



DISSERTATION PAPER

ON

**GUARDIANSHIP OF PROPERTY: A CRITICAL ANALYSIS
UNDER PERSONAL LAWS AND STATOTURY LAWS**

Course Title: Supervised Dissertation

Course Code: LAW 406

SUPERVISED BY

Nadia Rahaman

Lecturer, Department of Law

East West University

**A thesis submitted in conformity with the requirements for the degree of Bachelor of Laws,
Department of Law, East West University**

SUBMITTED BY

Md. Mahmudul Hassan Khan

ID: 2015-3-66-015

Submission Date: 12th December 2019



DEPARTMENT OF LAW

Plot No-A/2, Main Road, Jahurul Islam City, Aftabnagar, Dhaka-1212, Bangladesh

Tel: 09666775577 (Ext 421), E-mail: shahjalal@ewubd.edu

URL:<http://www.ewubd.edu>

Consent Form

The dissertation titled Guardianship of Property: A Critical Analysis Under Personal Laws and Statutory Laws prepared by Md. Mahmudul Hassan Khan, ID: 2015-3-66-015 submitted to Nadia Rahaman for the fulfillment of the requirements of Course 406 (Supervised Dissertation) for LL.B. (Hons.) degree offered by the Department of Law, East West University is approved for submission.

.....

Signature of the Supervisor

Date:

Acknowledgement

First, I would like to thank respected Mohammed Shahjalal Sir (Senior Lecturer and Chairperson, Department of Law, East West University) for giving me such opportunity to do this thesis work.

I am very grateful to my Supervisor, Nadia Rahaman Ma'am (Lecturer, Department of Law, East West University) for helping me to choose the subject matter of this thesis. She has provided me various research supports at every phase of the study and has directed me in every step. I will remain ever grateful to the tireless efforts of my Supervisor.

I also want to thank respected Nabila Farhin Ma'am (Lecturer, Department of Law, East West University) for helping me regarding my thesis work. This thesis would not have been possible without the commitment and enthusiasm of all those who are involved in this process.

I would also be thankful to my honorable faculty members Md. Khairul Islam and Mohammed Ataul Karim Sir (Senior Lecturer, Department of Law, East West University) for motivating me regarding my research works. Besides, I would like to thank all my faculty members of the Department of Law, East West University for their assistance, cooperation and support which enriched my research paper a lot.

Last but not the least; I would like to thank my parents to give me the spirit and support in all respects of my life.

Declaration

I, Md. Mahmudul Hassan Khan, do hereby solemnly declare and affirm that this research paper is original and my own work and is not copied from anywhere or from anyone's view. The purpose of this research is to complete my undergraduate degree as a course. A list of references is inserted in it to maintain the citation materials.

Contents

1. Consent Form.....	A
2. Acknowledgement.....	B
3. Declaration.....	C
4. Abstract.....	I
5. Abbreviations.....	II
6. Chapter-I: INTRODUCTION.....	1-2
1.1 Introduction	
1.2 Methodology	
1.3 Limitation of the Study	
1.3 Scope	
1.5 Aims and objective	
1.6 Research question	
7. Chapter-II: GUARDIANSHIP OF PROPERTY: DIFFERENT STATUTORY LAWS & RELIGIOUS LAWS.....	3-8
2.1 Introduction	
2.2 Guardianship of property under Muslim law	
2.3 Guardianship of property under Hindu law	
2.4 Guardianship of under Christian law	
2.5 Conclusion	
8. Chapter-III: GUARDIANSHIP OF PROPERTY CASES – A CRITICAL ANALYSIS...9-15	
3.1 Introduction	
3.2 Guardianship of Property Cases- A Critical Analysis	
3.3 Conclusion	

9. Chapter-IV: COMPARSIONS OF DIFFERENT COUNTRIES REGARDINGTHE GUARDIANSHIP OF PROPERTY.....	16-19
4.1 Introduction	
4.2 Comparative studies with other countries	
4.3 Conclusion	
10. Chapter-V: RECOMMENDATION AND CONCLUDING REMARKS.....	20-22
5.1. Findings of the Study	
5.2. Recommendations	
5.3. Concluding Remarks	
11. Bibliography.....	23-26

Abstract

This research work mainly deals with the existing laws in Bangladesh related to the Guardianship of property. It shows some critical analysis of the Personal laws and statutory laws. This paper also has discussed the laws with various case principles and also tried to show how the Courts are taking decisions regarding this issue. This work has tried to show some inconsistency by comparing the relevant laws. This research work also has discussed the perspective of other countries and tried to give a comparative study regarding the issue of guardianship of property. This paper mainly focuses on the analysis of guardianship of property according to the personal laws, statutory laws, and various case principles. There is a great debate that if mother can get the custody of her minor child as well as the guardianship of property. In order to fill the gap in the present debate, this dissertation contains recommendations to amend the current legal provisions that whether mother should get the guardianship of property if the situation demands.

LIST OF ABBREVIATIONS

1. Appellate Division	AD
2. All India Reporter	AIR
3. Bangladesh Legal Decisions	BLD
4. Dhaka Law Reports	DLR
5. Edition	ed.
6. The Guardian and Words Act, 1890	GWA
7. Gauhati Law Reports	Gau.
8. High Court Division	HCD
9. Indian Law Reports Calcutta series	Cal.
10. Kerala Law Journal	KLJ
11. Latin, short for ibidem, meaning “the same place”	Ibid
12. Law Reports Indian Appeals (Eng)	IA
13. Pakistan Legal Decisions	PLD
14. Supreme Court	SC
15. Volume	Vol.

