

## GUARDIANSHIP AND CHILD CUSTODY UNDER MUSLIM LAW AND SUGGESTED REFORMS

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### Abstract

The laws are not static they changes with the demand of time. The law governing custody of children is closely linked with that of guardianship. Guardianship in Muslim Law refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor Muslim, while custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor. The term 'custody' is not defined in any Indian family law, whether secular or religious. 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 his person and property**<sup>883</sup>.

For eradicating the loopholes in guardianship law under Muslim law there sine quo non reforms should be applied. Changes that are necessary in section 17,19 and 25 of guardianship and wards act,1890 reforms suggested by law commission report 257 on custody laws. Reform in Islamic law on custody and guardianship as In Muslim law, for very young children, the mother is preferred to be the custodian, but the father always remains the natural guardian. The face of unequal child custody arrangements should be changing. This trend has arisen largely in a response to changing familial roles (male care takers taking on more child rearing responsibilities) as well psychological studies revealing that the involvement of both parents in child rearing is preferable to sole custody arrangements<sup>884</sup>. However, such preferences for shared custody are often balanced with the —best interest of the child standard and interest.

**Keywords** – Guardianship, Miner, Custody, Best interest, Children, Care, Welfare.

GRASP - EDUCATE - EVOLVE

<sup>883</sup> Guardian and Wards Act, No. 8 of 1890] S. 4(2)

<sup>884</sup> Glover, R. & Steel, C., Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, *Journal of Divorce*, Vol. 12 No. 2-3 (1989)

## Introduction

### Aims and Objectives

- a. To strengthen the welfare principle in the Guardians and Wards Act, 1890 and emphasize its relevance in each aspect of guardianship and custody related decision-making;
- c. To provide equal legal status of both parents with respect to guardianship and custody;
- d. To suggest detailed guidelines to help decision-makers assess what custodial and guardianship arrangement serve the welfare of the child in specific situations; and
- e. To provide for the option of awarding joint custody to both parents, in certain circumstances conducive to the welfare of the child.

### Scope of the Paper-

The focus of this paper has been limited to the suggested reform which should be applied in law of guardianship under Muslim .

### Research Question-

Should and how can the —best interest of the child||welfare of the child|| standard be balanced against other factors (i.e. the wishes of the parents, other children, the wishes of the child)?

Whether there should be physical or joint custody or should it be left to the discretion of the judge?

### Research Methodology-

A descriptive style of writing has been used throughout the paper. The research methodology used in this paper is qualitative form of research highly based on textbooks and scholarly articles.

## Best Interest of the Child/Welfare of the Child Standard

The best interest of the child standard is utilized in a number of countries across the globe. According to the Convention on the Rights of the Child, —in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the **best interests of the child shall be a primary**

**Consideration.**<sup>885</sup> The Convention goes on to state that a child should be separated from his or her parents if there is —abuse or neglect of the child by the parents.<sup>886</sup> According to the United Nations Human Rights Commission, the —best interests of the child is a proxy for the —well-being of a child|| based on a variety of circumstances laid out by the Convention<sup>887</sup>. Welfare, as a decision criterion, is generally flexible, adaptable and reflective of contemporary attitudes regarding family within society.<sup>888</sup> However, there are two main criticisms of the best interest of the child standard. First, it is unpredictable and information intensive. Parents who are divorcing are thus left guessing in regard to how the court will handle their child custody dispute; this can lead to unnecessary pre-court bargaining that may indeed be harmful to both child and parents.<sup>889</sup> This could be resolved by a more predictable rule based standard. However, a rule based standard is likely to be rigid and not consider the individual circumstances of each case.<sup>890</sup>

Second, the best interest of the child standard primarily focuses on the predicaments of the child rather than including the feelings and intentions of the parents.

<sup>885</sup> Convention on the Rights of the Child, Art. 3, (1989)

<sup>886</sup> Ibid at Art. 9

<sup>887</sup> UNHCR, UNHCR Guidelines on Determining the Best Interests of the Child, (2008).

