

**Legal and Judicial Responses to Muslim Mother's Rights to
Guardianship in Bangladesh**

Ph.D. Dissertation

By

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Ph.D. Researcher

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To My Parents

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Declaration

This is to certify that the thesis entitled “**Legal and Judicial Responses to Moher’s Rights to Guardianship in Bangladesh**”, submitted by me to the University of Dhaka, Department of Law for the award of the degree of Philosophy of Doctorate in Law is a *bonafide* record of research work carried out by me under the supervision of **Professor. Dr. Taslima Monsoor**. The contents of this thesis, in full or in parts, have not been submitted to any other Institute or University for the award of any degree. My indebtedness to other works has been duly acknowledged at the relevant places.

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This is to certify that thesis entitled, “**LEGAL AND JUDICIAL RESPONSES TO MOHER’S RIGHTS TO GUARDIANSHIP IN BANGLADESH**”, submitted to the Faculty of Law, University of Dhaka, in partial fulfillment of the requirements for the degree of **DOCTOR OF PHILOSOPHY** in Department of Law, embodies the result of a piece of bona fide research work carried out by **SYEDA AFROZA ZERIN**. Registration No..... under my supervision and guidance. No part of the thesis has been submitted for any other degree or diploma. I further certify that such help or source of information, as has been availed of during the course of this investigation has duly been acknowledged.

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Glossary

▪ <i>Ayat-</i>	Verse
▪ <i>Ayat Al Radhaat</i>	Verse of Fosterage
▪ <i>Curatio-</i>	Care
▪ <i>Cura minorum</i>	Guardianship of Minor
▪ <i>Ex parte</i>	Done with respect to or interest of one side
▪ <i>Fiqh</i>	Theory or Philosophy of Islamic law
▪ <i>Hadith</i>	Practice of the Prophet
▪ <i>Hisn</i>	Fort
▪ <i>Hizanah</i>	Custody
▪ <i>Heba bil ewaz</i>	A gift with consideration
▪ <i>Impuberum</i>	Up to puberty
▪ <i>Kabinnama</i>	Contract of Marriage
▪ <i>Kaium-Mukam</i>	The personal representation of the testator
▪ <i>Kazi</i>	Religious Judge
▪ <i>Mahr</i>	Dower
▪ <i>Matbar</i>	Head of the village
▪ <i>Maqasid</i>	Classical Doctrine
▪ <i>Maa'l</i>	Property
▪ <i>Nikah</i>	Marriage
▪ <i>Nafaqa</i>	Maintenance
▪ <i>Naior</i>	Married Women's occasional visit to Parental home
▪ <i>Panchayats</i>	Village Court
▪ <i>Parens Patrae</i>	The Monarch or other authority, regarded <i>As the</i> protector of the citizen, who are Unable to protect themselves
▪ <i>Patria Potestas</i>	Paternal power
▪ <i>Qawwam</i>	Protector
▪ <i>Sharia</i>	The recommended path
▪ <i>Shalish</i>	Extra-Judicial Mediation or Arbitration
▪ <i>Sunnah</i>	Practice of the Prophet
▪ <i>Sui Juris</i>	Independent Person
▪ <i>Talaq</i>	Unilateral dissolution of marriage by the husband
▪ <i>Taqlif</i>	Trouble
▪ <i>Tutela Legitima</i>	Legal Guardianship
▪ <i>Tutela detive</i>	Magisterial Guardian
▪ <i>Ummah</i>	Society
▪ <i>Wali</i>	Guardian
▪ <i>Wasiyat</i>	Will
▪ <i>Zilla Judge</i>	District Judge

List of Abbreviation

AIR	All India Reporter
AD	Appellate Division
BLD	Bangladesh Law Decision
BSCR	Bangladesh Supreme Court Reports
BLC	Bangladesh Law Chronicles
CJ	Chief Justice
DLR	Dhaka Law Reports
DMMA	Dissolution of Muslim Marriage Act
FCO	Family Court Ordinance, 1961
GWA	Guardianship and Wards Act
HCD	High Court Division of Supreme Court
IA	Indian Appeal
ILR	Indian Law Reports

IC	Indian Case
MLC	Mainstream Law Chronicles
MFLO	Muslim Family Laws Ordinance 1961
PLD	Pakistan Law Decision
PBUH	Peace Be Upon Him
PC	Privy Council
SC	Supreme Court
SCMR	Supreme Court Monthly Review
WID	Women in Development

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- Ahmed Nawaz v. State* 20 DLR 1968(HCD) pg.45
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- Mrs. Nilufar Majid v. Mokbul Ahmed* 9 BLD 1984 (HCD) pg.79
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- Shah Shamim Delower v. MorjinaAker Family suit /case no. 21/2014*
- Sheema Begum v. Rehanuddin Family Suit No. 78/2011*
- Torab Ali v. Mst. Shirin Banu Family Suit No. 27/2009*

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The Family Courts Ordinance, 1985

The Guardians and Wards Act, 1890

The Majority Act, 1875

The Muslim Personal Law (Shariat) Application Act, 1937

Abstract

The Legal framework on guardianship of minors emerged under the Roman law. Later on, Islamic Law also addressed the issue in a progressive and dynamic manner. Though, most of the jurists have failed to appreciate the beauty of that dynamism thereby could not interpret it in a manner which is conducive to the changing needs of the society. During the British rule in the Indo-Pak Sub-continent, the Principal legislation governing the guardianship and custody of the children in Bangladesh was enacted, keeping the personal laws intact. The law apparently favours fathers and in practice tilted towards father as an absolute guardian of minor in any case irrespective of the interest and betterment of the children. International law dealing with the rights of the children also called upon the states to give the paramount importance on the best interest of the children on any matter including the guardianship. But our precedent setting courts could not go beyond the black letters of law and largely remained indifferent on their role in removing justice and in establishing substantive equality and justice in the society. In many cases where mothers are found as competent enough and fit as a guardian but the courts refused their stance. Only exceptionally, our higher court has given the guardianship to mothers.

But as a matter of fact, those progressive decisions have not received mainstream attention by the country-wide Family Courts. However, as a routine matter, Family Courts are granting the absolute right to guardianship to father and refusing the mothers' rights to guardianship in any case without fully understanding the implications of existing laws and judicial decisions. Mothers' role for rearing and caring of children is well known but beyond these mothers can also play a pivotal role in protecting and managing the property of children which is ignored for long. The submission in this research is to break down the silence which leads to grave injustice. It is found in the present research after an in-depth doctrinal analysis that, there is no bar legally to grant the guardianship to the mothers. The empirical studies showed the competence of mother to work better as a guardian of minor children. It is further submitted to have more proactive role by the higher judiciary of Bangladesh at the same time the lower judiciary i.e. Family Courts should not hesitate to grant guardianship to the mother when they are found as a competent.

CHAPTER 1

INTRODUCTION

1.1 Introduction

Bangladesh is predominantly a Muslim, male dominated and paucity-stricken country. Therefore, the present research is confined only with the norms of Muslim Law regulating the guardianship. The principal objective of this thesis is to identify the difficulties and barriers that Bangladeshi Muslim Mother facade in obtaining or exercising their right to guardianship of minor children after the cessation of their marriage or after the death of their husband.

According to the Modernist¹, in the classical texts of Muslim law, there is nothing explicit about the right of the mother to the guardianship of the children. Nonetheless, as the father is obligated with the responsibility to maintain the child, from that point of view, the father is considered as a legal guardian. But this is not absolute. Though, as per the orthodox view, a father is the only legal guardian, and in case of his absence, another male member may be appointed as the guardian of the child but not the mother. However, modernist has rejected the orthodox view. They said as per the 'welfare theory' whoever will be able to ensure the welfare of the child by providing him required maintenance and able to grip the property of the children may be appointed as the guardian of the minor.² According to the modernist Islam disquiets men and women as complementary to each other and thus as equitable in the private sphere. Consequently, men's liability to maintain the child and the wife automatically never establish that only father will be the guardian. But the orthodox jurist has undermined the mother's right to guardianship of the children despite the absence of any Quranic verse regarding this issue.

Therefore, Modern legislative reforms took place in different Muslim countries including Bangladesh with the object to ensure the welfare of the children and to

¹The word 'modernist' used here refers to those scholars who worked for the reform of Islamic tradition through an absolute emphasis on the Quran and Sunnah to meet the needs of modern society, including its institutions and technology arose in the nineteenth century. Islamic modernism underwent its richest development in the Middle East under Al-Afghani's Egyptian disciple Muhammad Abduh.

² Ahmed, Giasuddin, *Women's Rights and Family Values: Islamic and Modern Perspectives*, 1997, Dhaka

enhance the opportunity to appoint the mother also as the guardian of the minor in suitable cases. It is pertinent to mention that most of the modern legislations give the accent on a point that the Holy Quran is silent on the question that what should happen when men cease to be providers financially, emotionally or otherwise.³ According to modernist, therefore, it leaves open the question of the status of women when they are no longer dependent on men as the providers or bread earners.⁴ They also mentioned that recent trend shows that increasingly families are finding it very hard to live on the husband's income alone and many husbands are failing to provide their normative commitment. In that case, society created male domination and women subordination should not continue anymore.

Under Islamic law, even if the mother has the physical custody of her children, the father continues to be the guardian of the child as he is supposed to support the child financially. But, under the prevailing social setup where the father is not the sole financial contributor and the mother shares financial responsibilities and in many cases is the main contributor of the financial needs of the family, then the privilege of 'guardianship of person and property' should vest in her as well. Since its independence, the Bangladesh judiciary has not only accepted the progressive decisions of the Pakistani judiciary but has also made its independent contribution in interpreting child custody and guardianship rules by taking a more child rights-based approach, without blindly following the rigidity of the classical Hanafi law texts. Thus, in Bangladesh, a welcoming trend is discernible from the decisions of the higher judiciary, where the courts have favored welfare considerations of the child over personal laws in interpreting the Guardians and Wards Act 1890. Even though not many of such progressive judgments have ventured into assessing whether welfare is ingrained within the broader framework of Sharia law, the courts have certainly taken a stance in favor of protecting the interest of the child in question. This Chapter is followed by the Rationales of the Research, Objectives of the research, Statements of the Problems, Methodology including a Research Method and How the interviews were conducted. Outlines of the thesis, Scope and Limitations of the Research has also been incorporated in this Chapter.

³ Mashood A. Baderin, *International Human Rights and Islamic Law*, Oxford, Oxford University Press, 2003

⁴ Esposito, John L, *The Changing Role of Muslim. In Islam and the Modern Age*, Vol. 7, No. 1, Feb (1976), p.56

1.2 Rationale of the Research:

As per section 17 of Guardians and Wards Act 1890 the guardianship of children is to be determined as per the subject of the Family law of the concerned children. On the basis of that provision our judges of the Family Courts are blindly giving the guardianship only to the father or other members of the family but not to the mothers in any case. Though, Sharia law has not incapacitated mother to be the guardian and did not provide any unilateral right to the father to be the only guardian of the child. But our judiciary, both higher and lower has not yet come with any progressive decisions in this regard with minor exceptions. And the matter remains one of the unexplored areas among the researchers which is another rationality for conducting a comprehensive research in this field.

1.3 Objectives of the Research:

Firstly, the main objectives of this research are to revisit the applicable mechanism—the laws and legal practices currently followed in Bangladesh in cases relating to guardianship of minors.

Secondly, identifying the underlying causes for refusing mother to provide guardianship of minor.

Thirdly, assessing the perceptions of the judges, lawyers and litigants on mother's right to guardianship.

Fourthly, analyzing the significance of guardianship of mother.

Finally, suggesting necessary reformative measures and some way-outs for further improvements in the policies, laws and judicial practices that would ensure mother's right to guardianship of minor.

1.4 Statement of the Problem

In Bangladesh a Muslim mother despite being acknowledged as the primary care giver of her children, is not entitled to the legal guardianship of her minor children. The Guardians and Wards Act, 1890 is the fundamental law which addresses guardianship and custody disputes in Bangladesh. Most of the time the Family Courts of Bangladesh are refusing to hand over the guardianship of the minor children to the mother in the name of the provisions of section 17 and 19(b) of this Act. Truly speaking unlike Muslim personal law, the Guardians and Wards Act does not

differentiate between custody and guardianship and it charges the guardian with custody of the minor. In practice, the father being the guardian of the child entitled to his or her custody and the mother has little scope to apply for the custody of the minor children under the Guardians and Wards Act. But in Bangladesh the Family Courts are giving preference to mother in case of custody of children applying the principle of 'welfare of the child'. Unfortunately, in guardianship matters they are not ready to apply the principle of 'welfare of the child'. But the Supreme Court has already delivered a number of judgments regarding guardianship matters applying the 'welfare of the child' doctrine in a range of situations applying the current statutory provisions and handed over the guardianship to the mother.

Therefore, an effort has taken in this research to find out the causes of non- granting the guardianship to the mother by the Family Courts and to find the way out to ensure the application of 'welfare' doctrine in guardianship matters to ensure the best interest of the children. The research therefore consulted both primary and secondary sources, reviewing the existing laws applicable to custody and guardianship and academic commentaries including reported and unreported Judgments of the Family Court and the Supreme Court to justify the grounds for granting the right to guardianship of minor children to the Muslim Mother in Bangladesh.

1.5 Methodology:

This present research combined both doctrinal analysis and empirical studies. While the doctrinal aspect of the study, as a starting point, deliver the stimulus through which the empirical investigation itself provided the information on the basis of which the research engrossed on the trends and issues influencing mother's right to guardianship as well as the efficiency of the existing legal regime to guarantee mother's right to guardianship. To minimize the gap between theory and practice both qualitative and quantitative methodologies were applied in this research. The research retrieved both primary and secondary sources, revising the existing laws applicable to guardianship and academic annotations including reported and unreported judgements given by the family courts of Dhaka and higher courts. It has been very problematic to accumulate these judgments from the Family Courts as they had to be replicated from the original judgments of the courts. It was also tough to make those decisions reachable for this research, as not only they are confidential, they are also typically in Bangla. However, an attempt has been made in this research

to scrutinize the unreported decisions of the Family Courts of Dhaka to stretch a more comprehensive picture of the status of Muslim mother regarding their right to guardianship of minors than one gets from reported cases. Apart from this to confirm the persistence of this research 11 Judges, 31 Lawyers and 1253 Mother litigants has been interviewed. The interviews were semi-structured in nature simplified by questionnaires adapted according to the respondent's respective roles, connotation and engagements to the procedure. Interviews were transcribed and in most cases audio-recorded, negotiated by express assurance of privacy where the respondents favored so.

1.5.1 Research Method

In this research, an empirical study took place on the basis of a number of unreported cases which were dissolved by the Family Court of Dhaka. This research focused on the judgement of selected Family Courts of Dhaka only because the judgments are almost the same all over the country and people from different districts do come to Dhaka judge court and thus those judgement will represent the whole country. From the judgments of unreported cases, the views of the judiciary about the application of guardianship laws can also be analyzed. In this research the litigants (mother), judges and lawyers of those cases have interviewed. The information which has been collected has shown in tables, pie charts, column charts and figures.

1.5.2 How the Interviews were Conducted?

Among the litigants, most of the respondents were cooperative. Male litigants were not interviewed due to their unwillingness to talk on the issue of mother's right to guardianship of minors. Moreover, they were found embarrassed in the question of rights of guardianship. They expressed that according to them it is their unilateral right to have the guardianship and custody of the children especially when the child is a boy.

Most of the children expressed their desire to be with both mother and father. However, they were found very uneasy with the environment of the court. That's why it is decided not to take their interviews. Judges talked with a condition to keep their identity secret. Most of the lawyers were very much co-operative. But to take their interview visitation to their personal chambers was the only option. The following number of respondents have interviewed.

As part of the interview of litigants, 1253 mothers who were a party to custody and guardianship cases were interviewed. Among the Judges dealing with guardianship cases, 11 Judges of the Family Court of Dhaka were interviewed. All of them had 2-3 years of experience as a judge of the Family Court. 31 lawyers were interviewed. Almost 70% of them had more than 15 years of experience regarding Family matters.

1.6. Outlines of the Thesis:

This research is structured in six chapters. The introductory chapter provides the ground and context of the study that in our country the guardianship of person is granted to the mother whereas guardianship of property is always granted to the father or other male members of the family. It is followed by the Rationales of the Research, Objectives of the Research, Scope and Limitations of the Research, Methodology including a Research Method and How interviews were conducted and an outline of the Thesis. This Chapter ends with a Conclusion.

Chapter 2 of the study presents the existing legal framework on guardianship in Bangladesh with an elaborate discussion on historical evolution of the laws on guardianship in different legal systems. This Chapter begins with an introduction followed by the development process of guardianship law under non- statutory laws, Roman law, under British law in Indo-Pak Sub- Continent, development of law on Guardianship after Emergence of Bangladesh, development in Contemporary Muslim World and development under International Law. This chapters ended with a Conclusion.

Chapter 3 offers the discussion on judicial responses to the Mother's right to guardianship where laws are found mostly non-responsive to the needs and aspirations of mothers in this regard. This Chapter started with an Introduction. It is followed by Response from the Supreme Court referring to reported cases, Response from the Family Courts referring to unreported case laws. In this chapter the Judges views regarding Muslim mother's right to guardianship can be studied from their statements in court decision. This Chapter also focuses on the question whether Muslim mothers in Bangladesh stand to benefit from judicial activism on the question of guardianship of minor. However, it is found that in most of the unreported case, judges are giving preference to father in guardianship matters. But Supreme Court is

found to come forward to focus on the welfare of the child rather than the welfare of the parents.

Chapter 4 explores a pragmatic study in the context of Family Court of Dhaka to show the effects and relevance of the existing legal regime in depriving mothers from the right of guardianship. This Chapter commences with an Introduction. Followed by a study regarding the Eligibility of Mother as Litigant in Guardianship Suits in the context of their Socio, Economic and Educational competency. This Chapter presents eleven tables showing Mother's status in case of providing maintenance to children during marriage and after divorce and litigant mother's awareness of their right to guardianship followed by the decisions of some Family Courts where father or other male members of the family is preferred for guardianship of the minor. Different causes of preferring father or other male members of the family has also been discussed. The Chapter ends with a conclusion.

The perceptions of judges, lawyers and litigants on Mother's right to Guardianship are presented in Chapter 5. Where, the hesitation and discomforts are observed from the side of judges in granting the right to Guardianship to mother while they are not barred to do this. The aim of the chapter is to explore the attitude and opinion of the judges and lawyers and litigants regarding Muslim mother's right to guardianship of minor. This chapter focused on the Trends and Issues Influencing Muslim Mother's Right to guardianship of Minor, which includes Patriarchal Interest, Waiving the Right to Property by the Women Herself, substantiated by a table showing interview of litigant mothers, Dependence of Mother on the Father for maintenance of Children supported by two tables conveying interview with the Judges and litigant mothers, Mother's right to Guardianship of Minor Children under Existing law presenting two tables of interview of Judges and Lawyers .

Chapter 6 is the concluding chapter. This chapter summarizes the legislative enactments on guardianship in Bangladesh and discussed the judicial trends in judicial decision making. It is stated in this chapter that along with misinterpretation of non-statutory and statutory laws, patriarchal attitude or women subordination, there are more various grounds which are influencing the trend of refusing the Muslim mother to get the guardianship of children in Bangladesh. Focusing on the matter that custody without guardianship is almost meaningless, this chapter recommends some way outs to confirm the application of principle of welfare in guardianship cases to facilitate

Muslim mother's right to guardianship of minors. Chapter 6 concludes by summarizing this work's contributions to knowledge and the options for further research in relevant fields.

1.7 Scope and Limitations of the Research

The present research is confined to the Bangladeshi Muslim mothers' right to guardianship. As the claim for such guardianship increased manifold in recent years with the increased participation of women in economic activities, the research will only cover the data of denial and acceptance of guardianship to mother in this new millennium— from the year 2000 to 2017. The research covers only the mother litigants, judges, and lawyers involved in guardianship cases at the Family Courts of Dhaka. I have deliberately chosen the Family Courts of Dhaka as it is found that the mothers of almost all types of occupations with varying levels of education, and from diverse backgrounds with different perspectives are coming here as litigants to claim the right to guardianship over their children. As a matter of coincidence and the Family Courts' concurrent jurisdiction, the issues of custody and maintenance are referred in some cases with the narratives of guardianship.

1.8 Conclusion

The rigid interpretation of the provisions of Muslim law maintain a distinction between custody and guardianship of the minor children. These interpretation holds that though the mother is entitled to the custody of the children but is not entitled to the legal guardianship of her children. On the other hand, the Guardians and Wards Act 1890 is the core law relating to guardianship and custody does not differentiate between the custody and guardianship and it charges the guardianship with custody of the minor. But in practice the Family Courts of our country are refusing to grant the right of guardianship to the mother in the name of the provisions of Muslim laws and the Statutory laws. Interestingly, the Supreme Court has already delivered a number of judgments in the area of guardianship applying the principle of 'welfare of child' applying the current statutory provisions. The Judgments of the Supreme Courts are supposed to be considered as 'best practices' and should be followed by the lower Courts also. Therefore, in this research an attempt has taken to focus on the causes of not granting the rights of guardianship to the Muslim mothers in Bangladesh as well as to formulate recommendations for law, policy and procedural reforms in order to

further mother's right to guardianship of minor children. This Chapter has discussed on the objective of the Research, rationales of the Research, methodology, statement of the Problem, scope and limitations and outlines of the Research.

CHAPTER 2

DEVELOPMENT OF LAWS RELATING TO GUARDIANSHIP

2.1. Introduction:

This chapter deliberated about the development of laws relating to Guardianship. Since, in this research only the Muslim mother's right to guardianship of children has been discussed, therefore, this chapter also focused on the Non statutory laws regarding mother's position as guardian based on the provisions of the Holy Quran and Hadith.⁵ It is found from the research that traditionally as well as on the basis of the Islamic laws the right of guardianship of children always vested to the father.⁶ But the provisions of Holy Quran and Hadith always focused on the welfare of the children and thus created the scope of Muslim mother's right to get both custody and guardianship of her minor children. In this chapter the development of laws relating to guardianship of minor children under Roman Law, British Law in India, Pakistan and Bangladesh has been conversed. Moreover, the laws regarding guardianship prevails in different Muslim countries has also been deliberated in this chapter to show the recent development of guardianship law in the Muslim contemporary world and Mother's right to guardianship from International perspective has been discussed also.⁷

2.2. Under Non -Statutory Laws:

Like India and Pakistan, the cases of guardianship of minor children is being governed in Bangladesh by the amalgamation of statute laws i.e. The Guardians and Wards Act, 1890, Muslim personal laws and case laws. However, according to the Sharia Application Act of 1937, Sharia law (Muslim Personal Law) is the governing law for guardianship of Muslim.⁸ Therefore, Bangladeshi law recognized two sets of laws at the same time to govern the materials regarding the guardianship of Muslim Children.⁹ Moreover, in Bangladesh, disagreements arising in the personal sphere for both Muslim Men and Women, are governed by Muslim family laws which is largely

⁵ Hodkinson, Keith, *Muslim Family Law: A Sourcebook*, 1984, Croom Helm, London and Canberra

⁶ Muhammad Khalid Masud, Brinkley Messick, David S. Powers, ed. *Islamic legal interpretation: muftis and their fatwas*, Cambridge, Mass: Harvard University Press, 1996

⁷ Rauf, Mohammad Abdul, *The Islamic View of Women and the Family*.(2nd ed.) New York, 1977

⁸ Misbah, Mohammad Taqi, *Status of Women in Islam*, London 1990

⁹ Monsoor, Taslima: *From Patriarchy to Gender Equity*, Dhaka, 1999 pp. 192

insightful of Sharia principles as promulgated by its major sources. In this context, it is pertinent to discuss about the different provisions of the Holy Quran and Hadith regarding the Mother's Right to Guardianship to make it clear that whether Muslim law is forbidding to grant the guardianship to the Muslim mothers at all or not. An in-depth study of Islamic Law reveals that there is no verse in Quran on the custody or guardianship of minors but the classical Muslim Jurists have referred to the verse of fosterage (*Ayat Al-Radhaat*) which says that the mother should breast feed their infant for two complete years. Therefore, through *Iqtada Al Nass* it is inferred that in the years of infancy the right of upbringing and fostering the child remains with mother. As per provisions of Verse No 233 of Surah *Al-Baqra*, no parent shall be subjected to torture for his being the parent of child. The said provision is reproduced here to below for the perusal:

"The mother shall give suck to their children for two whole years, that is for those parents who desire to complete the term of suckling, but the father of child shall bear the cost of mother's food and clothing on a reasonable basis. No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of his child, or a father on account of his child. And on the father's heir is incumbent the like of that which was incumbent on father. If they both decide on weaning, by mutual consent, and after due consultation, there is no sin on them. And if you decide on a foster suckling-mother for your children, there is no sin on you, provided you pay the mother what you agreed to give her on reasonable basis. And fear Allah and know that Allah is all-seer of what you do".¹⁰

This verse is to somehow related to custody. But this verse is preferring mother's right to custody of infant children to ensure the best interest of the child. Likewise, Sura An Nisa verse 4 of the Holy Quran is also indirectly related to the guardianship and the reasoning behind the supposed superiority of men over women is also derived from verse 4:34 of the Quran. There are a number of translations of this verse from the Arabic original, and all differ to some extent. Verse 4:34 begins:

"Men are in charge of women by right of what Allah has given one over the other and what they spend for maintenance from their wealth."

