

GUARDIANSHIP OVER THE ORPHAN CHILD AND HIS PROPERTY IN ISLAMIC LAW;

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Introduction

Children especially orphans are vulnerable and open to a lot of societal hazards and several forms of exploitation in the society hence in need of special care, protection and assistance.

An orphan has been defined as a child whose parents are dead and half orphan where he has one dead parent and living parents.¹ In another parlance an orphan is defined as a child under the age of 18 years who has had at least one parent dead. A child whose mother has died is known as a maternal orphan, a child whose father has died is a paternal orphan while a child who lost both parents is a double orphan.²

The above definition may be true and correct but for the 18 years fixed for the age of a child. In Islamic law there is no settled or fixed age of attaining the age of majority rather it is reckoned with the attainment of the age of puberty which may vary from person to person, usually ranging between the ages of 12 – 16 years.

Guardianship

Guardianship literally means the responsibility for the care of a young or an incapable person and his property. Dr (Mrs) J. A. M. Audi in her article titled Child Custody (Hadanah) under Islamic law in Nigeria: Looking at the Best Interest of the Child, defined guardianship as the responsibility to ensure proper care, maintenance and upbringing of a child. This includes expenses for the child's upbringing from infancy to maturity. The guardian has responsibility for the major decisions in the child's life and to prevent his or her exploitation.³

Legally it means the exercise of control over the affairs of another person, who due to some reasons is incapable of taking care of himself. In another parlance it is defined as the judicial relationship between a guardian and a ward or other incapacitated person whereby the guardian assumes the power to make decision about the ward's person or property.⁴ The

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¹ Garner B. A. et al 2004 Black's Law Dictionary, 8th ed., Thomson West, U. S. A. P. 1134

² UNAIDS 2004 AIDS and orphans: a tragedy unfolding, Report on the global AIDS epidemic P. 62

³ Ahmadu Bello University Zaria Journal of Private and Comparative Law, Vol. I No. I, 2006 P.220

⁴ Garner B. A. op. cit. P.726

reasons may range from minority, insanity to imbecility. For the purpose of this paper guardianship is generally discussed in relation to minority and in particular to an orphan.

In Islamic law guardianship of a minor, orphan or otherwise is classified into three:-

1. Guardianship for the person of a minor that is custody
2. Guardianship in marriage; and
3. Guardianship of the property of a minor.

Custody – Hadanah

Custody is a subdivision of guardianship referred to as guardianship of upbringing; it means the care, control and maintenance of a child. In other words signifying the rearing or breeding of a little child by caring for or guarding his interest until he/she reaches the age of puberty. Ordinarily and especially where the marriage of the parents is subsisting the father and the mother jointly take the responsibility for the care, rearing or breeding of their little child. However, where the marriage has been dissolved, the right to custody of the child whether a boy or a girl belongs to the mother.

The mother has a preferential right to the custody of her child whether before or subsequent to the dissolution of the marriage. This right of the mother subsists in case of a male child until he reaches the age of seven and in the case of a female until she attains the age of puberty. In this instance the right of the father is deferred and the primary right is vested in the mother. The mother's right to custody of her child may be supported with the tradition of the Prophet in response to a complaint by a divorced woman whose husband wanted to take away her child where he said:-

"You have more right to him as long as you do not marry"⁵

The rationale behind giving the mother right to the custody of her child may be due to her close attachment to the child which is more than his closeness to anybody else. Thus, "the mother's right of custody is that for rearing the child of tender age, mother is the best suited and this right is not lost by the mere fact that she has been divorced by the husband and is living away from him. This principle spelled out in Islamic law is based on practical experience and considerations which are conducive to the proper growth of the child. It cannot be disputed that a child of tender

⁵ Reported by Ahmad and Abu Dawud as quoted by Al-Jaza'iry A.J. (2001) Minhaj Al-Muslim Vol. 2 1st ed Darussalam, KSA, P. 392

age would feel psychologically most secured in the company of the mother rather than that of the father. No one can compete with the mother in that respect. The amount of love and care which a child receives from the mother cannot be had or expected from any other relation including the father.⁶

In determining claims of this nature and in particular where the marriage was dissolved and there is dispute between the two parents over the custody of the child, "the interest of the child can not be sacrificed. The over-riding consideration in all such cases and in all circumstances is the interest of the child and all other claim of rival parents must be subordinate to it."⁷

Although the mother has the right to the custody of the child, the father is however, still the natural guardian, as such even where the mother resides in A different area, the father has the right of general supervision, and once it is shown that he has not been deprived of that right, the mother cannot be denied her right of custody. Moreover, in case of any conflict between the father and the mother with regard to custody the interest of the child should be the sole determining factor. This clearly proves that, ordinarily, the mother is the most entitled to the custody of her minor child, though she may be deprive of it where it can be proved, that it will not be in the interest of the child to be placed under her custody.

