

Custody and Guardianship in Islam

by Syed Mumtaz Ali

Recently, a visitor to our web site requested more information concerning the subject of guardianship in Islam. The response to his letter would necessarily be rather detailed and so instead we decided to publish his letter and our response on our website so as to clarify some of the points with our readers. The following is his original letter to us then our response to him follows. Please note that we have withheld both his name and e-mail address for reasons of privacy.

Beginning of Letter

Dear Administrator,

Your Web Site is really very informative and impressive. I tried to find an answer to a question which is related to family matters but couldn't. Could you please help me.

Under the English concept, which forms the basis of the " Law of Guardian and Wards and operative in Pakistan, custody of a minor rests with the mother for a period of Seven years in case of Boys and until Puberty in case of Girls.

What are the Islamic Laws on the subject.

..... End of Letter

Our Response

Thank you for your letter. Perhaps this short answer will help you to learn about the fundamental provisions of Islamic Law (*Shariah*) with regards to the technical details of guardianship.

To begin with, one has to bear in mind that there are two types of guardianship over a minor: -

1. *Wilayah* or guardianship of the property and education and marriage of the ward
2. *Hizanah* or guardianship over the rearing and bringing up of the child.

Guardians are appointed in the following manner: -

1. by natural right, or
2. by testament, or
3. by appointment by a judge

Neil B.E. Baillie in his '*Digest of Moohummadan Law*', which is a condensed presentation of the Hanafi code of jurisprudence (*Fatawa-e-Alamgiri* -- page xxxiii of the Introduction), treats these three methods of appointment in this way: "Of Guardians there seems to be two kinds the *lineal* and the *testamentary* guardian. The powers and duties of the former are limited to the marriage of his ward, and of the latter to the care of his person and property. The testamentary guardian does not appear to be distinguished from the ordinary executor. No executor has authority to contract minor in marriage, unless he happens to be the lineal guardian also."

Guardianship for purposes of marriage

Guardianship for the purpose of marriage is allowed because of the necessity for a proper and suitable match which may not always be available. Guardianship extends to the father and grandfather and other relations in their absence. But when a minor is given in marriage by a guardian, other than the father or the grandfather, he or she can, in exercise of what is called the option of puberty, refuse to be bound by the marriage and ask the court to annul the marriage. If the guardian was the father or grandfather, a legal presumption is raised that they must have acted in the best interest of the minor. The presumption is, however, not conclusive and such a marriage can also be set aside in certain cases where it is plainly undesirable, and injurious to the minor.

There is a difference of opinion among the Hanafis as to the circumstances under which a marriage contracted by the father can be set aside. The accepted view seems to be that if the father was not a man of proper judgment and was of reckless character and married his minor daughter to a man of immoral habits, it is liable to be set aside. Abu Yousuf and Muhammad go further that an

evidently unequal or undesirable marriage or marriage for less than a proper dower of a minor female or an excessive dower for a minor male is not valid, but Abu Hanifa does not share this view.

Guardianship for purposes of management and preservation of property

The guardianship of a minor for the management and preservation of his property devolves (1) first on his or her father, (2) then on the father's executor, (3) next on the paternal grandfather, (4) then on his executor, (5) then on the executors of such executors, (6) finally on the ruling power or his representative -- a Qazi or judge. Ultimately it rests upon the Qazi to appoint a guardian for an infant's property when there is no near guardian (i.e., the father, the father's father and their executors). The other paternal kinsmen who are termed 'remote kindred', and the mother succeed, according to proximity, to the guardianship of an infant for the purpose of education and marriage. They do not have the right to be guardians of the minor's property unless appointed to do so by the ruling authorities, or unless appointed to be a guardian in the original proprietor's Will, which has been duly attested by competent witnesses. If the mother remarries, she forfeits her right to guardianship. However, she can regain this right should she become divorced again and has thus returned to widowhood.

In case of default of the mother as well as the paternal kindred of a minor, the minor's maternal relations (according to proximity) are entitled to guardianship for the purposes of education and marriage, and not management of the ward's property, unless appointed in the late owner's Will or by the Qazi.

The general rule is that a guardian, executor, or anyone who has the care of the person and property of a minor, can enter into a contract which is (or likely to be) advantageous and not injurious to his or her ward.

