

## Guardianship – Muslim law

- The term guardianship (Wilayat) denotes the guardianship of a minor. The Quran is a basic of the law relating to concept of guardianship. Muslim law makes a difference between guardian of the person and the guardian of the property and guardian for the purpose of marriage (Wilayat-ulnikah) In case of minors.

### **Who is minor?**

- A minor is one who has not attained the age of majority. Puberty and majority presumed to have been attained on the completion of 15 years. But now the Muslims in India are governed by the **Indian Majority Act 1875**. Except in the matters of marriage, divorce and Mehr.
- According to **Section three** of the Indian Majority Act, 1875, someone domiciled in the Republic of India who is below the age of **eighteen years**, is a minor.

### **Subject matter Guardianship**

Guardianship in Muslim law is for three things,

1. Guardian of minor person,
  2. Guardian for minor's property and
  3. Guardian for minor's marriage (**called wali**) Guardianship in marriage (jabar): Marriage is often contracted on behalf of the minors by the guardian. the father can impose status of marriage on his minor children. This power of imposition is named 'jabar', the abstract right of guardianship (wilayat) and therefore the guardian so empowered is understood as 'Wali'.
- **Guardianship in all three aspects is with father and after him the grandfather.**
  - Under the Muslim Personal law, a father enjoys a more dominant position for both custody and guardianship.

- The mother can get custody of the child but she is not considered the natural guardian of the child.

### **Custody v. Guardianship**

(a) Custody is granted specifically as a matrimonial relief to a parent who seeks such custody, whereas guardianship exists at law.

(b) A guardian need not be a custodian; or a custodian, a guardian of the child

(c) Custody could be for a short duration or for a specific purpose but guardianship is more permanent in nature.]

- Custody might not be with father but guardianship is always with the Father in Muslim law.
  - Under the **Shia law**, a mother's right to the custody of the minor children, i.e., **Hizanat** extends until a son is **two** years old, and till the daughter attains the age of **seven**.
  - Under the Hanafi (**Sunni**) law, a mother is entitled to the custody of her son till he reaches the age of **seven**, and in case of daughter, till **she attains puberty**.
  - The mother's right continues, even if she is divorced from the father of the child, unless she remarries, in which case the custody belongs the father.
  - This, however, is not a rigid rule and the court can deviate, if the welfare of the child so demands.
  - **In Irfan Ahmad Shaikh v. Mumtaz ( AIR 1999 BOM 25 )**
  - Custody of a female child was given to the mother. The mother's marriage with the child's father was dissolved and she remarried a person who was not within the prohibited degree of relationship to the child. The court nonetheless gave custody to the mother the child had also expressed a desire to remain with the mother.
  - Even though as a natural guardian, the father may have prima facie right to the minor's custody, this may be negated, if the infant's welfare lies in keeping him with the mother – **Abdul Kalam v. Akhtari Bini (AIR 1988)**
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## **Muslim law recognizes the following kind of guardianship:**

1. A natural or legal guardian
2. Testamentary guardian
3. Guardian appointed by courts or statutory guardian
4. De-facto guardian

### **1. Natural or Legal Guardian**

Natural guardian is a one that encompasses a right to regulate and supervise the activities of a minor. Father is recognized as the natural guardian of his kid underneath all the schools of Muslim law. The father's right to act as guardian of a minor is an independent right and is given to him underneath the substantive law of Islam.

A natural guardian is additionally known as a legal guardian. But within the absence of the father, the father's executor might also act as a legal guardian. The executor could be one who is appointed by the father or grandfather to act as the guardian of his minor kid on his behalf.

Thus, the natural guardian of a minor in order of priority are as follows:

1. Father
2. Executor of father
3. Paternal grandfather
4. The executor of Paternal grandfather

Under Muslim law within the absence of any of the above-mentioned persons, no one else is recognized as the natural guardian of a minor.

### **Shia Law**

Within the absence of father only paternal grandfather could act as a legal guardian. In the presence of paternal grandfather, the father's executor has no right to act as legal guardian of a child.

## **2. Testamentary Guardians**

A testamentary guardian may be a one that is appointed as guardian of a minor beneath a will. Only father or, in his absence, paternal grandfather has the right to appoint a testamentary guardian.

A non-Muslim and a feminine might also be appointed as a testamentary guardian.

### **Shia Law**

A non-Muslim cannot be chosen as a testamentary guardian.

## **3. Guardians appointed by Court**

In case of the absence of a natural and legal document guardian, the court is authorized to appoint a guardian for the aim of the minor's person or property or for both. The appointment of a guardian by the court is ruled by the Guardianship and Wards Act, 1890 which is applicable to all the Indians irrespective of their religion. Such guardians are also called Statutory Guardian.

## **4. De-facto Guardians**

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

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### **Testamentary Guardian**

- **Father** has full right to appoint testamentary guardian, after father the Executor has the right and after him the Grandfather.
- Mother has no right to appoint the Testamentary Guardian except

1. When she is appointed as the executrix by the child's father in his will
2. It is about her own property which will devolve after her death to her children

### **Illegitimate Children**

- The father has no right over the illegitimate children and he is not the guardian of illegitimate children, even the mother is also just a custodian of the illegitimate children and not the guardian. (Gohar Begam vs Suggi Alias Nazma Begam And Others 1960

### **Concept of Muhrim:**

- The custody of a Muslim child cannot be given to a person who is not muhrim.
- Muhrim means a person who is in relation to the child and is within the prohibited degree of relations with the child. i.e., any person who unfit to marry the child.

### **Powers of the Guardian**

- Can sell the movable property for minor's essential necessities like food, clothing or nursing.
- Can alienate immovable property only in exceptional circumstance and fraudulent transactions are voidable at the instance of the minor.
- Can lease the property for benefit or needs of minor, but the duration of the lease can't be more than the duration of minority.
- Can carry on the business of the minor but likes a prudent man would have carried the business.
- In emergency can also procure debt on behalf of minor, if there was no necessity and debt was taken it would not be binding on the minor.
- Where, there is a conflict in the application of the provision of personal law, and the Guardians and Wards act, 1890 the latter will prevail- Poolakkal Ayissakutty v. P.A. Samad ( AIR 2005 Ker 68 )