**GUARDIANSHIP OF PROPERTY: A CRITICAL ANALYSIS
UNDER PERSONAL LAWS AND STATOTURY LAWS**

CHAPTER-I
INTRODUCTION

1.1 Introduction:

In Bangladesh disputes related to the personal matters are determined by their own religious and personal law for both men and women. The area of custody and guardianship is also related to personal laws. Personal laws which are applicable in Bangladesh have gone through a series of procedural and to a degree gender equality enhancing reforms over the past fifty plus years.¹ These reforms, both in the before and after independence eras, have benefited women in a number of areas such as divorce, marriage, and inheritance.² Although the area of custody and guardianship has not met any significant amendment through legislation, but in some occasions we can see that by some case decisions from the Apex court a number of progressive trend setting judgments which may serve as guidelines while adjudicating disputes in the area.³ The main guiding law related to guardianship of property in Bangladesh is The Guardianship and Wards Act 1890. In this topic I have discussed about the related provisions related to guardianship and some comparative studies with different countries regarding guardianship laws with Bangladesh. Also in this study I have tried to figure out how new amendment can be made in our laws so that woman has gender equality in getting guardianship of a child saving the best interest of child and not conflicting with the personal laws. Thereafter, in the last part this study ends with its findings of the overall research and prospective recommendations.

1.2. Methodology:

This research can be said as theoretical research or descriptive research which includes relevant case principles, theories, and different opinions of individuals. On the basis of these, I have added my own hypotheses or choice of research methods with addressing the questions of why and how. I have conducted this research by describing what exists and also, I have tried to

¹ Nowrin Tamanna, Muhammad Amirul Haq, Sara Hossain: MUSLIM WOMEN’S RIGHTS UNDER BANGLADESH LAW Provisions, Practices and Policies related to Custody and Guardianship; The South Asian Institute of Advanced Legal and Human Rights Studies (SAILS) 2011

² Ibid

³ Ibid

discover new meanings as well. To conduct this research, I mainly used secondary data. The methodology is depending on some secondary sources by searching websites, different blogs, various books, online journals, newspapers, and different journal articles. I also collected data from various Acts, Statutory Laws etc. for performing this work.

1.3. Limitations:

These systematic assessments on this issue might be able to get better outcome if there is no limitation of time. Only three months is not enough for this research. I could not have more time and consultations for my other courses and examination. Doing this research, I was not able to find enough materials regarding this topic. I was not able to find some important cases regarding this matter for the lack of DLR, PLD, and AIR in the library as well.

1.4. Objectives of the study

1. The objective of this study is to analyze the relevant laws regarding the issue.
2. To show the conflicting circumstances between the traditional and statutory laws.
3. Comparing our laws with other country's laws.
4. Suggesting better ways to resolve disputes regarding guardianship of property.
5. To provide equal legal status of both parents with respect to guardianship of property.

1.5. Scopes:

The work is mainly based on the existing provisions regarding the guardianship of property in Bangladesh and showing some criticism about the existing systems. This paper also contains some case principles regarding the guardianship of property.

1.6. Research Question:

Several questions can be framed on this research topic. However, this research has been limited to the following question. To fulfill the purpose of the research following question will be addressed: Whether the courts in Bangladesh has followed 'Best Interest Principle' in case of minor's property?

CHAPTER -II

GUARDIANSHIP OF PROPERTY: DIFFERENT STATUTORY LAWS & RELIGIOUS LAWS

2.1. Introduction:

Religious laws in Bangladesh are commonly known as Personal laws. All religion has their own personal laws. Every religion has its own laws regarding the guardianship of the child's property. In this chapter I have chosen to study the position of the guardianship of property under different statutory and religious laws.

2.2. Guardianship of property under Muslim law:

Guardianship of the property means and includes the right to take all decision about the property of the child. The right belongs to father and grandfather and to anyone according to their wasiyat (will) or to anyone appointed by the court⁴. According to the Muslim law, there are three types of Guardianship that are recognized for the purpose of guardianship of property. Such as –

- i. Legal guardian
- ii. Guardians appointed by the court and
- iii. De facto guardian.

2.2.1 Legal guardian:

According to the Muslim Law, father is the legal guardian of his minor child's property. During the lifetime of the father, he is legal guardian of property of the children and in his absence, grandfather will enjoy the right of guardianship of property.⁵ Under Hanafi law, the father is the guardian of the minor's property; failing him, in order of priority, the following are entitled-

- a. Father's executor

⁴ Al- Zuhaili, Wahbah Dr, Al- Fiqh Al- Islami Wa Adillatuhu, (The Islamic Jurisprudence and its Evidences), Syria, Vol. 9 (1997) 6691.

⁵ Dr. Muhammad Ekramul Haque, Muslim Family Law (first published 2015, London college of Legal Studies) p- 393

b. Father's father

c. Paternal grandfather's executor and

d. Executor of the last-named executor.⁶

Above mentioned persons are the only people who are entitled to be appointed a guardian of the property of a minor. Mother has no power to appoint legal guardian by will in case of guardianship of property.⁷ The important point is that mother, brother, uncle, etc., are not legal guardians.⁸ According to the Hanafi Law, the executor of the father's will have preference over the grandfather. On the other hand, Shia Law says that, however hold that the father cannot appoint an executor by will in presence of the grandfather. Shafi law also mentions that grandfather has preferential rights over the father's executor in matter of property management.⁹ On another view, appointment of an executor by the father is valid to extent of one- third of the property and for the discharge of all rights or claims upon his estate.¹⁰

2.2.1.1 Alienation by legal guardian:

Generally, Muslim Law does not allow legal guardian to alienate immovable properties of a minor. But there are some recognized exceptions to this general rule:¹¹

1. Where the sale may fetch double the value of the property.
2. Where minor has no other property and sale is necessary for minor's maintenance.
3. Where there are no other means of paying debts of the deceased.
4. Where there are no other means of paying debts of the legacies (under Will).

⁶ The Hanafi texts distinguish the powers of the father from those of any other guardian and subdivide fathers according to their powers of judgment.

⁷ Syed Khalid Rashid, Muslim Law, (5th edn. 2009, Eastern Book Company Lucknow), p- 173.

⁸ D.F. Mulla, Principles of Mohammedan Law (18th edn. By M. Hidayatullah, N.M Tripathi, Mumbai 1977) p-375

⁹ Syed Khalid Rashid, Muslim Law, (5th edn. 2009, Eastern Book Company Lucknow), p- 173.

¹⁰ Ibid, 173.

