



## Custody for Born from Mistaken Sexual Intercourse, Bastard Child and Neutral Child

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### **Abstract**

Custody of born from mistaken sexual intercourse, bastard and neutral children is a necessary subject in custody discussion which needs research among a set of broad discussions on custody. Thus, in present paper, by studying jurisprudential pathology of legal laws, we address children custody issue in order to investigate this case and provide scientific guidelines to clarify children custody. Present paper is composed by a theoretical and analytical technique and by using relevant laws especially civil laws on custody as well as jurisprudential resources.

**Keywords:** *Custody; Born from Mistaken Sexual Intercourse; Bastard Child; Neutral Child; Civil Law*

### **Introduction**

Scattering the kindness and security locus of family proves the challenge that to whom one should assign daughters and sons of a family some of them are in preschool and under 7 years old since mother claims their full custody by her special feelings and emotions and, on the other hand, the father claims full purview of his child's fate by his guardianship right and alimony power.

In this vein, civil law which illuminates the personal moods of Iranian Shiites comes to the scene and states in its article 1169 that "mother has priority to keep a child in the first two years upon born and after its expiration, the father enjoys custody right except than girls to who the mother has the right of custody for the first seven years."

For each mother or father who have been in darkness, the custody of born from mistaken sexual intercourse is fixed in accordance with article 1168 of the civil law and if mother and father have been in darkness in the time of intercourse, the child is seen as a legal child for both of them and in accordance with civil law, both of them are granted the custody right. In the meantime, concerning the custody of

bastard and neutral children, one should see whether the custody can be easily determined or not. Anyhow, in present paper and through three discussions, we discuss on custody for three groups of children.

### ***Discussion one – Custody of Born from Mistaken Sexual Intercourse***

Born from mistaken sexual intercourse implies in cases when a woman, a man or both are unaware of sexual intercourse and they conduct a sexual intercourse to which they were not allowed. Various implications on born from mistaken sexual intercourse are mentioned in jurisprudential books such as when someone conducts sexual intercourse in darkness with a woman that imagines she is her wife and so on.

These are not good examples since it is too far that someone conducts a sexual intercourse which is a combination of physical and mental relations and does not understand that she is not her wife.

It is better to consider the implications of born from mistaken sexual intercourse between a man and woman with a temporary contract and have conducted sexual intercourse by assuming the bond of marriage while the bond of their temporary marriage has been already expired. Or, imagining a man and woman who have got married by assuming that there is no barrier while, in fact, such factors as breast feeding and similar ones have been barriers on their right marriage.

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### ***Discussion one – Custody of Bastard Child***

Article 1167 of civil laws reads: “a child born from adultery is not joined to adulterer.” This fully accepted jurisprudentially.

“Not joining” means legal parentage and relations emerged from right marriage between parents and their legitimate children. Heritage and guardianship by father and grandfather as well as the right of custody by mother and father are inferred from such provisions and are, inter alia, the ramifications of legal parentage. On the same basis and by referring to legal laws, jurists believe that such right is not appeared in illegitimate and illegal relations. Thus, they believe that adulterer has no right for custody<sup>2</sup>.

Considering the possibility of adultery by one or both sides, there are different discussions in this regard.

When one party has committed adultery, born from mistaken sexual intercourse toward another party for which the relevant verdicts was already mentioned. Here, our discussion is on the conditions that adultery is committed by both man and woman.

Some authors believe that in such case, one cannot apply durations, priorities and other issues concerning custody. On the other hand, considering the necessity of retaining and educating the child, the court is entitled to choose a volunteer to whom one can assign the expediency of the child<sup>3</sup>.

In its advisory theory number 2537/1/29-7/694, Legal Office, Administration of Justice states: “according to article 1158 of Iranian civil law, a child born from the intercourse between a man and

<sup>1</sup> Assadollah Emami, Comparative study of parentage in Iranian and French laws, Moosavi Publications, Tehran, 1970, pp. 226 & 227.