<sup>888</sup> Gilmore, Stephen, Great Debates: Family Law, Palgrave Macmillan, (2014) pp. 76-83

<sup>889</sup> Ibid

<sup>890</sup> Ibid

The following considerations can be relevant: the child's views; the child's identity (such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, and personality); preservation of the family environment and maintaining relations (including, where appropriate, extended family or community); the care, protection and safety of the child; any situation of vulnerability (disability, minority status, homelessness, victim of abuse, etc.); and the child's right to health and right to education-COMMETEE

Infant's welfare paramount. In any proceedings before any Court, concerning the custody or upbringing of an infant or the administration of any property belonging to or held on trust for an infant or the application of the income thereof, the Court must regard the welfare of the infant as the first and paramount consideration, and must not take into consideration, whether from any other point of view, the claim of the father, or any right at common law possessed by the father in respect of such custody, upbringing administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father. This provision applies whether both parents are living or either or both is or are dead.

Even where the infant is a foreign national, the Court, while giving weight to the views of the foreign Court, is bound to treat the welfare of the infant as being of the first and paramount consideration whatever orders may have been made by the Courts of any other country." In Halsbury's Laws of England, the Law is succinctly in the following terms.

In **Salamat Ali v. Majjo Begum**<sup>891</sup>, the Allahabad High Court observed that under the personal law if mother is entitled to custody of a minor she should normally get, but the court should also consider whether in so doing it would be for the welfare of the minor.

<sup>891</sup> AIR 1985 All 29

### **Laws Governing Guardianship and Custody law of Muslim in India**

#### **Guardians and Wards Act (GWA), 1890:**

The GWA is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion. It authorizes District Courts to appoint guardians of the person or property of a minor, when the natural guardian as per the minor's personal law or the testamentary guardian appointed under a Will fails to discharge his/her duties towards the minor. The Act is a complete Code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issues under every religion.<sup>892</sup> Even if the substantive law applied to a certain case is the personal law of the parties, the procedural law applicable is what is laid down in the GWA.<sup>893</sup>

**Section 7 of the GWA** authorizes the court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the **welfare of the minor**.<sup>894</sup>

**Section 17** lays down factors to be considered by the court when appointing guardians.<sup>895</sup>

**Section 17(1)** states that courts shall be guided by what the personal law of the minor provides and what, in the circumstances of the case, appears to be for the welfare of the minor.<sup>896</sup>

**Section 17(2)** clarifies that while determining what constitutes the welfare of the minor, courts shall consider the age, sex and religion of the minor; the character and capacity of the proposed guardian and how closely related the proposed guardian is to the minor; the wishes, if any, of the deceased parents; and any existing

<sup>892</sup> Section 2 of the HMGA states that its provisions are 'supplemental' to and 'not in derogation' of the GWA

<sup>893</sup> Guardian and Wards Act, No. 8 of 1890, S.6 (—In the case of a minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both, which is valid by the law to which the minor is subject.))

<sup>894</sup> Guardian and Wards Act, No. 8 of 1890, S. 7

<sup>895</sup> Guardians and Wards Act, No. 8 of 1890, S.17

<sup>896</sup> Guardian and Wards Act, No. 8 of 1890, S. 17(1)

or previous relation of the proposed guardian with the person or property of the minor.<sup>897</sup>

**Section 17(3)** states that if the minor is old enough to form an intelligent opinion, the court may 'consider his/her preference.'<sup>898</sup>

**Section 19** of the GWA deals with cases where the court may not appoint a guardian.<sup>899</sup>

**Section 19(b)** states that a court is not authorized to appoint a guardian to the person of a minor whose father or mother is alive, and who, in the opinion of the court, is not unfit to be a guardian.<sup>900</sup> The earlier Section 19(b) prevented the court from appointing a guardian in case the father of the minor was alive. **This clause was amended by the Personal Laws (Amendment) Act, 2010** and was made applicable to cases where even the mother was alive, thus removing the preferential position of the father.<sup>901</sup>

**Section 25** of the GWA deals with the authority of the guardian over the custody of the ward.<sup>902</sup>

**Section 25(1)** states that if a ward leaves or is removed from the custody of the guardian, the court can issue an order for the ward's return, if it is of the opinion that it is for the welfare of the ward' to be returned to the custody of the guardian.<sup>903</sup> Reading the above provisions together, it can be concluded that, **in appointing a guardian to the person or property of a minor under the GWA, courts are to be guided by concern for the welfare of the minor/ward.** This is evident from the language of Sections 7 and 17. At the same time, the implication of Section 19(b) is that unless the court finds the father or mother to be particularly unfit to be a guardian, it cannot exercise its authority to appoint anyone else as the guardian. Thus, power of the court to act in furtherance of the welfare of the minor must defer to the authority of the parent to act as the guardian.

