

Dr. VIPIN KUMAR SINGH  
ASST. PROFESSOR.  
SUBJECT- MUSLIM LAW  
LL.B. IV SEMESTER & BALL.B. IV SEMESTER

## GUARDIANSHIP

Guardianship may be in respect of: (a) the person (b) the property and (c) marriage. There is guardianship in respect of a person. But in Islamic law, guardian for property is rarely appointed because the executor is the guardian to the property. Marriage guardian is called. Wall.

### *Types:*

1. Natural Guardian
2. Testamentary Guardian
- 3- Court Guardian 4. De facto Guardian

### **1. Quardian of Minor :**

Minority is at three stages :

- (i) A person is a minor under 15; according to Mohammedan Law. (ii) A person under 18 is a minor according to the Indian Majority Act, and (iii) A person under 21 is a minor under the Court of Wards Act. In Mohammedan Law, minors under 15 can act independently in respect of marriage, dower and divorce, in other respects it is 18 years (male or female).

Application: An application for the appointment of the guardian of the person or of the property or of both, must be made to the court under the Guardians and Wards Act 1890.

The court must take into consideration:

- (a) The welfare of the minor
- (b) The law to which the minor is subject.
- (c) The age, the sex of the minor and the character and capacity of the guardian and also the wishes of the deceased parent.

- (d) Preferences of minor, if any and appoints the guardian.

It is the duty of the guardian to take care of the welfare supervision education, protection and progress 'of the boy or girl. Father, on his death father's father is the natural guardian according to the Muslim law.

*Mother:* The custody belongs to mother upto the age of 7 if a male and upto puberty in respect of a female child (Hanafi Law). The leading case is *Imambandi Vs. Muisaddi* It was declared that the father is the legal guardian, if he is dead, the executor is the legal guardian. *The mother is entitled only to the custody of the person. She is not the natural guardian.*

Hence, if father and mother live together, the husband cannot take away the minor. The mother also cannot take away without the permission of her husband i.e., father's supervision continues.

A minor cannot be appointed as a guardian (rare exception in the case of his own wife or child).

If -the mother (widow) or a female guardian is married to a person not related to the child, she is disqualified. Similarly adultery, immorality or neglect of the minor are disqualifications.

In *Zynsbi Vs. Mohamed Ghouse* : Zynabi the wife (W) and her husband Mohamed Ghouse (H) lived separately in Madras. There were 3 daughters of ages 7, 5 and 3 and one son aged 7 ½ years, H took a second wife but the marriage was dissolved. All the children were with W. One day H came and took two children by force. Thereupon W filed a petition for custody

under the Guardian and Wards Act. Held W entitled to the custody of her children.

*Other Relations:* In the absence of mother the following are entitled to custody in order of priority. Mother's mother, father's mother, full sister and other female relations including aunts. If such a female marries a stranger, she loses her preference.

Failing the above persons, the following male relations are entitled to custody on priority basis.

(i) The father, (ii) Nearest paternal grand father, (iii) Full brother, (iv) Consanguine brother.

The general rule is 'no male is entitled to custody over a female minor unless he is related to her by blood, i.e., he must be within the prohibited degrees'.

An illegitimate child upto 7 years of age must be under its mother, after that, it is left to its option.

## **2. Guardianship of Property :**

Guardians : The father is the legal guardian. Failing him

(i) Father's executor (ii) Father's father (iii) Paternal grand father's executor.

*Court Guardians:* Failing legal guardians, the court may appoint a guardian, either the mother or some other person whom the court thinks fit under the circumstances.

*De facto Guardian :* He may intermeddle with the property of the minor. He will be only a custodian. He has no rights but only obligations.

*Immovable Property :* The legal guardian should not sell it except for double the value or where it is necessary for the maintenance of the minor. A court guardian cannot sell or mortgage without the permission of the court.

A *de facto* guardian has no right at all. The leading case is *Imambindi Vs. Mutsaddi*. Z had two children (minors). She conveyed certain shares (of herself and of children) of value Rs. 10,000 to P. Held by Ameer Ali J that mother had no power to alienate as she was not the legal guardian.

Other leading cases : (i) *Venkamma Naidu Vs. Chisty*, (ii) *Kharag Narayan Vs. Hameeda Khatoon*.

In *Venkamma Naidu's* case, the mother as<sup>1</sup> guardian of a minor, executed a sale-deed of immovable properties. Held, the sale was void.

*Movable property:* The legal guardian has the power to charge the movable property for the necessity of the minor, such as food, clothing, shelter etc. Court guardians have larger powers,

in respect of movable property the *de facto* guardian has powers similar to a legal guardian.