



APPOINTMENT AND QUALIFICATIONS OF GUARDIANSHIP IN MUSLIM LAW

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Introduction

The source of law of guardianship and custody are certain verses in the Quran and a few Ahadis. The Quran, the Ahadis and other authorities on Muslim law emphatically speak of the guardianship of the property of the minor, the guardianship of the person is a mere inference. Guardian includes any person having legal custody or control over child. Under Muslim Law, the notion of guardianship is subsisting from the beginning. Its source is found in some verses of the Quran and Ahadis though a little is found about guardianship of a person. For example, according to Rudd-ul-Mukhtar, the right of guardianship of the minor's property belongs to the father and in his absence to his executor, but if an executor has not been appointed, then to the grand-father. After the death of grandfather, the right goes to grand father's executor, and if the executor has not been appointed by him then to the Kazi who may himself act as such, or may appoint someone to act on his behalf.

Tahir Mohmood states that: "*Guardianship of a person in relation to a child belongs primarily to its father, the mother's being only a pre-emptive right to keep the father away for a legally prescribed period only*

from a particular aspect of the guardianship of person, namely, the custody and physical upbringing of the child''.

It may be said therefore, that mother has a right to the custody of her child for some time, because except her, no one can handle and nurse a child during its infancy. But her custody of the child is subject to the supervision of the father who, as a legal guardian, is under an obligation to provide means for the upbringing of child.

In this paper we will understand the different possibilities and move of our legal system for every circumstances arising regarding guardianship under Muslim law.

Meaning of Guardians

Guardianship is a relationship created by state law in which a court gives one person or entity (the guardian) the duty and power to make personal and/or property decision for another (the ward). Guardianship were designed to protect the interest of incapacitated adults and elders in particular¹. A person who is authorized under the law to protect the person or property of a minor, is called a guardian. Simply custody of the child upon a certain age. Under Muslim law, is called HIZANAT².

Qualification for family members or friends who serve as guardians and conservators tend to be minimal. For example, National Probate Courts Standard (Standard 3.3.11) recommend that courts appoint a guardian or conservator "suitable and willing to serve.."

¹ www.eldersandcourts.org/guardianship-basics.aspx

² www.legalbites.in/law-notes-muslim-law-minor-and-guardianship-under-muslim-law/



Before we proceed with the detailed study of the subject it is important to distinguish between the terms ‘Custody’ and ‘Guardianship’. Though these are used interchangeable, both have different implication in law.

In Arabic language guardianship is termed as ‘Wilayat’ and custody as ‘Hidhanat’. Custody means physical or material possession of the children, whereas its Arabic equivalent Hidhanat literally means training or upbringing of the child. The term guardianship means the constructive possession of the child which deals with care of his or her person as well as property and its arabic equivalent wilayat literally means to protect or to defend.

According to Guardians and Ward Act 3 of Pakistan as ‘A person having the care of person of minor or of his property or his person and property’.

According to the principle of established Muslim jurisprudence, father is the natural guardian (wali) of the person and property of the minor child⁴. Whereas custody (hidhanat) is a right of the child and not either of the parents, or any other person claiming through them. The basic consideration is to give a child the most natural, most considerate and most compassionate atmosphere to grow up as a better member of society.

Law of hidhanat in sharia has been framed keeping in view the roles of both parents. That is why mother are given preference while deciding custody of the children out of the wedlock during child’s initial year (till 7

years). There is consensus of all sunni schools of thought on this. Schools of fiqh differ in custody laws for boys and girls after 7 years of age.

In the context of family responsibilities towards a child the muslim law speaks of four different concepts:

- (a) Hizanat (custody of child)
- (b) Walayat-e-Nafs (guardianship of person)
- (c) Walayat-e-Mal (guardianship of property)
- (d) Walayat-e-Nikah (marriage-guardianship)

Nature

The term guardianship connotes guardianship of mind. I.e a person who has not attained puberty. Puberty is assumed to have been attained at age 15 years in general. However, as far as guardianship is concerned, a muslim will be governed by the Indian majority act of 1875 which provides that the age of majority is 18 years and 21 years if the minor has been appointed a guardian by the court. A guardian will be appointed by court under the guardian and wards act of 1890 for the welfare of the minor.