¹¹ D.F. Mulla, Principles of Mohammedan Law (18th edn. By M. Hidayatullah, N.M Tripathi, Mumbai 1977) p-376-77

5. Where the income is less than the expenses of the property.
6. Where the property is falling into decay.
7. Where the property has been usurped and the guardian fears that there is no chance of fair restitution.

On the other hand, in case of Movable properties legal guardian has power to sell or pledge the goods and chattels of the minors for the minor's imperative necessities, such as food, clothing or nursing.¹²

2.2.2 Guardian appointed by the court:

On the absence of the legal guardians, the court is competent to appoint a guardian for protecting the minor's property.¹³ 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. According to the Guardians and Wards Act 1890, the power of appointing, or declaring any person as guardian is conferred to 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.¹⁴

2.2.2.1 Alienation by certified guardian:

A guardian of the property of a minor appointed by the court under The Guardians and Wards Act, 1890, is bound to deal with movable properties as carefully as a man of ordinary prudence would deal with his own property. That clearly mentions that, he may alienate only in cases of grave necessities.¹⁵ In case of Immovable properties, the certified guardians cannot alienate

¹² *Imambandi v. Mutsaddi* [1918] 45 IA 73

¹³ *Ahmadallah v. Mafizuddin Ahamed*, [1973] AIR 1973 Gau 56

¹⁴ The Guardians and Wards Act, 1890. S 17

¹⁵ Syed Khalid Rashid, *Muslim Law*, (5th edn. 2009, Eastern Book Company Lucknow) p- 175

property of minor without the permission of the court and without necessity of the minor. But with the prior permission of the court, he may alienate.¹⁶

2.2.3 De-facto guardian:

De facto guardians mean persons not belonging to these two (legal guardians and Certified guardians) categories, but who place themselves in this position of a guardian by intermeddling with the property of the minor, are called de facto guardians.¹⁷ A self-appointed guardian is de-facto guardian. 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.¹⁸

2.2.3.1 Alienation by de-facto guardian:

In case of movable property, a de-facto guardian has power to sell or pledge the goods and chattels of the minors in his charge as a legal guardian of his property. But he cannot enter into any contract whereby the minor would be saddled with any pecuniary liability.¹⁹ On the other hand, a de facto guardian has no right to alienate immovable property of a minor. Such transfer is void.²⁰ Thus a sale, Mortgage, or any other transfer by mother, who is a de facto guardian, is absolutely void as held in *Imambandi v. Mustasaddi*²¹ case.

¹⁶ Mortgage, sell, gift away or exchange the property, lease any part of that property for a term exceeding 5 years or for any term extending more than one year beyond date on which the ward will cease to be a minor.

¹⁷ A.A.A Fyzee, Outline of Mohammedan Law (3rd edn., 1964) p- 203

¹⁸ Paras Diwan, Family Law (Allahabad Law Agency, Faridabad, 2007) p- 293

¹⁹ D.F. Mulla, Principles of Mohammedan Law (18th edn. By M. Hidayatullah, N.M Tripathi, Mumbai 1977) p- 305-306

²⁰ Syed Khalid Rashid, Muslim Law, (5th edn. 2009, Eastern Book Company Lucknow), p- 177

²¹ (1918) 45 IA 73.

2.2.4 Removal of guardian

A guardian can be removed in the interest of the minor. This has been discussed in Section 39 of The Guardians and Wards Act, 1890. The court may remove a guardian appointed or declared by court or a guardian appointed by will or other testament if: (1) He abuses trust (2) Fails to perform his duties (3) Incapacity to perform duties (4) Ill-treatment or neglect of ward (5) Continuous disregard of provisions of Guardianship and Wards Act or of any order of the court (6) Conviction of an offence showing moral turpitude (7) Having interest adverse to his duties as a guardian (8) Ceases to reside within limits of the court (9) Goes insolvent (guardian of property) (10) Cease to be under the law to which the minor is subject.²²

2.3 Guardianship of property under Hindu law:

The Dharmashastras did not deal with the guardianship's law. During the British period the courts promoted and developed the law of guardianship. The Guardianship and Wards Act, 1890 is similarly applicable for Hindus of Bangladesh like Muslims in ascertaining guardianship. It has come to established that the father is the natural or legal guardian of the children and when he is dead, mother is the natural guardian of the children and no one else can be the natural guardian of minor children. In Hindu law Testamentary guardians were also established: It was also established that the paramount guardianship of the minor children vested in the State as parents' parties and were exercised by the courts.²³

In Hindu law, father is the natural guardian of the person and separate property of the minor children of his. The Court has no power to appoint a guardian for a minor whose father is alive and fit as a guardian. In case of mitakshara joint family where all the sons are minors, the court may appoint a Guardian of the whole of the joint family property until one of the sons attains his majority.

In absence of father, the mother becomes the guardian of a minor unless the father appoints another guardian than mother for his children. In absence of both father and mother, the court may appoint the closest male paternal kinsman or the nearest male maternal kinsman or even a

²² The Guardians and Wards Act, 1890, S 39

²³ Retrieved from <<http://www.crisp-india.org/laws/67-guardianship-under-hindu-muslim-christian-and-parsilaws>> accessed 8 November 2019

stranger as guardian if the Welfare and benefit of the minor requires it. Mother is a lawful Guardian of her illegitimate children. But where the father is known, he has the preferential right over mother.

2.4 Guardianship of under Christian law

Some of the civil laws directly regulating family matters of Christians in Bangladesh are as follows²⁴: i. The Christian Marriage Act, 1872, ii. The Divorce Act, 1869. iii. The Guardian and Wards Act, 1890. iv. The Succession Act, 1925. The matter has been left in the hand of the discretion of the Court. Generally, Christians in Bangladesh are governed by the provisions of the Guardians and Wards Act of 1890 in matters which are related to guardianship of minors in respect of their person and property. The personal laws of the Christians and Parsis do not have any specific provisions on minority and guardianship. There is no separate enactment on the subject either. It is presumed that the father acts as a natural guardian of the minor children and their property²⁵. After him, the mother is presumed to act as a natural guardian as preferential right.

