

Custody of Children in Late Bronze Age Syria, in the Light of Documents from Emar

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ABSTRACT

Emar, a Syrian town situated on the bend of the Euphrates, thrived in the Late Bronze Age. Still, it was an era when life was frequently cut short by diseases, famine, and war, and men often died before their children could grow up. And yet, evidence for guardianship of such children is scarce. Minors are clearly mentioned in few documents, especially testaments, which do not give us much detail. Probably in a normal situation, the widow would take over the guardianship of her children or step-children, without any institutional intervention. Only in a problematic case (foreseen conflict, no wife able to fulfil guardian's duties) the patriarch would settle the question in his will, with a lot of freedom concerning the person of the guardian as well as their rights and obligations. What was not mentioned would be subject to customary law. If the widow could not become guardian, this duty would fall to older siblings or paternal uncles of the child. The article aims at reconstructing the main characteristics of guardianship as mirrored in documents of legal practice.

In contemporary law, custody is defined as «the care, control and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision-making authority) and physical custody (caregiving authority)».¹ Therefore, the first question to examine is if an institution with such or similar characteristics existed in the ancient Near East, or, more precisely, in the Late Bronze Age Syrian city of Emar.² However, it will be useful to start with an outline of the characteristics of the paternal authority in the region.

The authority of the head of the household (usually father or grandfather) lasted till his death or till the emancipation of sons/grandsons and marriage of daughters/granddaughters.³ It encompassed rights associated with it today as well, such as deciding about the upbringing and education of a minor child and disciplining him/her, by means of physical punishment if need be. However, it went much further; the head of the household could choose the profession for their children, give them into apprenticeship, marry them off (with no need for their consent), and even, when in need, pledge or sell them, although those practices were generally frowned upon by the society and took place only in dire economic circumstances. Those rights lasted in spite of the children's coming-of-age, unless the patriarch decided to bestow on them a part of his estate and thus free them from under his authority. Moreover, the patriarch had domestic jurisdiction over all the subordinate members of his household, i.e. the right of punishing them for several contraventions within the household and in the limits set by law. For instance, according to Middle Assyrian Laws, a father could punish his daughter who “willingly gave herself to a man” “in whatever manner he chooses”.⁴ Yet, he did not have the right of life and death upon his children.

In case of the death of the father or of the parents' divorce during the children's minority, someone had to take care of the latter, and thus, the issue of

¹ GARDNER 2009, 441.

² Emar, situated on the bend of the Euphrates, was first under Hittite rule, and then, probably in XIVth century, it became the main town of the Hittite border province of Aštata. The site yielded documents originating from XIV-XIIth centuries, mostly literary, scholarly and cultic, but also ca. 500 legal texts, especially sales and testaments, as well as adoptions, exchanges, donations, loans etc. They are written following two scribal styles – so-called Syrian and Syro-Hittite. The main differences between the two consist in the shape of the tablet, palaeography, way of sealing, and, more importantly in the legal content, the latter especially as far as sales are concerned. For an outline of both Syrian and Syro-Hittite formularies, see DÉMARE-LAFONT 2010; for an analysis and comparison of sale contracts, see FIJAŁKOWSKA 2014.

³ On paternal authority in the ancient Near East, see WESTBROOK 2003, 39-50.

⁴ Tablet A § 56 of Middle Assyrian Laws. On domestic jurisdiction in the ancient Near East see DÉMARE-LAFONT 2012.

custody would arise. However, there is no term for «custody» or «guardianship» either in Sumerian or in Akkadian, and no comprehensive legal regulation of this institution may be found in any of the ancient Near Eastern law collections.⁵ Therefore, information on the situation of orphaned minors and children of divorced parents must be gleaned from the few existing provisions of the «codes» and from texts of legal practice. Those data are of course casuistic, and show only a very fragmentary picture, highlighting problematic situations. If no conflict regarding the fate of children was expected by the patriarch, there would be no need for a document; by the same token, law collections encompass cases with a potential for a legal dispute. In other words, the usual situation, i.e. a smooth transmission and course of children's care usually means that no documentary trail is left. Still, in the next paragraphs we will try to trace out as detailed a picture of custody of minors as possible based on the scarce data in our disposition.