There are differences of opinion among the scholars regarding the duration of the custody. According to the Maliki School, where there is dissolution the child should be under the care and custody of the mother, in the case of male till he is matured, and the female until she marries and consummates the marriage. But the father has to look after his or her upbringing, education, behaviour and circumcision. According to Hannafi, Shafi'i and Hambali Schools, the child remains in the custody of the mother only up to the time he or she can serve himself or herself, approximately for boys seven years and for girls nine years.⁸

However, according to another opinion, *"the female custodian, whether she is the mother or another woman like the Grand mother, has the right to custody of the child until he or she can dispense with the usual female assistance in*

⁶ Hussain I. (1989) Muslim's Law and Custom, Srinagar Law Journal Publication, Kashmir PP.331-332

⁷ Ibid P.332

⁸ El-Imairi M. T. 1978 Personal Status in Islamic Law (Unpublished manuscript) CILS, A. B. U. Zaria P.143

*eating, drinking dressing, washing etc which is presumed to be at the age of seven in case of a male and in the case of a female until she has started her monthly menstruation at the attainment of full age, because she is in need of acquiring knowledge of the good manners required of women such as cooking and other household works."*⁹

Under the Shia law, the custody of the child is a right as well as an obligation of the parents. With regard to the custody of a child, his mother has precedence up to two years from the birth of the child. After the lapse of this period, the (right of) custody shall go over to the father, except in case of female children who shall remain under the custody of the mother until they attain the age of seven. Neither of the parents has the right to refuse to accept the custody of the child as long as he or she is liable for its custody. In the case of such refusal, the judge shall compel the person who is (legally) liable for the custody of the child (to look after the child) on an application by the other parent, guardian, any of the close relatives or the public prosecutor. Should such compulsion not be possible or effective, the custody of the child shall be (arranged) by the judge on the expenses of the father and should the father be dead, on the expenses of the mother.¹⁰

From the foregoing discussion it is abundantly clear that the guardianship of a child is necessary and it vests in the mother as of right. The child whether male or female, capable of understanding or not has no option of choosing whom to stay with between the father and the mother. Of all the people that have a right in the custody, the mother has the best title and the minor must remain in her custody so long as she is competent and had not been disqualified on any ground, until her entitled period expires.

Custody of an Orphan

By and large where the minor in issue is an orphan paternal or maternal different consideration would apply. If the minor is a maternal orphan i.e where his or her mother is dead, the custody shall pass to the following female relatives in order of priority:- Mother's mother, followed by maternal aunt, then father's mother, then Germane sister, then uterine sister, then Germane sisters daughter, then uterine sister's daughter, then the paternal aunt, then brother's daughter.¹¹

9. Qadri A. A. 1986 Islamic Jurisprudence In The Modern World, Taj company, Turkman gate, Delhi P.407

10 Iranian Civil Code 1967 SS. 1168, 1169 AND 1172

11. Ibid S. 1170

The right cannot be taken away by father by appointing any other person as guardian of the minor. However, the right is lost or may be forfeited in the following circumstances:-

1. Where, the woman who has the right of custody of a minor, neglects to take proper case of the child
2. Where, the woman is leading an immoral or infamous life or is guilty of misconduct or cruelty.
3. Where she marries a person who is a complete stranger to the minor, or who is related to the minor but not within the prohibited degree; but where she marries a relation that is within the prohibited degree to the child the right is not forfeited.
4. Where she apostates
5. If she insane or afflicted with contagious disease.

From the foregoing discussion we understand that the determining factor in deciding the custody of the child is the child's best interest and welfare.

