal representative. Accordingly, in case of doubt, natural guardians are recognised as the legal representatives of their wards and the courts or attorneys-general are not allowed to intervene.<sup>56</sup> Although this article refers to financial concerns, natural guardianship is not limited to these. The guardians' status also extends to non-financial concerns, unless expressly barred by law.<sup>57</sup>

<sup>49</sup> See also Uniform Judicial Precedent No 126-31/2/1363. There is even a belief that the method of losing virginity may affect the authenticity of the marriage. For example, if virginity is lost as a result of a medical operation, the girl is considered a virgin for the purpose of marriage. The same rule applies to a girl who divorces before any sexual intercourse with her husband has taken place. However, a girl who has lost her virginity because of adultery is not considered a virgin and will no longer be under guardianship for marriage (Al Taha (n 48)) According to the Uniform Judicial Precedent of 29/1/1363, sexual intercourse, whether legal or illegal, removes the necessity for the guardians' permission. *Civil Law Revision Collection* (Tehran, Deputy for compiling, revising, and publishing laws and regulations, 2020) 263, 62/62.

<sup>50</sup> Inferred from the contrary argument of The Civil Code of the Islamic Republic of Iran, Art 1044.

<sup>51</sup> M Langroodi, *Family Law* (Tehran, Ganj-e Danesh, 1997) 25, 28.

<sup>52</sup> H Emami, *Civil Law*, vol IV (Tehran, Eslamiyeh, 1992) 287.

<sup>53</sup> The Civil Code of the Islamic Republic of Iran, Art 1044.

<sup>54</sup> *ibid* Art 1043.

<sup>55</sup> Uniform Judicial Precedent of 18 April 1984; see also Judiciary's Legal Department Opinion, No 1.2261, 1999/3/14, *Civil Law Revision Collection* (Tehran, Deputy for Compiling, Revising and Publishing Laws and Regulations, 2020) 263.

<sup>56</sup> N Katouzian, *Civil Law: Family Law*, vol II (Tehran, Ganje Danesh Press, 1999) 215.

<sup>57</sup> *ibid*, 217.



By recognising fathers and paternal grandfathers as natural guardians, a question may arise regarding the priority of each in exercising guardianship over the ward. Some jurists have envisioned situations in which fathers and paternal grandfathers are in the same line and are independently responsible for exercising their guardianship (*Wilayat*) over a ward and administering their property.<sup>58</sup> Other than this, jurists assumed that natural guardians act alone; therefore, if the father is alive, the paternal grandfather should be forbidden from exercising guardianship. They argue that the nearer next of kin excludes the remoter next of kin, thus the guardianship of the father should be given priority.<sup>59</sup> Yet the Civil Code's preference is for the first view, where the father and paternal grandfather may exercise their guardianship rights and duties independently of one another.<sup>60</sup> This is a view that is not in conformity with current social customs, according to which, while the father is alive, not only society but also paternal grandparents do not consider themselves allowed to intervene in matters relating to the grandchildren. Grandparents' guardianship starts once the father is prevented from exercising guardianship, either by death or by a legal cause.<sup>61</sup> There is even a consultative opinion of the Judiciary's Legal Department that says the father's natural guardianship continues until the ward's age of maturity.<sup>62</sup>

Accepting the first view may also cause conflict in cases where the legal transactions of natural guardians are concurrent.<sup>63</sup> For example, where they sell the same property to different persons at the same time. To determine which transactions must be given priority, three different solutions may be proposed: (i) the invalidity of both transactions; (ii) the validity of the paternal grandfather's transactions; and (iii) the validity of the father's transactions. Despite disagreement surrounding the conflict in such cases, some consensual views of jurists imply that in each case the legal transaction is preferred that is most for the benefit of the child, and in case of any doubt the Court (*Hakem*) will resolve the dispute by applying the principle of caution.<sup>64</sup> Some jurists, however, consider the father's transactions to have priority, in accordance with what was said earlier; the paternal grandfather is not customarily considered a member of a family.<sup>65</sup>

<sup>58</sup> *Javaher-al-Kalam [Theological Jewels]*, vol 26, 322.

<sup>59</sup> Allama al-Hilli, *Sharā'ih al-Islām [Islamic Law]*, vol 7, 116.

<sup>60</sup> See Art 1180 Civil Code.

<sup>61</sup> N Katouzian, *Civil Law: Family Law*, vol II (Tehran, Ganje Danesh Press, 1999) 212.