<sup>2</sup> Seyed Hassan Emami, Civil laws, vol. 4, Eslamiyeh Bookstore, Tehran, 1991

<sup>3</sup> Nasser Katuzian, family civil laws, vol. 1, Yalda, Tehran, 1996, p. 161

woman with no marriage bond or born from mistaken sexual intercourse is not implied, such child is seen born from adultery and is illegitimate which cannot be joined to adulterer considering the clarification of article 1167 of the civil law and they have no legal relations including name, parentage, alimony right, custody, guardianship, heritage and nationality with their natural father.”

Despite of such argument on the lack of adulterer’s custody, quitting him from custody responsibility is not desired. How one can quit a person who has caused such consequences by violating laws and to left alone?

On the other hand, how can we neglect the blood relationship between a man and woman by whom a child is born and to designate the child to someone who probably has no blood relationship to him/her? It is right that the relationship between an innocent woman and man is deemed as an annihilated relationship and it would have no legal effect, but it would challengeable to neglect it completely especially in the case of custody.

Jurists have not been also able to neglect such effects in custody. For instance, by believing in judge’s authority in selecting the holder of custody says: “in the same assumption, being a mother or father albeit illegitimate would be an advantage not neglected by ethics and separating the child from mother’s natural bosom needs a reason more than benefit.”<sup>4</sup>

Keeping the children is intrinsically incumbent and the father and mother who are responsible for his/her creation are obliged to keep him/her. Social fairness and justice renders that custody should be recognized in parentage resulted from adultery<sup>5</sup>.

In this case, following to its advisory theory number 2537/1/29-7/694, Legal Office, Administration of Justice states:

“If it is proved that conception is due to deceit or threat or abuse of a subordinated girl, it seems that in accordance with article 9 of civil liability law, the girl is entitled to demand the cost of retaining the child from his/her natural father.”

According to above points, it is better to oblige adulterer to do them or to provide some costs at least in such cases as alimony, custody and similar items with financial load.

In this way, an ignorant would not carry the heady load of law breach (in the assumption of Born from mistaken sexual intercourse) and child will not be deprived of supervision and financial supports due to a mistake by his/her natural parents. As a natural father is obliged to obtain ID card for children, such obligations should be taken from his shoulders.

### ***Discussion Three – Neutral Custody***

Neutral is someone whose manhood or womanhood is not clear. There are three types of neutrality: either the signs of manhood are superior so it is assigned to male; or the signs of womanhood are superior so it is assigned to female; or there is no superior signs which is problematic neutral and needs more investigation and attention.

By modifying article 1169 of civil law and granting the custody of son and daughter to mother till seven years old, the importance of such discussion is reduced since before that, it was said that has mother the right for custody till two years for problematic neutral or till seven years or it should be averaged or drawn lots?

<sup>4</sup> Nasser Katuzian, family civil laws, vol. 1, Yalda, Tehran, 1996, p. 161

<sup>5</sup> Seyed Hassan Emami, Civil laws, vol. 4, Eslamiyeh Bookstore, Tehran, 1991, p. 182

Jurisprudentially, however, this issue should be discussed yet since there are different points on custody for girls and boys and the famous one considers custody for girls to seven years for mother and afterwards for father and the custody for boys to two years and afterwards for father.

There are two attitudes toward problematic neutral:

1. Some jurists believe it is assigned to girl and the custody of problematic neutral is mother's right till seven years<sup>6</sup>. According to them, only someone whose manhood is determined will be out of mother's custody till seven years.
2. Others believe that application of evidence considers that custody is father's right the ratios of two years and seven years for girls are mentioned in evidences and other items are remained by application. Thus, neutral custody is obliged till two years and belongs to mother and after two years, it is father's right since we have no knowledge on application<sup>7</sup>.

However, the opinion of the first group is more on Social interests but we do not address it more, since this discussion is no so important now.

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