

Concept of Guardianship(Muslim Law)

There are three types of guardianships recognised under Muslim Personal Law.

Guardianship:-

- a) of a person;
- b) in marriage;
- c) of property.

The guardians of property under Islamic law are rarely appointed;¹⁴⁷ an appointed executer (wasi) is the guardian of the property.¹⁴⁸

Guardianship of a person

The concept of custody (hadanah) and guardianship (Wilayah) mixed in the different parts of the Quran. Mahdi

Zaharaa and Normi A. Malek describes the relationship between custody and guardianship as a —complex structure of rights and duties distributed

145 Mulla on Mohammedan Law, pp 407

146 (Recommendation with regard to the concept of age of minority is discussed in the chapter on the marriage and divorce.)

147 Mulla on Mohammedan Law, pp 404

148 Asaf A.A Fyzee Outlines of Mohammedan Law Chapter VI Guardianship, pp 196

between entitled person”.¹⁴⁹ Custody, in terms of rights and duties, is more inclined towards the duties and responsibilities. It is the duty and responsibility of the custodian to look after the child and ensure the overall development of the child. The guardian on the other hand is given the power to take major decisions for the future of the child, ranging from education to marriage, to career choices.¹⁵⁰ He takes all decisions on behalf of the minor and supervise the child even when he/she is in custody of the mother or any other female relatives.

Principles Governing Custody (hadanah) and Guardianship (Wilayah)

the Hanafi school, the mother is to be the custodian of the minor for a specified

period. In case of a boy, the mother shall be the custodian by default if the child is below the age of seven years. Whereas in case of a girl, mother gets custody till the time girl attains puberty¹⁵¹. After which the custody and the guardianship of a boy above seven years of age and of unmarried girl above puberty is transferred to the father. In the absence of the mother, following female relations are entitled for the custody of the minor.

(i) Mother's mother, how high so ever;

(ii) Father's Mother, how high so ever;

(iii) Full Sister;

(iv) Uterine Sister;

(v) Consanguine Sister;

(vi) Full Sister's Daughter;

(vii) Uterine Sister's daughter;

(viii) Consanguine Sister Daughter;

(ix) Maternal aunts in the same order as sisters;

(x) Mother's father;

149 Mahdi Zaharaa and Normi A. Malek
—The Concept of Custody in Islamic Law||
Arab Law Quarterly, Vol 13, No. 2(1998),
pp. 155-177

150 Id.

151 See, Al-Durr Al-Mukhtar 3,566, Bab Al-
Hizana See also. Al-Hidaya 2,284, Al-
Mabsut, 5,208, Kilab Al-Nikah, Bab Hukm
Al-Walad ind iftiraq Al-Zawjayn, cited in the
reply submitted by the All India Muslim
Personal Law Board [AIMPLB]

(xi) Paternal aunts in the same order as sisters;

(xii) Paternal aunts of mother and father in the same order,

and in the absence of them.

(d) to the following female paternal relations in order;

(i) Father;

(ii) Nearest paternal grandfather;

(iii) Full brother;

(iv) Consanguine brother;

(v) Full brother's son;

(vi) Consanguine brother's son;

(vii) Full paternal uncle;

(viii) Consanguine paternal uncle;

(ix) Full paternal uncle's son;

(x) Consanguine paternal uncle's son, and in the absence of them.

(e) To the following relation in order:

(i) Uterine brother;

(ii) Uterine brother's son;

(iii) Father's uterine brother;

(iv) Maternal uncle; and

(v) Mother's uterine brother.

Provided that a male relation be within the prohibited degrees of a girl.

The rules applicable in Shia law, are different. Here, the mother is entitled for the custody of a boy until the age of two years and of the girl until she attains seven years of age. The custody after the prescribed period dwells upon the father and after him to the grandfather how

highsoever.¹⁵² The rationale given is that after birth,

152 Asaf A.A Fyzee Outlines of
Mohammedan Law Chapter VI
Guardianship

a two-year period is sufficient for breast-feeding a boy, after which he needs the guidance of his father.