<sup>62</sup> Consultative Opinion of the Judiciary's Legal Department, No 518, 7 February 1989.

<sup>63</sup> H Masjedsaraie, 'Paternal Guardianship in Islamic Jurisprudence' (2016) 13 *Journal of Islamic Law & Jurisprudence Researches* 169.

<sup>64</sup> *ibid* no 63.

<sup>65</sup> *ibid* no 61, vol II, 214.

Having discussed the competence of natural guardians, we can now turn to assess the qualification of natural guardians as grandparents.

### C. The Qualification of Natural Guardian

According to the Iranian Civil Code,<sup>66</sup> natural guardians should be mentally mature. Once a guardian becomes *alieni juris* (for any reason), his legal guardianship will cease and his responsibilities will be conferred on the other guardian.<sup>67</sup> This is consensual legal opinion between different school of thought, but in the event that the incapacity of the guardian is as a result of insanity, the prominent view is that only permanent insanity forbids guardians from exercising guardianship. A guardian suffering from periodic insanity is allowed to exercise his guardianship when he is not so suffering.<sup>68</sup> The definition of mental health for guardians – especially for grandparents – is an important issue regarding the best interests of the child. There are no statistics as to how much regular child care grandparents provide in Iran, or how many children are raised by their grandparents. Grandparents are often involved with their grandchildren's lives, though. Although cultural values promote the benefits for grandparents' and grandchildren's well-being and health, the relationship between grandparents' mental health and the best interests of children in Iran is surprisingly overlooked within academic discourse.

There are international studies investigating whether grandparenting can improve well-being by being involved in their grandchildren's lives.<sup>69</sup> A counter-hypothesis, however, takes the stance that caring for young children is challenging, particularly for older adults with limited reserves of strength.<sup>70</sup> According to this perspective, active grandparenting could overburden older adults and lead to grandparents' decreased health and well-being. Poverty and sanctions increase the weight of the burden on Iranian grandparents, as recent figures suggest that more than 60 per cent of the population live below the poverty line.<sup>71</sup>

<sup>66</sup> Arts 1184–1188 Civil Code.

<sup>67</sup> The Civil Code of the Islamic Republic of Iran, Art 1185. If the natural guardian of the child becomes incapacitated, the Public Prosecutor is obliged to appoint a guardian for the child according to the regulations governing the nomination of guardians.

<sup>68</sup> Kh Moradi, 'The Consequences of Violation by the Natural Guardian from the Viewpoints of Jurists of Different Islamic Denominations and the Civil Code of Islamic Republic of Iran' at [http://fiqhemoqaran.mazaheb.ac.ir/article\\_51380.html?lang=en](http://fiqhemoqaran.mazaheb.ac.ir/article_51380.html?lang=en) (accessed 20 June 2022).

<sup>69</sup> See, eg, K Mahne and O Huxhold, 'Grandparenthood and Subjective Well-Being: Moderating Effects of Educational Level' (2015) 70(5) *The Journals of Gerontology: Series B, Psychological Sciences and Social Sciences* 782.

<sup>70</sup> See LA Baker, M Silverstein and NM Putney, 'Grandparents Raising Grandchildren in the United States: Changing Family Forms, Stagnant Social Policies' (2008) 28(7) *Journal of Sociology and Social Policy* 53. Also ME Hughes et al, 'All In the Family: The Impact of Caring for Grandchildren on Grandparents' Health' (2007) 62(2) *The Journals of Gerontology: Series B, Psychological Sciences and Social Sciences* S108–119.

<sup>71</sup> The Parliament Research Centre Report for 2018/2019 indicates that the essential goods poverty line has increased in the last seven years rising from 15% to over 18%. See N Bozorgmehr, 'Spiraling Poverty in Iran Adds to Pressure on Regime' *Financial Times* (Tehran, 25 January 2021).