I. CUSTODY AFTER THE DEATH OF THE PATRIARCH

1. IN GENERAL

This was probably the most common situation. After the patriarch's (usually the father's but sometimes grandfather's) death, the custody of children would typically fall to the widow, together with the administration of her late husband's estate. She was allowed to remarry, and then the authority over the children would be exercised jointly with their stepfather, ceasing upon their coming of age. Moreover, it was subject to limitation and control. According to Code of Hammurabi, a widow could remarry only with the consent of the court, and even then, an inventory of the estate of the deceased had to be taken, the guardians being forbidden to sell any of it; such a transaction was void *ex lege* and the buyer forfeited his money.⁶ On the other hand, under economic

⁵ «Comprehensive» in ancient Near Eastern sense, i.e. containing enough provisions to give an idea of the institution, even if the said provisions were spread all over the law collection. Of course, there is no comprehensiveness in the modern sense in ancient Near Eastern legal systems, since the principles according to which the law collections were compiled are completely different from ours. On the law collections see, e.g., WESTBROOK 2003, 8-10; LAFONT 2000. English translations of all the collections may be found in ROTH 1997.

⁶ § 177 of the Code of Hammurabi.

duress a widowed mother could even sell her children, although probably the consent of closest male relatives was necessary.⁷

2. IN EMAR

A. APPOINTMENT OF THE GUARDIAN

A.1 WIDOW AS GUARDIAN

Numerous testaments from Emar contain a provision installing the widow as “father and mother” of the household and usually giving her the control of the estate as well. Another provision that comes together with the former is the obligation of the children to serve/honour (*palāhu*) or support (*wabālu*) such a guardian,⁸ under threat of losing their share of the inheritance; they are also prohibited to ask for inheritance division before the woman’s death. At first sight, it would seem that it was a way to bestow paternal authority upon the widow, and, by the same token, to appoint her guardian of minor children. Yet it is not the case, or at least not always. On the contrary, sometimes it is clear that the children in question are grown up, as in Emar 181, when the older siblings are supposed to keep in good repair a house for the youngest brother. Moreover, in this document the widow is made “father and mother” of the estate and is to be served, but the duty to marry off the two young men falls to the sister, apparently the oldest of the three. In other texts, the same institution is also used with respect to other relatives of the testator, for instance a daughter who becomes “father and mother” of her sisters, one of whom is already married, but still supposed to “serve” her sibling or lose her share of the inheritance.⁹ Therefore, it seems that the title of “father and mother” is primarily connected with the intention to keep the estate undivided, thus securing the support of the widow (or another person who could otherwise find themselves in a difficult position), and does not automatically mean that she

⁷ On the sale of children under economic duress see, e.g., OPPENHEIM 1955; EPH’AL 2009, 115-147.

⁸ The use of the first verb is characteristic of Syro-Hittite texts, of the second one mostly of Syrian tablets. According to Bellotto, in the latter case the stress is on practical duties, such as delivering bread and clothes. In contrast to sale contracts, the testaments and adoptions from Emar of both styles do not display many significant differences, and these differences do not suggest the existence of two sets of legal rules concerning inheritance and family law, as in the case of sale. See BELLOTTO 2009, 32; DÉMARE-LAFONT 2010, 52-63. For an analysis of the testaments see UNDHEIM 2001.