The mother might have the custody of the child but the father has the guardianship. Entitling him for the right to take any decision for the future of the child. He has the ultimate authority to decide matters regarding future of the child be it his/her education, or contracting marriage. That is why mother living far from the residence of

the father was one of the grounds for the disqualification of the mother for taking custody.¹⁵³ In **Gulamhussain Kutubuddin Maner v. Abdulrashid Abdulrajak Maner**¹⁵⁴, the Supreme Court, observed that during the lifetime of the father, mother cannot be the guardian of the minor to accept a gift on his behalf.

...we are of the view that where the father of a minor is alive, the mother of a minor cannot be appointed as a guardian of a minor to accept the gift on his behalf.¹⁵⁵

Thus, during the lifetime of the father, mother cannot technically accept a gift for the minor, or take any other decision for the welfare of the child as a guardian. The role prescribed here indicates the typical division of the labour based on gender. It flows from the notion that a man is

provider of the family and he has the ultimate responsibility to protect them; on the other hand, a woman is to look after the house and the needs of the children.¹⁵⁶ This may have been acceptable in a specific context or a point in history when these rules were laid down. However, with time such gender stereotypes have been challenged.

If both the spouses are earning then the financial responsibility of the child should also be shared. At the same time mother should also have the equal right to decide the matter related to

153 Mulla's Principles of Mahomedan Law, section 354(2)

154 (2000) 8 SCC 507

155 Id. para 2)

156 See, Nivedita Menon *Seeing like a feminist*, Penguin India, ed. 2012

the welfare of the minor. She should not only be there to take physical or emotional care of the child, but also have equal say in the matters deciding the future of the minor.

The earlier discussion on the best interest of the child indicates that the court does not take into consideration the personal law of the parties, when it comes to determining the custody of the child¹⁵⁷. It does not adhere to the principles prescribed in the personal law or even for that matter preference given in any statute.

It is therefore suggested that a Muslim mother should also be treated as the natural guardian of the minor, both the parents should be at an equal footing. Further, in the matter of custody a father should also get an equal opportunity to be considered as a custodian. Thus, in the absence of a clear codified law on custody of children the principle of best interest of the child should continue to be of paramount consideration.

Guardianship in marriage

The other type of guardianship, Muslim Personal Law talks about is ‘guardianship in marriage’. The guardian has the right to contract the marriage of a minor. If the guardian is of the opinion that the marriage is for the welfare of the minor, then he has

the right to contract such marriage. Even the consent of the minor, whose marriage is to be contracted, is not relevant. This form of marriage is called „jabar“ marriage.¹⁵⁸ Under this the guardian can impose the marriage on the minor, before he/she attains puberty.¹⁵⁹ However, this too would be covered by the overriding effect of the Prevention of Child Marriages Act, 2006. The Court is not entitled to appoint a guardian for the marriage, though it can appoint a guardian for

¹⁵⁷ See, Flavia Agnes, Custody and Guardianship of Minors, available at <https://flaviaagnes.wordpress.com/>

¹⁵⁸ Mulla on Mohammedan law

person or property. In some cases, the kazi can act as a guardian for the purpose of marriage.¹⁶⁰

Who can contract the marriage of a minor

Under Hanafi school the father has the right to contract the marriage of the minor. After him the right dwells upon the father's father, how highsoever. In the absence of these two relations, the right is further given to the brother and other male relations on the father's side in the order of inheritances. In the absence of all the above mentioned male relations the right belongs to the mother, maternal uncle or aunt.¹⁶¹ Under Shia law, however, the right is vested upon the father and after

him the father's father how
highsoever.162

The consent of the minor is not relevant, even the consent of the mother is not acknowledged. The right of the mother over her child is given preference when there is no male relation from paternal side. Allocation of right in such a manner indicates as underlying assumption that a mother is not capable of taking the decision for the welfare of the child and therefore if there is any possibility of locating a 'male' member, preference is given to him, to exercise the right. However, after the Prohibition of Child Marriage Act, 2006, the child marriage has been prohibited and also made punishable. Now, the father or the grandfather or as

the case may be, do not have any 'right' to give their minor children in marriage.¹⁶³