2.5 Conclusion:

In this chapter I have tried to provide an overview determine the guardianship of property under deferent religion and statutory laws. Muslim, Hindus, Christian law are equally following The Guardian and Wards Act, 1890 to determine the guardianship of property. According to the Mohammedan law and Hindu law, father is the legal guardian and mother can get the custody right till certain period of the minor. Muslim law took more restrictive approach to determine the guardianship of property. In the next chapter I will discuss this matter through case analysis.

²⁴Asma Jahan, LEGAL STATUS OF GUARDIANSHIP OF MINOR: BANGLADESH PERSPECTIVE, <<https://www.aarcentre.com/index.php/aarcentre/article/view/47/237>> accessed 9 November 2019

²⁵Rezaul Karim, Laws of Guardianship in Bangladesh: An Appraisal <<http://sclsbd.org/laws-of-guardianship-in-bangladesh-an-appraisal/>> accessed 9 November 2019

CHAPTER: III

GUARDIANSHIP OF PROPERTY CASES – A CRITICAL ANALYSIS

3.1 Introduction:

The term guardian is defined by the Guardians and Wards Act, 1890 (hereinafter, GWA) as a person having the care of the person of a minor or of his property or of both person and property²⁶. There are some important case principles regarding the guardianship in property matter. In this chapter I have chosen here to study the position of the guardianship of property under different case principles with critical analysis.

3.2 Guardianship of Property Cases- A Critical Analysis:

3.2.1 Imambandi v. Mutsaddi,²⁷

In this case, Ismail Ali Khan died in March 1906 leaving three widows and several children. Three months after his death, one of the widows whose name was Zohra wanted to sell the share for herself and her two children to certain purchasers. But on this situation other two widows and their children opposed the purchasers. On behalf of the purchasers Zohra filed a suit. She argued that she was the acknowledged wife and her two children were legitimate children of Ismail Ali Khan so she could lawfully alienate the minor's property. In this case, the Privy Council clearly held that, mother has no right or power to alienate the property for the reason she was not a legal guardian.

According to this case principle, Mother is only a custodian but not a legal guardian. Father is a natural or legal guardian so he has all rights upon his minor child's property.²⁸ In case of imperative necessities father can alienate his minor property but mother can't do this. Not only alienate the property but also a de-facto guardian will not be able to enter into an agreement whereby the minor will be implicated any pecuniary liability.²⁹ As a de-facto guardian mother

²⁶ The Guardians and Wards Act, No. 8 of 1890] S. 4(2),

²⁷ (1918) 45 IA 73, Cal. 878

²⁸ M. Jashim Ali Chowdhury, A Text Book on Muslim Personal Law (2nd edn. 2016, Sufi Prokashoni) p- 333

²⁹ D.F. Mulla, Principles of Mohammedan Law (18th edn. By M. Hidayatullah, N.M Tripathi, Mumbai 1977) p.305-306

has no right to her minor property which is related to alienate or pecuniary liability. In this case court clearly held that:

“It is now well settled that under Muhammedan Law that mother is not legal guardian of the immovable property of her minor children though she may be in charge of the same. Her position is no better than that of any other person who the charge of the person property of a minor and she is nothing but a de facto guardian having no power to convey to another any right or interest of the immovable property. Such contract is not enforceable against the minor.”³⁰

3.2.2 Meherun Hossain v. Nazrul Islam,³¹

In this case, Nazrul Islam was a tenant. The building was under the supervision of Meherun Hossain. The building originally belonged to Md. Ahamed Hossain who died leaving a widow (Meherun Hossain) and one son and two daughters. After the death of her husband, she entered into an agreement with Nazrul Islam to sell this building. Within six months she got appointed as guardian and obtained necessary permission to sell the property. But for getting higher price she was trying to sell it to another person. Nazrul Islam filed a suit for specific performance.³² On this situation lower Court provided the judgment in favor of Meherun Hossain. But lower court’s judgement was overruled, and court held that, under the Mohammadan law mother is not a legal guardian of the immovable property of her minor. She cannot alienate the minor’s property. In this case the most important point was that mother did not have the authority on the date of sale. The principle is like the *Imambandi v. Mutsaddi*³³ case.

Though the situations are different in both the cases, the decisions are similar. They clearly mentioned that mother is not a legal guardian, but she is a custodian or de-facto guardian. In above two cases mother is a custodian but mother has no right to alienate the property. In both the cases, nothing was discussed about the minor’s imperative necessities, so court provided their judgement against the mother. But our legal system follows the precedent and court follows the case principles. According to the “Best Interests of the Child” principle, mother can get the

³⁰ *Meherun Hossain v. Nazrul Islam*, 46 DLR 1994(HCD) 86 Para 11

³¹ 46 DLR 1994 (HCD) 86

³² *Ibid*, para 2

³³ (1918) 45 IA 73, Cal. 878

custody but on this same principle applying mother cannot be a guardian of the property of her minor child's. We can see two conflicting application of the same principle when we analyze the cases. The child if safe with her mother then mother can get custody but why the minor's property is not thought to be safe under his mother's supervision if the situation demands and why the mother cannot get the guardianship of the property is a question here. According to me satisfactory answer is yet to be found.

3.2.3 *Meethiyan Sidhique v. Mohammad Kunju*,³⁴

In this case the Supreme Court held that, father is the legal guardian and in absence of the legal guardian other legal guardians would be entitled to act. In their absence property's guardian will be appointed by the competent court. For the benefit of the minor's, the legal guardian and the court appointed guardian is entitled to alienate the minor's property. The mother is not guardian for the alienation of the property of the minor. Therefore, the mother cannot sell the minor's property and if the mother sale the minor's property then the sell is void.

3.2.4 *Haji Abdullah khan v. Nisar Mohammad Khan*,³⁵

This is another important case. In this case court held that, according to the Muhammadan Law father is the legal guardian or executor of the father or the person appointed by his will or the grandfather or executor by his will. Court relying on *Imambandi v. Mutsaddi*,³⁶ case principal held that mother's position is to be a stranger in property of the minor and position of the uncle is no better than mother. Uncle is not an authorized legal guardian and all who are not included among the guardians mentioned above are strangers.³⁷ In this case mother is treated as a stranger in case of guardianship of property of the minors. In the above case Khawaja Mohammad Khan brought a land for two of his own minor and two of his brother's minor sons. Question was raised that whether the contract was enforceable if entered on behalf of the minor's? Regarding this question court held that, De-facto guardian can't buy any immovable property on behalf of the minor.