Kinds of Guardians recognized by Muslim Law

- (1) Natural or Legal Guardian
- (2) Testamentary Guardian
- (3) Guardian appointment by court or statutory guardian
- (4) Defacto guardian

NATURAL GUARDIANS:

Natural guardian is a person who has a legal right to control and supervise the activities of child. Father is recognized as the natural guardian of his child under all the schools of

³ Guardians and wards act 1890, sec 4(2)

⁴ PLD 1963 Lah.534



Muslim law. The father's right to act as guardian of the minor is an independent right, and is given to him under the substantive law of Islam. Natural guardian is also called Dejure or the legal guardian. As stated above, only father is the natural or legal guardian of his child. As stated above, only father is the natural or legal guardian of his child. But in the absence of father, the father's executor may also act as legal guardian. Executor is a person who is appointed by father or grandfather to act as a guardian of his minor child on his behalf.

In absence of father or his executor, paternal grandfather or paternal grandfather's executor acts as legal guardian.

Father, Executor of father, paternal grandfather, Executor of paternal grandfather, in the absence of any of the above mentioned persons, nobody else is recognized as the natural or legal guardian of a minor.

According to Shia Law in the absence of father only paternal grandfather may act as natural or legal guardian. Father's father is known as paternal grandfather, the father's executor has no right to act as legal guardian of a child. Since the mother is not the legal guardian of her minor children, she has no right to enter into the legal guardian minors property⁵. The question of her being the natural guardian during the life time of the father does not arise. The father's right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor. The father's right to control the education and religion of minor children is

recognized⁶. He also has the right to control the upbringing and the movement of his minor children. So long as the father is alive, he is the sole and supreme guardian of his minor children⁷. The father's right of guardianship extends only over his minor legitimate children. He is neither entitled to guardianship nor to custody of his minor illegitimate children at any time, even after the death of the mother, though it is a different matter that he may be appointed as guardian by court.

In muslim law, the mother is not a natural guardian even of the minor illegitimate children, but she is entitled to their custody⁸. Among the Sunnis, the father is the only guardian of the minor children. After the death of the father, the guardianship passes on to his executor. Among the Shias, after the father, the guardianship belongs to the grandfather, even if the father has appointed an executor, the executor of the father becomes the guardian only in the absence of the grandfather⁹.

TESTAMENTARY GUARDIAN:

Testamentary guardian is a person who is appointed as guardian of a minor under a will. Only father or, in his absence, paternal grandfather has right to appoint a testamentary guardian. No special formality is required for the appointment of testamentary guardian but, as is obvious, such a testamentary guardian must be competent to act as guardian. That is to say he should be adult and sane person. A non-Muslim and a female may also be appointed as a testamentary guardian. According to shia

Fathima bi v sadhakautallai, 1997 mad 251: Gurbux v raffia, 1979 HP 66

⁶ Abdul Aziz v Nanhe, 29 All 332 : Nandhi mirza v Muni Begum, 1930 Oudh 411.

⁷ Imambandi v Mutsaddi, 1918 45 Cal 887

⁸ Gohar Begam v Sugg 1960 1 SCR 597

⁹ This is in accordance with Mohammed's views which is followed by the shias



law a non muslim cannot be appointed as testamentary guardian.

Among the Sunnis, the father has full power of making a testamentary appointment of a guardian. In the absence of the father and his executor, the grandfather has the power of appointing a testamentary guardian.

Among the Shias, the father's appointment of testamentary guardian is valid only if the grandfather is not alive. The grandfather, too, has the power of appointing a testamentary guardian. No other person has any power of making as appointment of testamentary guardian. Among the both the shias and the sunnis, the mother has no power of appointing a testamentary guardian of her children. It is only in two cases in which the mother can appoint a testamentary guardian of the property of her minor children, both legitimate and illegitimate viz., first when she has been appointed a general executrix by the will of the child's father, she can appoint an executor by her will, and secondly, she can appoint an executor in respect of her own property which will devolve after her death on her children.

