

Muslim Law  
Guardianship

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This article titled “Minor and Guardianship under Muslim Law” deal with the concept of Minor and Guardianship, the appointment of the guardian and the removal of a guardian.

### **Who is a Minor?**

This article deals with the concept of Guardianship what it means, the appointment of the guardian and the removal of a guardian. The ‘Urdu’ term for a child is ‘walad’ and according to the Holy Quran, a ‘walad’ is a blessing be it a baby boy or a girl. Also, it specifies that be it either since they are a blessing the persons should content and satisfied with whatever the case may be.

Moreover, the Holy Quran considers female infanticide and believes that those who involve in such a crime shall be punished on the day of judgment. In several other verses the Quran provides for adoption, parentage and guardianship.

It differs from the Indian Majority Act after the completion of the eighteenth year of the child then he/she becomes an adult. And once in the instance where the marriage has been conducted by arrangement between the parents of the major boy and girl and has been misrepresented or concealed in any way then the status of the marriage shall be invalid.

This has been similarly held in the case of **Sayid Mohaddin v. Katijabai**. On the other hand, the marriage of a minor child shall be permitted by the parent or the guardian. This power is given to the parents or the guardian because it is expected of them to act in the interest of the child. There obviously exists a trust relationship between the minor child and the parent. But the relationship between the guardian and the child is fiduciary in nature. This is to ensure that the minor child is not acting unfavourably to their own interest.

Therefore, assuming that the minor child is incapable to maintain himself there is need for resorting to the appointment of a guardian who shall be an adult and shall be capable to make decisions on behalf and in the interest of the minor child be it a girl or a boy.

## TYPES OF GUARDIAN/ GUARDIANSHIP UNDER MUSLIM LAW

Guardianship under 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

## MEANING OF GUARDIANSHIP UNDER MUSLIM LAW

The word Guardianship is denoted as '*Hizzanat*' in Urdu.

### 1. A NATURAL GUARDIAN OR A LEGAL GUARDIAN

Etymologically, a natural guardian is a person who shall be naturally or by the virtue of being a parent shall be responsible for the child. Under all schools of Muslim law, the father is the natural guardian of the child. This right is derived from the Substantive Muslim law.

The person who will be next in turn to takeover guardianship in the absence of the father. But the father, if he is alive he shall be the supreme and the only guardian who shall have the right to make decisions on behalf of the minor child.

In Shia law, the legal guardian who comes next, in turn, shall be the paternal grandfather i.e. the father's father. Moreover, the role of the executor of the father shall not begin if the father is present and if the father is absent then the paternal grandfather shall be acting.

### 2. TESTAMENTARY GUARDIAN

Lexically, testamentary would mean 'by the will'. Hence, a testamentary guardian is a person who shall be appointed as the guardian of the minor child. This appointment is carried out by the father of the minor child. And under a circumstance where the father is not alive then the paternal grandfather shall have the authority to decide the guardian.

This mode of appointment is an alternate mode of appointment of a testamentary guardian. According to usual practice, the testamentary guardian is appointed by way of will which encloses who shall be the guardian to the minor child in case the natural guardian i.e. the father is not alive. A testamentary guardian can also be a non-muslim person or a female. However, specifically under Shia Law, a female can never be a testamentary guardian.

### 3. GUARDIAN APPOINTED BY COURTS OR STATUTORY GUARDIAN

Guardianship and Wards Act, 1890 comes into play when the guardian of the minor child is appointed by the court. The Rules and procedure are highlighted under this act. However, it needs to be noted that this act shall not only apply to Muslims but it also applies to every Indian citizen in India. So it applies to Hindus, Muslims, Parsi and persons of every religion and this is a Specific Legislation specifically dealing with the policy of guardianship and ward.

Under Muslim law, when the father of the child is not there and there is an absence of legal documents specific absence of a will then the court shall have the authority to appoint the legal guardian of the minor child

A district court shall be the court who shall decide and appoint the guardian of a minor child. This is done in consideration of the age of the child, the sex of the child and the way the child has been brought up till this point of time. It also needs to be asserted that the High Court also has the powers to appoint a Guardian.

### 4. DE-FACTO GUARDIAN

This mode of guardianship comes into play when the person assumes the role of guardian without any legal or statutory authority. Therefore, a person who by way of circumstances is in the guardianship of a minor child not either by way of testament or statutorily then these types of guardianship is called a De-facto guardianship.

**For instance,** A is a minor child of 12 years who lives with his mother and maternal grandmother at his grandmother's house. A's mother died due to severe diseases and A was taken into care by his grandmother. In this case, the maternal grandmother of A becomes the de facto guardian of A.

Although the grandmother has not been appointed as the guardian by the court, nor is she appointed by the parents of A as the guardian, she has to take care of A because she is the only relative of A. Therefore, a person who assumes the care and protection of a minor because of any circumstance or a moral obligation and not because any legal mandate is called a de facto guardian.

### REMOVAL OF GUARDIANSHIP UNDER MUSLIM LAW

There are certain duties which are imposed upon a guardian that is required to be performed by the guardian. On the failure of which the guardian can be removed. This removal is usually taken place in the court.

THE COURT SHALL HAVE THE POWER TO REMOVE THE GUARDIAN UNDER CERTAIN CIRCUMSTANCES WHICH ARE:

- If the husband has abused the trust of the woman
- He has not performed any duties as the husband
- The husband does not have any capacity to perform the duties
- That the husband has not treated the woman well
- That there is no regard to the orders of the court by the husband and he is also not regarding the provisions of the Guardianship Act
- When the husband has been found guilty for moral turpitude
- Have different interests as a guardian
- That the wife ceases to be a minor.

### CONCLUSION

Guardianship under Muslim Law is an essential part of personal laws of people and with the passage of time, it has been codified by way of legislations. The Guardians and Wards Act is the legislation passed by the Parliament which deals with the laws and process related to guardianship in India.

However, it cannot be ignored that personal laws are based on customs and need to be taken into consideration. Considering this, the Bombay High Court in **Smt. Farzanabai v. Ayub Dadamiya** clearly held that personal law and beliefs of the parties need to be kept in mind by the adjudicating bodies whenever they hear any matter of guardianship.

