

STUDY MATERIAL

LL.M SEMESTER II

SUBJECT CODE – LM 112

**SUBJECT NAME – MUSLIM LAW
RELATING TO STATUS**

SUBJECT TEACHER – MS. NASREEN AZAUNNISA

TOPIC NO – 8 GUARDIANSHIP

1. Definition of guardian-

The Guardians and Wards Act¹, defines the term guardian as “a person having the care of the person of a minor or of his property, or of both his person and of property” and the person who has the right and duty of disposing of a male or female in marriage may be said to have the care of his or her person.

The basis of the law relating to guardianship is the Holy Qur’an and therefore there are few differences concerning the law on guardianship among the Shia and the Sunni Schools².

2. Meaning of guardianship-

In Muslim Law the term ‘guardianship’ denotes the guardianship of a minor. A minor is a person who has not attained the age of majority. Under Muslim Law puberty connotes majority. And puberty is supposed to be attained at the age of fifteen years. In India Muslims are governed by the Indian Majority Act, 1875 in all matters, except in matters relating to dower, marriage and divorce. Therefore, in matters relating to guardianship of a person and property, a Muslim whether male or female, will be governed by the Indian Majority Act, 1890. According to this Act a person attains the age of majority at the age of eighteen years. The age of majority of a minor who is under the Court of Wards, or a minor to whom a guardian has been appointed by a Court of Law, is twenty-one.

¹ The Guardians and Wards Act, 1980.

² Aqil Ahmed, Mohammedan Law 221(Central Law Agency, Allahabad, 23rd edn., 2009) (Revised by Prof. I. A. Khan).

3. Appointment of guardian-

When the Court of Law is satisfied that a minor needs guardian for the welfare of the person of the minor or for the property of the minor, the Court will appoint a guardian for that minor. In appointing a guardian for a minor the welfare of the minor shall be of paramount consideration. Along with this the Court shall also consider the age, sex, religion of the minor and the character and capacity, among many other things, of the proposed guardian. According to Section 17 of the Guardians and Wards Act, 1890, the Court may also consider the preference of the minor if he/she is old enough to form an intelligent choice.

Kinds of guardianship- There are three types of guardianship under Muslim Law³:

- (a) Guardianship of the person also known as *hizanat*
- (b) guardianship for the purposes of marriage also known as *jabr*
- (c) guardianship for the property of the minor.

4. Guardianship for the person of minor or guardianship for custody (*hizanat*)-

In *hizanat* the age of the minor and the relationship of the minor with the guardian is to be taken into account.

The custody of a minor can be studied under three heads⁴:

- (a) The mother of the minor
- (b) In default of the mother , other female relations of the mother or the father
- (c) In default of (a) and (b) , other male relations of the mother or father

³ Aqil Ahmed, Mohammedan Law 214 (Central Law Agency, Allahabad, 23rd edn., 2009) (Revised by Prof. I. A. Khan).

⁴ Ibid, p. 216.

4.1 Mother – Under the Hanafi law the mother of the minor has the right of custody of the minor till the age of seven years in case of a boy and till the attainment of puberty in case of a girl. Under Shia law, the mother has the right of custody of her minor son till he attains the age of two years and of the daughter till she attains seven years old. This right of the mother continues even after she is divorced by the father of the child and ends as soon as she remarries a second husband or during the subsistence of her marriage with the father of the child she resides at a place other than her husband's. In such case the custody belongs to the father of the minor.

4.2 In Default Of Mother Other Female Relations- Under Hanafi Law, in the absence of the mother of the minor, the right of custody of the minor shifts to other female relations of the mother and father. They are as follows:

- (a) Mother's mother (how high so ever)
- (b) Father's mother (how high so ever)
- (c) Full sister
- (d) Uterine sister
- (e) Consanguine sister
- (f) Full sister's daughter
- (g) Uterine sister's daughter
- (h) Consanguine sister's daughter
- (i) Maternal aunt
- (j) Paternal aunt

But there are certain circumstances where the mother and other female relations of the mother and the father loses this right of custody. It was held in *Rahima Khatoon v. Saburjanessa*⁵, that under the following circumstances a mother or a female relative loses her right of custody of a minor child:

- (a) where the mother or other female relatives, as the case may be, leads an immoral life
- (b) where the mother or the female relation remarries a man who is not related to the minor within prohibited degrees

⁵ AIR 1966 Gau 33.

4.3 In Default Of Other Female Relations, The Other Male Relations-

In default of the mother of the minor and the other female relations of the mother and the father, the custody of the minor belongs to the following male relations in order:

- (a) father
- (b) nearest paternal grandfather
- (c) Full brother
- (d) Consanguine brother
- (e) Full brother's son
- (f) Consanguine brother's son
- (g) Full brother of the father
- (h) Consanguine brother's son
- (i) Full brother of the father
- (j) Consanguine brother of the father
- (k) Son of father's full brother
- (l) Son of father's consanguine brother

Under Shia Law the custody of a minor's person belongs to the mother. In her absence, the father. In the absence of the father, the father's father.

In case of a unmarried female minor's custody, no male is entitled to her custody, except in cases where that person stands in prohibited degrees of relationship with the minor female. Where none of the above relations are available to be the guardian of a minor, the Court of Law will decide who shall be the guardian.