Another important issue is religion. The guardian should be Muslim. In fact, the common requirement found in all jurisdictions is religion. A non-Muslim paternal grandfather has no right of guardianship over his Muslim grandchildren. This is inferred from a Quranic verse that says, 'God has never put the Muslims under the domination and control of non-believers.'<sup>72</sup> The Civil Code is silent on this matter but provides that a Muslim guardian cannot appoint a non-Muslim guardian for his ward.<sup>73</sup> Lawyers argue that this article also, *a fortiori*, covers the apostasy of guardians. However, Christians, those of the Jewish faith and Zoroastrians are governed by their own religious personal status laws. This is known as the 'plurality of laws'<sup>74</sup> in many Muslim-dominant countries, granting relative legislative and judicial autonomy to non-Muslims in their status such as guardians and as regards 'grandparents' rights'. The other important issue that is also related to the best interests of the child is that the guardian must be just. This means that the paternal grandfather should be fair in his legal transactions regarding the property of the ward. This requirement is rather controversial, as some jurists consider the legal transactions of an unjust paternal grandfather as invalid; yet others believe that, irrespective of whether they are fair or not, all legal transactions of guardians are legally binding. Since the Iranian Civil Code is silent on this issue, lawyers suppose fairness is not a condition for guardians.<sup>75</sup> Along with fairness, however, the importance of the child's best interests, emphasised in the United Nations Convention on the Rights of the Child (UNCRC),<sup>76</sup> is the foundation of the grandparents' rights over the child, as can be seen from the visitation rights discussed in section III.D.

## D. Visiting Rights of Grandparents

The Family Protection Law gives grandparents the right to be heard in court when custodial parents do not allow visitation.<sup>77</sup> It does not give grandparents an exclusive right to visit grandchildren. Grandparent visitation statutes vary from one family court to another, but there are some common elements. The new Family Protection Law provides general guidelines about how the courts should decide whether to grant visitation privileges. The legal visitation rights are applicable only when certain events, such as divorce or the death of a parent, have occurred, or when children have lived with their grandparents.

<sup>72</sup> Quran, Nesa 141.

<sup>73</sup> The Civil Code of the Islamic Republic of Iran, Art 1192.

<sup>74</sup> See MH Fadel, 'Political Liberalism, Islamic Family Law, and Family Law Pluralism' in J Nichol (ed), *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (New York, Cambridge University Press, 2012) 184.

<sup>75</sup> M Haghkhah, 'Unauthorized Transactions by Natural Guardians on The Property of The Ward' (2013) 57 *Family Law and Jurisprudence Journal* 115.

<sup>76</sup> Art 12 UNCRC.

<sup>77</sup> Art 41.

The right to visit belongs to the parent who does not have custody of the child. It applies where the parents of the child do not live in the same house because of divorce or for any other reason.<sup>78</sup> According to a consultative opinion of the Judiciary's Legal Department, this right belongs to parents exclusively and does not extend to maternal or paternal grandparents.<sup>79</sup> Yet there are judgments in which the courts have recognised the right of visitation of grandparents, whether paternal or maternal, by referring to the best interests of the child as mentioned in the UNCRC. In one case, for example, the court, when referring to Articles 3–4 UNCRC, held that depriving an 8-month-old girl of visits with her paternal grandparents was against her best interests as, due to the death of her mother, it might cause her physical and mental suffering or lead to her forgetting them.<sup>80</sup> In another case, extending the paternal grandfather's visiting time with a 5-year-old girl whose father was killed in a car accident was affirmed by the Court of Appeal. The Court argued that visiting the paternal grandfather was not only in compliance with the best interests of the child, but also conformed with his position as the child's natural guardian.<sup>81</sup>

There is a need to conduct more research into grandparent visitation rights in law and practice in Iran. It would be very interesting to view court proceedings in such cases. Also, more research is needed to see how parents may benefit from grandparent visitation rights granted by law and the courts, because they require them to uphold contact with their children's grandparents (their own parents) beyond cultural norms.

With this argument, it is important to examine the end of *Wilāya*, loss and revocation of guardianship in Iranian legislation that distinguishes between 'guardianship over property' and 'guardianship over the ward'. The issues of eligibility, loss and revocation of guardianship are governed by several legal provisions as discussed in section III.E.

## E. When a Grandparent Stops Being a Guardian

The court, on the application of any interested person or of its own motion, may remove a guardian or revoke a guardianship order in the following circumstances:

1. As soon as a child reaches the age of maturity, he or she will cease to be under wardship.<sup>82</sup> Immature or insane children whose immaturity or mental

<sup>78</sup>The Civil Code of the Islamic Republic of Iran, Art 1174.

<sup>79</sup>Judiciary's Legal Department Opinion, No 7.3744, 3 April 2004, *Civil Law Revision Collection* (Tehran, Deputy for Compiling, Revising and Publishing Laws and Regulations, 2020) 352.

<sup>80</sup>Mazandaran Province, Court of Appeal No 13.

<sup>81</sup>Mazandaran Province, Court of Appeal No 12.