<sup>897</sup> Guardian and Wards Act, No. 8 of 1890, S. 17(2)

<sup>898</sup> Guardian and Wards Act, No. 8 of 1890, S. 17(3)

<sup>899</sup> Guardian and Wards Act, No. 8 of 1890, S. (19)

<sup>900</sup> Guardian and Wards Act, No. 8 of 1890, S.19(b)

<sup>901</sup> Personal Laws (Amendment) Act, No. 30 of 2010, S. 2

<sup>902</sup> Guardian and Wards Act, No. 8 of 1890, S. 25

<sup>903</sup> Guardian and Wards Act, No. 8 of 1890, S. 25(1)

In the end, as in every child custody decision, it is the welfare of the children which governs and each case will turn on ties individual facts and circumstances.

#### In Islamic law:

The father is the natural guardian, but custody vests with the mother until the son reaches the age of seven and the daughter reaches puberty. Islamic law is the earliest legal system to provide for a clear distinction between guardianship and custody, and also for explicit recognition of the right of the mother to custody.<sup>904</sup> The concept of Hizanat provides that of all persons, the mother is the most suited to have the custody of her children up to a certain age, both during the marriage and after its dissolution. A mother cannot be deprived of this right unless she is disqualified because of apostasy or misconduct and her custody is found to be unfavorable to the welfare of the child.<sup>905</sup> In judicial decisions under the GWA involving Muslim children, courts have sometimes upheld the mother's right to custody over children under Islamic law and on other occasions have given custody to the mother out of concern for the welfare of the child.

#### Response of Indian Judiciary to Guardianship and Custody Laws:

In deciding cases involving Muslim children, High Courts have decided in favor of the mother only when her right to custody was supported by Muslim law. In **Suharabi v. D. Mohammed**,<sup>906</sup> where the father objected to the mother's custody of the one-and-a-half year-old daughter on the ground that she was poor, **the Kerala High Court** held that the mother was authorized to have custody of a daughter of that age under Islamic law.

In similar vein, in **Md. Jameel Ahmed Ansari v. Ishrath Sajeeda**,<sup>907</sup> **the Andhra Pradesh High**

<sup>904</sup> Paras Diwan, LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY (2012) Universal Law Publishing Co.: New Delhi, at P. xvi.

<sup>905</sup> Ibid., at P. xvii

<sup>906</sup> AIR 1988 Ker 36

<sup>907</sup> AIR 1983 AP 106

**Court** awarded the custody of an eleven-year-old boy to the father, on the ground that Muslim law allowed the mother to have exclusive custody only until the age of seven in case of male children, and there was nothing to prove that the father was unfit to be a guardian in this case. In another case, the Madhya Pradesh High Court interpreted Mahomedan Law to allow custody for the mother.<sup>908</sup> **Two problems can be noted with the legal and judicial framework described above. The first is the superior position of the father in case of guardianship, though not necessarily in case of custody. The second is the indeterminacy of the welfare of the child principle, despite its widespread usage.**

#### **A. Superior Position of the Father**

The Researcher finds that under the GWA the discrimination between the mother and the father in terms of guardianship has been removed by the 2010 amendment to Section 19(b). As far back as 1989, regarding the preferential position given to the father under Section 6(a) of the HMGA, the Law Commission of India had stated that: “Thus, statutory recognition has been accorded to the objectionable proposition that the father is entitled to the custody of the minor child in preference to the mother. Apart from the fact that there is no rational basis for according an inferior position in the order of preference to the mother vis-à-vis the father, the proposition is vulnerable to challenge on several grounds. In the first place, it discloses an anti-feminine bias. It reveals age-old distrust for women and feeling of superiority for men and inferiority for women. Whatever may have been the justification for the same in the past, assuming there was some, there is no warrant for persisting with this ancient prejudice, at least after the ushering in of the Constitution of India which proclaims the right of women to equality and guarantees non-discrimination on the ground of sex under the lofty principle enshrined in Article 15. In fact, clause (3) of Article 15, by