The first exception is more apparent than real; any executor of the father has the power to appoint an executor by his will; this provision applies to all executor. The latter exception, too, has little significance, since every person is free to appoint an executor of his or her own property.

The mother can be appointed a testamentary guardian or executor by the father, or by the grandfather, whenever he can exercise this power. Among the sunnis, the appointment of a non-muslim mother as testamentary guardian is valid, but among the shias such as appointment is not valid, as they hold the view that a non-muslim cannot be a guardian

of the person as well as the property of a minor.

According to all muslim authorities, a non-muslim alien cannot be appointed as a testamentary guardian; if such an appointment is made it is null and void. It seems that the appointment of non-muslim fellow subject is valid, though it may be set aside by the kazi according to the Malikis and the Shaif law, a zimmi can be validly appointed testamentary guardian of the property of the minor, but not of the person of the minor. The shias also take the same view.

The Durr-ul-muhtar states that if a minor, a bondman, non-muslim or a fasik, is appointed as a testamentary guardian, then he should be replaced by kazi. But any act done by them before their removal, will be valid. Further, if disability ceases to exist before their removal, they cannot be removed. The Fatwai Alamgiri also takes this view, but holds that the appointment of a minor or insane person as guardian is void, and therefore, any act done by them before or after his removal will be void and non-effective.

There is some controversy among the muslim jurists on the point whether a person, who was a minor at the time of his appointment but who ceased to be so before his removal, can be removed on the ground that when his appointment was made, he was unqualified. It appears that when two persons are appointed as guardians, and one of them is disqualified, the other can act as guardian. It is only in two cases in which the mother can appoint a testamentary and illegitimate viz., first when she has been appointed a general by the will of the child's father, she can



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The Muslim jurists of all schools agree that a profligate, i.e., a person who bears in public walk of life a notoriously bad character, cannot be appointed as guardian. However, all acts done by contrary to the interest of the minor.

Acceptance of the appointment of testamentary guardianship is necessary, though acceptance may be express or implied. But once the guardianship is accepted, it cannot be renounced save with the permission of the court¹⁶.

Muslim law does not lay down any specific formalities for the appointment of testamentary guardians. Appointment may be made in writing or orally. In every case the intension to appoint a testamentary guardian must be clear and unequivocal¹⁷. A testamentary deposition made by a testator may be invalid, but appointment of the testamentary guardian of minor children will be valid. The appoint of the executor may be general or particular. The testator must have the capacity to make the will at the time when it was executed . this means that the will he should be in full possession of his senses.

The executor of the testamentary guardian is designated variously by Muslim law givers,

¹⁰ The Fatwai Alamgiri VI, 214: see also Md. Ameerooden v Md. Chundroonbeen

¹¹ This is so according to the juma ushshitat

¹² the durr-ul-muhtar, 835

¹³ The Fatwai Alamgiri iv, 214.

¹⁴ Ibid., see also yhe Radd-ul-muhtar 689

¹⁵ The Fatwal Alamgir iv, 214

¹⁶ The Rudd-ul-Muthari, v 689; Fatwai Alamgiri, vi 212.

¹⁷ The Fatwal Alamgiri vi, 218, 19.



indicating his position and powers. He is commonly called wasi or guardian of the minor children whenever he is appointed as testamentary guardian.

GUARDIANS APPOINTED BY COURT:

In the absence of a natural and testamentary guardian, the court is empowered to appoint a guardian for the protection of the minor's person or property or for both. The appointment of guardians by court is governed by the Guardians and Wards Act, 1890 which is applicable to all the Indians irrespective of their religion. In India, the court appoints the guardians for minor's person or property under this statute. Therefore, such guardians are also called statutory guardians.