¹⁰Al-Baqra:233

This verse has been extracted in a number of ways, but the essence is that men have some authority over their wives. Maududi and Qutb, amongst a number of classical exegetes, claim that this authority relates to the superiority of men over women in general. Maududi writes, “Men are superior to women in the sense that they have been endowed with certain natural qualities and powers that have not been given to women or have been given in a less degree”. Qutb is in strong support of this position, and it would take much space to even summarize his entire view on the differences between men and women, and why men are more fit to be in charge. The Quran does not make any clear distinction between the essential qualities of men and women. The Quran asserts that men and women are spiritually equal. Allah the High says in the Quran:

“O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.”¹¹

Thus, the equivalence of all people must be recognized, and the hadith must be construed in concurrence with this ruling. According to the Quran, the only acceptable judge between people, with a specific reference of men and women, is righteousness.

Many scholars approve that the phrase “men are in charge of women” relates merely to men’s financial responsibility to care for their wives and other members of their family. Men are in charge of women by right of what Allah has given one over the other and what they spend for maintenance from their wealth.¹² Thus, the verse should be understood in full, and in the context of the verse that distributes inheritance unevenly. The uneven distribution of inheritance corresponds to the line “Allah has given one over the other”. Ibn Ajibah, along with many other commentators and the scholars of the Maliki and Shafi’s school, understands “men are in charge of women” as a statement of conditional and acquired authority. Thus, if a man does not support his wife financially, he cannot lay claim to authority over her.

¹¹Al Quran 49:13

¹²Al Quran 4 :34

According to the meaning of Verse 34-Sura *Nisa*, the father has been entrusted the duty to maintain the child. And therefore, Almighty Allah has given superiority to the men over women in some special affairs of a family and this is due to the man to pay alimony and this is such a special meaning of “and for that, they expended of their property and righteous women are therefore obedient.” For achieving this important position, at first, it should be determined the duties and responsibilities of individuals. The responsibility of affording life has been given to the men by the Holy Quran. Of course, it doesn't mean the superiority of all men over all women. The real advantage over the signification of the Quran is related to virtue. It is clear that every manager should have an essential virtue in his or her area of responsibility.¹³ The reason for delegating the responsibility of supervision to the men is that men are more empowered than women in general. Perhaps the picture would have been different if females were the maintainers. The Quran is silent on the question of what should happen when men cease to be providers financially, emotionally or otherwise. Therefore, it leaves open the question of status of women when they are no longer dependent on men as the providers or breadwinners.

In the Holy Quran, there is a clear indication that if the mother and father of a child are living apart and if the mother decides to breast-feed the child, the father has to pay for the milk the mother feeds to the child. Because the mother's milk directly depends on the health of the mother and the health of the mother depends on the food that she eats, the husband has to pay for food and health of the mother.¹⁴ However, the Quran does not say that women must breastfeed, it rather says it should be mutual consent and because the milk belongs to the mother's body, it is she who decides to feed the child or not. So, we can make this principle into the law and say that it is compulsory for the father to make sure that he gives the money for the maintenance of the child.¹⁵

The male-female dynamics in Islam are such that there is equality of the sexes in the spiritual sphere. The Quran implies equality of all believers in terms of equal obligation to pray. There is no concept of vicarious liability in Islam and individual

¹³ Anderson, J.N.D., *Islamic Law in the Modern World*, 1959, Greenwood Press, Westport, Connecticut

¹⁴ Baillie, Neil B.E., *Digest of Muhammadan Law, Compiled and translated from authorities in the original Arabic*, 1958, Lahore, p. 441

¹⁵ Fyzee, Aasaf A. A. *Outlines of Muhammadan Law*, (1st ed.) Bombay 1949, (2nd ed.) 1955, (3rd ed.) 1964, (4th ed.) New Delhi, 1974, p. 208

persons are responsible for their acts and deeds.¹⁶ However, Islam contains an ambivalent message concerning equality of the sexes. But due to the misinterpretation of some of the verses of the Holy Quran at the level of worldly affairs and social relationships between people, there seems to be gender inequality.¹⁷

According to the verses of the Holy Quran in regard to the responsibilities of family, men are assigned as the “supervisor” in the family. And the way the Holy Qur’an stated the duty and responsibilities of the guardian from that point of view, guardianship means the supporting column of everything for minor in his or her life. Guardian is the person who is to do the most important issue of minor or the person of unsound mind. This word is adopted from the word ‘guard’ which is a subjective adjective and means the faithful person will be responsible for another person, Guardian means, someone who has supervised in some affairs and man or husband is the supervisor of woman or wife, because he is a trustee and has endeavoured to maintain her.

The Holy Quran, the ultimate solution for humanity as firmly and deeply rooted in the faith of Muslims, proclaims to a guide for all things. One of the *maqasid* of the Sharia is to protect the lineage which has its root in a valid marriage.¹⁸ As a guide for all things, the Quran especially focuses on the very basic institution family where two persons conjoin together through a sacred bond. Family, a place of peace and tranquillity, plays a vital role in shaping and developing the morals and characters of the children and consequently contributes to construct and reconstruct a healthy *ummah*. Being a sacred and immutable revelation for all the ages and eras, the Quran speaks both on the good and strained relationship between the spouses.

The Quran specifies the manner and suggests different strategies for solving the marital problem in a proper manner without dragging on a bitter relation resulting in severing the marital tie. Surely, Allah is the Highest, the Greatest. It is clearly stated

¹⁶ Ali, Abdullah Yusuf (trans.): *The Holy Quran*. Lahore 1934. pp. 90

¹⁷ Jamila Khatun vs Rustom Ali, 48 DLR(AD) (1996) 110, AT Para 33; 1996, 25 CLC (AD) [782]

¹⁸ Hamilton, Charles, *The Hedaya: Commentary on the Islamic Laws*, London, vol. 1, 1985, Reprint p. 38

in the Holy Quran, ‘If you fear a split between them (the spouses), send one arbitrator from his people and one from her people. If they desire to set things right, Allah shall bring about harmony between them. Surely, Allah is All-Knowing, All-Aware.’

Neither father nor mother should disregard the fate of their child because of their own oppositions. This may cause harm for the mind and spirit of the child which cannot be compensated later. This fact finds its recognition in the Holy Quran (*An-Nahl* 16:89). Here Allah (SWT) clearly lays down “...We have sent down to thee the book explaining all things...”¹⁹

Nikah, or marriage in the Holy Quran (*Al-Nisa* 4: 24 &25), has been designated as *hisn* or fort. It implies that marriage like a fort provides protection and acts as a safeguard for the couple joined together in a marital tie. The Qur’an’s basic posture is that Muslim women are first and leading Muslims, the religious equals of men (Q. 33:73). It denotes to women and men as one another’s “protectors.” (Q. 9:71). Muslim marriage is described in terms of love and mercy (Q. 7:189; 30:21), and the Qur’an describes spouses as “garments” for one another (Q. 2:187).

In Islam, children also have well-defined rights with respect to inheritance. Provisions have been made within the Qur’an and the Sharia for the inheritance rights of both female and male offspring. In pre-Islamic Arabia, women and children had no inheritance rights. In Islam, boys inherit two times the amount that girls inherit. There are also provisions for the inheritance rights of parents. The child is also entitled to a guardian. This may be the father, or it may be someone the father appoints to protect the child’s interests. Under Islamic Law a child, as a minor, is not permitted to enter into any contractual arrangement. It is, therefore, the duty of the guardian to ascertain that any intended contract is to the child’s advantage.

Considering the vulnerability and dependency of the children, Islamic law provides diverse rules for the protection of their body and property. According to these rules, both parents have well-defined duties towards their children before they reach the age of maturity.²⁰ In Muslim countries, the patrilineal system of descent is the norm, so these duties are incumbent upon established paternity resulting in mutual rights of

¹⁹ Ah, Abdullah Yusuf(trans.) ; *The Holy Quran*. Lahore 1934

²⁰ An- Naim, *Islamic Family Law in a changing world: A global resource book*, ed., USA 2002

inheritance, guardianship, and maintenance. Any child born within the valid wedlock is considered legitimate and provisions have been made regarding paternity in case of divorce or death of the father.²¹

Usually guardian means a person who is to take care of the person (*Hizamat*), property (*maa'l*) and marriage of a minor in accordance with the Islamic Sharia law. Guardianship is defined as "a right to control the movement and actions of a person who, owing to mental defects, is unable to take care of himself and to manage his own affairs, for example, an infant, an idiot, a lunatic. It extends to the custody of the person and the power to deal with the property of the ward."²²

In Islamic law guardians fall under the following three categories:

- (i) Natural guardians,
- (ii) Guardians appointed by the court and
- (iii) De- facto guardian

(i) Natural Guardians:

In all schools of both the Sunnis and the Shias, the father is recognized as guardian which term in the context is equivalent to the natural guardian and the mother in all schools of Muslim law is not recognized as a guardian, natural or otherwise, even after the death of the father.²³ The father's right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor. The father has the right to control the education and religion of minor children, and their upbringing and their movement. So long as the father is alive, he is the sole and supreme guardian of his minor children.

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

According to the traditional scholars, in Muslim law, the mother is not a natural guardian even of her minor illegitimate children, but she is entitled to their custody.

²¹ Reuben. Levy: *The Social Structure of Islam*. London 1962. pp. 92, Siddiqui, Muhammad Mazheruddin: *Women in Islam*. Lahore 1966. pp. 15-24

²² Rahim, Abdur: *The Principles of Muhammedan Jurisprudence*, Madras 1911, pp. 344

²³ Ali, Syed Ameer: *Mahommedan Law* vol. ii, (4th ed.) Calcutta 1917, reprint New Delhi 1985 p. 256

Among the Sunnis, the father is the only natural guardian of the minor children. After the death of the father, the guardianship passes on to the executor.²⁴ Among the Shias, after the father, the guardianship belongs to the grandfather, even if the father has appointed an executor, the executor of the father becomes the guardian only in the absence of the grandfather. No other person can be a natural guardian, not even the brother. In the absence of the grandfather, the guardianship belongs to the grandfather's executor, if any.²⁵

It is unfortunate that the patriarchal interpretation of Sharia law was greatly shaped by the prevailing social situation in the classical period. There was a time when a number of abusive uses of women became legally and religiously approved and a period of religiously sanctioned opportunism began in regard to the intrinsic complexity and ambiguity of the Qur'anic text. The misogynistic treatment of women was reflected everywhere in the earlier jurist's interpretation of Sharia laws on gender issues.²⁶ Therefore, though neither in Holy Qur'an nor in any hadith it is found that the father should be considered as the natural and legal guardian but somehow due to the patriarchal interpretation it is established that the father is the natural guardian.²⁷ Rather it is the Sharia law which always asserts that the issue of minor's welfare must be treated with paramount importance regardless of the disputing parent's legal rights or entitlements.²⁸

Modernist Muslim Scholars argue that Islam holds the principle of gradualism (evolution) in legislating laws according to its capacity. Islamic laws are not immutable, and there is nothing to indicate that the status that women achieved during the Prophet's lifetime was final, since gradualism was linked to the difficulties of those issues for which gradual steps need to be taken to secure equal rights for women in Muslim society today.²⁹ That's why if the mother is found eligible and more appropriate to ensure the 'welfare' of the child then she must be appointed as the guardian of her minor child. There is no embargo in appointing mother as the

²⁴ Baillie, Neil B.E., *Digest on Muhammadan Law: Compiled and translated from authorities in the original Arabic*, 1958, Lahore, p. 435

²⁵ Ali, Syed Ameer, *Mahomedan Law*, vol. ii, (4th ed.) reprint New Delhi 1985, p. 256

²⁶ Rashid, Syed Khalid, *Muslim Law*, Lucknow, 1985, p. 158

²⁷ Nasir, Jamal j: *The Status of Women under Islamic Law and under Modern Islamic Legislation*, London 1990, p.26

²⁸ *Saleha Begum vs. Kamal Hossain*, 50 DLR, pp. 180, at para 7

²⁹ Wilson, Roland Knyvet: *An Introduction to the Study of Anglo- Muhammedan Law*. London, 1984, p. 185

guardian even if the father is alive in the context of the benefit of the minor child. Among the Sunnis, the father has the full power of making a testamentary appointment of a guardian. In the absence of the father and his executor, the grandfather has the power of appointing a testamentary guardian.³⁰

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

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

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

Muslim law does not lay down any specific formalities for the appointment of testamentary guardians. Appointment may be made in writing or orally. In every case, the intention to appoint a testamentary guardian must be clear and unequivocal. A

³⁰ Hamilton, Charles, : *The Hedaya: Commentary on the Islamic Laws*, London, vol. 1, 1985, Reprint, p. 410

testamentary deposition made by a testator may be invalid, but the appointment of the executor may be general or particular. The testator must have the capacity to make the will at the time when it was executed. This means that the testator should be major and of sound mind, i.e., at the time of execution of the will, he should be in full possession of his senses.

The executor of the testamentary guardian is designated variously by Muslim lawgivers, indicating his position and powers. He is commonly called, *Wali* or guardian. He is also called Amin, i.e., a trustee. He is also termed as *Kaim-mukam*, i.e., the personal representative of the testator.³¹

But if the father makes a *Wasiyat* in this regard or if the court appoints her as a guardian in appropriate cases even a mother can be appointed as a guardian. This is pertinent to mention that article 238 of the Moroccan law has incorporated a scope for a mother to be a guardian by stating that, ‘The mother may designate a testamentary guardian for her child.’³² Article 244 further adds that the Court will appoint a guardian from other relatives only in the absence of the mother;

It is decided by the Court in a case that ‘in the absence of the mother and a testamentary guardian, the court shall appoint a legal guardian for the ward, selecting the most qualified person from among the agnates, failing that, among other relatives, and if not, from among other persons.’³³

(ii) Guardians Appointed by the Court:

On the failure of the natural, guardians and testamentary guardians, the *Kazi* was entrusted with the power of appointment of a guardian of a Muslim minor.³⁴

Now the matter is governed by the Guardians and Wards Act, 1890. This Act applies to the appointment of guardians of all minors belonging to any community.³⁵ The High Court also has inherent powers of appointment of guardians, though the power is exercised very sparingly. However, as per the provisions of the Guardians and Wards Act if it can be proved before the court that the mother can best serve the interest of the child and the appointment of father would be extremely injurious to the interest of

³¹ Saleha Begum vs. Kamal Hossain, 50 DLR, pp. 180

³² <http://www.hrea.org/moudawana.html#32>, accessed on 5 November 2013

³³ Jamila Khatun vs. Rustom Ali, 48 DLR(AD) (1996) pp. 110, AT PARA 33; 1996, 25 CLC(AD) [782]

³⁴ Section 17, Guardians and Wards Act, 1890

³⁵ Schacht, Joseph, *An Introduction to Islamic Law*, 1964, Oxford at the University Press, p.110

the child then mother should be appointed as the guardian and in some circumstance, she should get the priority.

(iii) De-facto Guardians:

A person who has voluntarily placed himself in charge of the person and property of a minor is called a de-facto guardian.³⁶ They have no authority to deal with the property of the minor. He is a mere custodian of the minor's person and property but has no right over either.³⁷ Usually, de facto guardians are relatives of the minor but without the right to be the guardian under Islamic law unless appointed by the will or by the court. He is thus an official inter meddler with the minor's property and has no status or position to alienate it without the court's permission.

Under the Muslim Law, the father is considered as a natural guardian for his minor children.³⁸ Though there is no direct verse of Quran or Hadith regarding this issue still we can see the reflection of this concept in the different judgment of the court given in different cases relating to guardianship. However, this is very pertinent to mention that under the Sharia law father has the absolute legal responsibility to provide maintenance to his children.³⁹ A mother is not legally bound to provide maintenance to her children. Father has the responsibility to provide maintenance to his children irrespective of the religious faith. A father cannot escape his liability on the ground of disobedience of his child.⁴⁰

However, if a child possesses some property then the father may spend from that property to maintain his child. In such case, the father is not bound to provide maintenance from his own income, as *Hedayasaid*: 'it is a rule that every person's maintenance must be furnished from his own substance, whether he be an *infant* or an *adult*.'⁴¹ Thus it appears that the responsibility to pay maintenance to wife differs from the payment of maintenance to the child.⁴² A wife, unlike a child, can claim maintenance from her husband irrespective of her financial condition and assets,

³⁶ Fyzee, Asaf A.A., *Outlines of Muhammadan Law*, 4th ed. New Delhi, 1974, p.203

³⁷ Musati Khan vs. Nazir Ahmed, PLD 1952, Pesh. (W.P.)

³⁸ J.N.D. Anderson, *The Eclipse of the Patriarchal Family in Contemporary Islamic Law' In Family Law in Asia and Africa*. London 1968. pp. 221-234

³⁹ Jhon L. Esposito, *Women in Muslim Family*, 1st ed., Syracuse University Press, New York, USA, 1982

⁴⁰ Pearl, David, *A Text Book on Muslim Law*, London, 1979,(2nd ed.) 1987, p. 65

⁴¹ Hamilton, Charles, *The Hedaya: Commentary on the Islamic Laws*, London, vol. 1, 1985 Reprint, p. 410

⁴² Bazlur Rahman Sikder vs. Tahera Begum Shamima, 50 DLR(HCD) (1998) 612, AT PARA 6; 1998, 27 CLC (HCD) [7923]

unlike a child from his/her father. In case of a son, the maintenance will continue until he attains puberty, while the maintenance of daughter will have to be continued by her father until her marriage.⁴³

An analysis of the opinion of the companions of Prophet (Peace be upon him) seem to be in complete harmony with the decisions of Prophet (Peace be upon him). Decisions of the companions of the Prophet (Peace be upon him) show that priority right of child custody in the years of infancy goes to the mother. When the child reaches the age when he is in position to decide the right from wrong, his wish is taken into consideration and mother has a superior right of custody as long as she does not remarry. In addition, when child is in mother's custody, the father is responsible for *Nafaqah*.

Up till the era of companions there was discrepancy on the principles laid down while deciding child custody, between the decisions of Prophet (Peace be upon him) and those of companions, neither do we find a decision in which child custody gets automatically transferred to the father when child attains certain age. The underlying principles while deciding the child custody cases remain that the child in his early years must not be deprived of the warmth, affection and fulltime attention that he needs in his growing years, which he/she can experience with his/her mother better than, his/her father. Once a child reaches a mature age, three considerations have to be kept in mind, the religion of parents, the choice of the child and the welfare of the child.

A deviation from the above principles is observed during the time when *Fiqh* was codified and the rulings of the masters of five leading schools of thought started. According to Imam Abu Hanifa, custody transfers to the father when the boy reaches the 7 years of age and the girl when she attains puberty. In Imam Malik's opinion, mother has the right to her son's custody till he is able to speak clearly and the daughter till her marriage. According to Shafi and Imam Hanbal, mother has the right of custody or upbringing the child till 7 years of age for both son and daughter. After this age the option will be granted to the children to choose with whom they wish to. In Shia Fiqh, Mother has the right to keep her son in her custody till he is two years old and daughter till she is 7. After this, the right of custody is transferred to the

⁴³ Gani, H.A., *Reform of Muslim Personal Law*, 1988, New Delhi, p.87

father. True, according to the principles established in Muslim Jurisprudence, father is considered to be the child's natural and legal guardian because upon him is the responsibility of *Nafaqa* of his child. So, if any mother carries the responsibility of *Nafaqa* of her child, and if it is found important to appoint mother as the guardian to ensure the welfare of the child then the text of the Hadith or Quran is not inconsistent with that. Rather it the Sharia which for the first time establish the application of principle of welfare.

An interesting case has been recorded in Nail al Autar which was brought before Ibn-e-Taiymiya. In this case child custody was contested by both parents. Court gave the option to the child for choosing the custodian. He opted the custody of the father. On it the mother asked the court to inquire the child why he has preferred the father? On court's inquiry the child said, mother compels me to go the school where teacher punishes me every day while the father allows me play with children and do whatever I like. On hearing this the court gave the custody to the mother.

This clearly shows that wishes of minor while deciding his/her custody has always been subject to the principle of welfare of the minor even in classical Muslim legal traditions. Classical scholars have added that when it is detrimental for the child to live with his/her mother due to her marriage, profession or religion then the custody will transferred to the father. This further reinforces the principle of welfare of the child.

In Nail al Autar it is stated that, "it is essential to look into the interest of the children before they are given the option to choose between the parents for their custody. If it becomes clear about anyone of them that he or she would be more beneficial to the children from the point of view of their education and training then there is no need of Quran or choice of the children. This view was upheld by Allama Ibn Qayyam also.

Islamic Law lays down that as a general rule in initial years child should remain with the mother and a thorough study of Islamic legal literature shows that even if the child custody is contested by the father in the initial years when the child is unable to make a sound judgement, custody has been granted to the mother in majority of cases. When the child reaches the age where by he can tell right from wrong, his wish is taken into consideration by the courts which is subject to the welfare of the child.

Hadith narrated by Abu Hurayrah in Al Bukhari⁴⁴ that, “A man came to the Messenger of Allah (peace and blessings of Allah be upon him) and said, ‘O Messenger of Allah, who among the people is most deserving of my good company?’ He said, ‘Your mother’ He asked, Then who?’ He said, ‘Your mother.’ He asked, Then who?’ He said, ‘Your mother’. He asked, Then who?’ He said, ‘Then your father’.” It becomes clear to us that Islam has declared that a mother’s status is three times more than a father. Regarding the status of Mother in Islam Prophet Muhammad (peace and blessings be upon him) also said that ‘Paradise lies at the feet of the mother.’

So, giving the excuse of personal laws for not granting the right to guardianship to mother is not acceptable. Rather Muslim law has granted equal rights of the mother with the father and patronizes the principle of welfare of child to ensure their best interest.

2.3. Development of the Law Relating to Guardianship under Roman Law

Much of the modern law of guardianship owes its genesis if not in the content at least in its concepts- to Roman law. For example, the classification of guardians into a legal, testamentary and certified guardian, which we find in modern legal systems, has a striking analogous in the scheme of the Roman law relating to *tutela*.⁴⁵ So have the powers of guardian’s legal safeguard and many other matters. The very expression ‘minor’ is ultimately derived from the phraseology of Roman law.

In Roman law, by virtue of *patriapotestas*, the father was not only the head of the family but had all-embracing powers.⁴⁶ Children begotten in lawful wedlock are in the powers of the parents. Guardianship in Roman law began as a prosecution of the *patria potestas* into the future, with a view to the protection of the family property after the death of the testator. Protection of the person came later, and did not assume importance until the institution of the ‘dative guardian’ (guardian appointed by the magistrate) came into prominence.⁴⁷ There were two kinds of guardianship, distinguished as *Tutela* and *cura (curatio)* in Roman law. *Tutela* is defined as ‘a right

⁴⁴ Hadith no.5626

⁴⁵ Levy, Reuben M.A.: The Status of Women in Islam. In *An Introduction to the Sociology of Islam*. Vol. 1, London, 1957, p. 135

⁴⁶ Lee, Robert Warden., *The Elements of Roman Law*, 1955, p. 91

⁴⁷ Justinian, *Institutes Book 1 Title 23*, sections 139-141

and power exercised over a free person who, on account of tender years, cannot take care of himself; given and allowed by civil law.⁴⁸

Where the father was alive, *Partiopotestas* was in operation and the question of *Tutela* did not arise, in general. The father could also make a testamentary appointment of guardianship.

In certain situations, where the above types of guardians did not exist certain Roman Magistrates had the power to appoint magisterial guardians (*Tutela dativa*). In the city of Rome, there was a special praetor for the purpose.

Tutela was integrally linked with puberty. In the theory of the Roman law, a person came in the full enjoyment of his personal and proprietary rights on the attainment of puberty (14 years for boys and 12 years for girls) up to the age of puberty his or her interests were looked after, and protected by the 'tutor' in the absence of the father. The essence of *Tutela* consisted of the assistance which the tutor had to give to enable juristic acts to be performed by the person below age. This was because of the doctrine that as such persons were not legally independent persons (*sui juris*), their transaction required the approval of a guardian (*tutor*).⁴⁹

An early statute allowed persons above the age of puberty (14 for males and 12 for females and below the age of 25 years, to be placed under the temporary control of curators; without whose consent certain alienations of the property could not be made. At a later date, Emperor Marcus Aurelius initiated the practice of allowing the minor to get a permanent curator appointed.

The parallel institution of *curaminorium* was thus developed, to save young persons from the consequence of their own lack of judgment as age over puberty. This was meant for persons below 25 (Minor xxv Anniis). In the beginning, the praetor exercised certain powers in individual cases to prevent the overreaching of the minor. Later, a curator was appointed on minor's application. In later law, the distinction between tutor and curator was progressively buttered.