³⁴ (1996) 7 SSC 436: AIR 1996 SC 1003

³⁵ 17 DLR (SC) 481

³⁶ (1918) 45 IA 73, Cal. 878

³⁷ *Haji Abdullah khan v. Nisar Mohammad Khan*, 17 DLR (SC) 481

In *Rahima Khatoon v. Saburjanessa*,³⁸ court held that when any women married another person on the death of former husband then she will not be entitled to the guardianship of person or guardianship of property of her minor daughter. Generally regarding the guardianship of property mother's right is much less and father's³⁹ right is the best of all.

3.2.5 *Azmeri Haque Badhon v. Mashrur Siddiqi Sonet*,⁴⁰

This is the landmark case in our sub-continent where court provided a judgment that, mother is a legal guardian of her minor child. Court also mentioned that, for ensuring the best interest of the child, court can apply the discretionary power and can provide that decision. In this case, the court is held to have rightly appointed the mother in preference to the father, as guardian of the minor for the welfare of the child.⁴¹ For the welfare of the minor court provide that judgment. In this case court clearly held that-

“The guardian of the daughter is her mother and she will stay in her custody. The child's father can visit her twice a month in the presence of her mother. But for the betterment of her daughter the mother's decision will be held as final. So, she won't just receive general custody, whereas she will get the child's complete guardianship.”⁴²

This case is a leading case regarding guardianship of property of minor child in our country. In this case mother filed a suit for child's custody but for the thought of best interest of the child, court provided the custody with guardianship to the mother. Dhaka's 12th District and Session Court's Assistant Judge provided this judgment by suo moto rule. In this case court observed 'best interest of the child' doctrine. Court also observed that father could not ensure the best

³⁸ AIR 1996 Gau 33, (1995) 3 GLR 210

³⁹ i. Father; ii. executor appointed by the father; iii. father's father, iv. Executor appointed by the paternal grandfather, and v. Executor of the last name executor.

⁴⁰ Unreported case, Dhaka's 12th District and Session Court's, Assistant Judge

⁴¹ Sarjean Rahman Lian, Barrister at Law and Advocate of the Supreme Court of Bangladesh, Guardianship of a minor in Bangladesh Law, <<https://www.daily-sun.com/printversion/details/379835/2019/03/24/Guardianship-of-a-minor-in-Bangladesh-Law>> accessed 28 November 2019

⁴² Staff-reporter, Badhon receives guardianship of daughter Saira, (published at 09:16 pm April 30th, 2018) Dhaka Tribune <<https://www.dhakatribune.com/showtime/2018/04/30/badhon-receives-guardianship-daughter-saira>> accessed 21 November 2019

interest of her child and father was not providing any maintenance of the child when the child was under the custody of the mother. Mother could not claim any maintenance or any past maintenance, just she wanted the custody of her child. Court said that for the betterment of her daughter, the mother's decision will be held as final and she won't just receive the custody whereas she will receive the full guardianship of her child.

3.2.6 *Muhammad Baksh v. Mst Gulam Fatima*,⁴³

In this case court held that, all rules of Muhammadan law relating to the guardianship and custody are applying for the benefits of the children or to ensure the best interest of the minor. According to this case Muhammadan law doesn't create any discrimination to men and women about who gets the guardianship of the property. If any mother ensures that if she gets the custody and guardianship, it will be applied for the benefits or best interest of the minor. On this basis mother can get the guardianship of the property.

3.2.7 *Syeda Shamsunnaher v. Morshed Anwar Khan*⁴⁴

In this case High Court Division deviated from the old notion and progressively held that a court can appoint a mother as both the custodian of person and guardian of the property of the minor child in view of the welfare of the child. In view of the series of findings of the Apex Court, it is time to review the age-old Act. Nevertheless, decision as reported in this case has binding force of law. Mother is a person who can take best care of the minor's person and property and as such she should get priority over all to be the guardian of the person and property of the minor's.

3.2.7 Other relevant case analysis:

Under Muhammadan Law, only the father, the executor appointed by the father's will, the father's father and executor appointed by the will of the father's father are entitled to be guardians of the property of a minor, and in their absence the duty of appointing guardian for the protection and preservation of the minor's property falls on the court.⁴⁵ All of those cases are provided their

⁴³ PLD (1953) Lahore 73

⁴⁴ 10 MLR [2005] (HCD) 148

⁴⁵ *Achamma v. Yousuff and Others*, (1958) KLJ, 305

judgment against the mother. To providing the judgment against the mother are creating gender discrimination. Father will be a legal guardian, but mother will not get the right. Although our Constitution clearly says that “the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of the birth.”⁴⁶ But regarding this matter, there is discrimination. Father’s father gets the guardianship of property, but mother will not get this right. Mother gives us birth, nurture us but regarding the guardianship of property she is deprived. I do not say that father or father’s father or executor by the father or father’s father should not get the guardianship of property, but that mother should also be entitled to be in this list to get the guardianship of property. In absence of a de-jure guardian, mother or a de-facto guardian provide to pledge of the minor’s movable property for his imperative necessities.⁴⁷

On the other hand, in *Abu Baker Siddique v. S.M.A Bakar & others*,⁴⁸ *Mst. Zohra Begum v. Sh. Latif Ahamed Munawar*,⁴⁹ *Bashir Ahamed v. Abida Sultannna*,⁵⁰ cases court provided their judgment according to the best interest of the child,⁵¹ and mother got the custody of her child but cannot get the guardianship of the property. In guardianship matters, it’s presumed that father is the ‘natural’ guardian.⁵²

3.3 Conclusion:

After analyzing the cases the researcher observes that, father and father’s executor get preference over the mother in case of guardianship of property on the other hand in case of custody matter get preference over the father. Father is a legal guardian and mother is a custodian.⁵³ Mother has no right to alienate the minor’s property, according to Muhamman law only legal guardian and