It may be noted that no provision has been made under this act for the guardianship for marriage. The result is that except the guardian for marriage, the guardians for a Muslim minor's person or property may be appointed by a court of law. In some cases, there may be conflict between muslim personal law and the guardians and wards act.

In cases of such a conflict, provisions of the guardians and wards act will prevail over the provisions of muslim personal law. Court here means court of the district judge.

Section 17(2) of the Act provides that in considering the welfare of a minor, the court shall have regard to the age, sex and religion of the minor; the wishes, if any, of a deceased parent and any existing or previous relation of the proposed guardian with the minor or his property.

In *Smt. Farzanabai v Ayub Dadamiya*, the Bombay High Court observed that under guardians and wards act, the personal law of the parties is a factor which is to be kept in

mind by courts subject to the interest of the child. However, as the central idea should be the welfare of the minor; therefore, the rules of muslim personal law may be considered by court only where they are conducive to his welfare.

Under the Guardian and Wards Act, 1890, the power of appointing or declaring any person as guardian is conferred on the district court. The district court may appoint or declare any person as guardian of a minor child's person as guardian of a minor child's person as well as property whenever it considers it necessary for the welfare of the minor, taking into consideration the age, sex, wishes, of the child as well as the wishes of the parents and the personal law of the minor.

In *Rahima v. Sabuijanes*, the Gauhati High Court said that when mother had remarried after the death of her husband, she should not be appointed a guardian of her minor daughter. The paternal grandmother would be a preferable guardian and the court appointed her accordingly. *M. Sharma, J.* said:

The disqualification to be guardian is, if the mother married second time. As regards the mother or a female guardian, marriage to a person not related to the child within the prohibited degrees is a bar to guardianship.

It is further provided that the mother does not lose the custody of her infant children merely because she is no longer the wife of her former husband, but where she marries a second husband, the custody of such children normally belongs to her former husband.

In that case other relations failing the mother, by absence or disqualification, the following female relations are entitled to custody in order of priority-



- (i) Mother's mother, how high so ever,
- (ii) Father's mother, how high so ever and
- (iii) Full sister and other female relations including aunts.

DE-FACTO GUARDIANS:

A de facto guardian is a person who is neither a legal guardian nor a testamentary or statutory guardian, but has himself assumed the custody and care of a child. According to Tyabji a de facto guardian means an unauthorized person who, as a matter of fact has custody of the person of a minor or of his property. It may be said that a defacto guardian is a person having no authority for the guardianship but under the circumstances has taken responsibility to act as the guardian of a minor.

- (1) Guardianship of persons of the minor for custody (Jabar)
- (2) Guardianship of persons of the minor custody (Hizanat)
- (3) Guardianship of property which is divided into three sub groups:
 - a) De jure guardianship
 - b) De facto guardianship
 - c) Certified guardianship

Guardianship of the person of the minor for custody

Under Sunni Law the mother is entitled to the custody of a male child up to years 7 years and a female child till she attains puberty. Under shia law she has custody of male child till age of 2 years and female child till the age of 7 years; she is the de facto guardian; under Sunni law failing the mother the custody of a boy up to 7 year and girl up to puberty goes to the following female relatives in order:-

- (i) Mother's mother how highsoever;
- (ii) Father's mother how highsoever;
- (iii) Full sister;
- (iv) Uterine sister;
- (v) Consanguine sister;
- (vi) Full sister's daughter;
- (vii) Uterine sister's daughter;
- (viii) Consanguine sister's daughter;
- (ix) Maternal aunt in like order as sister;
- (x) Paternal aunt in like order as sister;

In default of mother and female relatives, the custody goes to following:

- (i) father;
- (ii) paternal grandfather ;
- (iii) full brother;
- (iv) consanguine brother;
- (v) full brother's son;
- (vi) consanguine brother's son;
- (vii) full brother of the father;
- (viii) consanguine brother of the father;
- (ix) son of father's full brother;
- (x) son of father's consanguine brother;

Under Shia law the custody goes to the custody goes to the mother, failing her to the father and failing him to the father's father.