<sup>82</sup>The Civil Code of the Islamic Republic of Iran, Art 1193.

unfitness continues past their minority,<sup>83</sup> and virgin, mentally mature girls, as discussed in section III.A, are exceptions. To ensure the maturity of the child, identity documents are determinative. A grandparent must prove the claim if he asserts that the child has not reached maturity.<sup>84</sup>

2. If the court finds that the grandparents do not act in accordance with the child's best interests, the court may terminate the guardianship and appoint another competent person (as a *qayyem*).<sup>85</sup>

In the following cases, grandparents are not barred from guardianship but, due to their mental or physical condition, a trustee may be attached to them by the order of a competent court:

1. *Guardian's incapacity*. Where the guardian of the ward is unable to administer the ward's estate owing to old age or sickness or similar reasons, the court may dismiss him and prohibit him from administering the ward's estate, appointing another competent person (*Amin*) in his stead.<sup>86</sup>
2. *Guardian's absence or imprisonment*. If the only natural guardian of a child cannot administer the estate of his ward owing to absence or imprisonment for any reason, and if he has not nominated anyone else to represent him, the court will provisionally appoint a trustee (*Amin*) on the proposal of the Public Prosecutor to take charge of the estate and attend to all matters regarding it.<sup>87</sup>

In both cases, the guardianship is transferred to the other natural guardian if he is alive and able to perform the necessary duties.

As the Civil Code does not provide examples of how the termination of guardianship may affect the best interests of the child, jurists have suggested three main situations, including: (i) disadvantageous transactions of the guardian are not legally binding (effective) unless the child approves them after maturity;<sup>88</sup> (ii) disadvantageous transactions of the guardian are valid if concluded reasonably with due care to the interests of the child; and<sup>89</sup> (iii) disadvantageous transactions of the guardian are void if they cause loss and the guardian is considered to be aware of this result.<sup>90</sup> In practice, it seems that the court has applied the last of these approaches. For example, in an Appeal Judgment, it was held that transferring a child's financial right to a third person, which the guardian admitted was not

<sup>83</sup> *ibid* Art 1180.

<sup>84</sup> Uniform Judicial Precedent No 518-7, February 1989, *Civil Law Revision Collection* (Tehran, Deputy for Compiling, Revising and Publishing Laws and Regulations, 2020) 354.

<sup>85</sup> The Civil Code of the Islamic Republic of Iran, Art 1184.

<sup>86</sup> The Civil Code of the Islamic Republic of Iran, Art 1184.

<sup>87</sup> *ibid* Art 1187.

<sup>88</sup> Emami (n 52) 213.

<sup>89</sup> However, the guardian should compensate the losses of the ward (*ibid* no 15, vol II, 224, 226).

<sup>90</sup> Haghkhah (n 75).

in the child's best interest, was voidable and could be declared void at the request of the child.<sup>91</sup> A recent judicial precedent holds that guardians should reasonably consider the benefit to the child in their transactions, or they will be void.<sup>92</sup>

The limitations of grandparents' rights in their relationships with their grandchildren have many similarities to those applying to parents. For example, if the dishonesty of a guardian is strongly proved in respect of the estate of the ward, the court may appoint another competent person (as a *qayyem*).<sup>93</sup> The court considers several factors when assessing whether a relationship falls within the category of 'deceitfulness', but jurists argue that proving the guardian's deceitful intention is not required and evidence of his negligence will be satisfactory.<sup>94</sup> Consequently, the guardian will be dismissed if he exceeds the permissible use of the ward's property, fails in his duty of care or causes loss.<sup>95</sup> Again, debates over the validity of the legal transactions of a dishonest guardian have resulted in different views. The well-established view is that these transactions are considered unauthorised (ineffective) by the time of the maturity of the child, when he or she can confirm or reject them. In practice, however, a judicial precedent implies that the dishonesty of a guardian makes his transactions void. The case was about a guardian who had sold the property of a child (a shop) to cover his study expenses in the UK. The child had inherited the shop from his maternal grandfather, with a condition that the property was not to be sold until he reached maturity. The Supreme Court declared this transaction was void.<sup>96</sup> In doing so, the Court reiterated its protection of the best interests of the child.

#### IV. Concluding Remarks

The starting point of this chapter was to show the historical development of grandparents' rights in understanding the concept of guardianship. This was achieved by reviewing grandparents' rights in the current Iranian family structure and examining the nature of grandparents' rights. It is important to mention that there are other aspects of grandparents' rights that have not been discussed in this chapter, such as the permission of guardians that is required for any medical operation of children aged under 18<sup>97</sup> or the rights of guardians in Islamic criminal law.<sup>98</sup>

<sup>91</sup> Observance of financial expediency against acknowledging the rights of others, No 44 Tehran's Appeal Court, 9109970224400781, 29 October 2012 at [dadrah.ir/danesh](http://dadrah.ir/danesh) (accessed 10 May 2022).