⁹ Emar 31.

becomes guardian of the children; it means only that the children have certain duties towards her.¹⁰

In an age when life was often cut short by diseases, famine, and war, it is to be expected that a father's death before the coming of age of his children would happen often enough. Yet minors are mentioned only in a few testaments, when the wife is clearly ordered (and at the same time authorized) to "raise her children",¹¹ or to make decisions pertaining to their future, such as marrying them off. This, in turn, means that they were at least still living at home, even if approaching, or already having attained the adult age.¹² The scarcity of evidence appears to indicate that the widow of a man who died without leaving a testament (or who did not address this question in his will) would automatically become guardian of her children and step-children, or rather, that she would continue to take care of them without even calling it guardianship or custody. Testamentary mentions would be made either in order to extend or to limit her powers, or to avoid possible claims or doubts from other family members, especially if for some reason (e.g. old age or illness) the widow was unable to actively exercise the custody.¹³ It is all the more probable since in cases when important decisions are to be taken (marriages of children, slave manumissions, selling children under economic duress), the relevant contracts are often concluded by both spouses acting together, and not by the (alive and well) head of household alone.¹⁴ Also in case of temporary absence or sickness of the husband, the wife could act on behalf of their children, even marrying them off or selling them, although in the latter case, some justification was needed.¹⁵ It is therefore not at all surprising that once widowed, she would become their permanent guardian automatically.

¹⁰ For the analysis of this institution as means of keeping the estate undivided and the fate of the widow secured, see KAMMERER 1994; WESTBROOK 2001, 30-43.

¹¹ RA 77 3: 8. ... *ʾMi-ir-ta-ba-aʾ-li* 9. DAM-ia DUMU.MEŠ-ʾši ʾlu?-ú? ʾta?-ra? ʾab-bi – "Let Mirta-Baʾli, my wife, raise her children".

¹² Emar 70. For the reading of the text, see corrections in DURAND 1989, 190.

¹³ As in ASJ 30, where the son of the *de cuius*, ad not the widow, is entrusted with the duty to marry off his sisters.

¹⁴ See, e.g., RE 27 (manumission by a married couple); RE 6 (marriage contract concluded by both parents of the bride); RE 87 (adoption of a man by a married couple); Emar 217 (sale of children by a married couple).

¹⁵ As in Emar 216, where ʾKuʾe sells her daughter to be the second spouse of the (female) buyer's husband: 1. ʾKu-ʾe DUMU.MÍ ʾZu-[...] 2. DAM ʾZa-dam-ma [a-kán-na iq-bi] 3. ma-a LÚ.mu-ti4-ia il-t[a-bi-ir DUMU.MEŠ-ni 4. se-eh-ru ša ú-bal-la-aṭ-s[u-nu ú-ul i-šu] – "Kuʾe, daughter of Zu..., wife of Zamma, [spoke as follows]: My husband is o[ld, there is no one to] ca[re for our] small children".

A.2 OTHER GUARDIANS

If the testator was a widower, a major child could be appointed guardian of his/her siblings. It seems to be the case in a will where an adopted son is supposed to find a wife for his younger adoptive brother, thus fulfilling one of the duties of the guardian.¹⁶

It might have happened that the father outlived his son. Then, especially if the son had still lived in the paternal house together with a family of his own, his wife and children would remain under the authority of the father-in-law and grandfather, whose duty was to appoint a guardian *mortis causa*, usually probably the daughter-in-law.¹⁷ The same would be true for a widowed daughter who either had lived in an *erēbu*-marriage,¹⁸ or returned to the paternal home after her spouse had passed away, thus falling back under her father's authority. In one of the wills, the testator takes care of the fate of such a woman, who apparently has three sons of her own.¹⁹ She is declared "male and female", a legal fiction enabling a woman to exercise familial cult, which would not be necessary if the sons were grown up.²⁰ The latter are supposed to support their mother (*wabālu*), and the estate is to be kept undivided until her death. There is no single phrase in the text that might be interpreted as entrusting Unara with the custody of her children, but the wording of the document is reminiscent of the testaments installing the widow as "father and mother" of the estate in order to keep it undivided.²¹ It follows that the main purpose of this particular will was threefold – ensuring the continuity of the familial cult as well as the indivisibility, at least temporary, of the inheritance, and securing the support of the testator's daughter. On the other hand, it was not necessary to appoint her guardian of her children, which she would probably become automatically anyway as their mother; however, in view of their age, and perhaps of impending familial conflicts, the *de cuius* thought it preferable to enhance her authority.

