GUARDIANSHIP OF PROPERTY IN ISLAMIC LAW

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Abstract

A child has a right to have someone to manage its affairs during minority. Guardianship is one of the basic rights of a child. Guardianship includes guardianship of marriage, person (custody) and property. This research work is more focused towards the guardianship of property. In Islamic law, the father is the guardian (*walī*) of the child's property unless the interests of the child demand otherwise. This article explores rules regarding guardianship in Islamic law and discusses relevant issues including conditions for guardianship, interdictions, best interests of the minor and termination of guardianship. As in Pakistan, the law related to personal status is primarily based on Islamic law, it is important to explore the Islamic rules related to guardianship of property to provide a source for legal reforms. For instance, a mother can be a testamentary guardian but cannot be a guardian of property otherwise. Islam is the law that preserves the rights and interest of all humans throughout their lives, without gender and race discrimination. The authorization of property guarding to a mother is an open concernment that scholars may conceptualize and discuss in view of child's interests. This article recommends reconsideration of the said distinction and further argues that the Islamic law always keeps best interests of child and considers child interest as primary. This research work is a qualitative study and comparison has been done among judgments and decrees of *fuqaha'* (experts of Islamic jurisprudence) and other legal opinions in Islamic perspective.

***Keywords**:* Guardianship, Guardianship of Property, Interdiction, Islamic Law.

1. Introduction

Guardianship is a basic right of the child. Due to tender age and lack of mental maturity a child is not capable to manage its affairs.

Islamic law provides the institution of guardianship to ensure proper management of the affairs of the minor. There are three kinds of guardianships: guardianship of person known as custody; guardianship of marriage and guardianship of property. In this research paper we will endeavour to explore and analyse the rules of Islamic law regarding guardianship of property. As in Pakistan the law related to personal status is primarily based on Islamic law it is important to explore the rules related to guardianship of property to provide a source for legal reforms.

1.1. Research Methodology

This is a qualitative study, I have tried to access original sources of Islamic law as well as writings of modern scholars regarding this issue. Comparative study of *Ḥanafī, Mālikī, Ḥanbalī and Shāfi'ī* schools have been done. With regard to guardianship *Ḥanafī* opinion has been flexible as compared to other schools so the researcher has especially focused on the *Ḥanafī* school. Guardianship includes guardianship of person, marriage and property but in this study, we will only discuss guardianship of property. After discussing the concept of guardianship briefly, the researcher has explored the rules of guardianship of property. Qualifications of a guardian, interdiction, and the ways to terminate guardianship have also been discussed. At the end conclusion will summarize my findings.

1.2. Literature Review

In Islamic law the concept of guardianship has been discussed extensively. If we look at the current literature on this topic we notice that writings by Islamic jurists have dealt with rules related to custody and guardianship of marriage in detail but we cannot find a comprehensive study related to guardianship of property especially in the modern context. As law related to personal status in Pakistan is primarily based on Islamic law there is a need to study the issues related to guardianship of property so that it can become basis for reforms in Pakistani law. In modern law all rules related to children revolve around their best interests. Despite discussions on rules related to guardianship of property in classical books the phrase 'best interests of the child' has not been used.[1] In books written by modern jurists we find frequent mention of the 'interests of the child'.[2] Probably the term became prevalent after its incorporation in the convention on the rights of the child. In this paper the researcher try

to evaluate and contextualize the rules related to guardianship of property including the doctrine of the best interests of the child.

2. Guardianship in Islamic law

Wilāyah is the term used for guardianship in Islamic law. It is defined as 'the carrying through a decision affecting a third person whether the latter wishes or not'.[3] There are two kinds of guardianship in Islamic law: guardianship of person and guardianship of property. Guardianship of person is further divided into three categories: (i) custody which is a duty to look after the child from birth until the age of discretion; (ii) the obligation to train and discipline the child which starts from discretion and ends at puberty and (iii) the guardianship of marriage.[4]

The concept of guardianship is based on a few verses of the Holy Qur'ān and various *ahādīth*. Islam introduced rules regarding the guardian's authority to avoid pre-Islamic practices of corruption especially in the case of the property of orphans.[5] Allah Almighty says in the Holy Qur'ān:

> *"to orphans restore their property (when they reach their age) nor substitute (your worthless) things for (their) good ones; and devour not their substance (by mixing it up) with your own ... when ye release their property to them, take witnesses in their presence".*[6]

In another verse Allah Almighty says:

> *"Come not nigh to the orphan's property except to improve it until he attains the age of full strength".*[7]

Allah Almighty says:

> *"... they ask thee concerning orphans, say: the best thing to do is what is for their good; if ye mix their affairs with yours, they are your brethren; but Allah knows the man who means mischief from the man who means good and if Allah had wished, he could have put you into difficulties: He is indeed exalted in power".*[8]

