

# Guardianship

- **Synopsis:**
- **Definition**
- **Appointment of Guardian**
- **Age of Minority**
- **Kinds of Guardians**
- **Kinds of Guardianship**
- **De-facto Guardians**
- **Guardianship of Marriage**

# Definition

- Guardian means a person who takes care of and provides maintenance for him/her. A guardian may be natural such as father, or mother, or legal, who is appointed by the court. However, anybody who takes care of or maintains can be a guardian. Guardianship means the acts of a guardian through which he/she discharges his responsibilities in that capacity.
- **The Holy Quran says:** “Restore the orphan, when they come of their age, their substance (property); do not substitute bad or good (that is, take not what ye find of value among them or effect to your own use and give them worse in its place), nor devour their substance by adding it to your own, for this is an enormous crime.”
- The Holy Quran, Ch. IV, verse.2.

# Appointment of Guardian

- Under Muslim law, no formal appointment is required for a competent person to act as guardian. The only consideration is, whether he or she is competent and entitled to be a guardian. According to Muslim Law, a person who has attained the age of 18 years and who is sane can act as guardian. A guardian may also appoint under the Guardian and ward Act, 1890.

# Appointment of Guardian

- The application for the appointment may be made not only by a person desirous of being, or claiming to be guardian of the minor but also by any relative or friend of the minor. Section 17 of the Guardian and Wards Act, 1890 provides some provisions that should be followed by a court for appointment of a guardian. The provisions are:-
  1. the welfare of the minor;
  2. age sex and the religion of the minor;
  3. Character and capacity of the proposed guardian, and his nearness to the minor.
  4. the wishes ,if any of the deceased parents,
  5. any existing or previous relation of the proposed guardian with the minor or his property, and
  6. Preference of the minor, if he is old enough to form an intelligent preference.
- D F Mulla, , *Principles of Muhammadan Law*, page; 294.

# Age of Minority

- Minors are All children of age below sixteen, unless symptoms of puberty appear earlier, are treated as minors. According to the Islamic Shariah, a minor attains adulthood as and when a boy or a girl attains puberty. The Muslim Family laws Ordinance 1961 has fixed the adulthood age at sixteen. Under the Adulthood Act 1875, a minor ceases to remain so when he reaches eighteen. But in case the court appoints a guardian for minor or a court of ward for taking care of his property, he continues to be treated as minor until he is twenty one.
- According to Islamic Shariah, the natural guardian of a minor and the caretaker of his property is his father if he is alive. The court may appoint or declare, under the Guardians and Wards Act 1890, someone as the guardian of a minor.

# Kinds of Guardians

- 1. Natural guardian, by natural right;**
- 2. Testamentary Guardian, appointed by the father by testament;**
- 3. Court appointed Guardian or certified guardian appointed by a judge.**

# Kinds of Guardians

- **Natural guardian:** Father is the natural guardian of his legitimate children. The term natural guardian is not used in Muslim law. He has no right of the guardianship of the illegitimate children, nor even after the death of the mother, unless the court appoints him. The mother is not a natural guardian of her minor children, neither during the life time nor after the death of the father. Thus the father is the sole guardian. He controls the education, upbringing and religious inculcation of the child as a supreme. After his death guardianship passes on to his executor in Sunni law and to the grandfather according to the Shia law.

# Kinds of Guardians

- **Testamentary guardian:** testamentary guardian is appointed by testament or will of the natural guardian that is the father of the minor. The father, the executor then the grand father can appoint this type of guardian is Sunni law. The Shia father cannot appoint a testamentary guardian if the grandfather is alive. He can do this only after the death of the grandfather. The mother is totally deprived by the two schools but she can become a testamentary guardian by appointment. A non-Muslim can also be a testamentary guardian. The appointment may be oral or written. The testator must be a major and of sound mind at the time of making the will. The executor of the testamentary guardian called wasi (guardian), amin (a trustee), or a kaim –mikam (representative). Once the obligation of the testamentary guardianship is accepted, it cannot be renounce without the permission of the court.
- **Court appointed guardian:** The court appointed guardian takes place when no natural guardian is available and testamentary guardian has not been designated. Under the Guardians and Wards Act, 1890 the power is in the hand of the District court now, irrespective of any religion. Under the section 17 of the said Act the District Court gives the appointment as per the application of the interested person.



## De-facto Guardian

- If a person, who is neither a legal guardian nor a guardian appointed by the court, voluntarily takes the responsibility of taking care of the property of a minor, he becomes his de facto guardian. A de facto guardian is merely a custodian of the minor and his/her property.

# Kinds of Guardianship

**Muslim law recognizes three kinds of guardianship, namely;**

- **Guardianship of person.**
- **Guardianship of property.**
- **Guardianship of marriage.**

# Guardianship of person: (custody)

- **Guardianship of person: (custody) for purposes of bringing up children (education etc.)**
- Of all the persons, the mother is the most entitled to the custody (*Hizanah*) of her infant child during marriage and after separation from her husband, unless she:
  - 1) has become an apostate,
  - 2) is wicked, or
  - 3) is unworthy to be trusted.
- Next, the mother's mother, no matter how high, is entitled to the custody (*Hizanah*) of her infant child. If she has died or is married to a stranger, then the full sister is entitled. If the sister has died or is married to a stranger, then the half-sister by the mother is entitled to custody of the child. On the failure of her in the same way, the daughter of the full sister, then the daughter of the half-sister by the mother. Next the maternal aunt in the same way, and then the paternal aunts also in like manner. The woman's custody of a boy terminates when he is 7-years old, whereas the custody of a girl terminates when she reaches puberty.
- Fatawa-i-'Alamgiri vol. 1, pg. 728

# Guardianship of property

- **Guardianship of property: for purposes of management and preservation of property:**
- The guardianship of a minor for the management and preservation of his property devolves (1) first on his or her father, (2) then on the father's executor, (3) next on the paternal grandfather, (4) then on his executor, (5) then on the executors of such executors, (6) finally on the ruling power or his representative -- a Qazi or judge. Ultimately it rests upon the Qazi to appoint a guardian for an infant's property when there is no near guardian (i.e., the father, the father's father and their executors).

# Guardianship for purposes of Marriage

- Guardianship for the purpose of marriage is allowed because of the necessity for a proper and suitable match which may not always be available. Guardianship extends to the father and grandfather and other relations in their absence. But when a minor is given in marriage by a guardian, other than the father or the grandfather, he or she can, in exercise of what is called the option of puberty, refuse to be bound by the marriage and ask the court to annul the marriage. If the guardian was the father or grandfather, a legal presumption is raised that they must have acted in the best interest of the minor. The presumption is, however, not conclusive and such a marriage can also be set aside in certain cases where it is plainly undesirable, and injurious to the minor.