necessary implication, gives a pre-vision of beneficial legislation geared to the special needs of women and children with a pro-women and pro-children bias. It is indeed strange that in the face of the said constitutional provision, the discrimination against women has been tolerated for nearly four decades.”<sup>909</sup> The Commission had recommended amending Section 6(a) to—constitute both the father and the mother as being natural guardians ‘jointly and severally,’ having equal rights in respect of a minor and his property.<sup>910</sup> The problem is further highlighted by the inconsistency between the superior position of the father in statutory law and recent judicial thinking on parental roles. While pursuing the goal of equality in parental responsibility is laudable, the decision leads to an ironic result—the mother is not deemed a natural guardian and therefore does not have a say in significant decisions affecting the child, but she has equal financial responsibility towards the child. Equality between parents is a goal that needs to be pursued and, indeed, the law should not make preferences between parents based on gender stereotypes. However, such equality cannot be only in terms of roles and responsibilities, but must also be in terms of the rights and legal position of the parents. Thus, the first step towards reform in this area is to dismantle the preferential position of the father in the HMGA, and make both the mother and the father natural guardians

#### **B. Indeterminacy of the Welfare standard**

While the welfare principle is used extensively by appellate courts dealing with custody issues, there is no evidence of the extent of its use by the lower courts. Based on a study of Family Court orders, **legal academician Asha Bajpai notes,**

**The best interest of the child may have been considered by the courts, but there was no mention of this standard in the orders. The**

<sup>908</sup> Mumtaz Begum v. Mubarak Hussain, AIR 1986 MP 221

<sup>909</sup> Law Commission of India, 133rd Report, August (1989), Para. 4.1, available at: <http://lawcommissionofindia.nic.in/101-169/Report133.pdf>

<sup>910</sup> Law Commission of India, 133rd Report, August (1989), Para.4.3, available at: <http://lawcommissionofindia.nic.in/101-169/Report133.pdf>

**courts did not give any information regarding the factors that they considered or their reasons for awarding custody. The orders just mentioned to whom custody was awarded in a particular case.<sup>911</sup>**

The problem with respect to the welfare principle is that despite its extensive invocation, the appellate judicial decisions do not illuminate the legal content of this principle. Family Law scholars note that while there are illustrations galore, no principled basis can be found in the manner in which courts use the welfare of the child standard. **Legal academician Archana Parashar analyzed Supreme Court judgments from 1959 to 2000 that used the best-interest principle in custody disputes. Parashar concluded that in the absence of legislative guidance regarding what factors should be used to assess the best interest of a minor, courts give varied interpretations based on their personal ideas about what is best for the children and notions of ideal parenthood.<sup>912</sup>** Parashar rightly notes, these decisions are also based on the judges' perceptions of who is a 'good' mother. Consequently, women who do not fit into such criteria would have difficulty claiming custody of children.

The wide discretion available to judges under the welfare principle also means that certain issues that should merit consideration are not treated seriously while determining custody. Allegations of sexual abuse against female children by fathers, grandfathers or other male relatives are brushed aside without any investigation, if they appear improbable to the judge.<sup>913</sup> **Legal scholar and activist Flavia Agnes notes in this regard that —the courts must exercise their power with great prudence and caution, so that it does not result in violation of the basic human right of children,**

**the right to life, which includes the right to live without fear and trauma.<sup>914</sup>**

Numerous countries across the globe have adopted a preference for shared parentage systems over sole custody arrangements for child custody disputes post-divorce.<sup>915</sup> This trend has arisen largely in a response to changing familial roles (male care takers taking on more child rearing responsibilities) as well as psychological studies revealing that the involvement of both parents in child rearing is preferable to sole custody arrangements.<sup>916</sup> However, such preferences for shared custody are often balanced with the —best interest of the child standard. The —best interest of the child standard is increasingly utilized as the tool to evaluate child custody arrangements in many nations, particularly those who are signatories to the Convention on the Rights of the Child.<sup>917</sup> It requires family courts to consider the well-being of the child as paramount.<sup>918</sup>

**On 6th July 2015 the Supreme Court in ABC v. The State (NCT of Delhi)<sup>919</sup>,** delivered a path breaking judgment on gender equality and ruled that even an unwed mother must be recognized as legal guardian of her child without forcing her to disclose the name of the child's biological father.