The Right of Male Relation to Custody of a Child

In default of the women listed above, the right of custody of the child devolves on the father. In the case of an orphan i.e. where both of his or her parents are dead his or her custody devolves to the child's father's male relations in the following order of priority:- father's father followed by Germane Brother, then consanguine brother, then Germane Brother's son, then the consanguine brother's son, then the full paternal uncle, then the consanguine paternal uncle, then the full paternal uncle's son and then the consanguine paternal uncle's son.

Where more than one person came together as being entitled to the custody of the child the most pious and eldest should be selected excluding anyone who is of bad moral character or who is an idiot or a cousin in case of a girl of marriageable age.¹²

Guardianship of the Property of a Minor

A minor or an orphan may get property either through inheritance, gift, bequest, endowment, sadaqah. Etc. Guardianship of the property of a minor is based on the fact that a minor is interdicted, debarred or prohibited from exercising his legal right over his property by reason of his age.

¹² Qadri A.A. op.cit. P. 407
A.B.U.L.J. Vol. 24 – 25, 2006

There are different classes of guardians in relation to the property of a minor, they include:-

- i. A Dejure guardian
- ii. Testamentary guardian
- iii. Appointed guardian
- iv. A defecto guardian

A Dejure guardian in other words known as legal guardian includes also the testamentary guardians and it consists of the following classes of people 1. The Father, 2. The father's executor or nominee 3. The father's father and 4. The father's father executor.

Against the above background, the law provides that the guardianship over the minor's property cannot be exercised by all those who can exercise the guardianship of upbringing. In fact guardianship of property is assigned to the father as of right. Where the father is dead it passes to his executor where he appoints one. Where he did not appoint an executor, the guardianship will then devolve on the father's father, then followed by the administrator or executor appointed by the father's father.¹³ In the absence of any of the above the court will have the right to appoint a guardian to take charge of the minor's property.

A defecto guardian is a guardian that is neither a legal guardian nor a guardian appointed by the court but a person who voluntarily placed himself in the charge of the person or property of the minor; he can be either the uncle, brother, mother or any other relation of the minor besides the legal guardian.

Powers of the Guardians

The law carefully and exhaustively defines the powers and duties of guardians being they legal guardians or defecto guardians.

Powers of a Defacto Guardian

A defector guardian is considered as a custodian to the minor's property only, and has no right or power to transfer the property of the minor, where he did, such transfer is void.¹⁴ In the case of *Ali Mohammed V Ramniwas* ¹⁵.

¹³ Ibid Pp. 415-416

¹⁴ Hussain I. Op. Cit. P334

¹⁵ 1964 A.J.R. Raj. 258

It was held that a defector guardian has no power to transfer any right or interest in the immovable property of the minor and that such a transfer is not only voidable but void.

Likewise a sale by a minor's uncle of the minor's property is void ab initio and the minor is entitled to treat it as a nullity.¹⁶

Even the mother has no right to assume guardianship for her child's property unless appointed as executor, otherwise any purported dealings or transfer of the minor's property will be illegal and void. Thus in the case of *Gyasuddin V Allah Tala Waq Mansuma*¹⁷ A mother of a minor son, although she had not been appointed by the court as guardian for the minor, purported to execute a Waqf for and on behalf of the minor son. It was held that the execution of the Waqf by the mother for and on behalf of the minor son was illegal and void, in as much as the defacto guardian has no right to alienate the minor's property.

Powers of a Legal Guardian

A legal guardian has the power to sell even the immovable property of the minor and infact can do so even without the sanction of the court except where he is appointed by the court. According to Hannafi law, where it is absolutely necessary or where the advantage is obvious, the guardian can sell the movable property for an adequate consideration and invest the proceeds in a beneficial and profitable venture for the benefit of the minor. In fact it is even permissible for a father to sell his own property to the child and vice versa. With regard to immovable property the guardian can transfer them where double value may be obtained, more especially where the sale is a necessity; such as where the produce of the property is not enough to meet the expenses of keeping it or where it has been usurped and the guardian has reason to fear that there is no chance of restitution.¹⁸

According to Shafi'i law, a legal guardian can alienate movable property of a minor by way of exchange or on credit if the interest of the minor so demands, such as where he is carrying on business for an infant proprietor. However, where the guardian is appointed by the court or is a testamentary guardian, he is not allowed to pledge the goods of his ward into his own hands on account of debt due to himself, nor into the hands of any person over whom he exercise control or parental authority

¹⁶ Sadar Shah Vs Haji I.L.C. 545

¹⁷ 1986 A.I.R. All 19

¹⁸ Qadri A.A. Op. Cit, PP. 416 - 417

for the he is merely an agent and cannot have a double capacity in contract.¹⁹

Going by the above presentation, it is clear that a father has the power to deal with the property of his minor son in manner he likes, but it must be in such a way that it has some advantage or benefit to the minor child.