These verses are related to orphans and their guardians but rules related to general guardians are also derived from them. The purpose behind the concept of guardianship is that a minor cannot comprehend its transactions so there is a possibility of harm if the minor is given the authority to manage its affairs.[9]

Guardianship is a combination of a right and a duty but the element of duty is stronger as compared that of right. The duty is imposed to protect the interests of the minor.[10] The basic consideration in rules regarding custody and guardianship is the welfare of the child. If any of these rules is in contradiction with the welfare of the minor the rule shall not be enforced.[11] As far as consideration of the best interests of the child is concerned in Islamic law the presumption is that whatever is ordered by Allah Almighty is in the interest of mankind and whatever is prohibited by Him is not in their interest. If parents ask the child to do something against the *Shar'īah* it will be considered against the interests of the child so the child must not obey it. For instance in the case of *shirk* (unbelief or worshipping another god within Islam) Allah Almighty says in the Holy Qur'ān:

> *"But if they strive to make thee join in worship with Me things of which thou hast no knowledge; obey them not…".*[12]

This implies that there is no blind obedience to parents. Parents have authority only if they keep themselves and the child within the limits prescribed by *Shar'īah*.[13] In classical books on Islamic law the term 'best interests of the child' has not been used. In books written by modern jurists we find frequent mention of the 'interests of the child'. Probably the term became prevalent after its incorporation in the convention on the rights of the child.[14] As far as classical books are concerned although the interests of the child are not clearly mentioned it is an underlined requirement to be considered by the Islamic judge. A judge is expected to decide cases keeping in view welfare of the child. It can be noticed that opinions given by the scholars are based on welfare of the child but 'best interests of the child' has not been mentioned as a rule anywhere.

The guardian of a person is not necessarily the same as the guardian of property. They could be two different persons. For a young child the mother is the best custodian while guardianship rests with the father. Custody is considered subservient to guardianship and where custody is

with the mother, the father still has the right to supervise the child based on the reason that he is responsible for the child's maintenance.[15] Guardianship includes the duties of bringing up the child to transform him into a good Muslim, his/her education, training and protect his/her interests in all situations.[16] Guardianship is an institution established for persons who have deficient or no legal capacity[17] like a minor, an insane person or a female. As far as minor children are concerned, it is their right to have someone to manage their affairs because of their immaturity and tender age. The duty of guardianship may become incumbent upon a person on three grounds: kinship, testament/will or order of the court.[18] The court has authority in matters of guardianship according to a *hadīth* in which the Prophet *(Ṣal Allah-u-'alaihe wa sallam)* said "the *sultān* is a *walī* for the person who has no *walī*."[19] This *hadīth* confers authority of guardianship on the state if a person has no guardian. The state delegates this authority to judges who exercise it on former's behalf.

3. Guardianship of Property

A guardian is responsible to manage his ward's affairs pertaining to property. Guardianship of property means the authority to initiate contracts regarding property on behalf of the ward. It also includes protection of the property from every possible damage and to endeavor to increase its worth.[20]

In Islamic law, guardianship of property lies with the father. The father is a natural guardian of his legitimate children. For an illegitimate child the mother is the guardian as the illegitimate child and the father have no mutual rights and obligations.[21] There is agreement among the jurists on the guardianship authority of the father for legitimate children. The jurists differ on the order of guardians in the case of absence or disqualification of the father. According to the *Ḥanafī* school in the case of the father's death, absence or disqualification, guardianship lies with the executer of the will appointed by the father, then the paternal grandfather how high-so-ever, then the paternal grandfather's executor and then the judge. *Ḥanafī* scholars give preference to the father's executor over the grandfather because if the father has appointed the executor in the presence of the grandfather, it means that he is considering that person better than the grandfather. Except the father and the grandfather no other person has authority over property of the child unless appointed as a testamentary guardian.[22] A judge has no authority

over the child if the father or the grandfather are alive. The mother has no authority over the property of her children. She can neither be a guardian nor can she have preferential right to appoint one.[23] If all persons mentioned in the given order do not exist then the executor appointed by the mother will have authority.[24] It is ironic and apparently contradictory that these scholars do not consider a mother capable to be a guardian but executor appointed by her enjoys this authority.