The above judgment is a reflection of the dynamic thinking of the Apex Court which wants to keep company with the changing time. The GWA was passed by parliament way back in 1890.

Thereafter the Indian society experienced many upheavals, as a result of which the S.C. wanted to turn GWA in favour of the child's utmost welfare. That is why this novel judgment.

<sup>911</sup> Asha Bajpai, Custody and Guardianship of Children in India, 39(2) FAMILY LAW QUARTERLY 441, 447 (2005)

<sup>912</sup> Archana Parashar, Welfare of Child in Family Laws—India and Australia, 1(1) NALSAR LAW REVIEW 49, 49 (2003)

<sup>913</sup> Flavia Agnes, Family Law II: Marriage, Divorce and Matrimonial Litigation (2011), Oxford University Press: New Delhi, Pp. 257-259

<sup>914</sup> Ibid. at 259

<sup>915</sup> E.g. Australia, Family Law Amendment (Shared Parental Responsibility) Act, Section 61 DA (2005); Netherlands, Civil Code, Article 247 (2009)

<sup>916</sup> Glover, R. & Steel, C., Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, Journal of Divorce, Vol. 12 No. 2-3 (1989)

<sup>917</sup> Convention on the Rights of the Child, Art.3, (1989)

<sup>918</sup> Ibid

<sup>919</sup> [Arising out of SLP (Civil) No. 28367 of 2011

### Summary Of Recommendations

*“The law is dynamic and is expected to diligently keep pace with time and the legal conundrums and enigmas it presents<sup>920</sup>”*

Researcher fully and unflinchingly supports the recommendations and suggestions made by the Law Commission of India in its 257th Report (22nd May 2015), has given a comprehensive report under the title of —Reforms in Guardianship and Custody Laws in India”.<sup>921</sup> The best interest of the child should be the sole consideration which supersedes all others.

The recommendations of the Law Commission India in its 257th Report are captured in the Guardians and Wards (Amendment) Bill, 2015, which are appended to the report. The Guardians and Wards Act, 1890. In this regard, the Law Commission also makes incidental reference to some of the recommendations of the 83rd report (26th April 1980) of the Law Commission, under the title of „The Guardians and Wards Act, 1890,<sup>922</sup>as well as the 133rd report (29th Aug. 1989) of the Law Commission, under the title of ‘Removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of the welfare principles.’<sup>923</sup> The Commission provides detailed legislative text by recommending the insertion of a new chapter IIA dealing with ‘Custody, Child Support and Visitation Arrangements’. The Commission also provides specific guidelines to assist the court in deciding such matters, including processes to determine whether the welfare of the child is met; procedures to be followed during mediation; and factors to be taken into consideration when determining grants for joint custody. The recommendations are discussed in detail in the following pages.

<sup>920</sup>ABC V State

<sup>921</sup>

<http://lawcommissionofindia.nic.in/reports/ReportNo.257CustodyLaws.pdf>

<sup>922</sup> 128 Law Commission of India, 83rd Report, April (1980), available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>

<sup>923</sup> 129 Law Commission of India, 133rd Report, August (1989), available at <http://lawcommissionofindia.nic.in/101-169/Report133.pdf>

### A. Amendments to the Guardians and Wards Act, 1890

The Law Commission recommends the following amendments to this Act:

**1. Section 17:** This section provides for matters to be considered by the court in appointing the guardian of a minor, and requires the welfare of a minor to be consistent with the laws to which the minor is subject. In the past, Section 17 was read with Section 19 of this Act (which deals with the preferential right of natural guardianship).<sup>138</sup> **Before being amended by the Personal Laws (Amendment) Act, 2010, Section 19 offered a preferential right to the husband (of a minor girl), or the father (in all other cases) to be the guardian of the minor, if neither were unfit to be appointed guardian. The 2010 Act included the mother along with the father as a natural guardian of the child, and changed the position of the law slightly.**<sup>924</sup>

However, the welfare of the child was still not, under law, truly the paramount consideration in such matters.