The father's executor on the other hand can dispose of only the movable property at a reasonable consideration; but he has no power to dispose of the immovable property.

While a judge or guardian appointed by the court has power to look after and develop the child's property only. He can only dispose of movable property where it is necessary for the maintenance or welfare of the minor. He can not dispose of the immovable property.

Remuneration for the Guardian

The law generally recognises the right of a guardian to be allotted a reasonable remuneration. However, where the guardian is rich or can afford to render his services without the remuneration, it is commendable for him to do the job free of charge; but where he is poor then he is permitted to charge reasonable wages for his job. The basis of this statement is clear from the provisions of the Qur'an and Traditions. The Qur'an provides in this respect that:-

".....If the guardian is well – off let him claim no remuneration, but if he is poor let him have for himself what is just and reasonable..."²⁰

From the tradition it was reported that Muslim went to the Holy Prophet (SAW) and said to him "I am poor and I have an orphan under my guardianship. The Prophet replied:- 'eat from the property of the orphan under your guardianship but don't consume it extravagantly or against their growing up or hoarding money from it..²¹

This infact ascertained that a guardian is entitle to remuneration for his job, especially where he is poor, but he is cautioned while taking the remuneration to take what is reasonable, fair and just and not to be extravagant by consuming it hastily before the child grows up.

¹⁹ Ibid

²⁰ Holy Qur'an 4:6

²¹ Hadith quoted by El-Imairi M.T. Op. Cit
A.B.U.L.J. Vol. 24 – 25, 2006

Code of Conduct for the Guardian

Guardians either of the orphan or of the minor child are warned in very strong terms against misappropriating and squandering their ward's property. So many verses of the Holy Qur'an unequivocally denounced guardians that unjustly squander the property of their ward.

The provisions of the Holy Qur'an on this subject refer to orphans, but the wording are construed to be of general application and defines principles just like those of chancery in English law and court of wards in India.²² In its warning against misuse or misappropriation the Qur'an provides:-

"To orphans, restore their property (when they reach their age) nor substitute (your) worthless things for (their) good ones, and (by mixing it up) with your own. For this is indeed a great sin. "²³

This verse enjoins justice to the orphan, it means for example not to substitute a weak animal of yours for a fat one of the orphan or not to give something of bad quality for something of good quality or not to mix them together with your own so that you eat up both.²⁴ Three things are particularly mentioned as temptations in the way of a guardian which he must avoid:-

- i. He must not postpone restoring all the property of his ward when the time for doing so comes.
- ii. Where there is a list of the property under his care, it is not enough that such list should be technically followed; the property restored must be of equal value to the property received. The same principle applies where there is no list.
- iii. If the property is managed together, or where perishable goods must necessarily be consumed, the strictest probity is required when the separation takes place.

The restoration of the property mentioned in number one above is however, subject to the provision of the Holy Qur'an that says:-

"To those weak of understanding make not over your property, which God hath made a means of support for you, but feed and cloth them therewith and speak to them words of kindness and justice."²⁵

²² Yusuf A.A. The Holy Qur'an Text, Translation and Commentary, Dar Al Arabia Vol. I. P.179

²³ Holy Qur'an 4: 2

²⁴ Al-Mubarakpuri S.S. Et al 2000 Tafsir Ibn Kathir Vol. 2 Al Haramain Islamic Foundation Darussalam KSA Pp. 372 as quoted from At-Tabari 7:525 - 528

²⁵ Holy Qur'an 4: 5

Another verse of the Holy Qur'an also warned the guardians in the following terms:-

*"Those who unjustly eat up the property of orphans, eat up a fire into their own bodies they will soon be enduring a blazing fire."*²⁶