⁴⁶ The Constitution of the people’s republic of Bangladesh, Ar. 28 (1)

⁴⁷ *Mohammad Amin v. Vakil Ahamed* (1952) AIR, SC 358

⁴⁸ 38 DLR (AD) 1986

⁴⁹ PLD 1965 Lah. 695

⁵⁰ 1989 ALD 432

⁵¹ The best interest principle is consistently practiced in the Family Courts of Bangladesh. There are a plethora of cases that followed this principle: *Abdul Jalil & another vs Sharon Laily Jalil* 50 DLR (AD)55; 10 MLR (HCD) 2005, 148

⁵² *Knowing Our Rights: Women, family, laws and customs in the Muslim world: Women Living Under Muslim Laws*, (2006, 3rd Edn. The Russell Press, Nottingham, UK). p-345

⁵³ *Imabandi v. Mutsaddi*, (1918) 45 IA 73, Cal. 878

court appointed guardian can alienate the minor's property.⁵⁴ In most of the custody cases, courts provide the decision according to the best interest of the child's principle. But it is a matter of sorrow that in the case of guardian of the property courts are not applying that principle. In this chapter I have tried to provide an overview with critical analysis of the different case principles regarding the guardianship of the property. In the next chapter I will discuss some comparisons with other country regarding the guardianship of property.

⁵⁴ *Amin v. Vakil Ahamed*, (1952) SCR 1133

CHEAPTER – IV

COMPARSION AMONG DIFFERENT COUNTRIES REGARDING GUARDIANSHIP OF PROPERTY

4.1 Introduction:

In Bangladesh and South Asian countries custody is given based on best interest of children where guardianship is decided based on bloodline and fathers are to be legal guardian. But there are many Central Asians and African countries where women and men have equal rights to custody & guardianship and decisions are given on the best interests of the child doctrine. In this chapter I have chosen a few states for a comparative study of the position of guardianship of the property.

4.2 Comparative Study of the other countries:

4.2.1 Tunisia:

The Tunisian laws apprehend ‘the equal rights of parents in custody and guardianship’.⁵⁵ It has created a scope for a mother to get guardianship of the property of her children. According to the Tunisian law, during the marriage, father and mother has equal responsibilities and right for their child. In case of divorce, death of the father, or separation of the spouse, if the mother can get the custody right then she will also get the full guardianship. According to the best interest of the child, mother can get both the rights. In Tunisia-

“In the event of divorce, the judge shall award custody based on the best interests of the child. If the mother is awarded custody, she exercises the authority of guardianship in relation to the ward’s travel, education, and financial affairs; she may be granted full powers of guardianship if the guardian is unable or unfit t to exercise them.”⁵⁶

⁵⁵ Knowing Our Rights: Women, family, laws and customs in the Muslim world: Women Living Under Muslim Laws, (2006, 3rd edn The Russell Press, Nottingham, UK). p-344

⁵⁶ Ibid, p-344

Father and mother have equal rights to custody and guardianship matters. This decision is based on the best interest of the child.⁵⁷ The Tunisian Code does not set ages as limits for custody of the mother and all custody cases are decided by the court in the best interests of the child.⁵⁸ If the mother is awarded custody, she exercises the authority of guardianship as well.

4.2.2 Turkey:

According to the Turkey law, custody and guardianship do not discriminate between the father and the mother.⁵⁹ Father and mother have equal right regarding the guardianship of property. Men are not regarded as being superior to women in this matter.⁶⁰

In Turkey father and mother are treated equally for guardianship and custody matter. But in the Indian sub-continent father is the legal guardian and mother is custodian or de-facto guardian. Turkey also Recognize women and men as having equal rights to custody & guardianship of property.⁶¹

4.2.3 Gambia:

Under the Family Code if there is a disagreement, the best interest of the child is the guiding principle.⁶² Custody and guardianship of children can be awarded to the father, the mother, or a third party. S. 29:1 (Rights of Children) of the 1997 Constitution provides for taking account of the best interests of the child with regards to custody and guardianship.⁶³ So according to the

⁵⁷ Islamic Family Law, Tunisia Republic of Draft: Under Review.<<https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/tunisia-republic-of-%EF%BF%BD-%EF%BF%BD-draft-under-review/>> accessed on 21 November 2019

⁵⁸ Tunisia text - Reunite International <www.reunite.org > edit > files > Tunisia Text> Accessed on 1st December 2019.

⁵⁹ Knowing Our Rights: Women, family, laws and customs in the Muslim world: Women Living Under Muslim Laws, (2006, 3rd edn The Russell Press, Nottingham, UK). p-344

⁶⁰ Ibid, p-345

⁶¹ Legal capacity and proxy decision making, 2010.<<https://www.alzheimer-europe.org/Policy-in-Practice2/Country-comparisons/2010-Legal-capacity-and-proxy-decision-making/Turkey>> accessed on, 21 November 2019

⁶² Knowing Our Rights: Women, family, laws and customs in the Muslim world: Women Living Under Muslim Laws, (2006, 3rd edn The Russell Press, Nottingham, UK). p-344

⁶³ Supra, p-344

Gambia laws, mother is a legal guardian as like father. There is no gender discrimination regarding the guardianship of property and custody matter. Court provides the judgment according to the best interest of the child principles.

4.2.4 Senegal:

In Senegal, the judge awards custody and guardianship to either parent or a third person according to the best interest of the child. If a widow remarries, other relatives may request the court to fix certain conditions regarding the custody, maintenance, and education of the child.⁶⁴ In Senegal guardianship of property is awarded to the father or mother or a third person who will ensure the best interest of the child.

4.2.5 Cameroon & Central Asian Republics:

Custody and guardianship can be given to either parent. The best interest of the child is the paramount consideration.⁶⁵ This country also does not create any discrimination with man and women regarding the guardianship of property matter.⁶⁶

So, it can be seen that less developed African countries like Cameroon and many central Asian Muslim countries have given equal rights to custody & guardianship to men and women. Those countries look on to the best interest of the child. Also, country like Indonesia and Tunisia do not give legal guardianship to the father automatically rather it has been given on the best interests of the child. Indonesia has more liberal approach of giving custody to the minor's child in the hand of mother in normal circumstances. But in Bangladesh Custody is decided in the best interests of the child; fathers are presumed to be 'natural' guardians where mother cannot be a legal or natural guardian at all. Where it can be said that woman does not have equal right to men in case of guardianship of property.