The Law Commission recommends that the possibility of any alternate reading be corrected in statute, and reaffirms, in this context, the general recommendations made by the 83rd report of the Law Commission. Thus, in the appointment or declaration of a guardian, the welfare of the minor must be paramount, and everything else must be secondary to this consideration. In determining welfare, however, the court may give due regard to the laws to which the minor may be subject. As the 83rd report observed, —such an amendment will settle the position for all times to come,<sup>925</sup> and will remove the possibility of the appointment of a guardian without first assessing welfare.

**2. Section 19:** This section provides for the preferential right of certain persons to be regarded as natural guardians. It provides that the court may not appoint a guardian, if the husband of a minor who is a married female is

<sup>924</sup>Personal Laws (Amendment) Act, No. 30 of 2010, Chapter II

<sup>925</sup> 140 Law Commission of India, 83rd Report, April (1980), Para.6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>

not unfit to be the guardian of her person, or if the father or mother (who are living) of a minor other than a married female is similarly not unfit to be the guardian. **Here, too, the Commission reaffirms the 83rd report regarding the importance of the welfare principle, and recommends that in determining whether a person is unfit to be a guardian in these circumstances, the welfare of the minor under Section 17 shall be the paramount consideration.**

**3. Section 25:** This section provides for the arrest of a ward if the ward leaves or is removed from the custody of his guardian, if such arrest is for the welfare of the ward. As with its recommendations above, the Law Commission concurs with its 83rd report, in various aspects.<sup>926</sup> First, the concept of arrest of a minor is an archaic one, and needs to be amended to reflect modern social considerations. Therefore, the Law Commission recommends a substitute section, replacing arrest with the requirement to return the ward to the custody of his or her guardian. Again, the Commission reiterates the necessity of placing the welfare of the minor as the paramount consideration.

Second, the present text of the law is unclear as to whether a guardian who has never had custody of a minor is entitled to the relief under this section. This needs to be clarified, and accordingly, the Law Commission reiterates the recommendations of the 83rd report<sup>927</sup> as regards the language of the provision to specifically state that it applies in cases where the child is not in the custody of the guardian, though the latter is entitled to such custody.

Third, it recommends that the court must not make an order under this section in respect of a child of fourteen years of over, without taking into consideration the wishes of the child.<sup>928</sup> This is in consonance with the provisions of Section

17 of this Act, which allows the court to consider the stated preference of a minor, if the minor is old enough to form an intelligent preference. In a scenario where the minor of over fourteen years of age has left or been removed from the custody of his or her guardian, the Commission recommends that the court must take into consideration the preference of the child

**Researcher therefore suggests that Sections 17, 19 & 25 of Guardians and Wards Act, 1890 should be amended on the following lines:**

**A. Amendment of Section 17** - In the Guardians and Wards Act, 1890 (hereinafter referred to as the principal Act), in section 17,

(i) for sub-section (1), the following sub-section shall be substituted, namely:--

(ii)(1) In appointing or declaring the guardian of a minor, the welfare of the minor shall be the paramount consideration;

(iii) after sub-section (1), the following sub-section shall be inserted, namely:--

(1A) Subject to the provisions of sub-section (1), the court shall have due regard to the law to which the minor is subject, in appointing or declaring the guardian of that minor.1

**B. Amendment of Section 19** - In the principal Act, in section 19, after clause (c), the following proviso shall be inserted, namely:--

1) Provided that in determining whether a person is unfit to be a guardian under clause (a) or clause (b), the welfare of the minor as required under sub-section (1) of section 17 shall be the paramount consideration.

**C. Substitution of New Section for Section 25 - In the principal Act, for Section 25, the following section shall be substituted, namely:-**

**Section 25- Proceedings for custody of ward-**

1) Notwithstanding anything contained in section 19, if a ward leaves or is removed from the custody of a guardian of his person, or is not in the custody of the guardian entitled to such custody, the court, if it is of the opinion that it will

<sup>926</sup> 141 Law Commission of India, 83rd Report, April (1980), Para.6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>, Para.7.18

<sup>927</sup> Law Commission of India, 83rd Report, April (1980), Para.6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>, Para.7.14-7.17

<sup>928</sup> Law Commission of India, 83rd Report, April (1980), Para.6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>, Para.7.20

be for the welfare of the ward to return to the custody of his guardian or to be placed in his custody, may make an order for his return, or for his being placed in the custody of the guardian, as the case may be.

2) For the purpose of enforcing the order, the court may exercise the power conferred on a Magistrate of the first class by section 97 of the Code of Criminal Procedure, 1973.