A guardian may sell or purchase moveable items on account of his ward, either for an equal rate or at such a rate that may leave a slight loss, but not at such a rate which would make the loss great and apparent (*Hidayah*, vol. IV, pg. 553)

Guardianship (custody) for purposes of bringing up children (education etc.)

Of all the persons, the mother is the most entitled to the custody (*Hizanah*) of her infant child during marriage and after separation from her husband, unless she: 1) has become an apostate, 2) is wicked, or 3) is unworthy to be trusted (*Fatawa-i-'Alamgiri* vol. 1, pg. 728)

Next, the mother's mother, no matter how high, is entitled to the custody (*Hizanah*) of her infant child. If she has died or is married to a stranger, then the full sister is entitled. If the sister has died or is married to a stranger, then the half-sister by the mother is entitled to custody of the child.. On the failure of her in the same way, the daughter of the full sister, then the daughter of the half-sister by the mother. Next the maternal aunt in the same way, and then the paternal aunts also in like manner. (*Fatawa-i-'Alamgiri* vol 1. Pg. 728)

The woman's custody of a boy terminates when he is 7-years old, whereas the custody of a girl terminates when she reaches puberty.

The man's custody continues until puberty for a boy, and not just until puberty for a girl, but until she can safely be left to herself and trusted to take care of herself.

It is important to always bear in mind that under Muslim Law, *personal* emancipation does not necessarily lead to an emancipation of *property*. As a matter of fact, the Islamic system recognizes two distinct periods of majority: 1) One has reference to the emancipation of the person of the minors from the *patria protestas* (*bulughyet*), 2) The other to the assumption by them of the management and direction of their property (*rushd*). Among the Hanafi's and the Shi'ah, puberty is presumed to occur upon the completion of the 15th year; among the Maliki's upon the completion of the 18th year. The Hanafi's and the Shi'ahs **generally** consider *Rushd* (discretion) and *bulughyet* (puberty) to go together, and therefore the personal emancipation of minors which occurs on their attaining puberty, carries with it the emancipation of their goods from the hands of their guardians. They thus become entitled to take charge of their own property.

There are cases, however, in which a boy or a girl may have arrived at puberty and may yet not be sufficiently discreet (possessed of understanding) to assume the direction of his or her own property. In such cases, the Muhammedan Law separates the two ages of majority, and while according to the minor personal emancipation from the right of *jabr*, (i.e. the right to impose the status

of marriage on a minor) takes care (in the minor's own interest) to retain the administration of his or her property in the hands of the legal guardian.

If a minor should not be discreet at the age of puberty, he or she will be presumed to be so when the ward completes their 18th year, unless there is any direct evidence to the contrary. (Syed Amir Ali, *Muhammedan Law*, Vol. II, pg 493, Published by All Pakistan Legal Decisions, Nabha Rd., Lahore, 1965)

The principle of two distinct, and yet concurrent, periods of majority has been adopted in the Indian Majority Act, going back as far as 1875 (See chapter: The Status of Infancy - Personal Emancipation - emancipation of Property - Indian Act IX of 1875)

For further elaboration of provisions relating to puberty, we have reproduced below the entry under the heading of "puberty" from *The Dictionary of Islam*, by T.P. Hughes (published by Premier Book House, Katchery Road, Lahore, Pakistan):

"Puberty. Arabic *bulugh*, *bulughiyat*. The puberty of a boy is established as soon as the usual signs of manhood are known to exist; but if none of these signs exist, his puberty is not clearly established until he has completed his eighteenth year. The puberty of a girl is established in the same way; but if the usual signs of womanhood are known not to exist, her puberty is not established until her seventeenth year has been completed. This is according to the teaching of the Imam Abu Hanifah. But his two disciples maintain that upon either a boy or girl completing the fifteenth year, they are to be declared adult. The Imam ash-Shafi'i concurs in this opinion, and it is said there is also a report of Abu Hanifah to the same effect. The earliest period of puberty with respect to a boy is twelve years, and with respect to a girl nine years."