CHRISTIAN LAW:

The statutes codifying the Christian laws do not deal with the concept of custody and guardianship. The reason might be that they are covered under the Indian Divorce Act, 1869 and the Guardians

160 Asaf A.A Fyzee Outlines of Mohammedan Law Chapter VI Guardianship

161 Mulla section 271 pg. 233(Act sort of); Asaf A.A Fyzee Outlines of Mohammedan Law Chapter VI Guardianship, 209

162 Mulla on Mohammedan law page 412(book)

163 See also Yunusbhai Usmanbhai Shaikh v. State of Gujarat, 2016 CriLJ 717

and Wards Act, 1890. The above said two statutes somewhat cover guardianship and custody under Christian Law.

The Indian Divorce Act, 1869

Chapter XI of the Indian Divorce Act, 1869 (the Act 869), contains sections 41 to 44 for the custody of a minor. The sections give the sole authority to the Court to decide the matter of the custody of a child for affecting the doctrine of welfare of the child. The provisions do not seek a final decision in the matter relating to custody but suggest reviewing the orders and such conditions from time to time, according to the need of the minor.

The provisions deal with two situations where the question of custody of the minor may appear. First, where the parents of the concern minor have applied for the decree of judicial separation¹⁶⁴ and second where they have applied for the dissolution or nullity of the marriage.¹⁶⁵

Section 41 of the Act 1869 stipulates the power of the Court to give interim orders for the custody of the minor with regard to his/her maintenance and education, in cases where the proceedings are ongoing. The Court has the power to make such decisions from time to time. Section 42 provides that on attaining the decree of the judicial separation the parents can approach the Court for the custody of the

child. The Court on receiving such application may make such orders regarding the custody, maintenance and education of the minor.

Section 43 similarly deals with the situation where the proceedings for decree of dissolution or the nullity of marriage are still pending. Sections 44 deals with the application of the parents in case

164 Section 41 of the Act, 1869.

165 Section 43 of the Act, 1869.

where the decree of dissolution or the nullity of the marriage has been finalised.

The Act 1869 further provides the Court with an option to keep the child under its protection if it appears to be the need at that point of time. The proviso to section 41 further states that the application with respect to the maintenance and education of the minor shall be decided within the period of sixty days, from the date of notice served to the respondent.

The provisions laid down in the Act 1869 endorse the principle of best interest of the child and do not talk about the preferential right of one parent over the other. Thus, leaving no room for gender inequality. The matter related to the guardianship of minor are dealt under the provisions of the Guardians and Wards Act, 1890.

PARSI LAW

The law governing guardianship for the Parsi community is the Guardians and Wards Act, 1890. Section 49 of the Parsi Marriage and Divorce Act, 1936, (the Act 1936) provides that the court has the power to decide the interim custody of the child. The court can, from time to time prescribe such terms and conditions, which it deems necessary for the welfare of the child. The court can also pass order with regard to the maintenance and education of the minor.

The Act, 1936 does not discriminate between parents. However, section 50, stipulates that in case of adultery committed by the wife, the court can pass a decree of divorce or judicial separation.

In that case, if any property is devolving upon the wife, one half of the same can be reserved for the welfare of the child(ren). The section is discriminatory simply for not providing the same for the father. This

matter is also sub-judice before the Supreme Court in the matter of

Naomi Sam Irani v. Union of India & Anr. IA 29371/2018, in WP(S) (CIVIL) No.(s) 1125/2017.