

2012-10-16

## Fråga-svar

### Utfärdande av vårdnads dokument i Afghanistan

#### Fråga

- Hur utfärdas dokument om vårdnad i Afghanistan?
- Vilka instanser är behöriga att besluta om vårdnad om ett barn i Afghanistan?
- Är det vanligt att går till domstol för att få vårdnaden om ett barn i Afghanistan eller finns det andra sätt att gå till väga?

#### Svar

Sammanställning av information från olika källor:

Migrationsverket (2010):

Om ett barn blir föräldralöst följer vårdnaden normalt faderns sida av familjen, vilket i praktiken innebär att hon i första hand tas om hand av farmor eller annan nära släkting på faderns sida. I andra hand går vårdnaden till nära släktingar på moderns sida, efter traditionella sunnitiska familjerättsliga regelverk (Hanafiskolan) alternativt motsvarande shiitiska (Jaafari). Om vårdnaden av ett barn skulle ha tillfallit en person som, enligt traditionella mönster, inte skulle ha fått den, bör vårdnaden i alla händelser finnas registrerad. Registreringssystemet är gemensamt för olika sekter och alla kategorier av vårdnadsärenden kan, vid behov, hanteras vid afghansk civildomstol.(379) (s. 34)

UN Committee on the Rights of the Child (2010):

#### **B. Best interests of the child**

95. The Civil Code, with specific legal provisions, gives primacy to the best interests of the child in case of the parent's separation.

According to article 236 of Afghanistan Civil Code, custody is defined as protection and upbringing of the child during the time when the child needs a woman's protection and upbringing. In accordance with article 238 of the said law, a woman who receives custody of a child should be sane, an adult, reliable, and have the ability to protect and care for the child. According to article 249 of the Civil Code the duration of custody for the child for boys is up to seven years of age and for girls is up to nine years of age. According to article 256 of the Civil Code, maintenance in all its forms for young boys is until the time he is able to work and for young girls is until the time she marries. According to article 259 of the said law, if the father does not have the ability to pay for his children's maintenance and is also unable to work, the obligation to maintain the children passes on to the custodian next to the father.

(s. 24)

### **C. Separation from parents**

156. Articles 236 and 237 of the Civil Code of Afghanistan provide mothers with the priority for the protection and upbringing of children when they are in need of care upon the resolution of marriage or the separation of parents. In accordance with articles 239, 240, and 241 of the Civil Code, in cases where the parents of the child are not available or do not have the capacity to care for their children, the custody of the child shall be transferred to the next of kin of the child as the law provides.

(s. 35)

### **Foster parents**

169. According to article 57 of the Juvenile Code (2005), if a child does not have a guardian the Court shall appoint a custodian for him/her. In accordance with article 58 of this law, a person who is interested in the welfare of the child can apply for custodianship to the court and receive information about the requirements. Persons seeking custodianship should provide information on the application to the Special Court for Children about their relationship with the child and state their reasons for being qualified to exercise custody over the child. The Court shall then forward the information to specialized social services institutions to verify the information provided. According to article 59, the legal custodian of the child is thus appointed and shall have all the powers and responsibilities as the parents of the child, including the responsibility for maintenance and the best interests of the child. (s. 37)

Shiite Personal Status Law [Afghanistan] (2009):

#### *Original text*

#### **Paragraph 3, article 194:**

A mother gets preference over the father to have custody of her daughter until age 7 and that of her son's until age 2. After that the child's custody belongs to the father.

#### *Amendments*

#### **Paragraph 3, article 194:**

A mother gets preference over the father to have custody of her daughter until age 9 and that of her son's until age 7. After that the child's custody belongs to the father. (s. 3)

## **CHAPTER FIVE: GUARDIANSHIP**

Definition and types of Guardianship

### **Article 45:**

(1). Guardianship, in accordance to the provisions of this law is the power and authority given to a person to perform duties for others in limited circumstances; the person is called guardian while the person in custody is called ward.

(2). Guardianship can be of the following two types:

1. General Guardianship refers to the guardianship of an authorized judge who is responsible for the affairs of a person who is incompetent or has mental deficiencies.

2. Specific [or special] guardianship refers to the guardianship of certain individuals and has two types:

- *Qahri* or Natural guardianship refers to the guardianship of father and paternal grandfather over the ward.

- *Khaas* or Appointed guardianship: a person appointed by the father or paternal grandfather for the affairs of the ward.

(3). The guardianship of the father or paternal grandfather is in accordance with the law and it does not need authorization by the court.