When a boy or girl approaches the age of puberty and they declare themselves adults, their declaration must be credited, and they then become subject to all the laws affecting adults, and must observe all the ordinances of the Muslim faith. (*Hidayah*, Hamilton's Translation, vol. iii. P. 483; *Jamiu 'r-Rumuz*, *Durru 'l-Mukhtar*)

Syed Ameer Ali says: "The validity of marriages contracted for minors by any guardian other than the father or the grandfather, is not established until ratified by the parties on arriving at puberty. Such ratification in the case of males must be express, and in the case of females, may be either express or implied on arriving at

either ratifying the contract entered into during their minority or of canceling it. According to the Sunnis, in order to effect a dissolution of the matrimonial tie, in exercise of the right of option reserved to the parties, it is necessary that there should be a decree of the judge; and until such decree is made, the marriage remains intact. If before a decree has been obtained one of the parties should die, the survivor would be entitled to inherit from the deceased.

The Shi'ahs differ materially from the Sunnis on this. They hold that a marriage contracted on behalf of minors by any unauthorized person (*fazuli*), i.e. any person other than a father or a grandfather, remains in absolute suspension or abeyance until assented to by the parties on arriving at puberty; that, in fact, no legal effect arises from it until such ratification, and if in the interval previous to ratification, one of the parties should die, the contract would fall to the ground and there would be no right of inheritance in the survivor." (*Personal Law of the Mahommedans*.)"

When a female has neither a father nor grandfather nor any of her *'asabah* (remote/distant kindred) to take charge of her, or if the *'asabah* is immoral, it is a duty of the judge to take cognizance of her condition. And if she can be trusted to take care of herself, he should allow her to live alone, whether she be a virgin or a *saiyibah*. (a woman who departs from her husband either through death or divorce or a girl who has lost her virginity.) [It is to be noted that a girl who has lost her virginity by fornication is considered a virgin in law, provided that her fornication has not formed the subject of a judicial proceeding. In short, a virgin, in fact, and one in law (*hukmi*) stand on the same footing]. If she cannot be trusted to take care of herself, then he should place her with some female *amin* or trustee, in whom he has confidence. After all, he is the superintendent of all Muslims. (*Fatawa-i-'Alamgiri*, vol. 1 pg. 780)

When a mother refuses to take charge of the child without hire, then the child may be committed to another.

A boy or a girl having passed the period of *hizanah*, has no option to be with one parent in preference to the other, but he or she must necessarily remain in the charge of the father. (*Hidayah* vol. 1 pg. 889)

Before the completion of *iddah* or dissolution of marriage, the proper location of *hizanah* is where the husband and wife live. The former cannot take away the child out of the custody of the latter. After completion of her *iddah* and separation from her husband, a woman

may take her child to the place of the mother's birth, provided that the marriage had been contracted there, or it is so close to the place of separation or close to the husband's residence, in such a way that if the husband should leave his residence in the morning, in order to visit the child, he will be able to return to his residence before nightfall. There is also no objection to her moving with the child from a village to the city or chief town of the district, if this is advantageous to the child, and in no way injurious to the father. If the child's mother is dead and *hizanah* or custody has passed to the maternal grandmother, she cannot remove the child to her own city, even though the marriage had taken place there. Other women are like her in respect to the place of *hizanah*.

For further details relating to place of *hizanah*: 1) while the marriage between the child's parent still subsisting; 2) after dissolution of the marriage; and 3) after the death of the child's mother, please refer to pages 439-440 (in the section under "Of the Place of *Hizanah*") of Baillie's Digest. However, the following quote may be appropriate in order to conclude this discussion:

"When a man who takes away his child from his mother, and then divorces her, is obliged to return the child to her. A man having married a woman at Busra, where she bears him a child, takes the child with him to Kufa, and there divorces the mother; whereupon she brings a suit against him for the child, contending that he must bring it back to her. If he took away the child by her own desire, he is not obliged to bring it back, and the woman should be told to go there and fetch it. But if the child was taken there without the mother's direction, he must bring it back to her. A man goes out from Busra to Kufa taking his wife and child with him, and then sends her back to Busra and divorces her. In such circumstances it is incumbent on him to send the child back to her, and he may be compelled to do so."

(*Hidayah*, vol. I.; *Fatawa-i-'Alamgiri*, vol. I.; *Durru 'l-Mukhtar*, pg. 846; *Jami'u 'r-Rumuz*; *Tagore Lectures*, 1879; Baillie's Digest, p. 430.)