4.4 Father- The father is entitled to have the custody of his son after the son has attained seven years of age and his daughter after she has attained puberty, under Hanafi Law. In the absence of the father the custody of the person of the minor belongs to the paternal relations of the minor in the order given above.

4.5 Illegitimate Child- In *Gohar Begam v. Suggi Begum*⁶,

it was held by the Apex Court that the custody of a minor illegitimate child is with the mother under Muslim Law and the refusal to restore the child with the mother is illegal detention of the minor.

4.6 DISQUALIFICATIONS-There are certain disqualifications which terminate the right of guardianship⁷.

Firstly, a minor is not entitled to be the guardian of a minor.

Secondly, a mother of a minor is not entitled to be the guardian if she commits adultery, she lives the life of a prostitute, she is a singer or a mourner or has committed criminal offence and is convicted by the law. She is disqualified if she marries a man who is not related to the minor within prohibited degree of relationship. She also loses to be a guardian if she is not living with the father of the minor during the subsistence of the marriage, without any sufficient cause.

5. Guardianship Of Minor's Property-

If a minor owns movable or immovable property, he/she needs a guardian to look after it. The guardianship of the property of the minor can be classified into⁸:

- (a) Natural guardian
- (b) Guardian appointed by court
- (c) *De facto* guardian

The person who is entitled to be a natural guardian is given below in order⁹:

- (a) The father
- (b) Executor appointed by the father's will
- (c) The father's father

⁶ AIR 1960 SC.

⁷ Aqil Ahmed, *Mohammedan Law* 221(Central Law Agency, Allahabad, 23rd edn., 2009) (Revised by Prof. I. A. Khan).

⁸ *Ibid*, p. 223.

⁹ *Ibid*, p. 223.

(d) Executors appointed by father's father will

6. Powers Of The Natural Guardian In Respect Of The Minor's Property-

The natural guardian is authorized to deal with the minor's property in the following circumstances¹⁰:

- (a) It is necessary to sell the property of the minor as the minor has no other means to maintain himself/ herself.
- (b) When the minor has inherited the property and there is no means to repay the debts of the deceased from whom the minor has inherited
- (c) Where the maintenance of the property is so high that expense exceeds the income from the property.
- (d) Where the property is a perishable property and it has started to decay.
- (e) Where there is no other means of paying the legacies.

Guardians appointed by Court-where there is no natural guardian , the Court can appoint a guardian. But the guardian appointed by the Court cannot do certain things without the prior permission of the court. Any such alienation without the prior permission of the Court is voidable at the instance of the minor or any such person affected by such act. But subsequent ratification by the minor after attaining the age of twenty-one years binds the minor. The guardian needs the permission of the court for the following activities:

- (a) Charge the property of the minor
- (b) Sale the property
- (c) Gift the property
- (d) Mortgage the property
- (e) Lease the property for a period exceeding a term of five years

De facto guardian- de facto guardians are guardians who are not natural guardians or guardians appointed by court but they have voluntarily placed themselves in charge of the minor's property

¹⁰Aqil Ahmed, Mohammedan Law 224(Central Law Agency, Allahabad, 23rd edn., 2009) (Revised by Prof. I. A. Khan).

of person. The mother, brother, and all relations other than father or father's father are de facto guardian unless they are appointed by execution of a will or by the order of the court.

Alienation of movable property- A de facto guardian has the power to sell the movable property of the minor to supply the minor with the necessities such as food, medicine or clothing.

Alienation of immovable property- a de facto guardian cannot alienate the minor's property without the authority of the court. Such alienation is void in law according to Section 27 of the Guardians and Wards Act, 1890.

7. Removal of Guardians- The court of law can remove a de jure or a de facto guardian for any of the following causes¹¹:

- (a) Ill-treatment to the minor
- (b) Abuse of property
- (c) Incapacity to perform his duties
- (d) Having an interest adverse to the faithful performance of his obligations
- (e) Not abiding by the orders of the court
- (f) Not abiding by the provisions of the Guardians and Wards Act, 1890
- (g) Insolvency of the guardian
- (h) Insanity of the appointed guardian

8. Duties and rights of a Guardian- The guardian has the following rights and duties¹²:

- (a) Duty to take proper care of the person and property of the minor
- (b) Duty not to misuse the property of the minor
- (c) Duty to maintain proper accounts of the income and expenditure of the minor's property
- (d) Duty to arrange for the marriage and other religious ceremonies of the ward
- (e) Duty to file suit in order to protect of the minor's property
- (f) Right to control the acts of the minor for the betterment of the minor

¹¹ Aqil Ahmed, Mohammedan Law 228 (Central Law Agency, Allahabad, 23rd edn., 2009) (Revised by Prof. I. A. Khan).

¹² Ibid, p. 229.

9. Cessation of guardianship- The power to be a guardian ceases by the following¹³:

- (a) By death, discharge or removal- If the appointed guardian dies, or he is removed the person ceases to be a guardian.
- (b) By the minor attaining majority- When the minor for whom the guardian was appointed, attains majority, the appointed guardian ceases to be a guardian.

¹³Aqil Ahmed, Mohammedan Law 230 (Central Law Agency, Allahabad, 23rd edn., 2009) (Revised by Prof. I. A. Khan).