### **Article 47:**

(1). Guardianship of a ward by the father and paternal grandfather is the same, and the exercise of either of them in the use of the ward's assets is valid and cannot be invalidated by the act of the other. In case of dispute between the father and grandfather in a ward's affairs, the grandfather has priority over the father.

(2). The father or paternal grandfather in the absence of each other, with the permission of the other, or when one of them has become legally incompetent, can appoint an executor on their behalf in regard to the ward; however, as long as any of them have guardianship qualifications and they are alive, the other cannot appoint another executor. (s. 18)

### Child Support

Article 194:

(3). The mother has custody of a girl up to seven years of age and of a boy up to two years of age. After the aforementioned periods, the father will have custody of the girl and the boy. (s. 73)

I utgangspunktet består et afghansk hushold/storfamilie av mor/far, deres gifte sønner med koner og barn og egne ugifte barn. Når en far dør vil det normale være at hans kone og barn tas vare på av storfamilien på farssiden. Ofte vil en mannlig slektning, vanligvis en bror av faren, gifte seg med enken og ta til seg hennes barn (Smith 2009, s. 54). Ved enkelte tilfeller kan enken giftes bort til en ny mann utenfor familien, men da vil normalt hennes barn bli igjen i storfamilien og ikke bli med moren over i en ny familie. (s.1)

U.S. Department of State (2009):

**e. Denial of Fair Public Trial**

Courts primarily decided criminal cases in major cities, although civil cases were often resolved in the informal system. Due to the undeveloped formal legal system, in rural areas local elders and shuras were the primary means of settling both criminal matters and civil disputes; they also allegedly levied unsanctioned punishments. Some estimates suggested 80 percent of all cases went through shuras, which did not adhere to the constitutional rights of citizens and often violated the rights of women and minorities. An NGO in Herat, however, reported shuras often treated women fairly in resolving civil matters such as divorce and custody cases.

Landinfo (2005):

Familielovgivningen i Afghanistan er omtrent en kodifisering av Sharia og Hanafi juristprudens. Adopsjonsinstituttet finnes ikke i Islamsk lovgivning. Ifølge Sharia er far "naturlig" forsørger med foreldremyndighet og fysisk omsorgsansvar. Etter far er det fars far til barnet som anses som "naturlig" forsørger " med samme rettigheter. I tilfelle skilsmisse har mor i utgangspunktet rett til fysisk omsorg til barnet inntil barnet når en viss alder, men juridisk ingen foreldrerett/-myndighet over barnet. I henhold til Civil Code i Afghanistan kan mor i tilfelle skilsmisse tildeles den fysiske omsorg for gutter under syv år og jenter under 9 år, men hun får ikke foreldremyndighet over barna.[1]

I henhold til afghanisk tradisjon kan en enke ikke gifte seg med andre enn nære slektsrelasjoner til avdøde ektefelle. I de fleste tilfelle vil enken måtte gifte seg med den avdøde ektefellens bror (dette var tidligere nedfelt i lovgivningen, men ble opphevet ved dekret av Taliban/Mullah Omar ), eller en annen nær slektning av ektefellen og /eller bli nektet å gifte seg utenfor avdøde ektefelles familie.[2]

I forhold til spørsmålet om foreldremyndighet om ektefellen/far til barnet dør, vil evt. overdragelse av myndighet til mor være avhengig av om mor har bolig og kan forsørge barnet. I virkelighetens Afghanistan i dag vil dette nærmest være en hypotetisk problemstilling og foreldreansvaret for barnet vil fortsatt være hos farens familie. I tilfelle moren har fått familiemyndigheten, vil, om hun ønsker å gifte seg på nytt, foreldremyndigheten tilfalle familien til avdøde far.[3]

Formelle administrative institusjoner og domstoler fungerer ikke og de fleste konflikter løses av lokale organer/jirgas/shuras/eldreråd som av størstedelen av befolkningen anses som det primære organ for konfliktløsning. [4]

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Denna sammanställning av information/länkar är baserad på informationssökningar gjorda under en begränsad tid. Den är sammanställd utifrån noggrant utvalda och allmänt tillgängliga informationskällor. Alla använda källor refereras. All information som presenteras, med undantag av obestridda/uppenbara fakta, har dubbelkontrollerats om inget annat anges. Sammanställningen gör inte anspråk på att vara uttömmande och bör inte tillmätas exklusivt bevisvärde i samband med avgörandet av ett enskilt ärende. Informationen i sammanställningen återspeglar inte nödvändigtvis Migrationsverkets officiella ståndpunkt i en viss fråga och det finns ingen avsikt att genom sammanställningen göra politiska ställningstaganden. Refererade dokument bör läsas i sitt sammanhang.

## Källförteckning

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