According to the *Mālikī* school, the following is the order for guardianship; the father, executor of the father, executor's executor if any, the judge and the Muslim community if there is no judge. Other relatives of the child cannot be guardians unless appointed by the father or the judge. The *Ḥanbalīs* follow the same order. In the *Shāfi'ī* school after the father guardianship devolves on the paternal grandfather how high-so-ever then to their executors and then to the judge. Only the *Shāfi'īs* give priority to the grandfather over the executor of the father as opposed to other schools who give priority to the executor in such case. The judge may appoint an appropriate person as a guardian and it is the responsibility of that judge to keep a check on him. According to the *Shāfi'ī* school the mother cannot be a guardian except if the other person to be appointed as a guardian is a stranger. The mother will be given priority over a stranger.[25]

The principle in cases of guardianship is that the closer relative is preferred over the distant relative. This is based on the following verse of the Holy Qur'ān:

> *"... but kindred by blood have prior rights against each other in the book of Allah"*.[26]

If a closer relative is there the distant one has no authority unless the former is disqualified.[27]

A natural guardian, whether father or grandfather, has authority to appoint a testamentary guardian. The father or the grandfather can appoint more than one testamentary guardian. In such a case each testamentary guardian will have the authority as assigned by the father or the grandfather. If specific authority is not assigned, according to Abū Yūsuf (*Raḥmat Allah 'alaih*) , a transaction made by one of them will be valid without the consent of the others. Abū Ḥanīfah and Muhammad Shaibānī (*Raḥmat Allah 'alaihimā*) disagree, according to them in this situation a transaction will only be valid if made by consent of all of them.[28] The

mother has no authority to appoint a testamentary guardian. In the case of legitimate children the authority to appoint a testamentary guardian is with the father or the grandfather and in the case of illegitimate children this authority vests in the judge. The judge can appoint an appropriate person as the child's guardian.[29] This approach seems patriarchal and needs to be revisited. The child's mother is expected to be more concerned towards welfare of the child as compared to the child's grandfather. The father has authority to appoint a supervisor to keep check on the testamentary guardian so that he may not abuse his powers. The mother can be appointed as a supervisor *(mushrif)*[30] or as a testamentary guardian by the father or the grandfather. This is the opinion of the majority of jurists. They based their opinion on the tradition according to which 'Umar (*Raẓi Allah 'anhu*) appointed his daughter Hafsah (*Raẓi Allah 'anha*) as a testamentary guardian.[31]

Express or implied acceptance of the testamentary guardian to this appointment is necessary. A testamentary guardian may be given limited powers related to some specific purpose in which case he will be considered guardian to the extent of that purpose only. He may be given full powers without any restriction in which case he will be considered guardian for all purposes. The condition for validity of such appointment is that the testator should have capacity to make such appointment at the time of making the will. He should be able to understand the nature and consequences of his act. Such appointment by the father or the grandfather can be challenged on the ground of misconduct or other disqualification of the testamentary guardian and the judge has authority to remove him. In such situations the role of the judge is supervisory. The actions of a testamentary guardian will have legal effect till removal by the court unless he is a minor or insane.

Majority and sanity of the appointee are conditions for validity of the appointment. If at the time of appointment the guardian was sane but later became imbecile or insane his appointment will be considered void and the judge will have a right to appoint a new guardian.[32] If a minor is appointed as a guardian and his appointment is not declared void by any court and he continues to exercise his powers till his majority, according to Abū Ḥanīfah (*Raḥmat Allah 'alaih*), his appointment even after attaining the age of majority will be considered void. According to Shaibānī and Abū Yūsuf (*Raḥmat Allah 'alaihimā*), his appointment will be considered valid after attaining majority.[33]

If the male relatives in the given order do not exist the court may appoint the mother or any other relative as a guardian according to the

welfare of the minor. In this way a woman can be appointed as a guardian by a court. Being a female is not a disqualification for guardianship.[34] This seems contradictory. Qualifications for a natural guardian and testamentary guardian are the same if a woman can be appointed a testamentary guardian, she should be considered equally capable to be appointed as a natural guardian. If the father or the grandfather has appointed a guardian through their will and the court considers that appointment illegal due to the absence of necessary conditions or qualifications for guardianship it can remove the guardian and can appoint a person appropriate for the post.[35]

A guardian is not all powerful in matters relating to property. He does not enjoy absolute authority to deal with the minor's property the way he pleases. There are limitations on his authority. This will be discussed latter.

4. Conditions for a Guardian

The following are the conditions for a guardian.

1. Legal capacity. Only a person with full legal capacity can be a guardian. There are three conditions appurtenant to full legal capacity: puberty, sanity and freedom. A person having deficient or defective legal capacity is not qualified for guardianship as such a person is not entitled to make his/her own transactions so he/she cannot be responsible for someone else.[36]
2. The guardian should have the same religion as the ward has. If his religion is different from the ward he will not be entitled to guardianship. As said earlier this is not a condition for a judge as a judge has authority over all subjects irrespective of their religion.[37] A judge enjoys the authority delegated to him by the state and he is responsible to protect rights of all citizens irrespective of their religion. Allah Almighty says in the Holy Qur'ān:

   "... and never will Allah Almighty grant to the unbelievers a way (to triumph) over the believers".[38]

It means that non-Muslims cannot be given authority over Muslims. A guardian has authority over the child so according to this verse a non-Muslim cannot be a guardian of a Muslim child. It is presumed that the

guardianship of a non-Muslim can be proved detrimental for the child's religious inclinations and morality.[39] All schools agree that if the mother is a non-Muslim and is appointed as a testamentary guardian, she can exercise powers to manage the minor's property.[40] As far as a testamentary guardian is concerned he/she should possess four characteristics: puberty, sound judgment, Islam and honesty.[41]