Under Sunni law the father is entitled to custody f the boy over 7 and an unmarried girl who has attained puberty and Shia law to the custody of a male child over two year and unmarried girl of 7 years. The custody of an illegitimate child goes to the mother. Rights of Hizanat.



In the case of Imambandi v. Mustad AIR 1987 SC 554 The property in the suit belonged to Ismail Ali Khan . it was alleged by the plaintiff that on his death he left three windows one of whom, Zohra, acting on behalf of herself and her two minor children purchased the share in the suit for the possession of which they brought action. The reliefs sought were

- (i) declaration of the title and status of plaintiff's vendors;
- (ii) a decree for possession of shares covered by the sale deed;

The defendants contended that Zohra was not a married wife and that the children were not legitimate and that the shares did not pass under the sale. The Privy Council held that Zohra and her children were entitled to the shares. The important question was whether the plaintiffs acquired any title to the infant's share under the sale by the mother. The defendants contended that the mother had no power to convey her children's interest to the plaintiffs. It was held that although the mother is entitled to the custody of the person of the minor, she is not the natural guardian and the father alone or if he is dead his executor is the legal guardian. The mother has not power to deal with the minor child's property. She may incur responsibilities but can impose no obligation on the the infant. This rule is subject to certain exception provided for the protection of a minor child if there is no de jure guardian i.e, the court may appoint the mother pledges the properties of the minor child it is unlawful unless she is the executrix or is authorized by the guardian of the minor or by the judge. Then it is lawful and the right of possession and user is established in the Murtahali without the power of sale.

Termination of Hizanat

Disqualification of the Hizanat can be categorized unto 5 heads:-

General disqualification- a minor cannot act as a guardian of any minor other than his own wife or child, a non muslim parent etc.

- (i) disqualification effecting females- the mother or female's relatives can be disqualified on the following courts-
 - a. she leads an immoral life-
 - i. adultery;
 - ii. becomes a prostitute;
 - iii. has committed criminal offence
 - iv. is a professional singer or mourner
 - b. she neglects the child
 - c. she marries a person not related to child within prohibited degrees (Rahima Khatoon v. Saburjanesa)
 - d. During subsistence of marriage she goes and resides at a place at a distance from the father's place;
- (ii) disqualification affecting males – no male relative, outside of prohibited degrees, is allowed to have custody of an unmarried girl.
- (iii)
- (iv) Disqualification affecting parents-

Mother gives up custody of boys after 7 and girls after puberty (Sunni law) and boys after 2 and girls after 7 (shia law). The mother does not lose her right to custody by divorcing the father.

The father is a natural guardian but will be disqualified by the court for –



- Cruelty to wife or children;
- Felony;
- Adultery;
- If he is unfit in character and conduct;
- If he is unfit as regards external circumstance;
- If he waives his right of custody;
- If he enters into agreement to the contrary;
- If he goes out of the jurisdiction of the court or if intends to go abroad;

without the consent of the girl or boy, as the case may be. If his or her consent is obtained by misrepresentation of material facts by the guardian the marriage will be unlawful, but it can be ratified by the person concerned by the words or conduct. This last rule is based on the policy of Islamic law to preserve marriages rather than allowing their disintegration on technical legal grounds.

In the Shafei school of Sunni law and the Ismaili school of Shia law major girls also need guardian's intervention for marriage but, based on worldly wisdom of the time, the rule was meant only to protect them against exploitation in the marriage market. Very rightly, the courts in India have not strictly enforced it. The following cases may be seen on this point:

(v)
(vi)

Disqualification affecting husband- husband is not entitled to custody of minor wife unless she attains puberty or such age that would permit consummation of marriage. In this circumstance, the mother is the guardian. However, the minority of the husband does not deprive him of his right to guardianship.