⁶⁴ Supra, p-345

⁶⁵ Supra, p-345

⁶⁶ Child Abduction Information, <<https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/International-Parental-Child-Abduction-Country-Information/Cameroon.html>> accessed on 30 November 2019

4.3 Conclusion:

It has been seen that in case of custody and guardianship of a minor many Muslim countries are taking liberal approach as there is no strict injunction in Quran. But in comparison to other countries, in Bangladesh mother cannot be a legal guardian according to the case precedents of our country that means our country is taking more rigid approach regarding this matter. In this chapter I tried to provide a comparative overview of the other countries regarding the guardianship and property matter. In the next chapter I will discuss about recommendation of my research, finding and conclusion of this study.

CHAPTER-V

RECOMMENDATIONS AND CONCLUSION

In this chapter, I will be discussing about the findings of my study based on my research. Then I will try to recommend some prospective solution for the outcomes of the study with some concluding remarks.

5.1 Findings of the Study:

The main purpose of this study was to find out as to how mother gets the right of guardianship of property and whether children's best interest in property has been properly protected by the courts of law or not. From the reviewed articles, case principles and journals, firstly, it is found that, mother is mostly a custodian of her minor child. As a custodian or de-facto guardian, she has no right to alienate the minor's property even if it's necessary for the minor. According to the Islamic law, even if the mother has the physical custody of her children, father continues to be the guardian of the child as he is supposed to support the child financially.⁶⁷ Under Muslim Law mother is not the natural or the legal guardian of the child and is merely entitled to preferential custody up to certain ages. But the father or the paternal grand-father of the minor may appoint the mother, brother or uncle or any other person as his executor or executrix of his will in which case they become legal guardian and have all the powers of the legal guardian.⁶⁸ There are numerous cases where courts have observed that the welfare of the child will get paramount importance to determine the custody and for this reasons mother gets the custody but according to this principle mother cannot get the guardianship of property. There is a direct discrimination between men and women. In absence of father, father's father is entitled to be a legal guardian, but mother has no power to be legal guardian. In modern times, mothers are also seen to maintain their child from their means. In this scenario, the law of guardianship which recognizes mainly the father to be the natural guardian has become obsolete.

On the other hand, most of the Muslim countries clearly mention that in case of 'guardianship and custody' men and women are equally treated. But our country has created a discrimination

⁶⁷ Asma Jahan, LEGAL STATUS OF GUARDIANSHIP OF MINOR: BANGLADESH PERSPECTIVE, Journal of Asian and African Social Science and Humanities (ISSN 2413-2748)

⁶⁸ Ibid, p-3

regarding this matter between men and women although our constitution clearly mentions that men and women are not to be discriminated based on sex, race, caste etc. In *Azmeri Haque Badhon v. Mashrur Siddiqi Sonet*,⁶⁹ case, court provided guardianship to the mother.⁷⁰ In the matter of guardianship of children, a Muslim woman is definitely at odds. Under the Guardian and Wards Act, 1890, further, a mother can always apply to the court to be appointed the guardian of her children.

The important findings of this research are-

- I. Regarding the guardianship of property there is discrimination between men and women.
- II. The children's interest in property has not been properly protected by the courts of-law.
- III. Father gets preferential rights over the mother regarding this matter.
- IV. There is no statutory obligation that mother cannot be a legal guardian.
- V. Best interest principles are only applied for determining the custody not for determination of the guardianship of property.
- VI. The court can provide the guardianship of property by suo-moto to the mother.
- VII. Some Muslim Countries provided the guardianship of the property to mother based on best interest of the child.

5.2. Recommendations:

There should not be any discrimination regarding guardianship and custody of children between father and mother. I recommend two steps that may be taken forward to ensure welfare of minor child. They are given below:

- i. The government should take proper measures to ensure equal rights regarding guardianship of children by amending the prevailing statutory laws regarding this. Article 182 of the Turkish Civil Code states, as a principle, the judge grants the custody or guardianship of the children to the parent he or she believes will look after the children better. Men do not have any superiority over women in this respect. In Bangladesh we can also apply this in guardianship law to ensure the equal rights.

⁶⁹ Unreported case, Dhaka's 12th District and Session Court's, Assistant Judge

⁷⁰ Staff-reporter, Badhon receives guardianship of daughter Saira, (Published at 09:16 pm April 30th, 2018) <<https://www.dhakatribune.com/showtime/2018/04/30/badhon-receives-guardianship-daughter-saira>>accessed 2 December 2019

- ii. The best interest of the child doctrine should also be applied to determine the guardianship of property by the courts of Bangladesh. If certain guidelines can be directed by the Apex court of Bangladesh, the lower courts will have to follow the same.
- iii. Intellectual debate is a must. Opinion of the Islamic jurists, women rights activists, judges, lawyers, elected representatives, academics, affected parents and even intelligent minor children can be gathered to find out a solution. Reforms may be welcome within the ambit of basic tenets of classical law alone. Sensitizing the judges and lawyers is also crucially important.

5.3 Concluding Remarks

From the study we can see that woman are being deprived in getting guardianship of property in Bangladesh. The minor child's interest in property is also disregarded by courts as well as law makers. Although there are many countries which have taken steps to give the legal guardianship of a child to woman, Bangladesh is lagging. Also, from this research we can see that there are no conflicts in sharia laws and other personal religious laws to give the guardianship of property to a mother. In this situation, the courts must take proper approach and the welfare of the child should be given paramount importance. Also, it is expected, and hoped, that this study will help both policy makers and practitioners in the area of custody and guardianship, in addition to supporting specific law reform initiatives that may be undertaken.