For a testamentary guardian there is no such condition that he/she should be an heir or relative. Appointment of a testamentary guardian is valid only if made by the father, the grandfather or the judge. The person who is appointed as a testamentary guardian should have all the qualifications of a guardian at the time of taking charge of the minor's affairs. If he is lacking any of the qualifications at the time of appointment it will not affect his appointment but if he lacks any qualification at the time of taking charge of the minor he will be removed and someone else will be appointed as a guardian by the judge.[42]

Apart from these conditions a guardian should be honest, mature and trustworthy. If the father is a spendthrift and cannot be trusted the judge may entrust the duty to look after the property of the child to a more trustworthy person.[43] The guardian should have a good reputation in the community. If he lacks these qualifications he can be removed by the court. The actions of a minor or an insane guardian are void even if not formally held void by the court. If a guardian is not completely insane and is sane during lucid intervals only those of his acts will have legal effect, which are done while he was sane. This is the *Ḥanafī* opinion.[44] For any other disqualification, the actions of the guardian are valid until cancellation of the appointment of the guardian by the court provided that the actions are in the best interests of the minor.[45]

4.1. Authority/Powers of a Guardian

There are two stages in the life of a minor with respect to authority of the guardian: the first stage is when the minor is below the age of seven years and the second stage is from the age of seven till majority. Any act done by the minor before the age of seven has no legal effect. At this stage the guardian has full legal authority to act on minor's behalf.[46] After the age of seven till puberty the child can make beneficial transactions. Those transactions which are vacillating between benefit and loss are enforceable after ratification of the *walī*. At this stage to some extent the guardian's authority is shared by the minor. This is

according to the *Ḥanafī* school. According to other schools a minor's actions have no legal effect till majority.[47] The age of seven is very low with regard to financial transactions. *Hanafīs'* opinion is based on discretion which is a question of fact, it means that only if a child possesses discretion he/she may be awarded right to conclude beneficial transactions not otherwise

The general principle with respect to the authority of a guardian is that he can make a transaction if it is purely beneficial or vacillating between profit and loss. A guardian has no authority to make a transaction which is harmful or entails loss. This principle applies to a natural guardian, testamentary guardian and the judge.[48]

The father is a natural guardian of a minor if he is reliable and is of sound judgment. If the father lacks these qualities, he does not deserve to be a guardian. The father has absolute power in matters pertaining to property except for transactions which are purely harmful. According to the *Ḥanafīs* and the *Mālikīs,* the father can sell and buy a minor's property. There is no distinction between movable and immovable property as far as his authority is concerned. Another opinion in the *Ḥanafī* school is that the father can buy property on a minor's behalf but cannot sell it as it is a harmful transaction and a guardian is not allowed to do so.[49] According to the *Ḥanafīs* the natural guardian can sell and buy a minor's property for himself whereas according to the *Shāfi'īs* it is not allowed for the guardian to do so. He can neither gift a minor's property to someone nor can he take it as loan for himself. The father has authority to pledge a minor's property to discharge the minor's debt. There is a difference of opinion in pledging a minor's property to discharge the father's debt. According to Abū Ḥanīfah and Shaibānī (*Raḥmat Allah 'alaihimā*) the father can pledge a minor's property to discharge his own debt whereas according to Abū Yūsuf and Zufar (*Raḥmat Allah 'alaihimā*) he has no such authority. Abū Yûsuf and Zufar (*Raḥmat Allah 'alaihimā*) consider it a harmful transaction for the minor so they do not allow it.[50] According to Abū Ḥanīfah and Shaibānī (*Raḥmat Allah 'alaihimā*) this transaction is not harmful as according to the rules of pledge of property if a minor's goods are destroyed or damaged during the period of pledge they will be compensated by the person who has possession of the goods. Secondly the father has a right in the property of the child according to the hadith *"you (the son) and your property belongs to your father"*[51] as this transaction is beneficial for the father so it should be allowed. But even Abū Ḥanīfah and Shaibanī

(*Raḥmat Allah 'alaihimā*) allow it only in dire need; for instance, if the father has no property of his own to pledge. If he has his own property, he is not allowed to pledge a minor's property. The father is allowed to lease out a minor's property but the lease should not be for very long time as probably it would be on a low rate which is against the best interests of the minor. The jurists did not discuss which period shall be constituted a long period. It is left to the courts to decide according to the facts of each case. It is not allowed for the father to lend a minor's movable property to someone unless there is a custom in that area of exchange of goods/services as in that case the minor may be in need of borrowing something in future.[52]