¹⁶ Emar 183: 8. *al-nu-um-ma* ^m*Da-gan-h[a-ri-iš]* 9. *a-na* ^m*A-hi-ha-mi-is* [ŠEŠ-šu DAM-tu₄] 10. *li-hu-u*[z] – "Now Dagan-hariš will make Ahī-hamiš take a wife".

¹⁷ TBR 76: ^m*E-be DUMU-ia GAL BA.UG*₆ ð ^É.GI₄-ia 4. ^m*Ha-ab-ú DUMU E-be DUMU-ia GAL li-ra-ab-bi-ma* – "Ebe, my eldest son, is dead, and my daughter-in-law shall raise Habu, the son of Ebe my eldest son".

¹⁸ It is a form of marriage whereby the son-in-law lives with his wife in the house of his father-in-law; often he is also adopted by the latter, in order to ensure the continuity of the family line. For marital adoptions in Emar see BELLOTTO 2009, 91-122.

¹⁹ They are called "my sons" by the testator, but from the wording of the text it seems more likely that they are in fact his grandsons, as suggested by the editor. See RA 77, 27.

²⁰ For "male and female" women see most recently YAMADA 2014.

²¹ Unara is called only "mother", and not "father and mother" of the boys, but the other provisions are analogous to the "father and mother" testaments, including a prohibition on requesting the division of the estate under the penalty of losing one's share.

If there was no widow/mother and no siblings, paternal uncles would probably become guardians jointly.²² If the wife was not the biological mother of the children, they could be given to her into adoption, probably to strengthen her authority on the one hand and to ensure their inheritance rights to her property on the other hand.²³

B. DUTIES OF THE GUARDIAN

Not much is said in testaments about the guardian's duties; they were probably regulated by customary law, and the wills mention them only if the testator wanted to make alterations or adjustments.

B.1 IN REGARD TO THE PERSON OF THE WARD

The main duty seems to have been simply to raise him/her, as ordered by the testator in TBR 76. That would of course encompass making all the most important decisions concerning the child's future, such as choosing the education and job for the boys, and marrying off boys and girls. The latter obligation could be rewarded by the possibility of taking the bride price (often *expressis verbis* mentioned in the will),²⁴ a sum of money given by the groom to the family of the bride; in case of boys to be married, silver for the bride price should come from the estate.²⁵ Several marriage agreements testify to these practices. In RE 61 a woman concludes such a contract, marrying off her daughter into another family and accepting a bride for her son from them; she probably acts as guardian of her children after the death of her husband. In another text (RE 76) a girl married off by her two brothers is mentioned; it follows that the brothers were her guardians after the parents' death, or at least were obligated by the father to marry her off and allowed to take her bride price.²⁶

²² Emar 205.

²³ ASJ 29: 3. *a-nu-ma* ^f*Al-um-mi* DUMU.MÍ-*ia a-na* DUMU.MÍ-*ut-ti* 4. *ša* ^{fd}*30-na-e* DAM-*ia at-ta-din-ši* – “And now I gave Al-ummi, my daughter, to Kusuh-na'i, my wife, as a daughter”.

²⁴ See, e.g., Emar 70 (the widow is to marry off the testator's daughters and to take their bride price); ASJ 30 (brother); TBR 41 (brother); TBR 45 (brother).

²⁵ The obligation to marry off the testator's children must have encompassed paying the bride price out of the estate (if it was to be kept undivided) or of the share of the inheritance of the obligated. Even in a case of an indebted father who adopted his creditor in exchange for paying off his debts and appointed him sole heir, the biological son of the adopter is still to receive 50 shekels of silver from the estate in order to pay the *terhatum* (RE 10).

