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PERSPECTIVE

CULTURALLY SPEAKING

Part XIV: Child custody, below and above the Best Interest of Children model

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There are seven issues in California divorces with children. 1) child custody, 2) child support, 3) spousal support, 4) division of community property and debt, 5) claims of separate property claims and reimbursements, 6) attorney fees and costs, and 7) domestic violence (increasingly). *Of these, custody of children, for many culturally sensitive parents, is the single most important issue.*

California considers custody of children as a matter of public policy. It is closely legislated and diligently enforced. As a result, the compatibility of cultural values with California public policy is a source of major concern, and a cause for increased litigation and mistrust in the legislative and judicial system. It is believed that more than half of post-judgment litigation in Los Angeles is due to parents returning to court to resolve child custody disputes.

California standard

In California, the child custody public policy may be condensed into four boxes: 1) ensuring health, safety, and welfare of children, 2) providing frequent and continuing contact with both parents, 3) limiting frequent and continuing contact

with parent if inconsistent with children's health, safety, and welfare, and 4) ignoring sex, gender identity, gender expression, or sexual orientation of parents as a factor in the child custody (FC. 3020). **Not in other cultures.** Compare the California state policies with other foreign policies: Japan, which believes children should be raised by one parent (Civil Code, Section 766); China, which typically rules that the mother is more suitable as a physical custodian for children under the age of two (Civil Code, Section 1084), or by the Philippines, which prohibits divorce and good parenting requires installing

civic consciousness, moral, mental, physical character and well-being. (Family Code, 209-211).

A global view

In what follows, I will compare the acceptable norm of child custody by testing the good parenting in Islamic jurisprudence, mainly the Iranian jurisdiction. Before I start, and for the sake of comparison, I would like to list the major causes of loss of child custody in California. They are: 1) domestic violence, 2) child abduction, 3) child abuse or neglect, 6) violating a custody order, 7) False allegation, 8) or a sex offender conviction.

I chose the Islamic standard to show the cultural underpinning of child custody in more than 25% of the world's population, a percentage that is expected to increase in the years to come (See Pew Research Center "The changing Global Religious Landscape: Babies born to Muslims will begin to outnumber Christian births by 2035; people with no religion face a birth dearth.") In this review I consider the requirements for a parent-child relationship; the rights and obligations of a custodial parent, and the concept of mandatory guardianship. (Number after the sentences reflects the Articles of Iranian Civil Code.)



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Parent-child requirement: Before a parent may ask for child custody it must be proven that a parent-child relationship exists. The following rules generally apply:

• **Husband-father presumed:** Under the following conditions, the husband is presumed to be the father, unless proven otherwise: 1) During marriage, unless a child is born before six or no more than 10 months from intercourse (1158). 2) After marriage if the mother is unmarried and the child birth occurs within two months after the separation (1159). 3) After marriage if the mother is remarried and the child's birth occurs within two months after the separation (1160). 4) Admission of paternity by husband, 5) Failure to deny within two months after actual (1162), or knowledge of the actual date of birth (1163). The same rule applies even if the mother confirms but the father is in doubt (1164).

• **Second husband-father presumed:** As above, mother remarried but the child may be attributed to either husband or ex-husband.

• **Void marriage:** To either or both putative parents (1166).

• **Consensual adultery:** To the non-adulterous parent (1167).

• **Rape:** To the victim (1167)

Custodial rights and obligations:

There is a difference between legal custody (*Hezanat Gahanooni*) and physical custody (*Hezanat Jessmi*). Father is the presumed legal custodian. Physical custody is subject to change, depending on children's age, parental gender, and health and marital status of mother. Custodial duties include providing for food, shelter, health and other necessities. For mothers, it does not include obligation for a suckling child (1176). It includes expectations of obedience and respect (1177), development of technical skills (1178), and correctional corporal punishment (1179).

• **During marriage:** Both parents have rights and duties (1168). Both must cooperate in providing welfare and education of children (1104). Husband, as head of the family

(1105), determines the family residence (1114), education and employment of family members (1117), and permission to issue a passport or travel abroad.

• **After marriage and mother's priority:** For custody of boys up to age two, and age seven for daughter. Custody then transfers to the father (1969).

• **No refusal of custody:** Neither of the parents can refuse to maintain the child during custodial time. Another parent or guardian may be appointed at the expense of the father, or if the mother or father are dead (1172). Removal of custody: A child cannot be taken from the parents, or the father or the mother in charge of its custody – absent certain justifications. (1175)

• **Termination of custody due to mother's remarriage or insanity:** Will terminate the custodial rights (1170).

• **Death of custodian:** Transfers the custody from one parent to another (1171).

• **Child endangerment:** The following conditions may terminate custodial time for each parent: 1) Parent's addiction to drugs, alcohol or gambling, 2) Known corruption and prostitution, 3) Mental illness, 4) Child abuse – including immoral activities, corruption, prostitution, begging and/or smuggling, 5) Repeated and excessive corporal punishment. (1173)

Guardianship (*Valayat*): Guardianship is much broader in scope than the custodial duties covering daily needs of the children. Custody is stewardship of children's needs during infancy, immaturity, or mental disorder. Guardianship is piloting the children's life toward a socially acceptable status, including financial and non-financial aspects of the child's life. By operation of law, it is vested in father and paternal ancestry, which may be assigned to a third party. This includes the right to consent of the first marriage of a female child. Unlike the obligation of custody, which includes expectation of payment and reimbursement of costs,

services of the Guardian are pro bono.

• **Mandatory guardian:** A minor child is under the guardianship of his father or paternal grandfather. It continues if immaturity or mental unfitness continues from the age of minority (1180).

• **Joint guardianship:** Either the father or the paternal grandfather have the right of guardianship over the children (1181).

• **Incapacity:** If the child has both a father and paternal grandfather, the guardianship of the one who becomes incapacitated or removed will cease (1182).

• **Scope:** The guardian is the legal representative of the ward in all matters pertaining to the estate, and the civil and financial concerns (1183).

• **Replacing mandatory guardian:** Negligent, incapacitated, dishonest, imprisoned mandatory guardian will be replaced by the court on application by the relatives of the child or on the request of the public prosecutor. The court may also appoint a financial trustee to work with the guardian (1184, 1185, 1186, 1187).

• **Executor after death:** Either the father or the paternal grandfather can appoint after the death of the other, an executor (1188). Neither the father nor the paternal grandfather can appoint an executor for his ward while the other is still living (1189).

• **Authorized guardian:** A father or paternal grandfather can authorize the guardian to nominate another guardian for his ward after the guardian's death (1190). The appointed guardian will be discharged if steps are not taken for the maintenance or the education of the ward (1191).

• **Moslem limitation:** A Moslem guardian cannot appoint a non-Moslem guardian for his ward (1192).

• **Termination upon maturity:** As soon as a child reaches the age of maturity, he will cease to be under wardship and if he becomes subsequently mentally deficient or insane, a guardian will be appointed (1194).

Visitation: Either of the parents who are not in charge of custody of the child has the right to visit the child, by agreement or court (1174).

Conclusion

California child custody provisions are children- and parent-centered, but not necessarily family- and community-focused. Resolving child custody disputes of culturally sensitive immigrant parents may conflict with California public policies. When possible, California family law practitioners, attorneys, judges, and mental health providers should strive to understand the cultural bases for child custody and leave room for reconciling the differences.

Culturally Speaking: Provides a step-by-step blueprint for more tolerable and lasting cultural divorces. It benefits partially from more than five decades of studies by its author in two legal systems.

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