3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.

4) In making an order under this section, the court shall have regard to the welfare of the ward as the paramount consideration.

5) The court shall not make an order under this section in respect of a child of fourteen years or over, without taking into consideration the preference of the child

**Researcher therefore suggests that after Chapter II “Chapter IIA: Custody, Child Support and Visitation Arrangements” may be added to in the principal Act.**

**Insertion of New Chapter – In the principal Act, after Chapter II, the following Chapter IIA shall be inserted, namely:-- “Chapter IIA: Custody, Child Support and Visitation Arrangements**

**Section 19A- Objectives of the Chapter-** The objectives of this Chapter are to ensure that the welfare of a minor is met by:--

a) Ensuring that the child has the benefit of both parents having a meaningful involvement in his life, to the maximum extent consistent with the welfare of the child;

b) Ensuring that the child receives adequate and proper parenting to help achieve his full potential;

c) Ensuring that the parents fulfill their duties, and meet their responsibilities concerning the care, welfare and development of the child;

d) Giving due consideration to the changing emotional, intellectual and physical needs of the child;

e) Encouraging both the parents to maintain a close and continuing relationship with the child, and to cooperate in and resolve disputes regarding matters affecting the child;

f) recognizing that the child has the right to know and be cared for by both the parents, regardless of whether the parents are married, separated, or unmarried; and

g) protecting the child from physical or psychological harm or from being subjected to, or exposed to, any abuse, neglect or family violence.

**Section19B- Definitions-** For the purpose of this Chapter:-- (a) "Joint custody" is where both the parents:-- i. share physical custody of the child, which may be equally shared, or in such proportion as the court may determine for the welfare of the child; and ii. equally share the joint responsibility for the care and control of the child and joint authority to take decisions concerning the child; and (b) "Sole custody" is where one parent retains physical custody and responsibility for the care and control of the child, subject to the power of the court to grant visitation rights to the other parent.

**Section19C- Award of custody-**

(1) In a proceeding to which this Chapter applies, the court may order joint custody or sole custody consistent with the welfare of the child.

(2) In determining whether an order under this section will be for the welfare of the child, the court shall have regard to the guidelines specified in the Schedule.

(3) Subject to the welfare of the child being the paramount consideration, the court may modify an order under this section, and record the reasons for doing so.

**Section 19D- Power to pass additional orders-** The court shall have the power to pass any additional or incidental orders necessary to effectuate and enforce any order relating to the custody of the child.

### **Section 19E- Mediation –**

(1) The court will ordinarily refer the parents to the court-annexed mediation Centre or, in the absence thereof, to such person as the court may appoint as mediator, either at the commencement of, or at any stage during, the proceedings under this Chapter.

(2) A mediator to which parents are referred to under sub-section (1) must possess relevant professional qualifications or training in mediation, and sufficient skill and experience in mediation relating to family disputes.

(3) For the purpose of this section, every High Court and District Court and Family Court shall maintain a list of court-annexed mediation centres or individual mediators.

(4) The court-annexed mediation centres or individual mediators shall be identified and paid remuneration in accordance with a scheme prepared for this purpose by the concerned High Court, in consultation with the respective State Governments.

(5) For the purpose of ordering or performing any mediation under this section, the court and the appointed mediator shall have regard to the guidelines specified in the Schedule.

(6) The court may, where it considers appropriate or necessary, seek assistance from a trained and experienced professional to undertake an independent psychological evaluation of the child.<sup>929</sup>

(7) A mediation ordered by the court under this section must ordinarily conclude not later than sixty days from the date of such order, unless extended by the court, where necessary.<sup>930</sup>

### **Section 19F- Child support –**

(1) A court may pass appropriate orders for the maintenance of children, and fix an amount that is reasonable or necessary to meet the

living expenses of the child, including food, clothing, shelter, healthcare, and education.

(2) For the purpose of determining reasonableness or necessity, the court may take into consideration the following factors, namely:--

- a. the financial resources of each of the parents;
- b. the standard of living that the child would have had if the marriage had remained intact;
- c. the physical and emotional condition of the child;
- d. the particular educational and healthcare needs of the child; and
- e. any other factors that the court considers fit.

(3) An order of the court under this section must subsist till the child reaches 18 years of age.