²⁶ The text is an agreement between the two brothers and the man to whom they gave their sister into marriage. Instead of marrying her himself, he gave her away to another man and took the

The duties of the guardian were not set once and for good; if the head of the household wished, he could change them, mainly by setting limits or transferring them partly to another family member. It seems that at least sometimes, he did not trust his wife to make right decisions, and preferred to leave them to his eldest child, or that the widow was simply either too old or too sick to fulfil this duty. Thus, in one text (ASJ 30), the widow is installed as “father and mother” of the house and her daughters are to support her, but if the son returns from abroad, it is he who is ordered to marry off his sister, fulfilling one of the main functions of the guardian. This text shows also that such a (part-) guardian could be appointed conditionally. In another document (Emar 181) there is a widow as “father and mother”, but it is the eldest sister who is supposed to find wives for her brothers.²⁷

In case of children pledged by their father, after their death it would be up to the guardian to decide about their fate. They could either pay the debts of the deceased (probably from the guardian’s own pocket, since people indebted to the point of pledging their children are not likely to leave much wealth behind) and redeem the child, or to agree to their enslavement by the creditor (Emar 205).²⁸ In dire need the guardian could sell, and probably, *a maiori ad minus*, also pledge the ward, but there are no Emar texts documenting the latter. As for the former, in TBR 52 the uncles of a girl sell her “in a year of distress”, and the right of redemption is mentioned.

Sometimes, the authority of the guardian could be hideously misused; such was the case of one Kila’e, a thief caught in flagrante delicto and condemned to slavery, who gave his sister into slavery instead (Emar 257).

B.2. IN REGARD TO THE ESTATE OF THE WARD

When the widow (or another person the testator wanted to protect) was appointed “father and mother” of the estate, the ward had no right to it until her death, so technically, it is incorrect to speak of custody in that respect. On the other hand, it is usually clearly stated that all the property is intended for the children, and the widow is not allowed to reassign it if the latter do not neglect their support duty. Still, sometimes it was simply impossible to keep the estate

(substantial) bride price, a part of which he must now give back to the brothers of the girl. Semitica 46 1 is another document where a brother is marrying off his sister, whereas in Emar 213 the widow Hūdi is giving her daughter in marriage to a man who paid her (Hūdi’s) debts (on this text see below).

²⁷ In TBR 41, TBR 45, TBR 69 it is the older brother (and not the widow) who is supposed to marry off the younger one.

²⁸ In this text, the creditor asks the paternal uncles of his pledges to repay the debt. They are unable to do it and decide that the two boys will become his slaves instead.

intact, usually due to an economic crisis caused by war or famine. What happened then is shown by a testament of Hūdi, wife of Abiu (Emar 213). In an earlier document (CM 12, 14) her husband made a substantial bequest to her, to be inherited by their five sons if they took proper care of their mother. But either they did not, or they died or left for a foreign country. In any case, in her will Hūdi, apparently in control of the whole estate of her late husband, mentions only her daughter.²⁹ Something bad must have happened after the husband's death, since she claims to be destitute and in debts. To survive, she marries her daughter to a rich and powerful man – Ba'al-malik, son of the diviner, and adopts him, bequeathing him all her estate. She seems to own valuable real property, but no cash for immediate needs, and it appears to have been the only way she could support herself and secure her daughter's future.

If there was no "father and mother" of the estate, the guardian would administer it till the maturity of the ward,³⁰ and would be forbidden to sell it; we can gather that, as in other periods of ancient Near Eastern history, an inventory would be made and then checked. However, sometimes there was no other solution than selling a part of the property. It is demonstrated by several sale contracts, when a mother sells real estate together with her children,³¹ or a widow – a building that had belonged to her husband.³² In all those cases an explanation is given, usually debts or "the year of duress" (an allusion to a general calamity befalling the land); probably those were the only circumstances when such a sale was permitted.