<sup>92</sup> Revocation of title deed due to non-observance of minor benefit to the natural guardian, Minutes of the Judicial Session, Bojnoord, Khorasan, 27 December 2007 at [www.neshast.org/Home/GetPublicSessionTranscript/8aa5a8a7-78d6-4e21-96d3-08d601ea40a4](http://www.neshast.org/Home/GetPublicSessionTranscript/8aa5a8a7-78d6-4e21-96d3-08d601ea40a4) (accessed 15 May 2022).

<sup>93</sup> The Civil Code of the Islamic Republic of Iran, Arts 1184 and 1186.

<sup>94</sup> L Asadi, 'The Capacity of the Islamic Government and the Necessity of the Mother Guardianship' (2007) 35 *Quarterly Journal of Women's Socio-Cultural Council* 56.

<sup>95</sup> Moradi (n 68).

<sup>96</sup> *ibid* no 95.

<sup>97</sup> Islamic Penal Code of the Islamic Republic of Iran, Art 158(f).

<sup>98</sup> For example, the guardian is not subject to the punishment exactly defined by Sharia (*Hudud*) if he steals from his grandchildren.

What we learn from the foregoing analysis of guardianship is that paternal grandparents, traditionally and in *Shia* jurisprudence, are regarded as parents and often accorded priority in connection with guardianship over their grandchildren. One major difficulty in court cases involving grandparents is the determination of what is in the child's best interests. 'Best interests' are not defined in the Iranian Civil Code. Only a handful of *Shia* jurisprudential principles have described specific criteria for determining best interests. It seems that *Shia* jurists' conception of *gebte* is quite like the 'best interests of the child' expressed in the UNCRC. Jurists have suggested different explanations of best interests. Some have considered it literally to mean the opposite of loss, such that loss is the cause of imbalance and best interests are a cause of stability and fairness. From this perspective, guardianship is provided in order that the interests of the child may be protected.<sup>99</sup> Accordingly, guardians should act in the way required by the interests of their wards.

Perhaps one reason for the lack of clarity on a definition of best interests is the shortage of research examining the best interests of children involved in grandparent disputes. A critical research-based analysis of grandparents' rights can provide a case-law analysis to assist in understanding how judges apply criteria for determining best interests regarding grandparents' rights. In Iran, as in many other jurisdictions, judges rely on their personal values, culture and conception of the family to reflect on grandparents' rights in the family structure.<sup>100</sup> As shown, the judge enjoys inclusive discretionary powers to assess the best interests of the child in light of the circumstances and the evidence presented for or against the grandparents.

The reality is that civil law does not include comprehensive principles covering the entirety of grandparents' rights in Iran. Important areas such as grandparents' visitation rights, for example, are not explicitly regulated in the law. In addition, because the law is silent regarding the conditions governing the loss and revocation of grandparents' rights, courts have mainly applied the principles of guardianship in *Shia* jurisprudence. As the legislative provisions on grandparents' rights are based on the *Shia*-derived notion of *wali*, the significant impact that Islamic law has had on grandparents' rights is unlikely to change any time soon. First, much of the existing law on financial guardianship has been measured against the child's interests. The law on the revocation of guardianship does not clearly mention the best interests of the child principle. However, it does provide a list of cases in which guardianship can be suspended or removed, with considerable discretion given to the judge to deprive the *wali* of guardianship rights. Second, aspects of civil law

<sup>99</sup> See, eg. legal opinion of Iran's Supreme Leader on guardianship at <https://farsi.khamenei.ir/treatise-content?id=138#1514> (accessed on 10 June 2022).

<sup>100</sup> See R Brown, 'Grandparent visitation and the intact family' (1991) 16 *Southern Illinois University Law Journal* 133. Also M Purnell and BH Bagby, 'Grandparents' Rights: Implications for Family Specialists' (1993) 42(2) *Family Relations* 173.

have supplemented the visitation rights of parents. The law does not stipulate that the court may limit visitation rights where it is in the child's best interests to do so. Finally, by understanding the continued change in family structure in Iran, it can at best be described as a sign that although grandparents' rights have a strong hold on Islamic law, judicial practice is evolving to include the best interests of the child in such cases.