The *Tutela impuberum* (up to puberty) in the classical law corresponds broadly to the English concept of guardianship of infants, but its inventive purpose was somewhat

⁴⁸ Nicholas , Barry, *An Introduction to Roman Law* (1975) reprint, pp. 93-94

⁴⁹ Lee, Robert Warden, *The Elements of Roman Law*, 1955, p. 90, para -136, item-4

different from the modern one of guardianship.⁵⁰ Modern guardianship is concerned exclusively with the interest of the ward but the primitive *Tutela* was concerned more with the rights of the guardian. As to the persons who could be guardians; the earlier rule in Roman law that the nearest male cognate was the guardian in the case of a person under puberty (14 for males, 12 for females) if the minor was not under *Patriapotestas*. Later cognates were substituted by Justinian Being based on a rule of law this guardianship was called *Tutela legitima*- an expression derived from the Lex of the twelve tables (450 B.C.) But the father could appoint a testamentary guardian – tutor *testamentarius*- and in later times, failing both of such guardians, a magistrate would appoint a tutor.

“Women could not be ‘tutors’ in Roman law- In fact, they themselves had to be under a ‘tutor’ (if they were not under *Patria potestas*) except in certain special cases (e.g. vestal virgins). This position slowly underwent modification and was abolished in 410 A.D.

The Roman law had many provisions for protecting wards against mal-administration by or misconduct of tutors. Any person other than the wards could take proceedings for the removal of a tutor on the ground of misconduct- a provision originating in the Twelve Tables. After the termination of the guardianship, the ward or his heirs could file an action for liquidation of accounts and could claim double damages against a tutor who had been guilty of embezzlement- also a provision dating from the Twelve Tables.⁵¹ ‘In the later Republic, a more general remedy called the action *Tutela* could lie after the termination of the guardianship. But now in our existing laws, we do not have any effective provisions to protect the ward from the torture or misbehave of the tutor. However, Roman law represents a law devised by men for men, a masterpiece of mature legal deliberation. It was therefore a law that could be changed, if circumstances so required, in much the same way in which it had been formulated.⁵²

2.4. Development under British Law in Indo-Pak Sub-Continent

Evolution of the law of guardianship in Indo Pakistan Sub-Continent during British rule is one of the most interesting chapters in Indian legal history. The earlier

⁵⁰ Nicholas, Barry, *An Introduction to Roman Law* (1975) reprint, pp. 65

⁵¹ Lee, Robert Warden, *The Elements of Roman Law*, 1955, p. 91, para -133, item-4

⁵² Anderson, J.N.D., *Islamic Law in the Modern World*, New York University Press, 1959, p. 221

developments in this field are vitally and integrally connected with the British rule and its impact on Indian legal institutions.

The British Government's original and most important non-trading activity in India was the collection of land revenue. To facilitate the collection of revenue from minors' estates, legislation became necessary. The second most important function of the British Government was the administration of justice. For the representation of minors in litigation, again, legislation was necessary.⁵³ Litigation in those times was concerned mostly either with revenue or with proprietary matters. Early legislation relating to minors and guardians was therefore predominantly concerned with proprietary aspects. There was also an immediate need for regulating the affairs of European British subjects. This need resulted in the passing of a specific Act applicable to European British minors.

Before 1890, there was no all India Act dealing with the guardianship of minors. The matter was governed, in part, by several scattered Acts or Regulations and, in part, by certain uncodified rules of personal law.⁵⁴ The statutory law before 1890 on the subject of guardianship consisted of the Acts separately in force in the three Presidencies of Madras, one fragmentary legislation amending the law relating to minors and the European British Minors Act, 1874, which provided for the guardianship of European British Minors. However, during the reign of British rule in India the principal legislative measures may be enumerated as the Bengal Minors Act, 1858, originally applicable to the Bengal Presidency, but later also extended to the Punjab, Oudh etc. This Act did not apply to minors who were European British subjects, nor to persons under the superintendence of the Court of Wards.

In the year of 1861 an Act was enacted to amend the law relating to minors. This Act made certain provisions supplementing the legislation relating to minors. It was not applicable to European British subjects.

The Bombay Minors Act, 1864 was applicable to the Bombay Presidency. It did not apply to European British subjects. It had caused serious difficulties in practice. This was the immediate factor that induced the Government of the day to take up the question of enacting suitable on the subject of guardianship.

⁵³ Kusha, Hamid R., *Minority Status of Women in Islam: A Debate between Traditional and Modern Islam*. In *Journal of Institute of Muslim Minority Affairs*. Vol. xi, No. 1 Jan. 1990, p. 64

⁵⁴ National Archives, Files relating to Act 8 of 1890, Notes portion, pp. 2

Therefore, the European British Minors Act, 1874 was enacted relating to the guardianship of European British minors. It did not apply to territories within the jurisdiction of the Chartered High Courts. The legislation of 1858, 1864 etc. merely conferred expressly a certain jurisdiction on the courts and defined exactly the position of those who availed themselves of, or were brought under those Acts. Soon after the establishment of the Court of Wards in Bengal, it was found necessary to the Civil Courts powers to nominate guardians of minors over whom that Court possessed no power.

The first step in this inception was the enactment of Bengal Regulation 1 of 1800. Which authorized Zillah Judges, where there were no testamentary guardians to nominate guardians to disqualified land holders not subject to the authority of the Court of Wards.

This Regulation with others relating to the same subject was repealed by the Bengal Minors Act, 1858, which provided a machinery for the appointment of managers of the estates and guardians of the person of minors residing in Bengal outside the limits of the original civil jurisdiction of the High Court.

Similar provision was made for the Madras Regulation 5 of 1804, section 20 and 10 of 1831, Section 3, and for Bombay Presidency by Act 20 of 1864, which was in terms similar to Act 40 of 1858. The Bengal Minors Act was the result of certain practical difficulties which had been revealed by the case law or otherwise in the working of the law.⁵⁵

In 1861,⁵⁶ there was passed an Act to amend the law relating to the minors. Specially section 1 and 2 of that Act stated that “Any relatives or friend of a minor who may desire to prefer any claim in respect of the guardianship of such minor may make an application by petition either in person or by a duly constituted agent, to the Principal Civil Court of original jurisdiction in the district by which such application; if preferred in the form of a regular suit, would be cognisable, and shall set forth the grounds of his application in the petition.”⁵⁷

⁵⁵ Act 40 of 1858

⁵⁶ Act 9 of 1861

⁵⁷ National Archives, File relating to Act 8 of 1890, p. 3

In 1881 the Bombay Government drew attention to certain defects in Act of 1864, and suggested an amendment of the Act in order to remove difficulties which had been experienced in the administration of minors' estates under its provisions.⁵⁸

The legislation mentioned above constituted the background of the Act of 1890. The immediate occasion for undertaking the legislation that culminated in the Act of 1890 was furnished by certain practical difficulties that had been experienced in the working of the Bombay Minors Act, 1864.⁵⁹ These difficulties had been brought to the notice of the Government of India by the Bombay High Court through the Local Government. Finally, in the year of 1890 The Guardians and Wards Act replaced the pre-existing enactments, or so much thereof as was surviving.⁶⁰ Thereafter, in India, The Hindu Minority and Guardians Act was enacted in the year of 1956. But that was applicable only for the Hindus, not for the Muslims.

Though during the British rule of India, British Government failed to enact any law equaling the status of father and mother to ensure the welfare of the children but later they brought a lot of changes in their own guardianship law. Therefore, it is pertinent to mention about the Development of Guardianship Law in England.⁶¹ In England, as far back as 1839, the mother was given a right to the custody of her own children till they were seven years of age.⁶² By subsequent legislation passed in the latter half of 19th century (Guardianship of Infants Act, 1886), she obtained the right to the custody till the children were sixteen years of age. Later, section 1 of the Act of 1925 extended the provisions of the Guardianship of Infants Act, 1886 and laid down that the rights of the mother in the matter of custody, care, guardianship etc. of the children shall be equal to that of the father; and that the welfare of the child should be the first and paramount consideration. It also provided that the Court shall not take into consideration whether, from any point of view other than the welfare of the infant, the claim of the father in respect of custody, upbringing etc. is superior to that of the mother or the claim of the mother is superior to that of the father. The Act of

⁵⁸ Amini, Taqi M., *Time Changes and Islamic Law*, 1988, New Delhi

⁵⁹ Act 20 of 1864

⁶⁰ Pollock, Fredrick and Maitland, Fredrick William, *The History of English Law*, 1895, vol. 2, pp. 312

⁶¹ Radcliff, G.R.Y. and Cross, Geoffrey, *The English Legal System*, 1946 (2nd ed.) p. 144

⁶² The Abolition of Tenures Act, 1660

1971 adopts the same principle. The Act of 1973⁶³ and 1975⁶⁴ lays down complete equality of *sexes* as to matters concerning children.⁶⁵

Recent legislation in England also emphasis in positive terms the equal positions of each parent while in India the Guardian and Wards Act 1890 while providing the appointment of the guardian kept in view the welfare of the minor but laid emphasis on the superiority of the father or male member in the matter of appointment of guardians of minors and their custody. Therefore, in the year of 1980 the then Indian Law Commission equipped a report on Guardians and Wards Act suggested pretty significant recommendations to amend the Act which will be discussed in the next chapter.

2.5. Development of Law on Guardianship after the Emergence of Bangladesh:

The Guardians and Wards Act is the central law which addresses guardianship and custody disputes in Bangladesh. Under the Guardians and Wards Act 1890, the superior right of the father in respect of guardianship was established. The position of the mother as a guardian of her children was of the second grade.⁶⁶The Guardians and Wards Act, 1890 was enacted with a view to amending and consolidating the rather scanty legislative provisions in the field existing before its enactment. This law was passed in addition to the provisions of various personal laws relating to guardianship of children, and not in place of them. It, therefore, exists side by side with the provisions of the personal laws. The Act itself makes it clear that it leaves the rules of personal law unaffected. The Act, thus, comes into operation when an application to appoint a guardian of a child has been made under it, and it prevails over the personal law in case of conflict with the latter. The Act is divided into four chapters. The first chapter deals with certain preliminary matters. Chapter two deals with the appointment and declaration of guardians. Chapter three is the longest chapter in the Act. It is concerned with the duties, rights and liabilities of guardians and some operative provisions of the Act are supplemented by chapter four of the Act. However, the Act of 1890 does not deal with the entire law relating to guardianship. It does not contain provisions as to who are to be the natural guardians of minors. The

⁶³ Guardians of Minors Act, 1971 and Guardianship Act 1973

⁶⁴ The Children Act, 1975

⁶⁵ National Archives, File relating to Act 8 of 1890 pp. 8

⁶⁶ Law and Society in the Legacy of Islam, ed. Sir Thomas Arnold and Alfred Guillaume (Oxford, 1931). P. 310

Act, in the first-place deals with the jurisdiction of Courts in regard to guardianship and secondly, it deals with the duties and liabilities of guardians of all classes.

Almost after one hundred years of the enactment of this Act in the year of 1980, the Indian Law Commission in its thirty third report on Guardians and Wards Act recommended pretty significant recommendations to amend the Act and their overall observations about the Act. However, the main purpose of the Act was to ensure the application of the principle of welfare of the child in custody and guardianship matters. But due to literal interpretation of the provisions of the Act and for some complexity of the language of the Act, in our country still the principle of welfare is not applying in the guardianship matters. Therefore, it seems pertinent to focus on some of the basic sections of this Act relating to guardianship of minors. As it is mentioned before that basically Chapter two of this Act deals with the provisions relating to the appointment and declaration of guardians. Therefore, only the sections which are directly influencing the mother's right to guardianship of minors will be discussed here. It is significant to mention here that the context of mother's right to guardianship of minors is nearly absent in the existing literature regarding guardianship and custody of minors. Most of the books and articles fixated on the mother's right to custody. It is already taken for granted by all that guardianship is an unilateral right of the father or other members of the family and not the mother. Few Articles delineated about the overall lacking of the Guardians and Wards Act, 1890. But in this Chapter an effort has given to discuss only about those sections which needs to be amended to patronize the mother's right to guardianship of minors.

Nevertheless, a pretty large number of questions has arisen with reference to certain provisions contained in this Act, particularly, sections 7, 17 and 19. Section 7 is the operative provision in this Chapter, dealing as it does with the power of the Court to appoint the guardian of the person or property or both.⁶⁷ Sections 8 to 16 mostly deal with procedural or other minor matters, but section 17 is of great importance. It is concerned with the matters to be considered by the Court in appointing a guardian. Section 18 provides that a Collector, if appointed or declared a guardian, is so appointed by virtue of his office. Section 19 prohibits the appointment of a guardian in certain cases. Although negative in form, this Section has given rise to a number of

⁶⁷ Section 5 followed the European British Minors Act, (13 of 1874)

problems in interpretation and to the question of the inter-relationship between section 17 and section 19.

Section 7 discussed the power of the Court to make an order as to guardianship. This section stated that where the Court is satisfied that it is for the 'welfare of a minor' that an order should be made appointing a guardian of his person or property, or both, or declaring a person to be such a guardian, the Court may make an order accordingly provided that no person, other than a citizen of Bangladesh, shall be appointed or declared to be a guardian of a minor who is a citizen of Bangladesh.⁶⁸

This section also stated that an order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court. It is seen that Section 7(1) empowers the Court to make an order as to guardianship, and may be described as the pivotal section in the entire Act. The power is to be exercised only for the welfare of the minor; for this reason, the introductory words of the section have been described as the keynote of the Act. The Court must be "satisfied" that the order should be made for the 'welfare of the minor'. Its satisfaction must be based on some material, and must not be illusory.⁶⁹ In making an appointment of a guardian under the section, the Court will, of course, have to bear in mind the fact that the effect of an appointment would be to extend the period of minority.⁷⁰

Moreover, power of the Court under sub-section (1) of section 7 is either to appoint a guardian or to declare a person to be a guardian. Such guardians are, in common parlance, called "certificated guardians". The power to declare a person as a guardian possesses some utility. As for example, in cases where a guardian has been appointed under a testamentary instrument and the Court, by a declaration, gives effect to the appointment.

Sub-section (2) of section 7 sets out the consequences of the appointment or declaration of a guardian by the Court. Without a formal order of removal, such an order implies the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court. The object is to avoid conflict

⁶⁸ Mahmood, Sh. Shaukat(ed.), *Muslim Family Laws*, Lahore 1989

⁶⁹ Sarat vs. Girindra (1911) 15 Cal, Weekly Notes 457, 459, 460

⁷⁰ [indiankanoon.org>doc](http://indiankanoon.org/doc)

of authority between two or more guardians.⁷¹ The powers of the certificated guardians are exclusive.

Sub-section (3) of section 7 requires the Court to ensure that an order under this section shall not be made where a guardian has been appointed by will or other instrument or appointed or declared by the Court, until the powers of such guardian have ceased. So section 7 is concerning about the following important issues:

- a. *the persons* who can be appointed as guardians,
- b. *the property* in respect of which a guardian may be appointed and
- c. *the nature* of the order can be passed.

The practical considerations justify the adoption of the wider view in the matter of power to issue conditional orders under section 7. Therefore, in an appropriate case, the Court should have power to make an appointment conditional on the performance of a condition by the guardian within a specified period. It should also be provided that the order shall not be operative until the condition is satisfied. In this context the recommendation given by the Indian Law Commission in its Eighty Third Report was to incorporate the following new sub-section in section 7, to achieve this object:—

"In an appropriate case, the Court may make an appointment of a guardian conditional on the performance by the guardian of a specified condition within a specified period and where such an order is passed, the order shall not be operative unless the condition is performed by the guardian within the period initially specified by the Court or subsequently extended by the Court."

Insertion of the above provision could ensure the best interest of the minor. But the provision was not incorporated.

Section 8 talked about persons entitled to apply for an order to get the guardianship. This section declared that an order shall not be made under the last foregoing section except on the application of the person desirous of being, or claiming to be, the guardian of the minor, or any relative or friend of the minor, or the Collector of the district or another local area within which the minor ordinarily resides or in which he has property, or the Collector having authority with respect to the class to which the minor belongs. Section 8 also provides that an order shall not be made under section 7, except on the application of the persons entitled to apply for an order, as enumerated

⁷¹ Argunan vs. Duraising, AIR, 1914 Mad 648(649)

in the section. These are, in brief, the person desirous of being or claiming to be the guardian, any relative or friend of the minor, the Collector of the district or the Collector having authority with respect to the class to which the minor belongs.

The expression "relative or friend" in section 8(b) really means a person who, being a relative or friend, has a beneficial interest in the minor.

The section does not, however, give the minor himself a right to apply to the Court. The general view is that without an application under section 8 the Court cannot proceed in the matter.

It may be noted that in England, a minor possessing property, if his parents are dead and if there is no testamentary guardian, may, after attaining the age of 14 years (male) or 12 years (female), himself "elect" a guardian.

Section 9 of the Act discuss the jurisdiction of the Court to entertain the application. This section stated that if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. This section also stated that if the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property and if an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

But in Bangladesh the guardianship matters are handled by the Family Courts instead of District Court.

Section 12 of the Act thrashed about the power to make interlocutory order for production of minor and interim protection of person and property. This section stated that the Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

Section 15 of the Guardians and Wards Act discussed about the procedure of appointment of the declaration of several guardians. According to this section if the law to which the minor is subject admits of his having two or more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them. Separate guardians may be appointed or declared of the person and of the property of a minor. If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties. But it is not clear whether any provision of the Act of 1890 expressly provides now for joint guardians. However, joint guardians may conceivably come into existence under an appointment made under a will.

Section 17 provided, “in appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. If the minor is old enough to form an intelligent preference, the Court may consider that preference. As per this section the Court shall not appoint or declare any person to be a guardian against his will.”

This section deals with the matters to be considered by the Court in appointing a guardian. The subject matter has assumed greater importance because of the debate as to the relative importance to be attributed to each of the various factors that come up for consideration, the welfare of the minor, his or her personal law and rights of the guardian thereunder and the fitness of the parent or other person claiming to be the guardian.

Eighty third report on Guardians and Wards Act recommended to insert two new sub-sections in section 17 to ensure the welfare of the child from the guardian. The commission stated that, ‘sub-section (1) of section 17 should be replaced by the following sub-sections:

(1) In the appointment or declaration of the guardian of a minor, the welfare of the minor shall be the paramount consideration.

And sub-section (2) of section 17 should be replaced by the following sub-sections:

"(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian, his educational competence and capacity for making the minor a healthy, happy and a useful individual of an all-round standard of education and his nearness of kin to the minor and any existing or previous relations of the proposed guardian with the minor or its property.

(2A) The wishes, if any, of a deceased parent may also be taken into consideration, but not so as to subordinate the factors mentioned in subsection (2).'

The Report further stated that,

“There should be a provision empowering the Court to call for periodical reports from the guardian appointed by the Court about the health, education and welfare of the minor. The period for submission of the reports may be fixed according to the circumstances of each case. To achieve this object, two new sub-sections may be inserted in section 17 as follows:

1. The Court may require the person appointed or declared to be the guardian under this section or the person to whom custody of the minor is entrusted under this Act to furnish to the Court, at such intervals as the Court may, in the circumstances of the case, deem fit, periodical reports regarding the health and education of the minor and such other matters relating to his welfare as the Court may specify."

2. The Court, on receipt of the reports shall consider them as soon as possible and may issue such directions to the guardian or other persons furnishing them as the Court may, in the interests of the minor, think fit."

As per Section 17(3) of this Act, if the minor is old enough to form an intelligent preference, the Court may consider that preference. This Act also provided that the Court shall not appoint or declare any person to be a guardian against his will. But the language of the concern section needs more clarification to carry out the intention of the legislature.

While, in general, the power of the Court to appoint a guardian is required for the welfare of the minor, ought not to be subject to any restriction, the Legislature has considered it proper to impose a prohibition against an appointment by the Court in certain special cases, enumerated in section 19. the section seems to be based on the assumption that by personal law, the husband of a minor married female and the father of a minor are vested with guardianship of the person of the minor, and the guardianship so vested ought not to be interfered with except where the guardian is unfit.

How far the assumption as to the rule of personal law is accurate, and how far the hesitancy of the Legislature to interfere with such guardianship should be allowed to continue in the changed conditions.

Section 19 dealt about the guardian not to be appointed by the Court in certain cases. This section states that nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be the guardian of her person, or subject to the provisions of this Act with respect to European British subjects, of a minor whose father is living and is not, in the opinion of the Court, unfit to be the guardian of the person of the minor, or of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.’

However, it is to be noticed that section 19 lays down restrictions as to (1) cases in which a guardian cannot be appointed of property, and (2) cases in which a guardian cannot be appointed of the person. As to property, it bars the appointment or declaration of a guardian where the minor's property is under the superintendence of a Court of Wards.⁷²

As to the person of the minor, there are three restrictions contained in clauses (a), (b) and (c). Here again, clause (c) is conceived with a minor whose property is under the superintendence of a Court of Wards, and needs no change. But clauses (a) and (b) require consideration.

⁷² National Archives, File relating to Act 8 of 1890, p.8

Therefore, the Indian Law Commission in its thirty third report on Guardians and Wards Act 1890 raised the question that how much of section 19 should be retained. In this connection, it is found that the minor's welfare ought to be the paramount consideration in proceedings for the appointment of a guardian. Section 17, understood in the above light, is intended to leave the discretion of the Court untrammelled by any other consideration or, at least, to make other considerations subordinate to the minor's welfare. In contrast, section 19 is intended to fetter the discretion of the Court in certain respects.⁷³

The Report further suggested that, "In this position, one alternative would be to delete section 19 altogether. But if that course is considered too radical or not acceptable for any other reason, certain modifications are required so as to ensure that section 19 is at least subject to section 17 and to effect certain other improvements which appear to be needed. One important modification is required in the law in order to maintain harmony with section 25. The latter section, dealing with applications for the custody of a minor, regards the welfare of the minor as the sole consideration. No doubt, it is true that section 19 is concerned with the appointment or declaration of guardianship a wide area while section 25 deals with only one particular aspect of guardianship, namely, custody. However, for the sake of clarity, it is desirable to ensure that the welfare of the minor is the paramount consideration both in custody and guardianship.

The preference given by section 19(b) is confined to the father. In view of the changed approach, it is necessary that the preference given in this clause to the father should be extended to the mother also, and she be placed on an equal footing with him.

Accordingly, the commission recommended that in section 19(b), after the existing word "father", the words "or mother" should be inserted.⁷⁴

Section 25, bearing the marginal note "Title of guardian to custody of ward", contains three sub sections. Sub-section (1), which is concerned with the ward leaving or being removed from the custody of a guardian of the person, empowers the Court to make an order for the return of the ward to the custody of the guardian, if such order will be for the welfare of the minor. It also empowers the Court to "cause the ward to be arrested and to be delivered into the custody of the guardian". Sub-section (2) confers

⁷³ indiankanoon.org >com

⁷⁴ National Archives, File relating to Act 8 of 1890, p.5

on the Court, for the purpose of "arresting the ward", the powers of a Magistrate of the first class and Sub-section (3) provides that the residence of a ward against the will of the guardian with a person who is not the guardian does not, of itself, terminate the guardianship. A number of questions arise with reference to section 25.

In the first place, it is not clear whether the power under this section can be exercised where the ward has never lived with the guardian who now applies for custody. In the second place, although sub-section (1) of the section itself lays down the test of welfare of the ward, yet attempts are, from time to time, made though mostly unsuccessful to argue that the rights of the guardian should also influence the decision. It should be emphasized that the minor's welfare is the paramount consideration in proceedings, under section 25. This criterion is already indicated in sub-section (1) by the words "if.....it will be for the welfare of the ward to return to the custody". However, it would be proper to re-emphasize this aspect. Finally, the association of women in proceedings under section 25 will, be a healthy improvement.

Therefore, In the year of 1980, the Indian Law Commission suggested to revise section 25 as follows:

- 1) 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 though the latter is entitled to such custody, the Court, if it is of opinion that it will 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 the Code of Criminal Procedure.
- 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 regard the welfare of the ward as the first and paramount consideration.
- 5) The Court shall not under this section make an order contrary to the wishes of a child of fourteen years or over, unless "the Court is satisfied that such an order is necessary by reason of special circumstances.

- 6) In a proceeding under this section, the Court shall, wherever practicable, make an endeavor to secure the services of a woman, whether related to the parties or not, including a woman professionally engaged in promoting the welfare of the family, for the purposes of assisting the Court in discharging the functions imposed by the law on it.
- 7) The provisions of this section shall apply notwithstanding anything to the contrary contained in section 19.⁷⁵

So, from the overhead discussion it can be said that there is a need and scope to amend the abovementioned sections as per the recommendation made by the Indian Law Commissions in its eighty third report to bring the mothers to the equal footing of the father regarding the right to guardianship of the minors. Besides, it is found that this Act declared that the guardian will be determined on the basis of the personal law to which the child is subject but with the consideration of the welfare of the child, but the concept of "welfare of the child" does not find a mention in the Act of 1890. However, it is like a thread that is visible at some places, but gets blurred elsewhere by being entangled with others. It needs now to be painted in glowing colors. As to the criterion to be adopted in such matters, Cardozo, sitting as a judge in the New York Court of Appeals,⁷⁶ made the following observations pertinent to the "best interests" theory:

"The Chancellor, in exercising his jurisdiction, does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other, or indeed against anyone. He (the Chancellor) acts as *parens patriae* to do what is best for the interest of the child. He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights as between a parent and a child, or as between one parent and another.....Equity does not concern itself with such disputes in their relationship to the disputants. Its concern is for the child."