This verse was revealed when the widow of Sa'ad b. Rubai complained to the Prophet that her husband died in Uhud and left two daughters and property, but his brother took all the property and left nothing for the daughters.²⁷

Another guide for the guardians was provided in the Holy Qur'an in the following words:-

*They ask thee concerning orphans. Say: The best thing to do is what is for their good, if you mix their affairs with yours they are your brethren, but God knows the man who means mischief from the man who wished He could have put you into difficulties: He is indeed Exalted in Power Wise."*²⁸

This verse recommends that the best way is for the guardian to keep the property, household and account of the orphan separate from his own, otherwise there may be some temptations to derive some personal advantages there from. However, in some cases it may be more economical and advantageous to the orphan to have his property administered with that of the guardian and in some cases to live in household of the guardian or marry from the guardian's family. If that is so then, there is no harm in managing the property together.²⁹

The reason for the revelation of the above verse as reported by Ibn Jarir was that according to Ibn Abbas when Qur'an 6: 152 and 4: 10 were revealed thus:-

"And come not near to the orphan's property, except to improve it" and "Verily, those who unjustly eat up the property of orphans, they eat up only fire into their bellies, and they will be burnt in the blazing fire"

Those who took care of some orphans, separated their food and drink from the orphans' food and drink. When some of the orphans' food and

²⁶ Ibid 4: 10

²⁷ El-Imairi M.T. Op. Cit. P159

²⁸ Holy Qur'an 2: 220

²⁹ Yusuf A.A. Op. Cit. P. 86

drink remained, they would keep it for them until they eat it or otherwise get spoiled. This situation was difficult for them and they mentioned this subject to Allah's Messenger, hence the verse 2: 220 was revealed and they joined their food and drink with that of the orphans.³⁰

Ibn Jarir further reported that Aishah said "I dislike that an orphan's money be under my care, unless I mix my food with his food and my drink with his drink"³¹

The verse signifies that there is no harm if you mix your food and drink with the orphan's food and drink since they are your brothers in faith. Moreover Allah knows those whose intent is to cause mischief or righteousness. If Allah wills, He would have made this matter difficult for you. But He made it easy for you by allowing you to mix your affairs with that of the orphans in a way that is better. Allah has thus allowed spending from the orphans estate by its executors, in reasonable proportions, on the condition that the executor has the intention to compensate the orphan later on, when he can afford it.³²

What should be born in mind however, is that the sole aim of these rules is to safeguard the interest of the orphan and the yardstick for determining his interest is what is best for him in a given circumstance. All this has been left to be judged by the conscience of the guardian and in doing so he is reminded that God knows all he intends.

Termination of Guardianship

The guardianship over a minor's property does not continue indefinitely. It normally terminates at the minors attainment of the age of puberty and possession of the quality of prudent judgement for the management of property. The age of puberty is attained at either the age of 18, or the ejection of seminal liquid while asleep or awake, or the growth of the coarse hair around the private organ or menstruation or pregnancy; while maturity is determined by the child showing sound judgement and prudent handling of property without extravagance. In support of this the Qur'an categorically provides:-

"Make trial of orphans until they reach the age of marriage, if then you find sound judgement in them, release their property to them, but consume it not

³⁰ Al-Mubarakpuri S.S. Et al 2000 Tafsir Ibn Kathir Vol. I Al Haramain Islamic Foundation Darussalam KSA Pp 609 – 610 as quoted from At-Tabari 4:348-350 Abu Dawud, An-Nasai and Al-Hakim

³¹ Ibid P.610 as quoted from At-Tabari 4:355

³² Ibid PP. 610 - 611

wastefully nor in haste against their growing up...."

33

This verse refers to teaching the age of adolescence, according to Ash-Sha'bi, Malik and several others among the salaf.³⁴ In another verse, the Qur'an also provides:-

"To orphans restore their property (when they reach their age)..."³⁵

The Sunnī Schools are however not unanimous as regards to the issue of attainment of maturity. The issue of determining maturity is of great importance today giving regards to the complexity of modern business affairs, long period of schooling and the dynamic nature of the world economic system, as such there is the need for the law to take a definite stand over the issue. However, the four Sunnī Schools of Jurisprudence have shed light on the issue. For instance according to the Shafi'i School the development of intelligence and wise management of property are the major yardstick to be used in ascertaining the issue. The minor after reaching the age of puberty might not have necessarily attained sufficient intelligence to enable him give a scrupulous judgement to warrant being entrusted with the management of his property.