C. TERMINATION

Custody would end upon the majority of the ward or upon their marriage, especially if the ward left to live with another family. However, in case of installing a "father and mother" of the estate, the ward would often enter into the possession of their property only some time after coming of age or marrying.

²⁹ It is more probable that the sons are dead, otherwise the reason for their disinheritance should be mentioned, especially since Hūdi explains why she does not install any of her brothers-in-law as heirs ("There is none who cares for me among my brothers-in-law").

³⁰ It is not clear when exactly a child attained maturity in the ancient Near East; probably individual puberty was the criterion. See WESTBROOK 2003, 39.

³¹ TBR 65.

³² Emar 114; in Emar 82, a woman sells a building so that "her children survive".

II. CUSTODY OF MINOR CHILDREN IN CASE OF DIVORCE³³

Prima facie it would seem that in a patriarchal society, after divorce the children would always stay with their father, but surprisingly enough, this was not the case in the ancient Near East. Several Old Assyrian legal documents show that it was indeed the divorced father who kept them if he could support them,³⁴ but according to Old Babylonian law, in case of a woman divorced with no fault, not only could she keep the children, but she also received her husband estate³⁵ or half thereof if the marriage was polygamous,³⁶ in order to be able to maintain her progeny. Thus, in that case the mother seems to be the only guardian of her children, but with her authority lasting only till their adulthood. However, it is difficult to determine how far this authority extended, since documents of practice featuring a woman acting on behalf of her children do not inform if she is a widow or a divorcee.

Unfortunately, none of the legal texts from Emar tells us anything about the rights of a divorced woman as a guardian. However, it seems justified to assume that the situation was similar to the one in other countries of the region, with children mostly under the father's care, possibly except such instances as divorce without the wife's fault.

Testaments from Late Bronze Age Syria show striking similarities to contemporary documents from Nuzi, a city situated on the other side of the ancient Near East, east of the Tigris river. In Nuzi, a woman could be entrusted with *abbātu* – paternal authority, which resulted in keeping the estate undivided until her death. The heirs were forbidden to ask for division, but the penalties were more elaborate than in Emar: putting in chains, in prison (*bīt kilim*), or disinheritance (which could be contested in court). A similar practice is also known from the Old Assyrian times, from Kaneš – an Assyrian colony in Anatolia.³⁷

³³ On marriage and divorce in the ancient Near East see, e.g., WESTBROOK 1988; WESTBROOK 2003, 44-50.

³⁴ VEENHOF 2003, 455.

³⁵ § 57 of the Laws of Eshnunna.

³⁶ § 137 of the Code of Hammurabi.

³⁷ See PARADISE 1972 (Nuzi); MICHEL 2000 (Kaneš).

III. CONCLUSION

To conclude, let us return to the question asked at the beginning of this article. Did custody, such as we understand it, or at least in a similar form, exist in Emar? As the sources show, the necessity of taking care of an orphaned child had to be faced as frequently as in any other society, but more often than not the question was solved within the family, without resorting to any external institution. The main rules of custody were probably set by customary law, granting it first to the widow, then to the older siblings, and finally to the paternal uncles of the child, and at the same time leaving the patriarch a lot of freedom in regulating details thereof. If no conflict arose, there was no need for a court to intervene; such intervention was certainly unnecessary to appoint a guardian until there was at least one adult family member left. Still, although in many aspects different from what we know today, the institution itself did exist and, moreover, it functioned remarkably well, notwithstanding the lack of detailed provisions and of state control which seem indispensable for us today. It should be also pointed out that on the one hand Late Bronze Age Syrian law concerning custody is well rooted in the ancient Near Eastern, and especially Mesopotamian tradition, but that on the other hand it contains several unusual institutions, surprisingly shared with another peripheral Near Eastern site, situated at the other end of that world. If the latter is just a coincidence, or a result of reception or exchange, remains to be found out.

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YAMADA 2014

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