The Commission also suggested to incorporate provisions as to the separate representation of children. It is pertinent to mention that there is vast and expanding scholarly material in the United States calling for the appointment of a child advocate

⁷⁵ Indiankanoon.org> doc

⁷⁶ Finlay vs. Finlay, 1925, 148, NE, 624,626(NY)

or counsel for the child in contested cases.⁷⁷ Separate legal representation of children has been suggested on the ground that the earlier the attorney is appointed in a contested custody case where a real dispute is apparent, the more effectively can the principles be put into practice.

Recently, in England, in regard to certain "care proceedings", the Court has been given a power to appoint a person to represent the interests of a child.

In the recommendation the Law Commission also suggested that the Act does not, at present, contain provisions empowering the Court to consult Child Welfare Officers before appointing a guardian. But such a provision needs to be incorporated in the Act to ensure the best interest of the child.⁷⁸

Incorporation of these proposed amendments were essential to ensure to treat the issue of minor's welfare with paramount importance regardless of the disputing parents' legal rights or entitlements. But unfortunately, the suggested recommendations were not incorporated in the Act.

In this context it can be said that the Guardians and Wards Act, 1890 was enacted long years ago. At the time of its enactment women had scarcely any rights for them; there were only social and legal degradation, material insecurity and other manifestations of the dominance and false superiority of man. That is why the Act of 1890 lays an emphasis on the preferential claims of the father or male member in the matter of appointment of guardian of minors.⁷⁹ But The social conditions existing today are altogether different from those that prevailed in 1890. The goal of social justice envisages conditions conducive to freeing family relations from distortions and deformations associated with the exploitation of man and with the social and legal degradation of women and their material insecurity. Women have now a status of equality with men in all spheres of life. The social significance of the family is now being recognized. It should develop into a unit supporting and promoting those talents and human qualities which foster the development of the individual. Parents must regard it as their foremost responsibility to bring up their children as healthy, happy and useful individuals and of an all-round standard of education, so as to enable them to blossom as active builders of society and the guardian must ensure this

⁷⁷ Mahmood, Tahir, Custom as a Source of Law in Islam. In *Journal of the Indian Law Institute*, vol. 7, No. 2, 1965, p. 103

⁷⁸ Law Commission of India, 83rd Report, Chapter 32A

⁷⁹ National Archives, File relating to Act 8 of 1890, pp.3

development of the child and safeguard its interest. In appointing a guardian for a child, the Court must determine which of the claimants is, by his or her educational competence and influence and his or her own example, best suited to provide the requisite care in bringing up the child.

2.6. Developments in Contemporary Muslim World

Under Sharia Law, the concept of guardianship is distinct from the concept of custody. Sharia law entrusts *hizana* (custody) of children in their tender age to mother and the guardianship to father during formative years of the child. In the event of the father is alive, he is the sole guardian of the person and property of the minor children. Muslim countries mostly follow the Hanafi School of jurisprudence.⁸⁰ In accordance with Hanafi law, a guardian can be appointed for his children only at his will. The right of *hizana* belongs to the mother and nothing can deprive her except her own misconduct. It is a right recognized solely in the interest of the children but it is not an absolute right. This means that if at any time it is felt that it would not be conducive to the physical, moral or intellectual welfare of the child to be kept in her custody, she can be deprived of it. The Hanafi law as practiced in India recognizes—the mother's custody until the son reaches 7 yrs. or a daughter's puberty wherefrom the custody is transferred to the father. Thus, mother's right to custody is qualified.

However, when, we turn to the heart of the Muslim world- the Arab countries of the Near and Middle East- we find that in most of them enormous changes have been affected during the last century or so in both the system and the law which they apply.⁸¹

According to Moroccan Law (*Mudawana* 2004) article 244, the Court will appoint a guardian from other relatives only in the absence of the mother.⁸² According to Nigerian law, the mother's right to get guardianship of children in suitable cases is already approved.

⁸⁰ The Hanafi School is the Madhab with the largest number of adherents, followed by approximately one third of Muslims worldwide. www.oxfordislamicstudies.com, Hud, Abdullah, *Jurisprudence and Law- Islam Reorienting the veil*, University of North Carolina, 2009

⁸¹ Farroqi, Vimla, Muslim Women's Rights to Equality and the Problems of Today. In Siddiqui, A Zakia and Anwar Zahan Zuberi(ed.): *Muslim Women: Problems and Prospects*. New Delhi 1993. P. 31

⁸² Lynn Welchman, *Women and Muslim Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*, Amsterdam University Press, 2007

In Fiji, the best interest is the main determining factor and has provided a specific guideline which provided the criteria to determine the child's best interest. The criteria include, inter alia, 'child's maturity, sex and cultural background, the capacity of each parent or any other person to provide for the needs of the child(including emotional and intellectual needs), the need to protect the child from psychological harm that may be caused by being indirectly exposed to violence affecting another person, and any other fact or circumstance the court thinks is relevant.'⁸³

Tunisian law granted 'equal rights of parents in custody and guardianship'.⁸⁴ It has also created a scope for a mother to be the guardian while she takes the custody of the children. In Tunisia, 'in the event of divorce', the judge shall award custody based on the 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 to exercise them.⁸⁵

In Iraq, according to the 'Qanun Al Ahwal Al Shaksiyya Al Muwahhad, the rights of *hidanah* is applicable till the age of 10 years both for boys and girls. Rabea Naciri has summed up the present position of Moroccan law (2004) in the following words:

"Women's custody rights under the new family laws guarantee that a Moroccan mother no longer automatically loses her custody rights if she remarries or moves to a town other than the town where her husband resides. However, a mother may still lose custody of her children over the age of seven if she remarries and her husband requests custody, she may obtain legal guardianship of her minor children only in cases in which the father is deceased or legally incompetent".⁸⁶

Esposito made the following comments about the Egyptian law on custody:

'Claiming to respond to claimants of mothers that their children were removed from their custody at too early an age (seven for boys and nine for girls), the Law of 1929

⁸³ Section 121 of the FLA cited in *Knowing Our Rights*, pp.344

⁸⁴ *Knowing our Rights: Women, family, laws and customs in the Muslim world*, Women Living Under Muslim Laws, 2006, pp.344 cited in *Muslim Family Law; Sharia and Modern World*, Dr. Muhammad Ekramul Haque, 2015, p.433-436

⁸⁵ *Knowing our Rights: Women, family, laws and customs in the Muslim world*, Women Living Under Muslim Laws, 2006, pp.344, cited in *Muslim Family Law; Sharia and Modern World*, Dr. Muhammad Ekramul Haque, 2015, p.433-436

⁸⁶ Rabea Naciri, *Women's Rights in the Middle East and North Africa*, 2005, pp. 183

decreed that when in the judgment of the court it seemed beneficial, the court would extend maternal custody of children to nine years for boys and eleven for girls. (Article 7) Because in this instance to choose to stay within the Hanafi school, reforms were minimal. They failed to consider the psychological hardship to the mother. The criterion of the Hanafi school was that the custody of children passes from the mother to the father when the boy no longer needed a woman's services and when the girl had reached the age of desire. In fact, the majority view had set these ages as seven and nine respectively, but the court chose to follow the minority of jurists who preferred nine and eleven.⁸⁷

The statutory laws in different countries recognized the right of both parents to see their children under the custodial care of the other.

But in Bangladesh father is enjoying a unilateral right of guardianship of minors. Almost 80% of Muslim Majority country has allowed both the parents to be the legal guardian of their child.⁸⁸ But the provisions of the Guardians and Wards Act provided a unilateral right to the father as the guardian during his lifetime.

Many Muslim countries including Morocco, Indonesia, and Malaysia have progressively modernized their laws following the standards suggested in various international human rights instruments for children.⁸⁹ These child rights instruments are not in principle against the spirit of the sharia law governing the custody and guardianship of the children.

2.6 Guardianship from International Perspective:

International protection of the rights of children initiated with the adoption of the Declaration on the Rights of the Child 1959 and the Convention on the Rights of Child (CRC) 1989.

The Convention on the Rights of the Child, adopted in 1989, was the first international treaty to state the full range of civil, political, economic, social and cultural rights belonging to children. The realities confronting children can be assessed against the commitments to which it holds States parties. Legally binding on States parties, the Convention details universally recognized norms and standards

⁸⁷ John L. Esposito, *Women in Muslim Family Law*, 1982, pp. 56

⁸⁸ Hussain, Aftab J., *Status of Women in Islam*, Law publishing Company, Lahore, 1987

⁸⁹ Rabea, Naciri, *Women's Rights in the Middle East and North Africa*, 2005, 183

concerning the protection and promotion of the rights of children, everywhere and at all times.

The Convention emphasizes the complementarity and interdependence of children's human rights. The values of the Convention stem from the 1924 Geneva Declaration of the Rights of the Child, the 1948 Universal Declaration of Human Rights and the 1959 Declaration of the Rights of the Child. The Convention applies to every child, defined as every person younger than 18 or the age of majority, if this is lower.⁹⁰

The Convention clearly stated in Article 3(1) that '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' And that States parties shall "ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the area of safety, health, in the number and suitability of their staff, as well as competent supervision ." ⁹¹

The CRC places the role of the legal guardian alongside that of the parents of the child in the care and upbringing of the child. For instance, article 18 of the CRC states that:

'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.'

It should be noted that article 18 of the CRC places the primary responsibility for the child's upbringing and guardianship squarely on both the parents without tilting towards the father and give emphasis on the best interest of the child.

The CRC is based on four core principles which are the principle of non-discrimination, respect for the best interest of a child, the right to life, survival and development of the child and the respect for the views of the child.

⁹⁰ Article 1

⁹¹ Article 3

The rights protected under the CRC are child-specific rights and they are guarantees in line with these four core principles listed above. These principles are to guide state parties in the interpretation and implementation of the CRC. They are founded on the concept of the equality and universality of rights and that children are human beings with equal rights.

The U.N. Declaration on Rights of the Child⁹² enunciates the following principle:

"The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security: a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable."⁹³

The Declaration further stated that,

‘The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.’⁹⁴

The Universal Declaration of human rights 1948 stated in Article 25 that,

‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’

The Article emphasized about the protection of Motherhood and childhood and stated that,

‘Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.’

⁹² 1959

⁹³ Principle 6

⁹⁴ Principle 2

Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally Adopted by General Assembly resolution in the year of 1986 states in the Preamble that the child shall, wherever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security... and the best interests of the child should be the paramount consideration. Further, Article 1 of the Declaration stated that,

‘Every State should give a high priority to family and child welfare’.

The first major International Convention to recognise the property rights of children, both present and future, is the Hague Convention on Parental Responsibility and Measures for the Protection of Children (1996). This Convention in its Preamble confirms that the best interests of the child are to be a primary consideration. Unfortunately, Bangladesh is not a signatory to this Convention.

2.7. Conclusion:

From the above views, it is summated that the flexibility in appointing the guardian is found within the framework of the Sharia. There is a misconception about the sharia that probably the sharia has not created the scope to appoint a guardian on the basis of the best welfare principle of the child. It is worth mentioning here that the principle of welfare of the child is a principle developed within the sharia. However, all the statutory laws of the guardianship owe its genesis to the Roman law. In Roman law the father was the head of the family and had extensive powers. Women could not be the guardian. Earlier, the Roman laws on guardianship was concerned with the interest of the guardians rather than the interest of the ward. During the British period in India, a lot of statutory laws were enacted relating to custody and guardianship. But there was no all Indian Acts on Guardianship. Therefore, in the year of 1890, the Guardians and Wards Act was passed. But the Guardians and Wards Act 1890, failed to embody the idea of the welfare of the minor being the first and paramount consideration in the appointment of a guardian and in other related matters. But surprisingly, the law on the subject of guardianship of minors has undergone great changes in England. Originally, their laws were based largely on the patriarchal and feudal theories of the family. But with the passage of time they have enacted laws on guardianship with the increasing recognition of the equality of father and mother in

1886 and 1925. The key-note of the law is, however, not the traditional rights of the father, but the welfare of the child and this principle was affirmed by the Act of 1925 as the 'first and paramount consideration'. Most of the Muslim countries have progressively modernized their laws ensures the application of principle of welfare of child in guardianship matters. But the the Act of 1890 lays an emphasis on the preferential claims of the father or male member in the matter of appointment of guardian of minors. Later, though the Indian Law Commission asked for the necessity to overhaul and revise the existing Guardians and Wards Act, 1890, so as to embody the idea of the welfare of the minor being the first and paramount consideration in the appointment of a guardian and in other related matters. Every International Convention relating to Child has emphasized on the application of principle of welfare in child related matters. So, it is the Judiciary who should have to play the role of a realist judge. On the other hand, now it is high time to contemplate about the 'welfare' of the child rather than the welfare of the mother or father. Patriarchal brashness or the feminism can never be the dimension to guarantee the welfare of the child.⁹⁵

⁹⁵ Anderson, J.N.D.: *'The Eclipse of the Patriarchal Family in Contemporary Islamic Law.'* In *Family Law in Asia and Africa*. London 1968, pp. 221-234, at p. 222

CHAPTER-3

JUDICIAL RESPONSES TO THE MOTHER'S RIGHTS OF GUARDIANSHIP

3.1. Introduction

This Chapter efforts to accentuate on the present inclination of the court regarding the right of the mother to be appointed as a guardian of their minor children. Traditionally, the right of guardianship of children is always conferred in the father. Pearl and Mensky so aptly explain it. They stated: 'Custody has more to do with practical stuffs, such as care and control of the child, while guardianship centres on the legal rights and obligations of the child's father and his representatives.' Thus, the issue of legal guardianship of the child continues to remain a sensitive one, presumably due to proprietary implications often associated with such legal guardianship. This involves gaining authority to dispose minor's property. However, there has been a discernible change in current judicial trends in the higher courts in matters related to custody, which is more in favour of the mother by way of upholding the best interest of the children. Not only that even in the arena of guardianship matters the Supreme Court has already delivered a number of judgments in area of guardianship smearing the welfare of the child doctrine in a series of circumstances. But even during this period the Family Courts are handling this issue in a conventional way and declining the mother to become the child's legal guardian. Therefore, pertinent judgments of some selected reported and unreported cases are discussed here to focus on the existing trend of the Family Courts of not granting guardianship to mother on regular basis as well as to show the development of guardianship laws on the basis of principle of welfare by the Supreme Court.

3.2. Response from the Supreme Court

The Supreme Court has delivered a number of judgements in the area of guardianship applying the principle of 'welfare of the child 'in few cases. These cases through applying the current statutory provisions, have subsidised increasingly in the direction of clarifying the law. Many sights these judgments as best practices. The key features of these cases are: their critical rendezvous with earlier rigid interpretations of

personal and statutory laws and their departure, in certain cases, to priorities the children's welfare, their strong standing beside the working mother who were previously refused to get custody, sometimes preference of mother though she is remarried. In these judgments it is found that the Supreme Court gets out of the traditional notions like working father is not more qualified than a working mother, A girl over 15 years may choose her mother as her guardian, remarried mother may be preferred over hostile uncles, a below 18 boy may be sui juris, possibility of second marriage alone does not invite disqualification for a mother, even maternal relatives may be preferred over the father if best interest of the child lies with the maternal relatives. For the convenience of discussion, the cases have been discussed Chronologically and on the basis of the principle laid down by the decision of the case to show the systematic development of guardianship law by the Supreme Court. The Supreme Court of Bangladesh adopted both custodial and guardianship decisions in accordance with 'the best interest of the child' principle. Here, only selected number of cases relating to guardianship decided by the Supreme Court of Bangladesh after the independence will be discussed to show the evolution process of the guardianship law in Bangladesh giving equal emphasis to the mother to be appointed as guardian of minors. The cases which are only related to custody and not guardianship has not been discussed here to avoid the repetition and similarity with the existence literature.

In *Abu Bakar Siddique vs. S.M.A. Bakar and others*,⁹⁶ is the first case where a mother was allowed by the Supreme Court to get the custody and guardianship of her 9 years old minor son. In this case the Appellate Division ruled:

"It is true that, according to Hanafi School, the father is entitled to the *hizanah* custody of the son over 7 years of age. Indisputably, this rule is the recognition of prima facie claim of the father to the custody of the son who has reached 7 years of age, but this rule which is found neither in the Quran nor in Sunnah would not seem to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure".⁹⁷

It was further held in the above case that the welfare of the minor was assumed to be the determining factor which the court regards as 'paramount consideration', even though the opinion of well-known jurists may not be followed. Thus, the rules of

⁹⁶ 38 DLR (1986) AD 106

⁹⁷ Ali Nawaz Gardezi v Muhammad Yusuf PLD 1963 SC 51 at pp. 74

custody and guardianship propounded in Hanafi law may be departed from in permissible circumstances, in considerations of the minor's welfare. In the above facts of the case, the mother was preferred to be the guardian of the minor also. The Appellate Division of the Supreme Court of Bangladesh, the apex Court with reference to a number of decisions conclusively determined that:

“In cases involving the question of guardianship their decisions are seen to be influenced by the concept of the welfare of the minor child concerned. In this connection it may be mentioned that under the provisions of the Guardians and Wards Act, the Court to whom an application is made under that Act is to be satisfied that the welfare of the minor required the appointment of a particular person as his guardian, but the Court is to make the appointment consistently with the law to which the minor is subject. Indeed, the principle of Islamic law (in the instant case, the rule of *hizanat* or guardianship of a minor child as stated in the Hanafi law) has to be regarded, but deviation therefrom would seem permissible as the paramount consideration should be the Child's welfare. We think in the present case the learned Single Judge, while considering the welfare of the boy, has rightly determined the question which need not to be disturbed. Facts as revealed clearly point out that the welfare of the boy requires that his custody should be given to the mother or that she should be appointed as his guardian.”⁹⁸

It is germane to remark that in a case of custody the court refused to follow the dictums of the classical jurists, concerned the right of a mother to the custody of her children.⁹⁹ Here, the court held that though under the Hanafi law, the mother has the custody of a son until seven years and a daughter until puberty and after that the custody reverts to the father but in this case, considering the welfare of the child the mother got the custody. Because the court held that since the Hanafi law on custody was not founded on any injunction of the Qur'an or the Sunnah, the decision concerning custody should be guided solely by 'the welfare of the minor.' The Court also observed that:

“If the interpretation of the Holy Qur'an by the great Commentators who lived thirteen or twelve hundred years ago, is considered as the last word on the subject, then the whole Islamic society will be shut up in an iron cage and not allowed to

⁹⁸ Ahmed Mia v Kazi Abdul Motaleb 23 DLR 1971 118

⁹⁹ Rashida Begum v. Shahab Din, P.L.D. 1960 (w.p.), Lahore, pp.1142

develop along with time. It will then cease to be a universal religion and will remain a religion confined to the time and place when and where it was revealed.”¹⁰⁰

In the light of the decision of the above case it can be said that modern reformers tried to adopt different liberal interpretations of primary sources in order to comply with the principle of welfare for the minor. Modernist Muslim scholars believe that Islam has always been in accord with common sense and justice. They argue that the Sharia law as developed by the classical jurists in the early years of Islam to deal with the prevailing social situation is subject to change, with the passage of time and necessity. Citing from Sayeh and Mores, Shaheen Sardar Ali says,

“Sharia allows different interpretations of an existing precedent, at least in three situations as laid down in Quran and Sunnah, such as necessity or the public interest, change in the facts which originally gave rise to the law, and change in the custom or usage on which the particular law was based. If anyone of the above conditions is present, the jurist may interpret in the light of the existing situation and his interpretation becomes part of Sharia law, provided it does not conflict with the Qur’anic provision.”

In *Mrs. Nilufar Majid vs. Mokbul Ahmed*,¹⁰¹ case it is decided by the Court that Second Marriage of a Mother will not be the only consideration to disqualify a Mother for guardianship if a Mother is otherwise held to be fit to be the guardian, the Court stated that:

“It is the welfare of the child which will be of paramount consideration. A mother who married to a stranger loses her preferential right of custody over a minor child but that will not totally exclude her from being considered fit for guardianship if she is otherwise held on a consideration of all circumstances in a particular case to be competent to be the guardian of such minor.”

In *Sharon Laily Begum Jalil vs. Abdul Jalil and Others*¹⁰² case, the father divorced the mother in 1995 and removed the children from her custody. The mother filed a habeas corpus petition, first in the United Kingdom and then under Article 102(2)(b)(i) of the Constitution for the recovery of the children. The learned Advocate for the respondents, frankly concedes that in view of the provisions of law provided in this

¹⁰⁰ Rashida Begum v. Shahab Din, P.L.D. 1960 (w.p.), Lahore, pp.1142

¹⁰¹ 1984 BLD 79

¹⁰² 48 DLR(HCD), 1996, 460

regard the petitioner may have the custody of the children but in such cases the welfare of the children is to be considered as prime. He submits that considering all aspects in the matter particularly regarding immoral leading of life by the petitioner, the children should not be given to her custody. But the Court directed to hand over the three minor children to the custody of the petitioner considering the fact that all the detenu children have been illegally and deceitfully removed from the lawful custody of the petitioner and are being illegally detained by the respondents and the petitioner is entitled to the custody of the children being their mother having genuine love and affection for the children and having devoted her entire adult life for their upbringing. However, in this suit affirming the principle of welfare of the children, the Appellate Division clarified the meaning of 'welfare' in the following language:

“It is now settled that the term 'welfare' must be read in the largest possible sense as meaning that every circumstance must be taken into consideration and the Court must do what under the circumstances a wise parent acting for the true interests of the child would do or ought to do. The moral and religious welfare of the child must be considered as well as its physical well-being.¹⁰³

In *Aysha Khanam vs. Major Sabbir Ahmed*,¹⁰⁴ in delivering the judgment of Court, Hasan, J., held that,

“even the provisions relating to the guardianship of minors are subject to the paramount need of the welfare of the child. In support of this view, he cited *Smt. Surinder Kaur Sandhu v. Hurbux Singh Sandhu*, where the Supreme Court of India said:

‘Section 6 of the Hindu Minority and Guardianship Act 1956 constitute the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conclusive to the welfare of the minor boy. The boy ought to be in the custody of the mother.’” In the present case the personal law and the welfare doctrine conflicted, the welfare doctrine would have precedence.¹⁰⁵

¹⁰³ 50 DLR, 1998, 55

¹⁰⁴ 46 DLR, 1994, 399

¹⁰⁵ 20DLR ,1964, 187

In *Abdul Jalil and others vs. Sharon Laily Begum Jalil*¹⁰⁶ case it is decided by the Court that,

“the issue of the minor’s welfare must be treated with paramount importance regardless of the disputing parent’s legal rights or entitlements. After being directed by the Court to hand over the children to Mrs. Sharon Laily , Mr. Abdul Jalil moved to the Supreme Court to get back the custody and guardianship of his minor children. It is found from the facts of the case that Mr. Jalil divorced his wife Mrs. Sharon who was a Christian British and Bangladeshi citizen and removed the children from her custody. After filing a writ petition, she got back the custody of her minor children then Mr. Jalil moved to the Supreme Court. But the Court directed that to ensure the welfare of the children they should remain in the custody of their mother and granted the father visitation rights.”

In *Rahmatullah (Md) and Others vs. Sabana Islam and Others*,¹⁰⁷ a civil revision was preferred by the paternal uncles and aunts of the minor against the mother who had successfully made an application before the Court of Assistant Judge to be appointed as guardian in respect of the minor’s person and property. In this case, the Court held that,

Before us all the parties are Muslim and the minor is, no doubt subject to the Mohammedan Law. Then, the question unfurled is how far the principles of Mohammedan Law would come on the way to appoint the mother as guardian of the minor after her marriage to a stranger even when the facts and circumstances of the case as found by the Courts below that the welfare of the minor would be best secured and achieved in the custody of the mother.

No other disqualification of the mother expecting her marriage to a stranger was raised. It was the view of the Courts that the uncles were acting the interest of the minor by recourse to litigation to deprive her of the property bequeathed to her by her father. The Court of Appeal had correctly affirmed the conclusion of the Assistant Judge that the welfare of the minor would be best secured and achieved in the custody of the mother.

¹⁰⁶ 50 DLR(AD),1998, 55

¹⁰⁷ 54 DLR, 2002, 519

There were some contentions as to the inheritance of the property of the deceased husband of Sabana Islam and proceedings before the *Artha Rin Adalatas* well. As a result of these complications, the petitioners prayed to be appointed as guardian of the minor and contented that Sabana Islam had remarried a ‘stranger’ and thereby forfeited her right to custody. The Family Court rejected their application and allowed the mother’s application. The High Court division also upheld the judgment of the Family Court and discharged the Rule. The Court cited the view of Justice Mr. Mostafa Kamal in the case of *Mrs. Nilufar*:

“A mother who is married to a stranger loses her preferential right of custody over a minor child but that will not totally have excluded her from being considered fit for guardianship if she is otherwise held on a consideration of all circumstances in a particular case to be competent to be the guardian of such minor and ensures the welfare of the child.”