In the case of the absence of the father and his executor, the grandfather is the guardian of the child. According to Abū Ḥanīfah and Abū Yūsuf (*Raḥmat Allah 'alaihimā*) the grandfather's authority over the property of the child is equal to that of a testamentary guardian as in the order of guardians he is after the father's executor. According to the opinion of Shaibānī (*Raḥmat Allah 'alaih*) the grandfather is like the father and has same powers. According to him the grandfather is after the father's executor in the order of guardians not because he has less love for the child but because the law gives respect to the choice of the father so he should have the same powers which the father of the child has. Other *Ḥanafis* agree with Abū Ḥanīfah and Abū Yūsuf's (*Raḥmat Allah 'alaihimā*) opinion except that the grandfather has authority to sell or buy a minor's property to himself whereas the executor cannot make such a transaction even if it is in the best interests of the minor.[53]

The father and the grandfather both can appoint a testamentary guardian. A testamentary guardian has the same powers as a natural guardian has, except he cannot sell or buy a ward's immovable property without any just reason.[54] The father has authority to sell a minor's immovable property. In the case of a testamentary guardian this authority is restricted and the property can be sold only if there is a just reason for it; for instance to discharge debts of the minor, or for getting double value of the property, or there is loss in keeping the property (for instance when expenditure on the property is more than it's income), or there are chances of destruction of the property, or when the property is in the possession of untrustworthy person and its recovery does not seem possible or if money is needed for the minor's maintenance. The standard for a just reason is what is considered reasonable among the community.[55] Whether a particular reason is just or not is a question of fact so needs to be proved.

If the property is sold by the testamentary guardian without any just reason the transaction will be void. This is according to Abū Ḥanīfah (*Raḥmat Allah 'alaih*). In in the opinion of Abū Yūsuf and Shaibānī (*Raḥmat Allah 'alaihimā*) a testamentary guardian has no power to sell or buy a minor's property in any circumstance. The natural guardian can restrict the powers of a testamentary guardian by will. Another difference between the authority of the natural guardian and the testamentary guardian is that the natural guardian can buy a minor's property for himself whereas the testamentary guardian is not allowed to do so. The testamentary guardian's powers with respect to immovable property of the ward are more restricted as compared to movable property. The reason for the difference in the rule regarding movable and immovable properties is the presumption that movable property is perishable and immovable is not, so it is considered in the minor's welfare to sell movable property to convert perishable property to some other form.[56]

'Necessity' is not a requirement for sale of movable property; the guardian can sell it for a benefit or for some other reason.[57] A testamentary guardian is not allowed to sell property of a major who is interdicted after majority without order of the court.[58] The guardian is supposed to act for the benefit of the minor but he will not be responsible for such loss which is inevitable in business provided he has exercised due care and diligence. The transaction must be *bonafide* on the part of the guardian. If the guardian has not exercised due care and diligence the minor can go to the court to avoid the sale. The guardian cannot purchase a minor's property or take it as a debt as his duty is to protect the interests of the minor and not to gain benefit for himself.[59] If there are two or more minors in the guardianship of the father he can sell one minor's property to the other minor whereas a testamentary guardian has no such authority. The father can take a minor's property on lease for himself but a testamentary guardian cannot make such contract with him/her. A testamentary guardian cannot pledge a minor's property to discharge his own debt.[60]

A natural or testamentary guardian can enter into a partnership or trade on the minor's behalf. He is required to show the care and diligence of an ordinary prudent man. He cannot do such business which is hazardous for the minor or which is immoral or illegal. If the guardian is appointed by the court then his powers will also be defined by the court. If he is given power to partition the shares of the heirs along with a minor he can do so.[61]

In the case of absence or disqualification of natural and testamentary guardians the judge has authority to appoint a guardian. The father's or the grandfather's authority to appoint a guardian is stronger than the judge. If the father or the grandfather has appointed a guardian through will but at the time of appointment of the guardian by the judge this fact was not known the appointment by the father will take precedence.[62] After appointment of the guardian the judge will have supervisory duties. He himself cannot make any transaction on minor's behalf but can keep a check on the guardian. Powers of a guardian appointed by the court are the same as of a testamentary guardian with some restrictions which are discussed below. The guardian appointed by the court cannot buy or sell a minor's property for himself even for the minor's welfare. The reason for it is that he is considered an agent *(wakīl)* of the judge and the judge himself has no such right so his *wakīl* also lacks such authority. Abū Ḥanīfah (*Raḥmat Allah 'alaih*) is of the opinion that a testamentary guardian has this authority if it is in the minor's welfare. According to Abū Ḥanīfah (*Raḥmat Allah 'alaih*) a judge while appointing a guardian has authority to restrict the guardian's power whereas a natural guardian has no such authority to restrict the powers of a testamentary guardian. Abū Yūsuf (*Raḥmat Allah 'alaih*) disagrees and according to him to restrict guardian's powers is permissible for the natural guardian. A judge cannot remove a testamentary guardian without just cause whereas he can remove a guardian appointed by him without any cause. A testamentary guardian can appoint anyone else as guardian through a will at his death whereas a guardian appointed by the court has no such authority.[63]