(i)
(ii)
(iii)

- (i) Hassan Kutti v Jainaba AIR 1928 Mad 1285
- (ii) Sayad Mohiddin v Khatijabai AIR 1939 Bom 484
- (iii) Adam v Mammad (1990) 1 KLT 705

In the Hanafi school of Sunni law and the Ithna Ashari school of Shia law both girls and boys who have attained puberty can marry by their own free will and without the involvement of their guardians. They can, of course, voluntarily act through their guardians; and a guardian can surely persuade any such person to desist from contracting a marriage if her or his interest so requires. But no guardian can act in any case

As regards those who have not attained biological maturity, maturity, Muslim law gives their guardians the authority to permit the marriage of such a person. Exercise only in exceptional cases and strictly in the interest of the ward, the authority is based on an expectation that the guardians would necessarily act the interest of the minor; it is not meant to clothe the guardians with an unrestricted or arbitrary power to impose a marriage on a minor. Marriage guardianship under Muslim law is indeed a sacred trust placing the guardian and the ward in a fiduciary relationship.



In no case are minors let off scot-free to contract a marriage at their own sweet will. In the Hanafi law there is a carefully drawn long list of relatives who would act one after the other as the guardian for the purpose of marriage. The list includes the following relatives in this order-based on the consideration as to who among these relatives on be expected to act more rationally without being unduly emotional toward the minor's wish:

- (a) Father or grandfather
- (b) Brother
- (c) Paternal uncle or his son
- (d) Granduncle or his son
- (e) Mother
- (f) Paternal or maternal grandmother
- (g) Maternal grandfather
- (h) Sister
- (i) Paternal aunt
- (j) Maternal uncle and aunt

By providing that the order of marriage-guardianship cannot be jumped and no remoter guardian can act out of turn, the law puts an additional check on the minors in the matter of marriage. The courts in India recognize this principle of the Muslim law. e.g., *Ayub Hasan v Akhtari* AIR 1963 All 525.

The shafei school of sunni law and the Shia law appreciably make things further difficult for the minors by providing that only the father or the grandfather can approve the marriage of a minor girl or boy.

In all these laws the marriage guardian's job is to protect the minor's interest by denying or giving consent for marriage.

In most Muslim counties the minimum age for marriage has now been raised by legislation.

The Guardians and Wards Act 1890, which does apply to Muslims, does not specifically refer to guardianship in marriage.

In Muslim law the mother is the mother of her child, not just his father's wife. The ups and downs in the relatives between a mother and her husband will not therefore adversely affect the mother's custody rights. A divorced mother remains the mother of her children and her right to their custody remains intact. Her remarriage will also not ipso facto terminate her custody rights, but if in such a case interest of the child so demands its custody may be taken away from her.

Applying this principle, a grown up girl's custody may be handed over to someone else if her divorced mother has married a person who is a complete stranger to the girl.

- (i) *Khadija Begum v Gjulam Dastgir* (1975) 2 AWR 194

The difference between guardianship and custody under Muslim law was noted by the Supreme court in the recent case of *Athar Hussain v Syed Siraj Ahmed* (2010) 2 SCC 654. On the rights to custody of children under muslim law reference may be made also to the following cases:

- (i) *Rafiq v Bshiran* AIR 1963 Raj 239
- (ii) *Enamul Haq v Taimunnisa* AIR 1967 Pat 344

The Guardian and Wards Act 189 which empowers the courts (a) to declare who is the legal guardian of a minor under the law applicable and, (b) to appoint a guardian for any minor, is fully applicable to the Muslims and has in its life of over 120 years been applied to them in numerous cases.

Conclusion



Guardianship is a concept or relationship arising from the natural incapacitates of infants and persons of unsound mind and sometimes other category of persons to manage their own affairs. A guardian is a person who has the authority and the corresponding duty to care for the personal and property interests of another person, called a ward. Usually, a person has the status of guardian because the ward is incapable of caring for his or her own interests due to infancy, incapacity, or disability. Most countries and states have laws that provide that the parents of a minor child are the legal guardians of that child, and that the parents can designate who shall become the child's legal guardian in the event of death.

Reference

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