In *Dr. Md. Rashidul Islam vs. Morsheda Parveen*¹⁰⁸ the Appellate Division has approvingly quoted the *Abu Bakr* case and explained the Court’s decision in the following language:

The High Court Division relying on a decision of this court in the case of *Abu Bakr Siddique vs. M.A. Bakr and others* reported in 6 BLD(AD) 245 has observed that according to Hanafi school, father is entitled to the *Hizanah* or custody of the son over 7 years of age. This rule is recognition of *prima facie* claim of the father to the custody of the son who has reached 7 years of age, but this rule which is found neither in the Quran nor Sunnah would not seem to have any claim to immutability so that it cannot be departed from, even if circumstances justified such departure. The High Court Division further held that the welfare of the minor would be better protected in the custody of the mother as she did not take a second husband and she took service in a School where first son was admitted for proper education. Accordingly, the High Court Division made the Rule absolute with the observation that if the father is interested to support his sons for better education and maintenance, he may send required amount of money to the present guardian i.e. the mother of the sons and she is bound to receive the said money for the benefit of the sons and for satisfaction of

¹⁰⁸ 34 CLC, 2005, 357

her son's father. Further if the sons after attaining the age of 16 years desire to live with the father they may be allowed to go with the father forthwith.¹⁰⁹

In a more recent case, *Farhana Azad vs. Samudra Ejazul Haque and others* the High Court division has clearly observed that the child's welfare is the supreme consideration, irrespective of the rights and wrongs of the contending parties.¹¹⁰ In this case the Court provided for interim remedy enabling the mother to retain custody of minors until the matter could be disposed of by a competent Court. Here, the father was living abroad and in his absence the mother divorced him while their children were allegedly detained by the paternal grandfather and grandmother. The mother claimed that she and her brother had been made to put their signatures to blank paper which was later used to forge a deed of 'handing over' the minors in favor of the paternal grandparents. Subsequently, the mother tried several times to visit her minor children but was not allowed to do so. In the meantime, the father remarried in USA and returned to Bangladesh with his new wife. He was about to hold a wedding reception when the petitioner came to know about the forged deed and his remarriage. Upon receiving a petition from the mother, the High Court held:

“In deciding the question of custody of the minor children the paramount consideration before the Court is welfare of the minors. The term welfare must be read in the largest possible sense which means that every circumstance must be taken into consideration and the Court must do what under the circumstances a wise parent acting for the true interests of the child would do or ought to do... Till the custody of the minor is decided by a competent Court, mother is legally entitled to retain the custody of her minor children. Before adjudication of the custody of the minors by a competent Court, if they remain in the custody of anybody other than the mother, that custody will be without lawful authority. The Family Court will take care of the case, and will come to a definite finding as to who is or are entitled to the custody of the minors taking into consideration the paramount question of welfare of the minors but till then the minors shall remain in the custody of the mother as provided under the law.

¹⁰⁹ Dr. Md. Rashidul Islam vs. Morsheda Parveen, 2005,34 CLC, 2005, para,10

¹¹⁰ 60 DLR (HCD) 2008, 12

In *Zahida Alam (Liza) vs. Syed Nuruddin Ahmed and Another*¹¹¹ the Court emphasized that the child's welfare is the supreme Consideration. This case involved a *habeas corpus* writ petition which was followed by a family suit. The petitioner was the mother of a 10 years old boy, she had been living in London for the preceding six years along with her son and husband. After their arrival in London, the child was diagnosed with significant psychological and physical health problems. Following a breakdown in the relations between the father and mother, the child was wrongfully removed by his father from the mother's custody and brought to Bangladesh without her knowledge. The mother being aggrieved by the deceitful removal of her son from her custody filed a writ petition before the High Court Division. The Court held:

“According to Mohammedan law of *Hizannah*, there is no doubt that father is entitled to the custody of his child when he attains the age of seven years. But the law relating to custody does not permit deceitful removal of the child from the custody of her mother. By doing so the respondent has taken the law in his own hand without waiting for adjudication of the custody and welfare of the child.

The Court emphasized that “child's welfare is the supreme consideration irrespective of the rights and wrongs of the contending party and directed the respondent to hand over the child to the custody of the mother and granted the father the right of visitation.”

In *Sefina Ferdousi Shimla vs. Jaohar Kabir*¹¹², Jaohar Kabir filed a family suit stating that he was married to Sefina and a son was born to them a year after their marriage. About three months after the birth of their son Sefina went to her father's house for a visit. When Jaohar went to bring her back and told Jaohar that she wanted a divorce. Jaohar at several times attempted reconciliation but Sefina refused and sent a divorce notice. A *talaq* was ultimately executed due to non- appearance of the petitioner that means Sefina. Sefina remarried before the divorce became effective. In such a situation Jaohar filed a suit for custody of their son. Sefina in the meantime, divorced her second husband before she brought the revision petition. The Family Court Judge awarded custody to Sefina. But the Appellate Court reversed this decision and directed the petitioner to hand over the custody to the father of the child.

In this case, the observation of the Court was as follows:

¹¹¹ 12 MLR(HCD) 2009, 465

¹¹² 61 DLR ,2009, 86

“A mother who is remarried to a stranger loses the preferential right of custody over a minor child but that will not totally exclude her from being considered fit for guardianship if she is otherwise held on a consideration of all circumstances in a particular case to be competent to be the guardian of such minor.”

In *Anika Al, daughter of late Kazi Haider Ali vs. Rezwanul Ahsan, son of Monjurul Ahsan Munshi*¹¹³ citing the decision of *Abdul Jalil and others vs. Sharon Laily Begum Jalil*,¹¹⁴ Their Lordships agreed that “nothing is more paramount, not even the rights of the parties under the rules of the personal law or statutory provisions, than the welfare of the children which must be determining factor in deciding the question of custody and guardianship of children whether in a proceeding in the nature of habeas corpus or in a proceeding for guardianship under the Guardians and Wards Act, 1890.

Their Lordships also made reference to *Abu Baker Siddique vs. SMA Bakar*, 38 DLR (AD) 106, where it was held that “ if circumstances existed which justified the deprivation of a party of the custody of his child to whose custody he was entitled under, Muslim Law, Courts did not hesitate to do so to ensure the best interest of the child.

Thus, it is found that with the passage of time the Supreme Court has delivered a number of Judgments in the arena of not only custody but also in guardianship matters applying the ‘welfare of child’ doctrine and developed the guardianship law where irrespective of the rights of the parent’s children right has been prioritize to ensure his or her interest. However, it is pertinent to mention that regarding the guardianship and custody of children, we do have only one statutory law and that is the Guardians and Wards Act 1890. And the provisions of these Act are interpreted by the different courts in different way. Moreover, the reported and unreported judgment of cases on custody and guardianship given by the court are also inconsistent with each other. Absence of any Quranic provisions on this particular area is another problem. The classical jurists heavily sided on the father and other male agnates excluding the possibility for a mother to be a guardian. But thing is that all those classical opinions are not purely Quranic also. Because God has given superiority to the men over women in some special affairs of a family and this is due to the man to pay alimony and this is such a special meaning of “and for that, they expended of their property

¹¹³ 17 BLC (AD), 2012, 77

¹¹⁴ 50 DLR(AD), 1998, 55

and righteous women are therefore obedient.” For achieving this important position, at first, it should be determined the duties and responsibilities of individuals. The responsibility of affording life has been given to the men by the Holy Quran. Of course, it doesn't mean the superiority of all men over all women. The real advantage over the signification of the Quran is related to virtue. It is clear that every manager should have an essential virtue in his/her area of responsibility. In regard to assigning the responsibility of supervision to men, the Quran says:

Men are the managers of the affairs of women for that God has preferred in bounty one of them over another, and for that, they expended of their property righteous women are therefore obedient. The reason for delegating the responsibility of supervision to the men is that men are more empowered than women in general. From the field work it is found that there are some women who are sometimes more superior than men in terms of managing and there are some situations in life that a woman is forced to handle life if the supervision and administration are assigned on behalf of her, so it's considered as a kind of sacrifice and self-sacrifice in the side of woman.

3.3. Response from the Family Courts

The cases on guardianship in Bangladesh highlight the disparity between theory and practice. Nonetheless it is seen that both the Non- statutory laws and Statutory laws of Bangladesh inquire for implementation of the principle of welfare in case of appointment of guardians for the minor but most of the time the Family Courts are giving the guardianship to the father. Even when there are some cases of custody where mothers are given custody of the children above the pre-determined age, the guardianship of the property of the minor is retained to the traditional conception of Muslim law.¹¹⁵ In guardianship cases, the courts are deciding the issue on the predetermined norms of Islamic law, i.e. giving paramount importance to the right of the father. Generally, the socio-economic conditions of women have the effect of not favoring their cases. The image that a mother is unable to maintain the child is sustained perhaps to protect men's own patriarchal interest.¹¹⁶

¹¹⁵ Mansoor, Taslima, *From Patriarchy to Gender Equity: Family Law and its impact to Women in Bangladesh* (1999), Dhaka, University Press Limited. pp.105, 106, 192

¹¹⁶ Nasir, Jamal, *The Status of Women under Islamic Law and under Modern Islamic Legislation*, London (1990). pp. 45, 46

In this chapter, attention will be given on the decisions of some unreported cases on custody and guardianship. From these judgments, it becomes very clear that the judiciary in Bangladesh is not giving enlightened judgments in cases of guardianship. They are mainly following the conservative line of interpretation of not recognizing a mother as a guardian of her children. But as it is discussed earlier neither in the Quran nor in Hadith the father has declared as the natural guardian of the child. Moreover, though article 25 of the Guardians and Wards Act 1890 stated that if the father alive then he will be the legal guardian but if it can be proved before the court that the mother can best serve the interest of the child and the appointment of father would be extremely injurious to the interest of the child than on the basis of the best interest principle of the child mother should be appointed as the guardian for the betterment of that child. Because in a more recent case *Zahida Ahmed (Liza) vs. Syed Noor Uddin Ahmed and another*¹¹⁷ in 2009 the High Court Division has clearly observed that 'the child's welfare is the supreme consideration, irrespective of the rights and wrongs of the contending parties. But most of the unreported cases are giving the impression that in case of appointment of guardian lower courts are not taking the best interest principle in consideration. However, with the passage of time due to the increase of rate of divorce, the numbers of custody and guardianship cases are also increasing.¹¹⁸ Now, an attempt has taken to analyse the decisions of Assistant and Family Judge Court given in different guardianship and custody cases to get the idea about the rate of suits where mothers are excluding from being appointed as a guardian. During this research, it is found that a significant number of guardianship cases are filed in the Family courts of Dhaka for guardianship of children uninhibited by their biological parents. Couples having no issues of their own generally files this type of case, as an alternative to adoption. But in this research these cases has not been discussed as the main focus of this research is to ensure the Mother's right to guardianship of their minor children.

In *Mossamat Sharifa Begum vs. Yunus Mia*,¹¹⁹ it was decided by the court that it is no one else but the father who should be appointed as the guardian of the child. This was a family suit for claiming dower, maintenance, guardianship, and custody of the

¹¹⁷ 38 CLC (HCD) 8118, para 16

¹¹⁸ See, Appendix 1

¹¹⁹ Family Suit/ Case No. 95/2011

children. In this suit, the plaintiff stated that her husband took a lot of money from her father as dowry during her marriage. But later he denied maintaining her and her daughter. She compelled to come back to her father's house. She said that in the natural course when she had conflicts with the defendant, she claimed for the dower money and maintenance of the child, for failure she filed a case against the defendant in the Family Court. The defendant in his statement stated that he divorced his wife because of her immoral character. However, he failed to prove his statement. Finally, the court declared that the Plaintiff is entitled to get dower, maintenance, and custody but declared the father as the legal guardian of the child. But in this case, we have seen that as a husband he failed to carry on his duty, specially, his duty to maintain his wife and child. But the court did not consider this issue. The court has followed the conservative line of interpretation of the laws.

In the case of *Monowara Parvin vs. Shaheb Ali*,¹²⁰ it had been held that as the mother is a working lady so she will not be able to look after her child and therefore is not entitled to get the custody and guardianship. It is a suit for custody and guardianship of minor children. The Plaintiff's case, in brief, is that she got married to the defendant on 3rd March of 2005. On 13th April 2006 Plaintiff gave birth to a child. Thereafter, the Defendant went to Saudi Arabia by her father's cost in 2007. In 2009 he came back and claimed dowry from the Plaintiff. But the Plaintiff refused to pay then the Defendant ousted her from his housekeeping the three years child with his own. Thereafter she filed this case before the Family Court to get back the custody and guardianship of her child. The Plaintiff was a teacher of a non-government college. As she was a working lady so it will be tough on her part to take proper care of the child, therefore, the court gives both the guardianship and custody to the father with the visitation right to the mother.

This judgment indicates one thing very clearly that on the one hand the court is asking for a suitable mother whom they are ready to appoint as a guardian, on the other hand, the criterion to be a suitable one is not fixed therefore sometimes courts are refusing to provide the guardianship to the mother on the ground that they are not competent enough to look after the property of the child even though a mother is a working lady and who has her own property but are not getting the guardianship due to becoming a working lady.

¹²⁰ Family Suit/case No. 31/2012

In *Munir Hossain and others vs. ShalinaKhanom*¹²¹ the suit was filed by the Plaintiff for custody and guardianship of the minor child. Here, the Plaintiff and the defendant got married on 22nd September of 2001. The husband was a shop keeper. The wife was a nurse. However, the couple was blessed by a daughter in the year of 2004. Very unexpectedly the husband died in the year of 2006. Then the Plaintiff started to live with her parent's house along with the daughter. In the year of 2009, the Plaintiff got married to another person. Thereafter, the uncles of the minor's daughter filed this suit for the custody and guardianship of the child. The Court declared that though the mother has lost her right to be appointed as the guardian of the child the custody will remain with her for the best interest of the child.

In this case, we have noticed that even in the absence of the father the mother who is undoubtedly eligible one had been refused by the Court to get the guardianship of her minor child. But the question is that if we can apply the principle of welfare in case of custody then there is still a scope to apply this principle in case of guardianship. But during the interview, it is found that due to the patriarchal attitude of our society no one would like to see the women in the leading position. That's why though there is law but the mothers are not getting the opportunity to enjoy the right to be appointed as a guardian of the minor.

In *Dr. Md. Rashidul Islam vs. Morsheda Parveen*¹²² the Plaintiff instituted this family suit against the defendant for the custody and guardianship of his two minor sons. The Plaintiff married the defendant on 14/12/1988 and in the wedlock one son was born on 30/7/1991 and another son was born on 31/7/1996. The Plaintiff divorced the defendant on 18/12/1997 and she left the Plaintiff's house and went to the house of her father in the district of Rangpur taking with her two minor sons and has been living there. The Plaintiff was a doctor and he was practicing in *Bogra*. After the divorce, he has been sending money and clothes for his children but the defendant refused to accept those. He also argued that the defendant and his father had no capacity to educate and maintain the minor sons properly. Consequently, on 8/1/1998 the Plaintiff sends his mother and cousin to bring his sons from the defendant and his father but they refused to hand over them. In this circumstance, the Plaintiff was

¹²¹ Unreported Family Suit/case No. 34/2015

¹²² Unreported Family Suit No. 100/1998

constrained to bring the suit. But the defendant contested the suit by filing a written statement and contended that after divorce the plaintiff had driven her away from his house along with two minor sons and thereafter the defendant has been living at Mohammadpur in Dhaka where she has been working as a school teacher and her elder son is admitted in class 1 in the same school and she also contested that the plaintiff had not paid any money for their maintenance.

The defendant also filed a suit being No. 228 of 1998 in the Family Court and the Court of Assistant Judge, 1st Court, Dhaka to keep her sons in her custody as well as for the guardianship but the suit was decreed *ex parte*.

During the interview, this woman informed us that she had not been summoned properly and therefore failed to appear at the court but the court has given *ex parte* decree in favour of the Plaintiff. It is found from our research that in most of the cases due to *ex parte* decree the mothers are not getting the guardianship of their children.

In *Rezwanul Ahsan Vs. Anika Ali*¹²³ the Plaintiff and the defendant were married on 23/12/2002 under Muslim Law and the dowry was fixed at TK. 10,00,000/- of which 2,00,000/- was shown as paid, although, according to the defendant, no money was paid. A child Farzana Ahsan, was born during their wedlock on 24.12.2003. Soon thereafter, the relationship between the petitioner and the respondent deteriorated. The defendant claims that she was physically and mentally tortured by the defendant, who was a drug addict. But all this information suppressed at the time of the marriage. It is alleged by the defendant that in July 2004 the defendant pushed her out of his house during the night after torturing her, but she went back to the house of the plaintiff for the sake of her son. On 26.07.2004 according to the defendant, the plaintiff again pushed her out of his house. Nevertheless, in the presence of the guardians from both the parties they came to reconciliation and started to live together. But she has been tortured again very inhumanely on 17/12/2004 and compelled to divorce him on 18/12/2004. But the Plaintiff said that after the wedding both families were quite happy. But when his wife became pregnant, she and her parents were not happy. After their son was born, he was under the care of his mother. Still, the defendant was not happy and she left him and went away with their child. Later he came to know that

¹²³ Unreported Family Suit No.284/2005

she had gone abroad leaving his son to her mother. Therefore, he instituted this suit. The court ordered by granting both the guardianship and the custody to the father.

Though as per the Muslim law in absence of mother the maternal mother should get the preference in case of custody but in this case, by giving the custody and guardianship to the father it is proved that mothers are not entitled to take higher degrees though they are eligible. Because after getting the information that mother compelled to come back to Bangladesh and when she lost her child's custody she became so helpless that she tried to get back the custody of her in any way but failed and thus the child became deprived of the mother's love and the mother also lost her legal right to get the custody and guardianship of her child.

In *Morsheda Banu alias Moshu vs. Hanif Jowerder*¹²⁴ both the Plaintiff and the defendant got married on 4th July of 2009. During the marriage, the defendant took 2,00,000 takas as dowry from the father of the Plaintiff as dowry. Though the father of the Plaintiff was supposed to pay him taka 3 Lac he failed to manage the amount during the marriage. After the marriage, the defendant used to torture the Plaintiff a lot for the remaining amount of money. However, in 2011 the Plaintiff gave birth to a male child. Thereafter, out of a family clash the husband sends her to her father's house and told her to come back with the remaining amount of money. All of a sudden in 2012 the Plaintiff received a divorce letter from her husband. Then April 2013 the husband took away the child without informing her and refused to send him back. He told that the boy is his own child and he also claimed that it is only he who is entitled to keep the child with him. Accordingly, getting no other way she filed this suit for custody and guardianship. Though the court granted the custody to the mother but appointed the father as the legal guardian.

In another suit namely *Shah Shamim Delower vs. Morjina Akter*¹²⁵ the Plaintiff and the defendant got married in February 2003. Here the Defendant was a teacher of Government Primary School and the Plaintiff was a small businessman. However, after their marriage, the Plaintiff used to torture the defendant mentally a lot out of his suspicious mentality. Though the wife had no relation with anybody the husband used to blame her for extramarital relationship. In the year of 2004, the couple was blessed by a male child. Though the Plaintiff and the defendant used to live together it was the

¹²⁴ Unreported Family Suit/case No. 11/2013

¹²⁵ Unreported Family suit /case no. 21/2014

defendant who would maintain herself and her child out of her own income. Even in the case of treatment of the child, the Plaintiff had no care. However, finally, the defendant divorced the Plaintiff in 2013. Thereafter, the Plaintiff filed this suit for the custody and guardianship of the child. It was stated by the Court that as per *Sharia* Law the father is the right one and fittest one to be the guardian of this child.

Though there is nothing about the father's right to be appointed as a legal guardian but the lower court very often declares the father as the guardian in the name of *Sharia*. True that as per the provisions of the Guardians and Wards Act if the father remains alive then the father is entitled to get the guardianship of the child. But if we interpret this provision it is found that as the father is obligated to provide maintenance to the children and wife, therefore, he should be honoured as a guardian. But the real scenario is totally different in our country. In most of the cases, it is found from our research that after being appointed as the guardian the father did not do any responsibility rather, he tries to brandish the stick only.

In another suit namely *Sajeda Begum vs. Kalimullah*¹²⁶ the suit was filed by the Plaintiff to get the custody and guardianship of her two minor children. Sajeda got married with Kalimullah in 2007. After her marriage, she came to know that Kalimullah got married for another two times before marrying her. However, in 2008 she gave birth to a daughter and in 2010 she gave birth to another daughter. Without telling her anything Kalimullah got married to another woman in September 2010 and forced Sajeda to leave his house. He refused to give the children to her. Finally, she filed this suit. Court ordered to hand over the children to the Plaintiff but appointed the father as the legal guardian.

In another suit¹²⁷ the Plaintiff and the defendant got married by themselves out of a love affair in 2007. Consequently, the Plaintiff's father refused to accept them. However, Defendant took her to his parent's house. After a few days, the Plaintiff's father-in-law and mother-in-law started to pressurize her to bring money from her father. While she refused to do so they threatened to get her out of the house. She was a worker in a local parlour. She was supposed to hand over the full salary to her husband. In the year 2009, she gave birth to a son. Then she somehow managed to rebuild her relationship with her parents. However, in 2010 her husband and father-in-

¹²⁶ Unreported Family Suit No. 89/2010

¹²⁷ Sheema Afrin Vs. Ashraful Khan (Unreported Family suit/case No. 43/2012)

law and mother-in-law again forced her to bring taka 1 Lac from her father's house. She refused to do so. Then her husband along with the other members of her family beaten her a lot and send her to her father's house along with the child. In 2011 the husbands send a divorce letter to the wife. Thereafter the husband and other members of his family began to pressurize her for handing over the child to them. They also came to her parent's house to take away the child. Finally getting no other way she filed this suit. The court declared that as the child is minor yet therefore it is the mother who should get the custody and as per *Sharia* law the father will remain the legal guardian of the child.

It is pertinent to mention that in an unreported suit¹²⁸ the plaintiff filed a suit for getting the appointment of his minor niece whose mother that means the Defendant of this suit got married for the second time after the death of her husband. From the fact of the suit, it is come to know that the defendant was a mother of a minor girl Shyama. However, Shyama's father died while she was 1 and a half years old. Before his death, he gifted the house to the extent of 3/4th of the property to his child and the rest to his wife by a deed of *Heba-bill ewaz*. However, after his death, they continued to live in that same house but after his death, his brother KhorshedMridha started to conspiracy to grab the properties. Sufia also said that the Plaintiff often tortured her to grab that property. Therefore, she had to marry for the second time only for the safety and security of the minor and herself. Plaintiff's advocate pleaded that by marrying a stranger she violated both the condition as well as the Rule of Mohammedan Law. Considering section 17 of the Guardian and Wards Act 1890 the Court stated that the welfare of the minor would be best secured and achieved in the custody of the mother but refused to appoint her as the guardian only due to the fact that she got married for the second time. But from my research, it is found that most of the time after getting divorced the husband got married for the second time. The child becomes compelled to stay with the stepmother who never let the father do anything good for the child.

In *Rahmatullah vs. Shabana Islam's* case the High Court division stated that the rule, the traditional rule is based on the reason that if a woman marries a man not closely related to the child, the child may not be treated kindly. Where the mother marries, for instance, her child's paternal uncle, it is expected that they will treat the child kindly:

¹²⁸ KhorshedMrida Vs. Sufia Nasrin Rita (Unreported Family Suit No. 33/ 2012)

Hedaya, 138 But in cases, when the paternal uncles are found acting against the interest of the minor, and in the absence of any other better claimants, this rule does not appear to bar the Court to declare or appoint the mother guardian of the minor.

Mr. Mostafa Kamal, J as his Lordship then was, Sitting Single in the case of Mrs. Nilufar Majid was of the view,

‘It is the welfare of the child which will be of paramount consideration. A mother who married to a stranger loses her preferential right of Custody over a minor child but that will not totally exclude her from being considered fit for guardianship if she is otherwise held on a consideration of all circumstances in a particular case to be competent to be the guardian of such minor.’

The mother against her divorced husband presented the appeal over the guardianship of their minor daughter. His Lordship found the reason for the above view as hereunder:

“PW 2 being a stranger the appellants lost her traditional religious right of custody of the minor child. The mother can be given the custody of the child only if the Court is of opinion that the welfare of the minor child shall still be served best if the mother is given the custody. She cannot claim the custody of the minor child as a matter of right now.”

As stated above, the above rule of tradition does not appear to be absolute. In the appointment of guardian of a Mohammedan minor under section 17 of the Act, the Court is obliged to consider the application of the above rule of Mohammedan Law in the given facts and circumstances of the case and to decide the best person amongst the rival claimants in whose custody the welfare of the minor would be best secure.