4.2. *De Facto* Guardian

If a *de jure* guardian is not present and some other person is in charge of the property of the minor, Islamic law recognizes his actions if these are for the child's benefit or to fulfill his or her needs. Such a person is called a *de facto* guardian. All those acts which are purely beneficial can be done by a minor if it has discretion or by a *de facto* guardian. Such persons can do those acts which are necessary to fulfill a minor's needs for instance selling or purchasing something on the minor's behalf if he/she needs it. A person who takes up a foundling is also empowered to do such acts. The circumstances of the child and his or her needs are taken into consideration before recognizing these acts.[64]

If the mother deals with the property of the minor although she is not appointed as a guardian her acts will be recognized only if they are in the best interests of the minor. She will not be considered a *de facto* guardian but a *fuḍūlī* (an unauthorized agent).[65]

A *de facto* guardian is recognized by Islamic law as in some situations where a legal guardian is not appointed, he is the person who protects the interests of the minor. But only those actions of a *de facto* guardian are protected by the law which are a product of necessity and which are purely beneficial. When a legal guardian exceeds his limits by violating the conditions of his guardianship, does not protect the interests of the minor or is disqualified the *de facto* guardian can protect the interests of the minor until appointment of a new guardian. As far as the acts of a legal guardian who has exceeded his limits are concerned his acts are suspended and do not take effect until confirmation by the minor after attaining majority. Such acts include harmful transactions. But if the guardian's conduct is not trustworthy and he continuously acts against the best interests of the minor, the minor can go to the court against the legal guardian. The ruler or the king is the guardian for the person who has no guardian. It is the responsibility of the state to protect the rights of all people including children. The judge has the power to step in to protect the interests of the minor if required. In the case of misconduct of the guardian the judge has authority to remove him and to appoint a new guardian. It is a duty of the judge to supervise the guardian.[66] If the guardian does not protect the best interests of the minor and it is considered against the minor's welfare to live with that guardian or to be in his supervision the guardian will be removed by the court.[67]

5. Interdiction

Interdiction or *hajr* means to restrict persons having no, or deficient, legal capacity from disposing of their property or entering in any transaction related to property. The persons under interdiction include the insane (*majnūn)*, the mentally deranged (*ma'tūh)*, prodigal (*safīh)*, the imbecile (*dhu-al-ghaflah)* and a minor.[68]

The object of interdiction is to protect such people and their property as they are not capable to fully understand the nature and the consequences of their acts. The rule of interdiction of minors is based on the verse *"to those weak of understanding make not over your property which Allah Almighty hath made a means of support for*

you ...".[69] A child before attaining discretion is considered as having no understanding and judgment so all his/her transactions at that stage are null and void. During the period between discretion and majority, some transactions of a minor are given recognition by the law. Such transactions are categorized in three groups. At first there are purely beneficial transactions which if made by the child have legal effect without ratification of the guardian for instance acceptance of a gift. The second category is of those transactions which are purely harmful and which have no legal effect even if made with the ratification of the guardian. An example of such a transaction is to give a gift to someone. The third category is of transactions vacillating between benefit and harm, for instance partnership or involvement in a trade in which there are chances of profit and loss. Such transactions are valid only after ratification of the guardian. In the case of purely beneficial transactions and transactions vacillating between profit and loss interdiction is lifted from the minor after the age of seven. The purpose for the lifting of interdiction in purely beneficial transactions is that it is in the minor's welfare to allow such transactions whereas the reason in transactions vacillating between profit and loss is that to allow such transactions is necessary for the minor's training and education. The minor while under the supervision of its guardian will make such decisions and will learn from them and on obtaining majority it will be easy for the minor to manage its own property. To provide such training is a duty of the guardian.[70]

Interdiction of a male child is removed on gaining mental maturity and puberty. According to the majority of jurists the same is the rule for a female child. Mālik (*Raḥmat Allah 'alaih*) disagrees and according to him interdiction of a girl is removed only after consummation of her marriage.[71] To link removal of interdiction with consummation of marriage means that a girl only becomes capable to manage her property after sexual intercourse. This research work raises the opinion that management of property has no apparent relation with sexual intercourse which should be based on *rushd* and capability to understand and manage financial affairs.