According to Imams Abu Hanifah, Abu Yusuf, Mohammed Shaybani and Shafi'i, guardianship of property normally terminates at puberty. They however, differ in the question of – whether in the exceptional cases of the prodigal, the weak minded and the underdeveloped (a) minority continued *Ipso facto* or (b.) a new interdiction must be imposed by a judicial decree, and as to the effect of such continued incapacity and when it terminates. According to Imam Abu Hanifah it terminates in all cases at the attainment of the age of 25. While according to Maliki and Hambali schools, the incapacity of a prodigal child may continue up to 50 years and even beyond.³⁶

Guardianship in Marriage

Like other aspects of guardianship, a father also has the power to impose the status of marriage on his minor child especially the female. According to Islamic Law, any marriage contracted without a guardian is void. This is the view of the majority jurists and is supported with a

³³ Holy Qur'an 4: 6

³⁴ Al-Mubarakpuri S.S. Op.Cit. Vol. 3 p.517

³⁵ Ibid 4:2

³⁶ Adri A.A. Op.Cit. Pp. 414 - 415

A.B.U.L.J. Vol. 24 – 25, 2006

prophetic tradition that says:- "There is no valid marriage without a Wali."³⁷

Again the prophet (SAW) is reported to have said,

"Any woman who married without the permission of his guardian, the marriage is void."

³⁸

The law permits the father to compel his minor daughter to marry in other word known as the power of compulsion (Ijbar). Power of Ijbar means the exercise of power by a father in imposing marriage on his minor daughter with or without her consent or even on a matured daughter, though it is desirable if he consults her.³⁹

The whole idea of guardianship under Islamic law is based on the need of giving protection to people who are incapable of protecting themselves.

It is only the father and the father's father who has the power to compel his virgin daughter into marriage and he is referred to as guardian with power of compulsion i.e. Waliy – Mujbir. However, where a father accords to his daughter the privilege of choosing the person she liked to marry, he is deemed to have waived his power of compulsion. Thus in the case of Alhaji Isa Bida V Baiwa Alhaji Isa Bida.⁴⁰ It was held inter alia – that there can be no right of Ijbar, after the father having considered his daughter to be matured enough to decide things for herself, allowed her to choose a husband.

Guardianship of Orphan in Marriage

It follows from the above that for the orphans generally there is no power of compulsion in marriage since it is only a father that has been given such powers. Other guardians do not have the power to compel their ward into marriage and they are referred to as Waliy ghayr Mujbir (guardian without the power of compulsion).

It is equally prohibited to marry orphans without giving a dowry. In this respect Allah says:-

*"And if you fear that you shall not be able to deal justly with the orphan girls, then marry (other) women of your choice, two....."*⁴¹

³⁷ Karim F. 1939 Al-Hadith Mishkat-ul Masabih Book II. The Book House Lahore P.651

³⁸ Ibid P.651

³⁹ Karimatu Yakubu & 1 or Vs Alahji Yakubu Tafida Paiko Unreported CA/K805/85

⁴⁰ SCA/NWS/CV/47/70

⁴¹ Holy Qur'an 4: 3

Allah commands, that when one of you is a caretaker of a female orphan and he fears that he might not give her a dowry that is suitable for women of her status, he should marry other women, who are plenty as Allah has not restricted him. The reason for the revelation of this verse as reported from A'ishah was that a man was taking care of a female orphan and he married her, although he did not desire to marry her. That girl's money was mixed with his and he was keeping her portion from her.⁴²

Conclusion

From the foregoing discussion, we have seen how the rights of the minors and the orphans are safeguarded in Islamic Law. Certain guiding principles had been laid down towards the guardianship, upbringing and maintenance of minor and orphan child. Parents and guardians are to look after their wards and to look after their property with the consciousness that Allah sees and knows all that they do bad or good.

⁴² Al-Mubarakpuri S.S. Op.Cit. Vol. 2 P.373 As quoted from Fath Al-Bari 8:87