No other disqualification of the mother excepting her marriage to a stranger was raised by the petitioners. It is the view of the Courts below that the uncles are acting against the interest of the minor by their recourse to litigation to deprive her of the property as bequeathed by her father. In the circumstances, the Court of appeal below has correctly affirmed the conclusion of the minor would be best secured and achieved in the custody of the mother. Consequently, the Rule is discharged however without any order as to costs. The impugned judgment and order affirming those of the learned Assistant Judge in appointing the mother, Sabana Islam as guardian of the minor, Mahmuda Islam Jhinuk in respect of the person and her property are

confirmed. Order of status quo as was directed at the time of issue of the Rule is hereby recalled and vacated.

In an unreported suit namely *Shahida Begum vs. Matiur Rahman (Sojol)*¹²⁹ Mrs. Shahida Begum got married to Mr. Matiur Rahman in 2006 out of a love affair. Just after the marriage Matiur Rahman and Shahida fled away to Matiur's friend's house situated in Mohammadpur. Here, Shahida started to work in a garment factory. At the end of the month, Matiur used to take her full salary from her forcefully. Matiur used to lead his life as a vagabond without doing anything. In 2007 Shahida got pregnant and managed to come back to her parent's house along with his husband. After few days Matiur left that house and did not come back. In May 2008 she gave birth of a daughter. She tried to communicate with her husband but failed. After a few days, he divorced her. He refused to provide maintenance to the child also. Getting no other way, she filed this suit for maintenance, custody, and guardianship of the child. Here, Mr. Matiur raised the question about the character of Shahida. He stated that the child is the result of her immoral life. The Court ordered that for the welfare of the child the mother will be the custodian and the father will be bound to provide maintenance to the child. Though the father raised a false allegation against the mother of the child still the court declared the father, the legal guardian of the child.

In *Sheema Begum vs. Rehanuddin*¹³⁰ Sheema Begum got married with Reazuddin. But unfortunately, due to a road accident he died. During his lifetime he made a fixed deposit of Tk. 50, 00000 for his only son Mahin. After the death of Sheema's husband, Sheema along with her son continued to live in her husband's house. The owner of the house was her husband. In the absence of the father, the paternal uncle of Mahin started to handle all the matters relating to their property. In the name of necessity, he filed a suit to the Family court to get the guardianship of the child and achieved the guardianship. Later, Sheema found that in fact the paternal uncle that means Rehanuddin is trying to grab all of their properties. Then she challenged the judgment and filed an appeal to the District Judge court to get the guardianship for the welfare of the child. The paternal uncle tried to say that she might go for second marriage which will be crucial for the child. However, finally, the Court handed over the guardianship to the mother for the welfare of the child with a condition that as the

¹²⁹ Unreported Family Suit No. 61/2013

¹³⁰ Unreported Family Suit No. 78/2013

child is nearly 18 so no one will raise money from his account until he attains the age of 18.

However, if we notice carefully then it will be clear to all of us that most of the women do not get the scope to go for an appeal. Therefore, even after the death of the father, mother is not getting the guardianship of the children. This is the point where I would like to say that in fact section 17 is not creating any kind of obstacle in case of appointing mother as the guardian of the children, in fact, it is nothing but the welfare of the child, which must be taken into consideration. If we remain rigid on section 17 and never feel free to appoint the mother as the guardian, then the mother will never be able to enjoy their rights. In fact, our lower courts are not interpreting the provisions of the Act neither they are applying the principle of welfare in case of appointment of a guardian.

In *Marina Khatun vs. Mr. Ataur Rahman*,¹³¹ it was found that Marina got married to Mr. Ataur Rahman on 21st May of 2011. In the year of 2012 Marina gave birth to a son. Thereafter in the year of 2013 Marina came to know that her husband involved with an extramarital relationship with one of his second cousin. Marina tried a lot to bring her husband out of that relationship but she failed. In the year of 2014, she had been divorced by her husband. The husband did not let her take their son with her. Therefore, she filed this suit both for custody and guardianship of her children. The court ordered to hand over the child to Marina but appointed the father as legal guardian. *Mst. Aleya Begum vs. Mr. Abdur Rahman*¹³² Mst. Aleya Begum got married to Mr. Abdur Rahman on 21/2/ 2011. In the year of 2012, Aleya gave birth to a son. A few days after the birth of the child Abdur Rahman started to create pressure on the Plaintiff to give him Tk. one lac as dowry. It is also found that soon after their marriage he claimed for 50,000 Tk. as dowry which she managed to give him by taking the money from her father. This time she refused to ask for the money to her father. Therefore, the defendant rid her from the house for the inability to meet the demand of dowry. He forced her to leave his house without her son. Aleya is a school teacher of a primary school situated in Savar. But Mr. Abdur Rahman was unemployed and was leading a very unruly life. Therefore, she filed this suit both for

¹³¹ Unreported Family Suit No. 112/2014

¹³² Unreported Family Suit No. 20/2014

custody and guardianship of her children. The court ordered to hand over the child to Aleya but appointed the father as legal guardian.

In Abu Bakar's case, the Appellate division precisely mentioned that in cases involving the question of guardianship their (judges of the High Court division) decisions seem to be influenced by the concept of welfare of the minor child concerned. In this connection, it may be mentioned that under the provisions of Guardians and Wards Act is to be satisfied that the welfare of the minor required the appointment of a particular person as his guardian, but the Court is to make the appointment consistently with the law to which the minor is subject. Indeed, the principle of Islamic Law (in the instant case, the rule of *hizanah* guardianship of a minor child as stated in the Hanafi School) has to be regarded, but deviation there from would seem permissible as the paramount consideration should be the Child's welfare. We think in the present case the learned Single Judge while considering the welfare of the boy, has right determined the question, which need not be disturbed. Facts as mentioned above clearly point out that the welfare of the boy requires that his custody should be given to the mother or that she should be appointed as his guardian.

But only due to the patriarchal attitude and superstition regarding the position of men in the family our lower courts are not following the principle of welfare in case of appointment of a guardian for the minor children. But the same courts are granting custody of children to the mother in the name of the principle of welfare.

The learned Family court judge on consideration of the evidence of the PWs and DWs, and the Exhibits and also keeping in view of the provisions of Muslim laws held that the plaintiff did not marry yet and it had not been proved that she did anything detrimental to her claim I getting the custody of the minor sons. The learned trial judge also considered that the plaintiff is a Government servant and out of her own income she is fully competent to maintain her minor sons. The learned Family Court judge considered various aspects both factual and legal and also, the welfare and interest of the minor sons and ultimately came to the conclusion that the plaintiff is entitled to the custody of the twin minor sons till the attainment of seven years of age. The learned Family Court judge also, keeping in view of the provisions of Muslim law and also the principles came to the decision that the plaintiff is not entitled to be appointed as the guardian of the minor sons. The learned Family Court judge concluded in recording the finding that both the plaintiff and the defendant from

their own position and stand would be dedicated for the welfare of the twin minor sons. The decision arrived at by the learned Family Court judge appears to have founded on correct principles of law. The relevant material portion of the decision of the Family Court judge is extracted hereunder:

স্বীকৃত মতে বাদিনি তালাকের পর পিত্রালয়ে পিতা ও ভাইদের সহিত বসবাস করিতেছেন । স্বীকৃত মতে বাদিনি এখন পর্যন্ত দ্বিতীয় বিবাহ করেন নাই এবং সন্তানদের পাওয়ার অপেক্ষায় আছেন । মুসলিম আইন অনুসারে শিশুর হেফাজতের অধিকার মায়ের । বাদিনি শিশু পুত্রের হেফাজত লাভের পরিপন্থি কোন কাজ করিয়াছেন মর্মে প্রমানিত হয় নাই । অধিকন্তু শিশুদের মাতা এক জন কর্মকর্তা হওয়ায় মাতার উপার্জনের দ্বারা সন্তান প্রতিপালনে পরিপূর্ণ সক্ষম ।

বাদিনি মাতার নিকট সন্তানের স্বাভাবিক সভাব চরিত্র গঠনে বয়োপ্রাপ্ত হওয়া সহজাত । পিতার আর্থিক প্রাচুর্য অপেক্ষা এক জন শিক্ষিত মায়ের তত্ত্ববধানে শিশু সঠিক ভাবে গড়িয়া উঠিতে সহায়ক হয় ।

শিশু পুত্রের চরিত্র গঠনে এবং মানসিক বিকাশে এক জন মায়ের যত্ন, স্নেহ মমতা অপরিসীম গুরুত্ব বহন করে । ফলে আইনগত ভাবে হেফাজত ক্ষেত্রে মায়ের দাবীকে অগ্রাধিকার দেওয়া হয় । বর্তমান ক্ষেত্রে বাদিনি এক জন মাতা হিসেবে সন্তান লালন পালনে তাহার অগ্রাধিকার থাকা বাঞ্ছনীয় । শিশুর হেফাজত প্রশ্নে প্রধান বিবেচ্য বিষয় হইতেছে শিশু সন্তানের কল্যান । বর্তমান ক্ষেত্রে সার্বিক বিবেচনায় শিশুদের কল্যান উত্তম ভাবে নিহিত তাহাদের মাতা বাদিনির নিকট । এমতাবস্থায় নাবালক পুত্রদ্বয়ের হেফাজত লাভের অধিকার বাদিনির আছে বলিয়া বিবেচিত ও গ্রহীত হইল ।

After a thorough analysis, it is found that very recently the number of custody and guardianship case is increasing a lot. Among the total family suits, most of the time the percentage of custody and guardianship cases are near about 40 percent. On the other hand, if we analyse the decisions of the Family court regarding custody and guardianship than it is also evident that in custody cases the court at least trying to follow the welfare principle though due to the absence of the clear explanation of the term welfare of the child is not ensuring in most of the case. However, the scenario is totally adverse in case of guardianship. The court very strictly follows the religious law and most of the cases handed over the guardianship to the father whether fit or unfit. As the number of custody and guardianship case is increasing, therefore, clarification of the term welfare and a uniform law relating to the custody and guardianship should be adopted as early as possible.

From the research, it is also found that where the father remains alive, the court in 99 percent of cases refused to hand over the guardianship to the mother. On the other

hand, where the father found dead, the court gave preference to the male agnates of the minor children. Question is that if it is all about the responsibility of the legal guardian to protect the person and property of the minor then most of the cases fathers are getting failed to do that. Because the data collected from the fieldwork and interview showed that in most of the cases the father where alive failed to provide the maintenance to the children. Rather they found to destroy the property of the children if any for their own interest which is remaining out of the consideration.

On the other hand, the preconceived idea that women are unable to maintain their children and property of the children is another cause behind this deprivation. But the recent economic pressures have the effect that more husbands cannot maintain their wives and both parents have to work for the survival of the family. But the cases, except a few unusual ones, suggest that the father's guardianship of the property of the minor is dominant. Patriarchal attitudes towards women are clearly evident here, in particular, the belief that the interests of the minor will suffer at the hands of the mother, or the common notion that mothers cannot maintain the property of the minor prevails. Islam recognized the women's right to the property which proved that definitely women have the capacity to look after the property. Moreover, standing at the 21st century where women are equally earning with the men and becoming the owner of property this issue becomes clearly insignificant.

3.4 Conclusion:

Both the reported and unreported cases except a few unusual ones, suggest that the father's guardianship of the property of the minor is dominant. Patriarchal attitudes towards women are clearly evident here; in particular, the belief that the interests of the minor will suffer at the hands of the mother, or the common notion that mothers cannot maintain the property of the minor prevails. This is another way to subjugate women by undermining their credibility. However, as we saw, in some rare cases mothers were appointed guardian of their children with reference to their best interests. These mothers, as specific individuals, were given recognized rights in guardianship cases when their own ability to help the child was greater than that of the father.¹³³ We have noticed that the financial position of the mother is considered by the lower court, whereas the primary responsibility of maintenance under the

¹³³ A reported example is *Md. Abu Bakar Siddique v S.M.A. Bakar and Others*, 38 DLR (1986) AD 106

Islamic law lies with the father. Thus, from the field work it is found that the patriarchal ideal generally survives in cases of guardianship and males are, in particular, regarded as the natural guardian of the property of the minor. The principle established by Abu Bakar's case and few other subsequent cases are to be followed by the Family courts. In fact, lower courts are bound by the decisions of the higher court. Abu Bakar's case stated that, neither in sharia law nor in statutory law nor in any other way except in justifiable cases father should be considered as the natural guardian. It is nothing but the welfare of the child which will be the considering factor to appoint the guardian for a child. Patriarchal assumptions are at the root cause of such arrangements.¹³⁴ Still, from our fieldwork, it is found that most of the judges of the lower court possess the mentality that as per the Sharia law father is the only eligible natural guardian and due to section 17 and 19(b) of the Guardians and Wards Act father will be the natural guardian during his lifetime. But with the passage of time, the social situation has been broadly changed. They are not dependent on their husband for bread and protection. Many women are virtually the sole protectors and providers for their family. So, the concept of priority and superiority of men over women, husbands over wives, must also be changed. During 1986 only Mrs. Bakar alone was found suitable to take the responsibility of the guardianship of her minor sick child but now in 2018, there is a huge number of women who poses all the criteria to be appointed as a guardian of the minor child.

It is worth mentioning here that as per the provisions of Sharia Law and Statutory laws of our country that means the Guardians and Wards Act 1890, in appointing the guardian for the child, the welfare of the child will be of paramount consideration. But there is a misconception about the sharia that probably the sharia has not created the scope to appoint a guardian on the basis of the best welfare principle of the child. But it must mention here that the principle of the welfare of the child is a principle developed within sharia. True, that as per Hanafi Law father is the legal guardian but during that period it was only father who was the bread earner. And definitely the principle of Islamic law has to be regarded, but deviation there from would seem permissible as the paramount consideration should be the child's welfare.

¹³⁴ Mannan, M.A. ,Status of Women in Bangladesh: Equality of Rights, Theory and Practice. In *Bangladesh Institute of Development Studies*.Research Report No. 113, Dhaka, December 1989

From the different reported and unreported suits, it is found that sometimes, the child's close relatives are hostile to him and wish him not to survive. Sometimes his mother's second husband has more love for the child, sometimes the close relatives may find to grab the property of the child in the name of guardianship by showing the excuse of the benefit of the child. Therefore, Ibn Abidin has rightly observed that 'the judge, therefore must use his insight and must keep in view the welfare of the child.'¹³⁵

¹³⁵ Tanjilur Rahman, A Code of Muslim Personal Law, Karachi, 745

CHAPTER 4

ELIGIBILITY OF MOTHER AS A GUARDIAN IN THE CONTEXT OF FAMILY COURT OF DHAKA

4.1 Introduction

This chapter explores the usefulness of the existing laws in the light of the data collected through a pragmatic study regarding the eligibility of mother as a guardian in the context of 2nd, 3rd, 5th, 12th, 13th and 15th Family Courts of Dhaka. Even though only the interviews of the litigants (only mother), lawyers and judges of these Family Courts of Dhaka will not represent the whole Bangladesh but it will show the practical scenario and the common trend of the family courts all over the Bangladesh in guardianship cases. However, from the interviews it is found that the women in our country are depriving from the right of guardianship not only due to the religious or traditional causes but also due to patriarchal influence, arbitrariness, fascination for male child and conflicting interest of a male elite as well as the unawareness about the right of the mother. This chapter shows that the legal provisions are undermined by the Courts due to the orthodox interpretation of law and socio-cultural norms of the society.

The existing laws and the point of views of the litigants are discussed in this chapter. The analysis of the quantitative study reveals that despite mothers are also entitled to get the guardianship of their child; their right is suppressed by patriarchal and socio-cultural norms of the society.

The findings from the analysis of the quantitative research are explored through the use of the qualitative studies of unreported and reported cases in the previous chapter in order to provide an in depth understanding of women and their status in our country.

Unequal gender relations, class domination, orthodox mentality and women's own perception about their capacity and status are also depriving them of their rights. During the interview one thing has been noticed that actually in case of guardianship of children mothers are always in a negative position whether they are financially solvent or not and whether they are otherwise eligible or not in fact being a female they are always in a vulnerable condition irrespective of any of their speciality.

4.2 Study Regarding the Eligibility of Mother as a Litigant in Guardianship Suits in the Context of their, Socio, Economic, Educational Competency:

To ensure the real condition of the mother as a guardian in the society as well as to bring the fact into light it was decided to interview the women who are the parties of the guardianship cases. During the fieldwork, 1253 women has been interviewed, out of them, 879 women filed the suit to get the guardianship of their children whose guardianships were enjoyed by their father but failed to provide maintenance and who were interrupting mother's right of custody in the name of legal guardianship. Around 300 women filed the suit to get the guardianship of their children whose father died. It is found some couples who filed the suit to get the guardianship of their adopted children but their interviews were not taken because it was related to the adoption issues. However, most of the women bound to come to the court due to the injustice done to them by the power of orthodox law and the socio-cultural norms of the society. Most of the women went to the local head for respective problems. But due to their patriarchal attitude and superstition, they challenged the legal provisions and gave their decision on the basis of Orthodox law.

The litigants were Muslims and had been categorized as poor, lower middle, middle and Rich class.

TABLE 1: ECONOMIC CONDITION OF THE RESPONDENT

Economic Condition	Frequency	Percentage
Poor	127	10.1
Lower middle	271	21.6
Middle	602	48.0
Rich	253	20.1
Total	1253	100.0

This classification has done on the basis of Mother's having and not having jobs, business or any source of income. ¹³⁶Their monthly income has also been considered. It is also to be noted that the respondents of the middle and rich family had a higher

¹³⁶ Haque, Naima, Unpublished thesis submitted in partial fulfilment of the requirements of the University of East London, School of Law for the degree of Doctor of Philosophy, London, 1995

rate of education. But most of the respondent from the poor or lower middle family were engaged with different small business though their rate of education was not high which designates their(mother's) financial solvency.

TABLE 2 : RATE OF THE PERCENTAGE OF RESPONDENT'S EDUCATION

Education	Poor	Lower Middle	Middle	Rich	Total	Percent
Primary	25	40	57	71	193	15.4
S.S.C.	32	46	202	54	334	26.6
H.S.C	30	53	225	36	344	27.4
Undergraduate	2	61	79	46	188	15.0
Graduate	0	10	18	20	48	3.8
None	40	61	21	26	148	11.8
Total	127	271	602	253	1253	100.0

The data of table 2 demonstrates that 15.4 percent of the total respondents were primary educated. On the other hand, 3.8 percent of respondents are Graduate which specifies that the rate of women education is increasing. Most of the respondents were self-dependent but it has had yet the little effect on changing their social status and patriarchal domination over them. Thus, instead of having a better socio-economical standing the mothers failed to get the guardianship of their minor children.

TABLE 3 : NATURE OF THE RESPONDENT'S JOB BY ECONOMIC STANDING

Nature of job	Poor	Lower Middle	Middle	Rich	Total	Percentage
Paid Employment	32	25	16	5	78	17.4
Personal Business	33	15	46	15	109	24.1
Govt. Or Non- Govt. Job	15	24	46	35	120	26.6
Other work	25	36	51	32	144	31.9
Total	105	100	159	87	451	100
Total Percentage	23.2	22.1	32.2	19.2	1253	100%

Table 3 displays out of a total of 1253 respondents 451 are directly related to earning process. Out of the 17.4 percent are related to Paid employment. Paid employment means activities like projects of NGOs or any other activities like sewing for which they are paid. On the other hand, it is noticed during my research that a good number of women has their own business like a beauty parlour, Grocery shop, etc. The percentage of this number of women is 24.1. Though not from the poor or lower middle family almost 26.6 percent women are related to Government and Non-Government job. During their interviews, it is come to know that most of them are involved in teaching. A few medical practitioners and University teacher have found also. This proved that a wider number of educated women are getting economically empowered. Moreover, 31.9 percent of women are found to be involved in other activities like paintings, acting, singing, etc. The information of this table is showing the economical fitness of the mothers and their eligibility to become a guardian of their minor children.

TABLE 4 : RATE OF MAINTENANCE PROVIDED TO THE CHILDREN BY THE FATHER AND MOTHER DURING THE MARRIAGE

During Marriage	Frequency	Percentage
Maintenance gave by father	203	16.2
Maintenance given by mother	1050	83.8
Total	1253	100

The above table displays that, 16.2 percent of the father continues to provide maintenance to the child even during the continuance of marriage. On the other hand, though the mother had no responsibilities to maintain the child but it was the mother who maintained the child and the rate of percentage was 83.8%. If the father would have preferred to be the guardian of his children basically for the reason of the responsibility of maintaining the child then on the basis of the above information it can be said that the father who is not giving the maintenance to his child his guardianship should be terminated and shifted to the mother who is performing this responsibility.

TABLE 5 : RATE OF MAINTENANCE GIVEN BY THE FATHER TO THE MINOR AFTER BEING APPOINTED AS A GUARDIAN

After Divorce	Frequency	Percentage
Maintenance gave by father after being appointed as the guardian by the court	121	9.6
Maintenance gave by the mother even after not getting the guardianship of the children	1132	90.4
Total	1253	100

Table 5 expressed that, 9.6 percent of the father continues to provide maintenance to the child after getting the guardianship. On the other hand, though the court handed over the guardianship to the father it was the mother who maintained the child and the rate of percentage is 90.4. So, if the mother had to maintain the child, considering the best interest of the child, the mother should get the guardianship of the children.

TABLE 6: RESPONDENT'S AWARENESS OF THEIR RIGHT OF CUSTODY AND GUARDIANSHIP OF CHILDREN

Respondent's Awareness	Frequency	Percent
Yes	718	57.3
No	535	42.7
Total	1253	100.0

From the overhead table, it is found that 57.3 percent of women were aware of their right to custody and guardianship of their children. On the other hand, 42.7 percent of women were not aware of their right but later they come to know about this right from the different activist of Human rights and NGO. They said that it was their belief that it is only father who can claim the custody and guardianship of the children after the divorce. From the unreported case studies, this truth comes out that the frequency of respondent's awareness is increasing due to the different awareness program organised by different NGOs and Human Rights activists regarding the right of the

mother and thus creating the scope for the mothers to be appointed as guardian of her minor children.

TABLE 7: PERCENTAGE OF CASES OF GUARDIANSHIP GRANTED TO FATHER OR OTHER MEMBERS OF THE FAMILY

Court of 1st Assistant Judge and Family Court							
Year	Total Guardianship and Custody Suits	Contesting	Mediation	Withdrawal	Exparte	Guardianship granted to father or other Members of the Family by Excluding Mother	Percentage
2012	663	365	85	23	192	189	98.43
2013	532	463	53	45	323	322	99.31
2014	928	756	113	17	668	651	97.45

The above table illustrated that in the year of 2012 Court of First Assistant Judge and Family Court handled 663 cases of guardianship and custody out of which almost in 98.43% cases the father got the guardianship. Likewise, in 2013 the same court granted the guardianship to the father in 99.31% cases and in 2014 the same court has given the guardianship to the father in 97.45% cases. While interviewing the judges, it is found that most of them possess the idea that ‘principle of welfare’ should be applied only in case of custody and only father is the legal guardian both as per the statutory and religious law. Therefore, in most of the cases the Family Courts declined to appoint the mother as the guardian of their minor child.

TABLE 8 : STATISTICS OF DISPOSAL OF GUARDIANSHIP CASES AND PERCENTAGE OF GRANTING GUARDIANSHIP TO FATHER AND OTHER MEMBERS OF THE FAMILY

Court of 2 nd Assistant Judge and Family Court							
Year	Total guardianship and custody Suits	Contesting	Mediation	Withdrawal	<i>Exparte</i>	Guardianship granted to father and other members of the family by excluding mother	Percentage
2012	435	218	11	21	186	184	98.92
2013	511	339	27	16	296	294	99.32
2014	361	124	9	15	100	98	98.0

The data of table 8 is showing that most of the subordinate judges has granted the guardianship to the father. In 2012 the percentage was 98.92% and in 2013 it was 99.32%. Again in 2014, the percentages go back to 98%. And most importantly it is noted that the ratio of mediation is very low. Moreover, in most of the cases *ex- parte* decree has been given. Basically, these judgments are giving the view that almost in 98.99% guardianship cases it is the father who is preferred for guardianship of the child. In the previous chapter it is found that the Supreme Court has delivered a number of judgments in the area of guardianship applying the ‘welfare of child’ doctrine in a range of situations. Many views these judgements as “best practices”. These cases through applying the current statutory provisions, have contributed progressively towards clarifying the law. But it is pertinent to mention that in most of the cases, the Family Courts are not following theses Judgments and they are blindly preferring the father for guardianship of the minor child:

TABLE 9: STATISTICS OF DISPOSAL OF GUARDIANSHIP CASES AND PERCENTAGE OF GRANTING GUARDIANSHIP TO FATHER

Court of 3 rd Assistant Judge and Family Court							
Year	Total guardianship and custody Suits	Contesting	Mediation	Withdrawal	Exparte	Guardianship granted to father and other members of the family by excluding mother in how many cases	Percentage
2012	541	255	51	30	201	198	98.50
2013	364	321	65	24	287	284	98.95
2014	440	242	24	16	191	187	97.90

The above table is also giving the identical expression. In the year of 2012, out of 541 guardianship and custody suits the 3rd Assistant Judge and Family Court settled the guardianship to the father or other male members of the family by excluding mother in 98.50% cases. In 2013 the rate of handing over the guardianship to father increased to 98.95% and in the year of 2014 out of 440 suits of custody and guardianship nearly in 97.90% cases it is the father and other male member of the family who is favored for guardianship of the child.