There is agreement among jurists that if a person under interdiction has shown signs of *rushd* (sound judgment) he/she should be given his/her property. According to Shāfi'ī (*Raḥmat Allah 'alaih*) giving property to the minor who has become maor and has shown signs of *rushd* (sound judgment) has no need for a court's order. Mālik (*Raḥmat Allah 'alaih*) however is of the opinion that property can be handed over only

by the order of the court. According to him interdiction can be removed only by the order of the court. The Ḥanbalīs agree with Shāfi'īs and according to them there is no need for the court's order.[72] According to Shaibānī (*Raḥmat Allah 'alaih*), interdiction on the basis of minority is removed on attaining majority without declaration from a court. If the minor is *safīh* (prodigal) according to Kasānī (*Raḥmat Allah 'alaihimā*) this interdiction cannot be removed except by the order of the court whereas according to Shaibānī and Shāfi'ī (*Raḥmat Allah 'alaihimā*) there is no need for intervention of the court in this case. When the minor shows signs of sound judgment interdiction will be removed and his/her property will be handed over to him/her.[73]

If at majority because of any reason a person becomes unable to manage his property, there is a difference of opinion among the jurists regarding his/her interdiction. According to Mālik and Shāfi'ī (*Raḥmat Allah 'alaihimā*) in this situation a major can only be interdicted by order of the court whereas according to Abū Ḥanīfah (*Raḥmat Allah 'alaih*) a major cannot be interdicted. Ibrahim Al-Nakha'ī and Ibn Sīrīn (*Raḥmat Allah 'alaihimā*) agree with Abū Ḥanīfah (*Raḥmat Allah 'alaih*), who considers the age of twenty-five years the final stage for removal of interdiction after which interdiction is not possible. It is not appropriate to fix an age to handover property as if the person is not capable to manage his/her property it will be against his/her interests to hand it over. Shaibānī (*Raḥmat Allah 'alaih*) does not consider intervention of the court necessary to interdict a major person whereas Abū Yūsuf (*Raḥmat Allah 'alaih*) considers it necessary. Such a person's transactions are not effective according to Shaibānī (*Raḥmat Allah 'alaih*) whereas according to Abū Yūsuf (*Raḥmat Allah 'alaih*) his/her transactions will be effective until interdiction by the court.[74]

The minor has no criminal responsibility and will not be liable for punishment. As far as civil responsibility is concerned a minor is liable for any tort committed by him/her and compensation will be taken from his/her property. If the minor has no property the payment of compensation will be deferred until the time, he/she will be able to pay. The guardian will be responsible to make arrangements for payment of compensation from the property of the minor but will not be responsible to pay it personally. This rule is for protection of the person and property of other people. Under Islamic law punishment can be withdrawn on the basis of valid excuses but *ḍamān* or compensation cannot be. This rule is based on the concept of the capacity of destruction which is upon every person

regardless of his age or mental maturity. This opinion is agreed upon by jurists except some *Mālikī* jurists who are of the opinion that a minor before the age of discretion is not liable to pay compensation in the case of destruction of property at his/her hands. The guardian will be vicariously liable for the minor's actions only if the incident happened due to his negligence or instigation or command. He will also be responsible if he gave the property to the minor without prior permission of the owner and the minor has destroyed it.[75]

6. Wages for Guardianship

Rules related to the wages of a guardian are derived from the following verse of the Holy Qur'ān:

> *"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"*

the verse also orders guardians to render accounts by saying:

> *"when ye release their property to them, take witnesses in their presence but all sufficient is Allah in taking account"*.[76]

Companions of the Prophet *(Ṣal Allah-u-'alaihe wa sallam)* differed with respect to interpretation of this verse. According to 'Umar (*Raẓi Allah 'anhu*) if a guardian is in need, he is allowed to take from the minor's wealth to fulfil his need but it will be considered a debt on him. According to Ibn Abbās (*Raẓi Allah 'anhu*) he is allowed to take according to his need and it will not be considered a debt. According to Abū Hanīfah (*Raḥmat Allah 'alaih*) the father can take from a minor's property according to his needs and it will not be considered a debt but a testamentary guardian cannot take from a minor's property even as a debt. According to another tradition Abū Ḥanīfah (*Raḥmat Allah 'alaih*) says that a testamentary guardian can take in the case of necessity but has to return it later. Jassās (*Raḥmat Allah 'alaih*) supports the latter opinion.[77] According to the Shāfi'ī (*Raḥmat Allah 'alaih*) school if the guardian is in need he can take wages from the property of the child otherwise not.[78] Another opinion is that for a testamentary guardian there are no wages unless the judge has fixed his wages. A judge can

also fix wages for a guardian appointed by the court. If, while appointing a testamentary guardian, the testator has mentioned that the guardian will perform his job voluntarily he is not entitled to wages.[79]