Bibliography

Books:

1. Ahmed A, Mohammedan Law (23rd edn, Central Law Agency,2009)
2. Fyzee A.A.A, Outlines of Muhammadan Law (4th edn, Oxford University Press, 1974)
3. Hoque, Dr. M.E., Muslim Family Law, Sharia and Modern World [1st edn, London College of Legal Studies (South) 2015]
4. Mulla D.F., Principles of Mohamedan Law, (1st edn, 1905)
5. Chowdhury, M. Jashim Ali, A Text book on Muslim Personal Law, (2nd edn, Sufi Prokashoni, 2016)
6. Islam S and Khan ABM Ehsan Ullah Khan, Outlines of Hindu Law, (1st edn, Shams Publications May, 2015)
7. Faiz-ud-din Dr. M, A Text Book On Islamic Law, (6th edn, 2014)

Governing Laws:

1. The Constitution of the People's Republic of Bangladesh, 1972.
2. The Guardians and Wards Act, 1890
3. Muslim Family Laws Ordinance, 1961
4. Muslim Personal Law (Shariat) Application Act, 1937
5. Code of Civil Procedure, 1908
6. Penal Code,1860

Journal Articles:

1. Knowing Our Rights: Women, family, laws and customs in the Muslim world: Women Living Under Muslim Laws, (2006, 3rd Edn The Russell Press, Nottingham, UK).
2. Convention on the Elimination of All Forms of discrimination against Women (CEDAW).
3. Arun Kumar, "Guardianship and Custody of the Person of a Minor Child – Conflicting Claims", Journal of the Indian Law Institute, Vol. 17: 2, 1975.

4. “Removal of Discrimination against Women in Matters Relating to Guardianship and Custody of Minor Children and the Elaborations of the Welfare Principle”, Law Commission of India, 133rd Report
5. Al- Zuhaili, Wahbah Dr, Al- Fiqh Al- Islami Wa Adillatuhu, (The Islamic Jurisprudence and its Evidences), Syria, Vol. 9 (1997) 6691

Cases:

1. *Imambandi v. Mutsaddi*, (1918) 45 IA 73, Cal. 878
2. *Meherun Hossain v. Nazrul Islam*, 46 DLR 1994(HCD) 86
3. *Meethiyan Sidhique v. Mohammad Kunju*, (1996) 7 SSC 436: AIR 1996 SC 1003
4. *Rahima Khatoon v. Saburjanessa*, AIR 1996 Gau 33, (1995) 3GLR 210
5. *Haji Abdullah khan v. Nisar Mohammad Khan*, 17 DLR (SC) 481
6. *Azmeri Haque Badhon v. Mashrur Siddiqi Sonet*, Unreported case, Dhaka’s 12th District and Session Court’s, Assistant Judge.
7. *Achamma v. Yousuff and Others*, (1958) KLJ, 305
8. *Ahmadallah v. Mafizuddin Ahamed*, [1973] AIR 1973 Gau 56
9. *Syeda Shamsunnaher v. Morshed Anwar khan*, 10 MLR [2005] (HCD) 148
10. *Muhammad Baksh v. Mst Gulam Fatima*, PLD (1953) Lahore 73
11. *Abu Baker Siddique v. S.M.A Bakar & others*, 38 DLR 1986 (AD) 106
12. *Mst. Zohra Begum V. Sh. Latif Ahamed Munawar*, PLD 1965 Lah. 695
13. *Bashir Ahamed v. Abida Sultannna*, 1989 ALD 432

Online Articles:

1. Ayan Roy, A Study of Guardianship of Person and Property Under Muslim Law, Posted: 8 Jun 2010.
2. Khan S, “Inheritance of Indian women: a perspective” Vol. 27, No. 2, MARGINALISED (SUMMER 2000), pp
3. K. Stephenson, family-law-lecture-notes-on-studyguide-9-welfare-of-the-child.pdf
4. Nowrin Tamanna, Muhammad Amirul Haq, Sara Hossain: MUSLIM WOMEN’S RIGHTS UNDER BANGLADESH LAW Provisions, Practices and Policies related to

Custody and Guardianship; The South Asian Institute of Advanced Legal and Human Rights Studies (SAILS)2011

Newspaper Articles:

1. Meherun Wahed, On norms of custody and guardianship, The Daily Star (4 December 2019)
2. Rooy chowdhary Arija, "Shariat and Muslim Personal Law: All your questions answered." The Indian Express (4 May 2016)
3. Professor Dr. Shahnaz Huda, Positive discrimination can ensure gender balance, The Daily Star (12 March 2019)
4. Staff Correspondent, Guardianship of a minor in Bangladesh Law, The Daily Star (24 August 2019)

Online Sources:

1. Asma Jahan, LEGAL STATUS OF GUARDIANSHIP OF MINOR: BANGLADESH PERSPECTIVE, Vol. 1, No 3 (2015)
<<https://www.aarcentre.com/index.php/aarcentre/article/view/47/237>> accessed on 22 October 2019
2. Child Abduction Information, <<https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/International-Parental-Child-Abduction-Country-Information/Cameroon.html>> accessed on 30 November 2019
3. Islamic Family Law, Tunisia Republic of Draft: Under Review. <<https://scholarblogs.emory.edu/islamic-family-law/home/research/legal-profiles/tunisia-republic-of-%EF%BF%BD-%EF%BF%BD-draft-under-review/>> accessed on 21 November 2019
4. Tunisia text - Reunite International <www.reunite.org > edit > files > Tunisia Text> Accessed on 1st December 2019.
5. Legal capacity and proxy decision making, 2010. <<https://www.alzheimer-europe.org/Policy-in-Practice2/Country-comparisons/2010-Legal-capacity-and-proxy-decision-making/Turkey>> accessed on, 21 November 2019

6. Asma Jahan, LEGAL STATUS OF GUARDIANSHIP OF MINOR: BANGLADESH PERSPECTIVE, <<https://www.aarcentre.com/index.php/aarcentre/article/view/47/237>> accessed 9 November 2019
7. Rezaul Karim, Laws of Guardianship in Bangladesh: An Appraisal<<http://sclsbd.org/laws-of-guardianship-in-bangladesh-an-appraisal/>> accessed 9 November 2019