



# **FACULTY OF JURIDICAL SCIENCES**

**COURSE:**

**Semester**

**SUBJECT:**

**SUBJECT CODE:**

**NAME OF FACULTY:**

# Lecture-1



## LECTURE 1: Acknowledgement of Paternity

### Guardianship Under Muslim Law:

The source of law of guardianship and custody are certain verses in the Koran and a few ahadis. The Koran, the alladis and other authorities on Muslim law emphatically speak of the guardianship of the property of the minor, the guardianship of the person is a mere inference. We would discuss the law of guardianship of custody as under :

- (a) Guardianship,
- (b) Custody, and
- (c) De facto guardian.

### Classification of Guardianship

In Muslim law guardians fall under the following three categories : (i) Natural guardians,

- (ii) Testamentary guardians, and
- (iii) Guardians appointed by the court.

### Natural Guardians

In all schools of both the Sunnis and the Shias, the father is recognized as guardian which term in the context is equivalent to natural guardian and the mother in all schools of Muslim law is not recognized as a guardian, natural or otherwise, even after the death of the father. The father's right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor. The father has the right to control the education and religion of minor children, and their upbringing and their movement. So long as the father is alive, he is the sole and supreme guardian of his minor children.[5]

The father's right of guardianship extends only over his minor legitimate children. He is not entitled to guardianship or to custody of his minor illegitimate children.

In Muslim law, the mother is not a natural guardian even of her minor illegitimate children, but she is entitled to their custody.[6]

Among the Sunnis, the father is the only natural guardian of the minor children. After the death of the father, the guardianship passes on to the executor. Among the Shias, after the father, the guardianship belongs to the grandfather, even if the father has appointed an executor, the executor of the father becomes the guardian only in the absence of the grandfather. No other person can be natural guardian, not even the brother. In the absence of the grandfather, the guardianship belongs to the grandfather's executor, if any.'

### Testamentary Guardian

Among the Sunnis, the father has full power of making a testamentary appointment of guardian. In the absence of the father and his executor, the grandfather has the power of appointing a testamentary guardian. Among the Shias, the father's appointment of testamentary guardian is valid only if the grandfather is not alive. The grandfather, too, has the power of appointing a -testamentary guardian. No other person has any such power. Among both the Shias and the Sunnis, the mother has no power of appointing a testamentary guardian of her children. It is only in two cases in which the mother can appoint a testamentary guardian of her property of her minor children :.first, when she has been appointed a general executrix by the will of the child's father, she can appoint an executor by her will; and secondly, she can appoint an executor in respect of her own property. which will devolve after her death on her children.

The mother can be appointed a testamentary., guardian or executrix by the father, or by the grandfather, whenever he can exercise this power. Among the Sunnis, the appointment of a non-Muslim mother as testamentary guardian is valid, but among the Shias such an appointment is not valid, as they hold the view that a non-Muslim cannot be a guardian of the person as well as of. the property of a minor. It seems that the appointment of non'-Muslim fellow-subject (iiminmi) is valid, though it may be set aside by the kazi. According to the Malikis and the Shafii law, a zimmi can be a validly appointed testamentary guardian of the property of the minor, but not of the person of -the minor. The Shias also take the same view. It appears that when two persons are appointed as guardians, and one of them is disqualified, the other can act as guardian. A profligate, i.e., a person who bears in public walk of life a notoriously bad,character, cannot be appointed as guardian:

Acceptance of the appointment of ...testamentary guardianship is necessary, though acceptance may be express or implied. But once the guardianship . is accepted, it cannot be renounced save with the permission of the court.

Muslim law does not lay down any specific formalities for the appointment of testamentary guardians. Appointment may be made in writing or orally. In every case the intention to appoint a testamentary guardian must be clear and unequivocal. A testamentary deposition made by a testator may be invalid, but appointment of the executor may be general or particular. The testator must have the capacity to make the will at the time when it was executed. This means that the testator should be major and of sound -mind, i.e., at the time of execution of the will, he should be in full possession of his senses.

The executor of the testamentary guardian is designated variously by Muslim lawgivers, indicating his position and powers. He is commonly called, wali or guardian. He is also called amin, i.e., a trustee. He is also termed as kaim-mukam, i.e., personal representative of the testator.

Guardian appointed by the Court.-On the failure of the natural . guardians and testamentary guardians, the kazi was entrusted with the power of appointment of guardian of a Muslim minor. Now the matter is governed by the Guardians and Wards Act, 1890. This Act applies to the appointment of guardians of all minors belonging to any community. The High Courts also have inherent powers of appointment of guardians, though the power is exercised very sparingly.

Under the Guardians and Wards Act, 1890, the power of appointing, or declaring any person as guardian is conferred on the District Court. The District Court may appoint or declare any person as guardian of a minor child's person as well as property whenever it considers it necessary- for the welfare of the minor, taking into consideration the age, sex, wishes of the child as well 'as the wishes of the parents and the personal law of the minor.

**SELF-TEST QUESTIONS**

S.NO	Question	Option (a)	Option (b)
1.			
2.			
3.			
4.			
5.			

**Answers: 1-(),2-(), 3-(),4-(),5-()**