A perusal of Family court decisions collected in the course of the fieldwork revealed that there is a common trend in the lower courts to determine the guardianship as well as custody matters without recording any reason supporting the decisions. This is not only creating a perception of arbitrariness inherent in the decision-making process but also makes it difficult to assess the extent to which these decisions are influenced by the ‘best principle judgments, if at all. Such practices are also unhelpful with regard to following up; reviewing monitoring decisions remains unexplained and unrecorded. During the fieldwork, a number of procedural and practice-related issues came to

light. For instance, it was found that in almost all family courts most of the guardianship cases are decided *ex parte*, which has been attributed by a number of caseworkers to non-service of notice to the opposite party allegedly with the help of corrupt Court officials. Thus, mothers are losing the opportunity to ask for the guardianship of their children.

TABLE 10: STATISTICS OF DISPOSAL OF GUARDIANSHIP CASES AND PERCENTAGE OF GRANTING GUARDIANSHIP TO FATHER

Court of 5 th Assistant Judge and Family Court							
Year	Total guardianship and custody Suits	Contesting	Mediation	Withdrawal	<i>Ex parte</i>	Guardianship granted to father in how many cases	
2012	449	402	37	11	336	321	95.53
2013	374	355	45	18	305	303	99.34
2014	255	241	65	21	215	211	98.15

The data of this table is showing that in 98% cases *ex parte* decree is awarded and thus mothers are getting deprived of the guardianship of their children instead of having the eligibilities to be appointed as guardian.

TABLE 11: STATISTICS OF DISPOSAL OF GUARDIANSHIP CASES AND PERCENTAGE OF GRANTING GUARDIANSHIP TO FATHER

Court of 2 nd Assistant Judge and Family Court							
Year	Total guardianship and custody Suits	Contesting	Mediation	Withdrawal	<i>Exparte</i>	Guardianship granted to Father	Percentage
2015	663	365	85	23	192	189	98.43
2016	532	463	53	45	323	322	99.69
2017	928	756	113	17	668	657	98.35

Table 11 demonstrates that out of 192 cases in 189 the father has been appointed as the guardian in the year of 2015. In the Year of 2016, the father gets the guardianship in 99.69% cases whereas the percentage is found 98.35% in 2017. Moreover, the rate of mediation is also very low and most importantly the rate of *expartedecree* is also high in most of the guardianship cases consequently a Muslim mother, despite being acknowledged as the primary care giver of her children, is not entitled to the legal guardianship of her children. With regard to custody, she does have the first claim of custody although it is of limited nature, but even during this period, the mother cannot be the child's legal guardian.

From the above pragmatic study, it is found that mothers are always not unfit to get the guardianship of their children. But due to the dispute over the proprietary right of mother, unequal gender relations, social norms and practices mothers are depriving from their rights, though in case of custody both the higher Courts and lower Courts are giving judgement in favour of mother to ensure the 'welfare' of the child but in Guardianship cases mothers are yet to get their right.

4.3 Dispute over the Proprietary Right of the Mother:

The Issue of legal guardianship of the child continues to remain a sensitive one, presumably due to proprietary implications often associated with such legal guardianship. This involves gaining authority to dispose of minor's property if any.

Therefore, mothers are getting deprived from the right to guardianship due to the power policy. Islam gives its citizens the right to absolute and complete equality in the eyes of the law. Even rulers are not above the law according to the Islamic concept that no one is above the law, for all men are equal. The Prophet himself laid the principle in a very strong footing in his numerous practices. Islam declares the equality of mankind as Allah, the common Creator created the men from a common source before whom all men owe allegiance and obedience.¹³⁷ Islam concedes no privileges on account of birth, sex, nationality or other factors. The Holy Qur'an lays down:

“O mankind, we have created you from male and female and we have made you into nations and tribes so that you may recognize each other”.¹³⁸

“O mankind, be careful for your duty to Lord who created you from a single being and from the same created your mate and from them twain scattered countless men and women and be careful of your duty to Allah in whose name you demand your mutual rights and be mindful of your ties of kinship. For Allah is ever watchful for you”.¹³⁹

The Prophet (PUBH) not only verbally upheld the right of equality but paid due regard to it during his lifetime.¹⁴⁰ Islam recognizes this right of equality not only among men but also between men and women. The Holy Qur'an says:

“The women are raiment for you (men) and you are raiment for them”.

This verse has beautifully and aptly described the equality between men and women. The Guardians and Wards Act 1890, which is applicable to all citizens of the country, provides some relief to the mother as it provides that it is the Court's duty to consider the welfare of the children over the rights of the parents. This brings a level of balance in the gender entitlements which otherwise leans favourably towards the father, as a result of patriarchy that is deeply embedded in society.

The analyses of the qualitative study revealed that despite women's right to guardianship, their right is suppressed by patriarchal socio-economic norms of the

¹³⁷ Hossain, Shaikh Shaukat, *Human Rights in Islam*, New Delhi, Kitab Bhaban, 1990, p. 62

¹³⁸ The Holy Qur'an 49:13

¹³⁹ The Holy Qur'an 4:1

¹⁴⁰ JKabbani, Rana, Reclaiming the True Faith for Women, In the Guardian, May 23, 1992

society. Furthermore, the right of the women is not recognized by society especially right to guardianship of children.¹⁴¹

But the main purpose of this Act is to embody the idea of the welfare of the minor being the first and paramount consideration in the appointment of a guardian and other related matters. Islam has given the right to inherit property to the women. If women get the right to inherit property, then definitely it proves that she has the capacity to handle and look after the property of the minor even. Consequently, appointing her as the guardian is of no harm.

Modernist Muslim scholars believe that Islam has always been in accord with common sense and justice. They argue that Sharia law as developed by the classical jurists in the early years of Islam to deal with the prevailing social situation is subject to change, with the passage of time and necessity. Citing from Sayeh and Morse, ShaheenShardar Ali says that Sharia' allows different interpretations of an existing precedent, at least in three situations as laid down in the Quran and Sunnah, such as necessity or public interest, change in the facts which originally gave rise to the law, and change in the custom or usage on which the particular law was based. If any one of the above conditions is present, the jurist may interpret in the light of the existing situation and his interpretation becomes part of Sharia law, provided it does not conflict with the Quranic provisions.¹⁴²

4.4 Unequal Gender Relations in the Social Context

From our fieldwork it is found that most of the male judges and lawyers hold the view that women are not capable to handle the responsibilities of the guardianship by giving the excuse of the Sharia law. They said that Quran has given superiority to the father over mother in the question of guardianship. But in the socio-economic sphere, the major concern of the Quran was to improve the situation of women by giving her legal capacity, granting her economic rights (dower, maintenance), and raising her social status from the pre-Islamic period. Some verses however show unequal treatment of women and the superior position of the men over women, the most commonly cited one being *Sura IV*: verse 34 which states that men are in charge of women, Allah has made some of them excel the others, and because they spend some

¹⁴¹ Md. Rahmatullah and others vs. Mst. Sabana Islam and others (HCD) 2003, 165

¹⁴² Farooqi , Vimla, Muslim Women's Rights to Equality and the Problems of Today, In Siddiqui A. Zakia and Anwar Jahan Juberi(eds.) *Muslim Women: Problems and Prospects*, Ne Delhi1993, p.29

of their wealth. Esposito explains that this priority of men over women has originated from the greater responsibility of men as protectors, maintainers and providers within the socio-economic context of the Arabian society at that time; when women were dependent on men in that particular society.

But the social situation of the women has been broadly changed in the 21st century. They are not dependent on their husbands for bread and protection. Many women are virtually the sole protectors and providers of their family. So, the concept of priority and superiority of men over women, husband over wives must also change. Therefore, considering the best interest of the child in case of necessity we must handover the guardianship of minor to the mother.

4.5 Unequal Gender Relations in the Context of Family

Islam keeps the institution of family in high esteem and tries to preserve it. Rights and duties of the spouses have been prescribed in a manner to keep an ideal balance. While it is the man's job to earn livelihood and provide sustenance to the family, the wife's duty is to give birth to the children, to bring them up and to groom them. She is not required to work for her family or earn a living. Law of *hizanah* in Sharia has been framed keeping in view the roles of both parents.

Under 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. However, it should be noted that under the prevailing social setup where the father is not the sole financial contributor and the mother shares financial obligations then the privilege of 'guardianship of person and property' may vest in mother also to ensure the welfare of the children.¹⁴³ In England children of the poet Shelly from Harriet were left in the care of a guardian other than himself by an order of the court- though not without some difficulty.¹⁴⁴ To Shelly and his friends, the decision appeared an example of the 'tyranny of priests and laws' impelling him to leave England permanently. But the Court had to pronounce the decision because Shelly's moral and atheistic ideas were considered a serious disqualification for exercising the rights of the father.

¹⁴³ Ibn Qayyam (1292-1350 CE /691 AH- 751 AH) was a Sunni Islamic jurist and commentators of Holy Quran. Ibn Quyyaam, *Zad al Ma 'ad*, translated by Syed Rais Ahmed Jaferi (Karachi; Nafees Academy) Vol. 4 p. 289, International Journal of Humanities and Social Science Vol. 4 No. 5; March 2014 269

¹⁴⁴ Shelly v. West brook (1817) Jac. 260 and Shelly v. Westbrook (1821) Jac. 266

4.6 Patriarchal Interpretation of 'Principle of Welfare'

Under the Guardians' & Ward, Act 1890, the superior right of the father in respect of guardianship was established through the provisions of section 17, 7 and 19(b). The position of the mother as a guardian of her children was of the second grade. Even the father could under old law nominate a guardian of his children so as to exclude the mother of the child through orally or the process of the execution of deed. The mother had no power to appoint testamentary guardian even if the father of the child had expired.

The statutory provisions are found hesitant to confer the absolute right of guardianship to the mother. So, it is the Judiciary who should have to play the role of a realist judge. On the other hand, it is high time to think about the 'welfare' of the child. Patriarchal attitude can never be the measurement to ensure the welfare of the child. In *Dr. Rashiduddin Ahmed v Dr. Quamrunnihar Ahmed's case*¹⁴⁵ the High Court considered it to be in the best interest of the children to place them in the interim custody of their father while the issue was finally settled in the lower court. The High Court decided on the ground that the father had been taking care of the children for nearly a year while their mother was in England. To put the children in the custody of the mother now would upset their settled lives. But the question remains whether it is for the paramount consideration of the welfare of the children to deprive them of the care of their mother or whether the courts are actually taking the advantage of the modern doctrine of child's welfare to deprive women of the already very limited rights granted to them.

In fact, the principle of welfare rests on certain fundamental considerations based on the natural bond.¹⁴⁶ In the Madras case of *India, Holloway J.* turning to Roman law, gave a quotation from Gaius and made the following observations:

“This great master (Gaius) considers, that, in not denying the natural guardianship between the erring mother and her sons with one another, heritable and admitting heritable tie between them, and the praetor was moved by natural equity.”

¹⁴⁵ 50 DLR (1998) (HCD) 532

¹⁴⁶ Chambers Encyclopedia Vol. 12, page-471

Even it is tough to determine actually who will be the best guardian for a particular child due to placing wrong information before the court. In a pending case of guardianship where the child's mother had been killed by the father of that child unexpectedly paternal grandfather gets the guardianship. Here the question lies that when it is a question of a child's future, here how far court is supposed to be always within the literal interpretation of the laws.¹⁴⁷

In England the firm decision on paramount of the "welfare" principle is founded in the judgment of Lindley, Lord Justice. In *Re McGrath (Infants)* (1893) Chancery Lord Justice Lindley at page 148 observed:

“The dominant matter for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money or by physical comfort only. The word must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being.”

This principle, since then, was being followed by the Court of Chancery as a matter of paramount consideration. The Supreme Court of Union of Soviet Socialist Republics in *Kvartshav vs. Red Kava* (1946) 9 Sud Park USSR 4 as quoted in BB Mitra: on the Guardians and Wards Act at page 115 held:

“It is kept in the home by the mother and not by the father where the interest of the child is better maintained and in this respect on the ground of saving the child from being subjected to two different regimes in matters of development and upbringing the father was also refused access when the parents are separated.”

In *Victor Justin Walter vs. Marie Josephine Walter* AIR 1928 Calcutta 600 the observation of division Bench of the Calcutta High Court presided over by Mukherji, J is couched in the following terms.

‘In considering the matter from the point of view of the welfare of the minor the Court should with advantage look to the circumstances which may possibly stand in the way of the child being properly looked after. The first and paramount consideration of the Court is the welfare of the child.’

If we look back through history, we find that even in Eighteenth Century England, the Chancery Court used to interfere where the parents/guardians were extravagant with

¹⁴⁷ Nasir, JamalJ.A., *The Status of Women under Islamic Law and Modern Islamic Legislation*, Leiden, Boston 2009

the rights of children. In the case of *Creuze v. Hunter*¹⁴⁸, Lord Thurlow, L.C was of the opinion that "the court had arms long enough to prevent a parent from prejudicing the health or future prospect of the child".

The welfare doctrine reveals that the interest of the child will get paramount importance to the court. But in our country though there are numerous cases where courts have observed that the welfare of the child will get paramount importance to determine the custody but in case of guardianship except some few cases everywhere, we have found the judges to be judgemental and giving the preference to the father without considering the welfare of the concern child.

4.7 Importance of Guardianship of Mother:

The position of women in a given society cannot be simply attributed to their role in providing offspring. There are many other social and economic roles of women than the stereotypical ones of mother and wife. The economic roles of women are shaped by socio-economic and political structures. According to an eminent author, these are reflected in women's ability to own or inherit and control income-earning assets, ability to participate in economic activities, control over their husband's income, which is usually determined by the level of their education, age, and pattern of their marriage, family structure and residential status; and right and ability to control property.¹⁴⁹

Islam has established women's right to inherit property. Thus, it is understandable that if the Muslim women get the right to inherit the property and can enjoy the absolute right to acquire, hold, manage and dispose of their property, then in necessary implications, it proves that she has the capacity to handle and look after the property of her minor children. Consequently, there should not have any bar in appointing mothers as guardians.

Modernist Muslim scholars believe that Islam has always been in accord with common sense and justice. They argue that Sharia law as developed by the classical jurists in the early years of Islam to deal with the prevailing social situation is subject

¹⁴⁹ Ahmad, Alia: *Women and Fertility in Bangladesh*. New Delhi, Newbury Park and London 1991, p.31

to change, with the passage of time and necessity.¹⁵⁰ Citing from Sayeh and Morse, Shaheen Shardar Ali says,

“Sharia allows different interpretations of an existing precedent, at least in three situations as laid down in the Quran and Sunnah, such as necessity or the public interest, change in the facts which originally gave rise to the law, and change in the custom or usage on which the particular law was based. If anyone of the above conditions is present, the jurist may interpret in the light of the existing situation and his interpretation becomes part of Sharia law, provided it does not conflict with the Quranic provisions.”¹⁵¹

In the socio-economic sphere, the major concern of the Quran was to improve the situation of women by giving her legal capacity, granting her economic rights (dower, maintenance), and raising her social status from the pre-Islamic period. Some verses, however, show unequal treatment of women and the superior position of the men over women, the most commonly cited one being Sura IV: verse 34 which states that men are in charge of women, Allah has made some of them excel the others, and because they spend some of their wealth. Esposito explains that this priority of men over women has originated from the greater responsibility of men as protectors, maintainers, and providers within the socio-economic perspective of the Arabian society at that time; when women were dependent on men in that particular society.

But the social situation of the women has been broadly changed in the 21st century. They are not dependent on their husbands for bread and protection. Many women are virtually the sole protectors and providers of their family. Thus, the concept of priority and superiority of men over women, husband over wives must also change. Consequently, considering the best interest of the child in case of necessity the guardianship of minor should be handed over to the mother.

Mother is the painter of the child’s personality and even his creator. Motherhood is a state that knows all the exquisite traits of beauty in a child’s upbringing and sacrifices all her personal facilities and domains in this regard. A mother can educate her child only when her spiritual and mental peace is provided for at home. Clearly, the nature of a woman is such that she is prepared for accepting the responsibility of a child’s

¹⁵⁰ Ali, Asghar, *The Qur’an, Women and Modern Society*, London, 2005 pp 12,13

¹⁵¹ Ali, Shaheen Sardar, referring to L.P. Sayeh, and Morse Jr. A.M. *Islam and the treatment of women: An incomplete understanding of Gradualism*, London, 1995, 30 TILJ, p. 323

upbringing and if we prevent her from this action, she will suffer from physical and psychological illnesses because her essence and nature is based on love and affection and this affection reaches its peak in her love towards her children. As God has placed this love and sacrifice in mothers, there is naturally an attachment placed in the child and this attachment is such that the child cannot pass a moment without his mother during the first years of life. It is clear that the absence of mother will result in great damage in the child because during the first years the child thinks of the mother as his only support and role model. In families where the mother and father live together, the child does not suffer irreplaceable damages of lack of parents but when the matter of divorce and separation is raised in a family or a child is placed in the situation of losing a parent due to a parent's death and the problems among families, very serious spiritual damages are brought upon the child. A nation's children represent a nation's future. How society treats its own children is a good reflection of the overall health and stability of that society. Notable point is that today, the father does not have full command on the family and their affairs and is not able to consider the child's interests and advantages and due to the increase of the women's scientific and intellectual level in society it can be said that in case guardianship is assigned to the mother no problem would occur for the child; rather, simulating guardianship for the mother will be able to ensure the overall welfare of the child and most importantly guardianship is not a unilateral right of the father or other male member of the society. Moreover, simulation of guardianship for the mother leads to the mother and the child's peace of mind and if the child is under guardianship of the father, all other people of the father's family are involved in the child's management which leads to the child becoming multi-disciplinary. But if the child is with the mother and all his/her affairs are supervised by the mother, there would be no disturbance in the child's mental and physical state.

4.8 Conclusion:

In this chapter an empirical study is being presented to assess the mothers' competency to get the guardianship of her minor children in terms of their economic, social, cultural and educational status. After interviewing the litigant mothers in guardianship cases and analysing the registers of concerned courts, it is found that in most of the cases mothers are more competent and in a better position in protecting and managing the properties of their minor children. It is clear from the empirical

study that mothers are lagging behind in the race of getting guardianship because of predominant cultural practices and beliefs and patriarchal mind set of other stakeholders of the case. In this chapter a quantitative research and a qualitative study have been made to provide an in depth understanding of the status of women in Bangladesh society.

Study regarding the Eligibility of Mother as a litigant in guardianship Suits in the Context of their Socio, Economic, Educational Competency presents eleven tables showing litigant mother's economic condition, level of education, job status. Tables also provide mother providing maintenance to children during marriage and after divorce, litigant mother's awareness of their right to guardianship, guardianship granted to father and other male members of the family by the Assistant Judge and Family Court in the years 2015, 2016 and 2017. Dispute over the Right of the Mother, Unequal Gender Relations in the Context of the Family, Patriarchal interpretation of 'Principle of Welfare' all describes that it is the father who is preferred for guardianship.

But the social situation of the women has been broadly changed in the 21st century. They are not dependent on their husbands for bread and protection. Many women are virtually the sole protectors and providers of their family. Mother is the painter of the child's personality and even his creator. Motherhood is a state that knows all the exquisite traits of beauty in a child's upbringing and sacrifices all her personal facilities and domains in this regard. Moreover, the trend of preferring mother as a custodian will be in vain if she is not provided with the right to guardianship of children. Therefore, considering the welfare of the children, it is inevitable to grant the right of guardianship of children to the mother.

CHAPTER 5

PERCEPTIONS OF JUDGES, LAWYERS AND LITIGANTS ON MOTHER'S RIGHT TO GUARDIANSHIP

5.1 Introduction

In this chapter the perception of Judges, Lawyers and Mother litigants has been fixated to identify the causes and consequences of the non-granting the right of guardianship to the mother. Because to recognize the roots and implications of the non-granting the right of guardianship to the mother, it is significant to dash the insights and attitudes of all the relevant stakeholders. From the findings of the previous chapters, it is found that to go into the details of the matters, further empirical study is required to find out the perceptions of judges, lawyers as well as litigants on awarding or depriving mothers from their right to guardianship. To detect the trends and issues influencing mother's right to guardianship, 1253 mothers, 11 judges from six Family Courts of Dhaka and 31 lawyers of the different Family Courts of Dhaka has been interviewed and the information collected from them has been substantiated by 5 tables.

5.2. Trends and Issues Influencing the Mother's Right to Guardianship:

In this chapter the trends and issues influencing the mothers right to guardianship has been discussed on the basis of the data collected from the Judges, Lawyers and Mother litigants through face to face interview. They have been asked either to agree or disagree with the question and they were allowed to say either 'yes' or 'no'. On the basis of their answers the trends and issues were identified. However, from the fieldwork, the following trends and issued are identified as the core causes from the perceptions of different stakeholders involved in guardianship cases regarding the deprivation of the mother's rights to guardianship.

5.2.1. Patriarchal Interest:

Litigants 80% (only mothers) agreed that though it is evident now that women are eligible to handle the property and economic affairs but to keep the Patriarchal interest unharmed mothers are not getting the guardianship whereas 45% Judges supported

this cause as one of the important causes behind the deprivation of mother's right to guardianship.

The male-female subtleties in Islam are such that there is equality of the sexes in the spiritual sphere. But due to the misinterpretation of some of the verses of the Holy Quran at the level of worldly affairs and social relationships between people, there seems to be gender inequality.¹⁵² Due to this, the women subordination has increased and empowerment of women decreased a lot. Consequently, this patriarchal society took the advantage to use the verses of the Holy Quran to upraise their rights and positions.¹⁵³

Asghar Ali, who analysed the concept of sexual equality in Islam, has argued that,

“The divine revelation simply says that men are *qawwam* over women, seeing it as a contextual statement and a normative one”.

Abdullah Yousuf Ali translates the word '*qawwam*' as 'protector', Pickthall translates it as 'in -charge', Arbury translates it as 'one who manages the affairs of women, maintaining them or are in charge of them.'

But the case study and even the overall situation of our country shows that husbands are failing to provide their normative commitment. Most of the women stated in their interview that their husband failed to provide them the maintenance even during their married life and after the divorce, they even failed to provide maintenance for their children. Therefore, in the name of the verses of the Quran our society is misinterpreting the real meaning of the Quran. Father could get the guardianship if he would have the capacity to maintain the child. But the father who has no goodwill either any capacity to provide maintenance to the child is not entitled to get the guardianship of the children in the name of having superiority over the women. Thus, Fatima Mernissi has argued in her work that the main problem of Muslim Women's subordination is not rooted in religion or tradition, but in patriarchal influence and arbitrariness which has dominated women for centuries. Mernissi writes that when she had finished writing her book, she had come to understand one thing,

¹⁵² Reuben. Levy: *The Social Structure of Islam*. London 1962. pp.92 Siddiqui, Muhammad Mazheruddin: *Women in Islam*. Lahore 1966. pp.15-24

¹⁵³ Ali (Trans.) (1934). p. 190: See also Rahman. Fazlur: 'The status of Women in Islam: A Modernist Interpretation'.

‘If women’s rights are a problem for some modern Muslim men, it is neither because of the Quran nor the Prophet, nor the Islamic tradition, but simply because of those rights conflict with the interest of a male elite. The elite faction is trying to convince us that their egoistic, highly subjective and mediocre view of culture and society has a sacred basis.’¹⁵⁴

According to Islam, social laws must be framed in accordance with human nature.¹⁵⁵ Islam qualifies and defines gender equality with the assertion that this is not absolute and undifferentiated equality but one involving special rights and duties for men and women.

Moreover, section 17 of the Guardians and Wards Act 1890 has also removed all the rigidity regarding the appointment of a guardian for a child. As per section 17 any person who will be able to ensure the best interest of the child shall be appointed as guardian. The Supreme Court of Bangladesh adopted both custodial and guardianship decisions in accordance with ‘the best interest of the child’ principle. But still, the Family Courts are following the orthodox traditional laws and all most each and every time giving the guardianship to the father excluding the mother though the mother is more capable to ensure the ‘welfare of the child.’ It is found in Table no: 3 that in the year of 2012 out of 192 custody and guardianship cases father got the guardianship in 189 cases.

In fact, Family Court has no practice to appoint the mother as the guardian of a child even though the mother is more eligible than the father to ensure the welfare of the child and most of the mothers think that these are happening due to the patriarchal attitude of the society.

5.2.2 Waiving the Right to Property by the Women Herself:

A study of two villages in Bangladesh revealed that 77% of women from families with land did not intend to claim their legal share in their parental property.¹⁵⁶

The socio-economic conditions of women have the effect of not favouring their cases and the preconceived idea remains that women are unable to maintain their children. It is a fact that the primary legal responsibility to maintain the child remains with the

¹⁵⁴ Mernissi. Fatima, *Women and Islam: A Historical and Theological Enquiry*. Oxford 1991, p 9

¹⁵⁵ Misbah. Mohammad Taqi. *Status of Women in Islam*. London 1962. P. 92

¹⁵⁶ Westergaard, Kisten, *Pauperization and Rural Women in Bangladesh- A Case Study in Comilla*, p.71

father and the issue is only the care and control of the person and property of the child. The image that a mother is unable to maintain the child is sustained perhaps to protect men's own patriarchal interest. But 90% of mother did not agree with this.