(4) Notwithstanding anything contained in sub-sections (1), (2) and (3), the court may make such further orders as it considers fit, including:--

- a. requiring the payment of a sum greater than the sum determined under sub-section (1);
- b. requiring the subsistence of an order for a duration longer than as provided under sub-section (3), but such order shall not subsist in any case beyond such time as the child reaches 25 years of age;<sup>931</sup>
- c. requiring the subsistence of an order under sub-section (3) beyond such time as the child reaches 25 years of age in case of a child with mental or physical disability;<sup>932</sup> and (d) making the estate of a parent, who dies during or after the conclusion of proceedings under this

<sup>929</sup> 145 Marital mediation Staff, What is the Difference between Marital Mediation and Marital Counseling?, February 22, 2013, available at <http://www.maritalmediation.com/faqs/what-is-the-difference-between-marital-mediation-and-marital-counseling-2/> (Last visited on April 22, 2015).

<sup>930</sup> Baljinder Kaur v. Hardeep Singh, AIR 1998 SC 764

<sup>931</sup> The Times of India, Raise Age for Child Maintenance to 21: Court, August 12 (2011),

<sup>932</sup> Juvenile Justice (Care and Protection of Children) Act, No. 56 of 2000, S.2 (d)

section, liable for obligations under the order passed by the court.

## **(2) Musawah Justification for Reform in Islamic law on custody and guardianship**<sup>933</sup>

**On equal right to custody and guardianship of children:** The Qur'an does not distinguish between fathers and mothers where the upbringing of children is concerned. Even parents who are divorced should still exercise 'mutual consent and due consultation' (Surah al-Baqarah 2:233) with each other regarding the upbringing of their children: '[...] No Mother shall be treated unfairly on account of her child. No father on account of his child.'

The classical jurists generally divided the rights and responsibilities of adults over their Children into physical care and custody and guardianship. It was regarded more suitable to confer custody to women over men. In practice, many Sharia's courts in premodern times granted mothers the guardianship of their orphaned children. Loss of custody on the ground of the mother's remarriage is based on a Tradition of the Prophet, where he said to a divorced wife, 'You have the first right to look after [your child] Unless you marry.' It is unfortunate that this Tradition has often been interpreted to mean that the mother loses the right to custody upon her remarriage, and that custody reverts to the father, regardless of whether this is in the child's best interest. However, it is possible to interpret this hadith as conferring upon the mother a prior right of custody over her young children before her remarriage, and if she remarries, then the mother and the father could have equal right to custody, and the case may be considered on its individual merits.

### **Conclusion**

As human affairs change and evolve, laws and social norms that shape family relations also need to be adjusted and refined to reflect these changes. Most contemporary Muslim family laws are based on a centuries old juristic (fiqh)

framework that no longer responds to contemporary Muslim realities. Law reform is one method for addressing social and economic changes and making our legal systems compatible with the needs of individuals and families today.

Family laws that pre-emptively grant guardianship to male relatives without considering the best

interests of the child can be reformed by applying the principles of *maslahah*. Research shows that fathers' claims to guardianship over children often work against the interests of the children, particularly in divorce disputes. Custodial mothers who do not have the legal authority to manage their children's affairs are unable to provide the care that their children may need in different situations (e.g. opening a bank account for them, dealing with medical problems,

attending to education needs, etc.).

Although Guardianship under Muslim law is mainly governed by their personal law but if in any case there is conflicting situations arise then guardianship and wards act, 1890 will prevail over personal laws. But here again certain loopholes are present that creates problem in guardianship law. For which certain reforms should be applied. Time to time law commissions is established which gives report on the necessary reforms many judgments also added fuel to the necessary reforms in guardianship law so that grave injustice can be prevented.

Reform is often resisted on the grounds that Muslim family laws are divine and thus not open to change. Yet in reality change and reform have been inherent in Muslim legal tradition. Islamic legal theory is rich with concepts and tools that have been continually used in the past and that can pave the way for family laws that are more in line with contemporary Muslim realities, as well as with modern notions of justice which, in the course of the twentieth

<sup>933</sup> Musawah, CEDAW and Muslim Family Laws p.4

century, have come to include gender equality.<sup>934</sup>

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<sup>934</sup> Musawah Paper Issue 2