7. Termination of Guardianship

Guardianship is terminated in two ways: firstly, if the ward dies; secondly when the minor attains majority.[80] The property will not be handed over unless there is puberty and *rushd* (sound judgment). If either of these qualities is missing the property cannot be handed over no matter what is the age of the ward. The purpose of this rule is to protect the interests of the child.[81] According to Abū Ḥanīfah, Shāfi'ī, Hasan Al-Baṣrī and Ibn Munzir (*Raḥmat Allah 'alaihimā*) *rushd* means sound judgment in religion and in management of property. They include religion in it, as a *fāsiq* (sinner) person is considered *ghair rashīd* (without *rushd*).[82] Mālik and Ibn Qudāmah (*Raḥmat Allah 'alaihimā*) disagree and according to them sound judgment is required only in the management of property.[83] They are of the opinion that a *fāsiq* person is considered *ghair rashīd* in the aspect of religion but not with respect to his property. The *Zāhirīs* consider sound judgment required only in terms of religion.[84] According to Abū Ḥanīfah (*Raḥmat Allah 'alaih*) the property will be handed over at the age of twenty five.[85] His opinion is based on the following verse:

> *"And come not nigh to the orphan's property, except to improve it, until he attains the age of full strength…"*.[86]

Abū Yūsuf and Shaibānī (*Raḥmat Allah 'alaihimā*) disagreed and according to them property will not be handed over to the person till he/she shows signs of sound judgement.[87]

According to 138 Atā, Thawrī, Abū Ḥanīfah, Shāfi, Abū Thawr and Ibn Munzir (*Raḥmat Allah 'alaihim*) there is no difference between a girl and a boy with respect to the rules of handing over property. According to a tradition Ahmad ibn Ḥanbal (*Raḥmat Allah 'alaih*) is of the view that the property is not given to a girl unless she gets married and has a child or lives in her husband's house for one year. The same is the opinion of 'Umar (*Raẓi Allah 'anhu*) and Shurayh (*Raḥmat Allah 'alaih*). Ibn Qudāmah (*Raḥmat Allah 'alaih*) is of the view that a girl will be given property after puberty and sound judgement. According to

Mālik (*Raḥmat Allah ʻalaih*) property cannot be given to a girl unless she gets married and her marriage is consummated. The reason he gives is that for a virgin the father has a right to marry her off so in the eyes of the law a virgin is like a minor.[88]

As far as use of the property by a major is concerned according to Abū Ḥanīfah, Shāfiʻī *(Raḥmat Allah ʻalaihimā)* and a tradition from Ahmad ibn Ḥanbal (*Raḥmat Allah ʻalaih*) a woman can use her property in whichever way she likes. Mālik (*Raḥmat Allah ʻalaih*) is of the opinion that she can only use one third of her property without consent of her husband. According to a second tradition Ahmad ibn Ḥanbal (*Raḥmat Allah ʻalaih*) agrees with Mālik (*Raḥmat Allah ʻalaih*).[89] Being a woman is not a disqualification to manage property. To disallow a woman to use her own property is against her rights as an owner. This opinion is open for future research by following the primary sources of said schools of thought.

8. Conclusion

Guardianship of property is a very important concept as it entails rights of a minor related to his property. In Islamic law the father is the guardian *(walī)* of property and a child before the age of seven has no say in these matters. After the age of seven the child has authority to contract beneficial transactions, and transactions that vacillate between profit and loss, after ratification by the *walī.* With growing maturity, the child gets more say in matters and the guardian's powers are curbed gradually. Complete authority is granted on attaining puberty and *rushd* (sound judgment). The mother can be a testamentary guardian but cannot be a guardian of property otherwise. This distinction made by the scholars is strange and should be revisited. If conditions required for being a testamentary guardian of property can be fulfilled by a woman and she is considered capable to manage property why is she barred from becoming a natural guardian? This seems a patriarchal interpretation and needs to be revisited. It is recommended that this matter should be deliberated again by the scholars keeping in view the modern social context. A natural guardian and a testamentary guardian have almost the same duties. The only difference is the mode of appointment. If a woman is capable of performing those duties the fact of her being a female should not be important. A woman is considered capable of managing her own

property so she should not be disqualified from becoming a natural guardian.

With regard to the best interests of the child in classical books this phrase has not been mentioned but it is an underlying consideration. It can be argued that with the passage of time Islamic law has transformed itself with regard to the interests of the minor. In classical Islamic law it was an under lying consideration but was not a paramount consideration whereas in modern Islamic law the best interests of the child is considered a paramount consideration. The basic purpose of all the rules regarding guardianship of property is to protect interests of the minor. Situation may vary in each case whatever is demanded by the best interests of the child should be done.

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85. Al-Jassās, *Ahkām-al-Qur'ān,* no. 2, 49; Al-Sarakhsī, 2001, no. 24, 183; Al-Khatīb, *Fiqh-al-Tifl,* 465-467.
86. The Holy Qur'ān (6:152).
87. (Al-Zail'ī, 2000), no. 2, 260-261; (Al-Sarakhsī, 2001), no. 24, 183.
88. Ibn Qudāmah, *Al-Mughnī*, no. 4, 560-561; Ibn Rushd, *Bidāyat-al-Mujtahid*, 1445-1446.
89. Ibn Qudāmah, *Al-Mughnī*, no. 4, 602.