TABLE 12: RATE OF WAIVING THE RIGHT TO PROPERTY BY THE WOMEN HERSELF

Waiving the right to property	No. of Respondents (Mothers)	Percentage of Respondents
Yes	126	10%
No	1127	90%
Total	1253	100%

Sometimes women themselves disclaim their rights of inheritance to maintain a cordial relationship with the natal family so that they can visit them occasionally on *naior*. Thus, the Quranic law of fixed shares was viewed as contrary to the existing social structures and was often ignored or circumvented.¹⁵⁷ Consequently, women's economic empowerment gets hampered. Moreover, although Muslim Family Laws in Bangladesh require husbands to give power to their wives, 88% of the women did not receive any dower. Rather men are taking dowry from the women. Accordingly, the male-dominated patriarchal society is keeping the women lag behind so that they failed to ask for gender equity. It is observed from the case studies and fieldwork that women are considered as incapable to handle the property of the minor but the divine law has entrusted them the right to hold property and to handgrip that by themselves.¹⁵⁸ Recently, it is seen that most of the women are related to economic affairs. So, more or less they are earning and possessing their own property whether movable or immovable. But still, in the different judgment given by the Family Court, we have seen the court to possess the idea that women are not the right one to get the guardianship.¹⁵⁹ They are holding the orthodox mentality and are giving the limited

¹⁵⁷ Levy, Reuben M.A., *The Status of Women in Islam*. In *An Introduction to the Sociology of Islam*. Vol. 1, London 1957, p. 245

¹⁵⁸ Islam, M. Z. (2013). Health as Human Rights under Malaysian National Legal Framework. *IOSR Journal of Humanities and Social Science (IOSR-JHSS)* Vol. 12(5), 51-57

¹⁵⁹ Huda, Shahnaz, *Personal Laws in Bangladesh: The Need for Substantive Reforms*, the Dhaka University Studies, Part - 1, Vol.15 (1), June 2004, pp. 103-126

interpretation of divine and statutory laws and thus depriving the mother to get the guardianship of her child to ensure the best interest.

5.2.3. Dependence of Mother on the Father for Maintenance of Children:

Maintenance is a fundamental right of Muslim women created not by any separate contract but by the marriage contract or *Kabinnama*, itself. However, a father is also liable to give maintenance to the children until they reached legal age.

TABLE 13: RATE OF DEPENDENCE OF MOTHER ON FATHER FOR THE MAINTENANCE OF CHILDREN

Dependence of mother on father for the maintenance for children	No. of Respondents (Judges)	Percentage of Respondents
Yes	8	65%
No	3	35%
Total	11	100%

TABLE 14: RATE OF DEPENDENCE OF MOTHER ON FATHER FOR THE MAINTENANCE OF CHILDREN

Dependence of mother on father for the maintenance of children	No. of Respondents (Mothers)	Percentage of Respondents
Yes	259	25%
No	994	75%
Total	1253	100%

From table 13 and 14 it is found that 65% Judges thought that the dependency of the mother to the father for maintenance is one of the vital causes for refusing the mother to appoint as a guardian of the child. But 75% mother disagrees with this statement.

Under Sharia law, a husband is bound to maintain his wife. The concept of maintenance is based on *Sura LXV*: verse 6 and verse 7 and *Sura II*: Verse 233, 241. The richness of the wife is no ground to disentitle the wife to maintenance by the husband. Chief Justice Murshed held in one case that the duty to maintain the wife is obligatory on the husband. But from our case study, it is found that even after getting the guardianship of the children only 9.6% father carried their duty to provide maintenance to their children. In fact, the Sharia laws consider the men to possess a superior position only due to having the burden on their shoulder to maintain their wives and children. But as soon as they fail to perform their obligation to maintain their wives and children certainly, they lost their superior position. Therefore, there is no way to consider the father as the only suitable person to get the guardianship of the children. Considering the welfare of the minor in such circumstances mother must be appointed as the guardian of the minor child.

Women's dependence upon and subordination to men is conditioned by a whole range of institutional practices embedded in the family and the kin-group. It is these aspects which provide the constituent elements of the well-documented system of patriarchy in Bangladesh which institutionalizes the female subordination and their structured dependency on men.¹⁶⁰ Consequently, Women are considering as incapable to handle the property of the child. Because most of the people possess the idea that women are dependent on men, therefore not capable to maintain or handle the property of the child. So, it appears that the main problem of subordination is not really religion or tradition, but patriarchal influence and authority. It is men who have interpreted religion, moulding it to perpetuate the patriarchal domination.

5.2.4. Mother's Right to Guardianship of Minor Children under Existing Laws:

85% Judges and Lawyers said that section 19(b) of the Guardian and Wards Act stated that if the father is alive then he will be the guardian. Therefore, the Court has nothing to do in this respect. Moreover, they stated that as per section 17 of the Act, welfare of the child need to be ensured by following the family law of the concerned child. And they think that as per Muslim Family Laws the legal guardian is father, which is wrong. The following two tables are reflecting these pictorial statistics.

¹⁶⁰ Cain, Mead, 'Class Patriarchy and Women's Work in Bangladesh'. *In Population and Development Review*. Vol. 5, No. 3, Sept. 1979, pp. 405-438

TABLE 15: RATE OF MOTHER'S RIGHT TO GUARDIANSHIP OF MINOR CHILDREN UNDER EXISTING LAWS ARE THE MAIN CAUSE OF REFUSING MOTHER TO GET THE GUARDIANSHIP

Existing Law is the main cause behind the deprivation of mother's right to guardianship	No. of Respondents (Judges)	Percentage of Respondents
Yes	9	85%
No	2	15%
Total	11	100%

TABLE 16: MOTHER'S RIGHT TO GUARDIANSHIP OF MINOR CHILDREN UNDER EXISTING LAWS ARE THE MAIN CAUSE OF REFUSING MOTHER TO GET THE GUARDIANSHIP

Existing Law is the main cause behind the deprivation of mother's right to guardianship	No. of Respondents (Lawyers)	Percentage of Respondents
Yes	26	85%
No	5	15%
Total	31	100%

5.2.5. Patrilineal and Patrilocal Kinship System and Preference of Son

In Bangladesh, a son is looked upon as the father's natural apprentice and successor or supporter of the parents in old age. Sons are supposed to build up family prestige and prosperity. A father believes that he will continue to live in this world through his son. That's why it is found from the fieldwork that most of the time father filed the custody and guardianship cases for the male child. Patrilineal descent clearly plays an important role in the systematic devaluation of women by its stress on biological paternity as the basis of assigning children and by making women more or less irrelevant in the genealogical reckoning. 85% Mother agreed with this. While 60% Judges and 42% Lawyers agreed to liable this cause behind refusing mother to get the

guardianship of minor. An important issue behind the unawareness about the right of the women regarding guardianship of children also is the social arrangements for patrilocal residence. After marriage, a woman is effectively cut off from the potential support of her own kin. She is suddenly thrust into a strange environment with people whom she does not know, as marriage is usually arranged by the guardians. That's why living in a discomfort zone she can hardly think about her right to claim the guardianship of her child even after the divorce. However, it is pertinent to mention here that 90% mother litigants informed that fathers are not interested about the custody or guardianship of their disable child. Rather, giving birth of a disable child is considered as a stigma for the mother and they had to get divorced by their husband for this.

5.3 Conclusion:

This chapter focused on the perceptions of Judges, Lawyers and Litigants on Mother's right to guardianship of minor in Bangladesh. On the basis of their perceptions, the trends and issues influencing the mother's right to guardianship of minor has been perceived in the present chapter. It is found that 80% Litigants (only mothers) agreed that mothers are not entrusting with the right of guardianship to keep the patriarchal interest unharmed. In support of their views they stated that their husband failed to provide them the maintenance even during their married life and after the divorce, they even failed to provide maintenance for their children. It is no other but the mother herself who take the responsibility to maintain their children. But to keep the Patriarchal interest unharmed mothers are not getting the guardianship of minors whereas 45% Judges supported this cause as one of the important causes behind the deprivation of mother's right to guardianship.

From table 13 and 14 it is found that 65% Judges and Lawyers thought that the dependency of the mother to the father for maintenance is one of the vital causes for refusing the mother to appoint as a guardian of the child. But 75% mother disagrees with this statement. 85% Mother agreed that Patrilineal and Patrilocal Kinship system and Preference of Son is one of the important causes of their deprivation from the right to guardianship of minors, while 60% Judges and 42% Lawyers agreed to liable this cause behind refusing mother to get the guardianship. From the interview with the Judges, Lawyers and Litigants it is found that waiving the right to property by the women herself is another cause of refusing mother's right to guardianship of children

but 90% mother did not agree with this. Rather they informed that 80% women are not receiving dower money from their husband. 85% Judges and Lawyers said the defect of the existing law is the main cause of refusing the mother's right to guardianship. They stated that as per section 19(b) of the Guardian and Wards Act, if the father is alive then he will be the guardian. Therefore, the Court has nothing to do in this respect. Moreover, they stated that as per section 17 of the Act, welfare of the child needs to be ensured by following the family law of the concerned child. And they think that as per Muslim Family Laws the legal guardian is father, which is wrong. Supreme Court of Bangladesh has already established that question regarding custody or guardianship of a minor is not solely dependent on his or her age, sex or religion but the consideration is welfare of the minor and this has to be the determining factor.

CHAPTER 6

CONCLUSION AND SUGGESTIONS

Introduction

This research has argued that irrespective of orthodox and modernist thoughts and ideas in Bangladesh neither the statutory law and nor the Muslim Sharia law is abstaining the eligible mother to get the guardianship of the property of her children. Moreover, in every case, it is found that decisions given by the higher courts have generally been taken by the lower courts as precedent. But in case of guardianship though the higher court has already given few enlightened judgments regarding the guardianship suits (where it was tilted to the mother) but lower courts i.e. Family Courts are not following those precedents. Still, they are pronouncing judgments based on their traditional role and orthodox views of not granting guardianship of property to the mother in any case. It is evident from this research that the law, at this stage of development, is ready to protect the right of mother by tackling the violation of rights of the mother, in any form e.g. depriving of the right of guardianship, but the societal milieu lacks due to discriminatory treatments based on patriarchal mind set.

The Holy Quran, the ultimate solution for humanity as firmly and deeply rooted in the faith of Muslims, proclaims to a guide for all things.¹⁶¹ One of the *maqasid*¹⁶² of the Sharia is to protect the lineage which has its root in a valid marriage. As a guide for all things, the Quran especially focuses on the very basic institution family where two persons conjoin together through a sacred bond.¹⁶³ Family, a place of peace and tranquillity, plays a vital role in shaping and developing the morals and characters of the children and consequently contributes to construct and reconstruct a healthy *ummah*. Being a sacred and immutable revelation for all the ages and eras, the Quran speaks both on the good and strained relationship between the spouses. The Quran specifies the manner and suggests different strategies for solving the marital problem

¹⁶¹ This fact finds its recognition in the Holy Quran (An-Nahl 16:89). Here Allah (SWT) clearly lays down "...We have sent down to thee the book explaining all things..."

¹⁶² The Arabic word *maqasid* (sing. Maqsad) literally implies the higher purposes or objectives or intents.

¹⁶³ *Nikah*, or marriage in the Holy Quran (*Al-Nisa*4: 24 & 25), has been designated as *hisnor* fort. It implies that marriage like a fort provides protection and acts as a safeguard for the couple joined together in marital tie.

in a proper manner without dragging on a bitter relation resulting in severing the marital tie.¹⁶⁴

Neither father nor mother should disregard the fate of their child because of their own whims and caprices. This may cause harm for the mind and spirit of the child which cannot be compensated later. Islam's prescription is to do every effort by a couple for the betterment of their issues even after the dissolution of their marital tie.¹⁶⁵

This implies that the gendered power dynamics and roles in a particular society cannot be taken as a valid excuse to make the children sufferer. Islam rather prescribes that either of the parents can play any role for the betterment and welfare of the children. There is no express prohibition or bar under Islamic law on granting the guardianship to mother. If anyone puts it conversely, its immediate connotation will be the permissibility or validity of mother's right to guardianship under Islam. By using the two dynamic sources of Islamic law i.e. Ijma and Qiyas, through the progressive development of Islamic law, it is high time to think of any express provision in favour of mother's right to guardianship for the welfare of the children, which will not go against the letter and spirit of the primary sources of Islamic law i.e. Quran and Hadith.

In Roman law, by virtue of *patria potestas*, the father was not only the head of the family but had all-embracing powers. Children begotten in lawful wedlock are in the powers of the parents. Guardianship in Roman law began as a prosecution of the *patria potestas* into the future, with a view to the protection of the family property after the death of the testator.¹⁶⁶ Protection of the person came later, and did not assume importance until the institution of the 'dative guardian' (guardian appointed by the magistrate) came into prominence. There were two kinds of guardianship, distinguished as *tutela* and *cura* (curatio) in Roman law. *Tutela* is defined as 'a right and power exercised over a free person who, on account of tender years, cannot take care of himself; given and allowed by civil law.'¹⁶⁷

¹⁶⁴ Sulayman, Abul Hamid. Abu, *Marital Discord Recapturing the Full Islamic Spirit of Human Dignity*, published by the International Institute of Islamic Thought, London, 1st edition 2003, from Forwarded by Bullock, Dr. Katherine.

¹⁶⁵ Sura *Al Ahkaf*, verse 15 and Sura. *Al Baqarah*, verse 233

¹⁶⁶ Lee, Robert Warden, *The Elements of Roman Law* (1955), page 91, para 137

¹⁶⁷ Servius (Consul B.C. 51 First Commentary on the Edict quoted by Justinian)

Where the father was alive, *patria potestas* was in operation and the question of *tutela* did not arise, in general. The father could also make a testamentary appointment of guardianship. In certain situations, where the above types of guardians did not exist certain Roman Magistrates had the power to appoint magisterial guardians (*tutela dativa*). In the city of Rome, there was a special praetor for that purpose. In sum, the Roman law regulating the guardianship is found as gender-biased and tilted to the father absolutely as a guardian of the children.

The common law is inherited from the colonizers and by virtue of this, our legal system got some remnants of Roman law. The principal legislation governing the norms of guardianship in Bangladesh is the Guardians and Wards Act, 1890, based on Roman law-influenced English law on guardianship and custody of the children. At the time of its enactment women had scarcely any rights for them; there were only social and legal degradation, material insecurity and other manifestations of the dominance and false superiority of man. That is why the Act of 1890 lays an emphasis on the preferential claims of the father or male member in the matter of appointment of guardian of minors.¹⁶⁸ Therefore, the courts in Bangladesh, particularly the family courts, are depriving the mother of getting the guardianship of their children. Their decisions always favour the father which perpetuated the fathers' role and position as an absolute guardian of the children in any case.

The Children Act of Bangladesh enacted in 2013 to give legal effect to the provisions of Convention on the Rights of Child at the domestic level. The Children Act referred to the legal guardian on many occasions. But, without giving any new understanding about the term, it has endorsed the definition of the Guardians and Wards Act. Though the Convention declares the equal eligibility of competent father and mother in obtaining the guardianship of children considering their welfare and best interest, the Children Act is silent in this regard. This silence has to be interpreted in consonance with the provisions of the convention. By way of this, another deduction can be taken in favour of permissibility or validity of the mother's right to guardianship under international human rights law.

¹⁶⁸ National Archives, File relating to Act 8 of 1890, p.3

Findings

1. In most of the cases of guardianship, the judges are deciding the matter based on the misunderstood norms of Islamic law, i.e. disregarding the paramount importance on children's welfare and giving undue deference to the father's ability as the only competent guardian. In the case of *Akter Jahan Taniya vs. The State*¹⁶⁹, the High Court Division decided that the mother's guardianship was lost by the operation of law as soon as she remarried another person who was not related to the minor girl within the prohibited degree or who was a stranger. In *Syed Nurul Haq vs. Anjum Ara Begum*¹⁷⁰, in the absence of the father, the guardianship of the child devolves to the grandfather and declared that the mother is not entitled to be the guardian. Thus, the guardianship of the minor is retained according to the traditional conception of Muslim law. Whereas, Justice Mr. Mostafa Kamal stated that in the appointment of a guardian of a Mohammedan minor under section 17 of the Act, the court is obliged to consider the traditional rule of Mohammedan law in the given facts and circumstances of the case and to decide the best person amongst the rival claimants in whose custody the welfare of the minor would be best secure.
2. In family matters, courts are often used as the last alternative when other attempts of conciliation and mediation have failed. This is not only because legal action involves pecuniary liabilities but is surely also due to the actuality that disgrace is attached to bringing personal issues into the public area. Absence of support from the natal family to assist a woman, as litigation would prejudice the family's procedures are dilatory, few women feel inclined to bring family disputes to the court and henceforth getting failed to ask for the guardianship of their minors.
3. From the fieldwork, it is found that most of the guardianship cases are decreed *ex parte* in favour of the fathers. The close observations and interviews with the mothers revealed that causes behind these *ex parte* decrees are repression and domination of women within the patriarchal society; and fraud and breach of trust from the part of their male counterpart. This image of subordination is enhanced and amplified by the traditional views of stereotyped female roles in

¹⁶⁹ BLD (1986) 281

¹⁷⁰ Family Suit No. 106 of 1989

the family and society. The main factors stated to contribute to this subordination are the patriarchy and paternalistic attitudes in the socio-economic and legal sphere.

4. From the unreported judgments of the Family Court cases, it can be seen that though the situation seems, however favourable in custody matters but in guardianship cases the scenario is totally different. This is most probably due to the inclusion of the mother's name in Sharia Law in case of guardianship of person that means in custody and exclusion of mother's name in guardianship to the property of the child. However, the High Court Division of the Supreme Court of Bangladesh found in an exceptional number of cases to hand over the guardianship to the mother to ensure the best interest of the child. However, as it is seen, in some rare cases mothers were appointed a guardian of their children with reference to their best interests but these mothers, as specific individuals were given recognized rights in guardianship cases when their own ability to help the child was greater than that of the father.¹⁷¹
5. As per the rules of this Act, if the minor is old enough to form an intelligent preference, the Court may consider that preference. This Act also provided that the Court shall not appoint or declare any person to be a guardian against his will. But it is seen in a number of cases that the views of the minor child are of no value. However, to ensure the exercise of this right by the child it is inevitable to introduce an atmosphere where opinion will be taken by a person who is expert in child psychology.
6. The Guardians and Wards Act declared that the guardian will be determined on the basis of the personal law to which the child is subject but with the consideration of the welfare of the child, but the concept of "welfare of the child" does find a mention in the Act of 1890. However, it is like a thread that is visible at some places, but gets blurred elsewhere by being entangled with others. It needs now to be painted in glowing colors. However, on some junctures, the courts gave some directions to upshot children's welfare on a case by case basis, even so, the recent understanding of 'children's welfare'

¹⁷¹ A reported example is *Md. Abu Bakar Siddique v S.M.A. Bakar and others*, 38 DLR (1986) AD, 106

seems to be a outcome of extrapolations strained from the Guardians and Wards Act not addressing the question of welfare of the child expansively parting scope for varying interpretations and wise workout of judicial discretion.

7. From this research it is seen that the lower courts, in most cases, are not succeeding 'best practices' as advanced by the High Court. In practice, rather the Family Courts infrequently diverge from the so-called age and sex rules while defining consequences that would further the welfare of the child.
8. As an out of court settlement, local arbitration or *shalish* is increasingly recognised by the Family Courts in Bangladesh. It seems that these alternative structures of justice could give practical remedies to the mothers but they are also preoccupied by male-controlled indices. It is evident from the unreported Family Suit No.21 and 5 that, Where, the Mother was denied in the *shalish* of their concerned area to give both the custody and guardianship of the child, albeit, the child's best interest was with the mother.
9. Inspection of lower court decisions collected in the course of this research exposed that there is a common tendency in the lower courts defining guardianship matters without recording any cause supporting the decisions. This not only generates a discernment of unpredictability intrinsic in the decision-making process, but also makes it tough to assess the extent to which these decisions are prejudiced by the 'best practice judgments.
10. It is seen that the socio-economic settings of women have the consequence of not preferring their cases. Specially the defined idea that women are incapable to maintain their children is the root cause of refusing the mother's right to guardianship of children. It is a fact that the primary legal accountability to maintain the child remains with the father and the issue is only the care and control of the person and property of the child. The image that a mother is incapable to maintain the child is sustained to protect men's own patriarchal interest. Here, the whole scenario of women empowerment and their increased and diversified participation in economic activities were ignored. Considering the roles which women are playing now and their contribution in

GDP and national economy, no one can reach to an adverse conclusion that, they are not capable enough to accomplish and knob the property as a guardian of their children.

11. The patriarchal jurisprudence and practice developed in the interim period have drastically reduced women's access to the arena of Islamic Jurisprudence. Women were gradually reduced from the public and jurisprudential life and were in no position to fight for their rights. The male-only jurists (*fuqaha'*) applied misogynous readings of the Qur'an, as well as *Sunnah* of the Prophet. They generated a *Sharia* that favored men over women, particularly in the area of divorce and guardianship. Consequently, the laws as they evolved through the four schools of law excluded women's issues and were consecrated as the complete and infallible expression of divine law even though there were differences of opinion amongst them.¹⁷²
12. Islamic laws have taken different forms at different times, and the particular version of *Sharia* espoused in an Islamic state is typically subject to the strategic political and economic considerations of that state's leaders. Many states found that Muslim personal law is not by its nature static. It can develop, adopting the principle that in the case of undue hardship, genuine necessity, or pressing need, decisions of other schools are permissible which is known as *taqlif*.¹⁷³

In a very important case of great significance the court refused to follow the dictums of the classical jurists. The Court observed:

'If the interpretation of the Holy Qur'an by the great Commentators who lived thirteen or twelve hundred years ago, is considered as the last word on the subject, then the whole Islamic society will be shut up in an iron cage and not allowed to develop along with time. It will then cease to be a universal religion and will remain a religion confined to the time and place when and where it was revealed.'¹⁷⁴

¹⁷² 38 DLR(AD)(1986) 106

¹⁷³ F.M. Kulay, *Islam and Comparative Law Review*, Vol. -13(1993) p.55. See also *Changes in Muslim Personal Law- Proceedings of a symposium, held at New Delhi on the 9th January 1964 on the occasion of the XXVI International Congress of Orientals*, New Delhi pp. 32, 54, 77.

¹⁷⁴ *Rashida Begum v. Shahab Din*, PLD (1960) W.P., Lahore, p.11 Accord 42. In this case, the Court held that since the *Hanafi* Law on custody was not founded on any injunction of the Qur'an or the *Sunnah*, the decisions concerning custody should be guided solely by the 'welfare of the minor'.

Suggestions

Many Muslim countries have so far reformed their laws to grant the right of guardianship to mother. They found their reformed or modernized laws as consistent with the jurisprudence and principles of Islamic law. In this context, it is submitted that Bangladesh should not hesitate to adopt such reformative measures in accommodating the mother's right to guardianship by considering the rights and welfare of the children. Bangladesh needs to carefully look at its options and tailor its reformative measures without dismantling the basic principles of Islamic law.

1. On the question of reforming the provisions of Guardians and Wards Act, 1890 to ensure the equal footing of mothers with the father regarding the right to guardianship of minors following amendments are suggested
 - a) Provisions for the appointment of experts to assist the Court in assessing the welfare of the child may be inserted in the Act to ensure the 'best interest of the child' side by side the equal status of mother with the father to the guardianship of children rather than the preferential right of the father. In England, for example, all courts have power to call for an independent report, on matters relevant to the welfare of the child. This service is provided in the High Court and the divorce court by the welfare officer, who is generally the principal probation officer for the area. Although the service is utilized mostly in proceedings ancillary to divorce, it is not so confined.
 - b) New provisions as to the separate representation of children may be incorporated by revising section 50 of the Guardians and Wards Act 1890 to give an opportunity to the minor to represent his interest so that the child can get an independent opportunity to choose his desired guardian.¹⁷⁵ Recently, in England, in regard to certain "care proceedings", the Court has been given a power to appoint a person to represent the interests of a child.
 - c) Section 17 of the Guardians and Wards Act may be revised to include new provisions to make the Court empowered to require the person appointed or declared to be the guardian under this section or the person to whom custody of the minor is entrusted under this Act to furnish to the Court,

¹⁷⁵ Sara Hossain, Nowrin Tamanna, *Muslim Women's Right under Bangladesh Law*, SAILS, P.25-27

periodical reports regarding the health and education of the minor and such other matters relating to his welfare as the Court may specify. The Court, on receipt of the reports shall consider them as soon as possible and may issue such directions to the guardian or other persons furnishing them as the Court may, in the interests of the minor, think fit. This will generate a possibility to eradicate the incompetent guardians and to appoint the apposite guardians for the minors.

- d) The preference given by section 19(b) is confined to *the father*. In view of the changed approach, it is necessary that the preference given in this clause to the father should be extended to the mother also, and she be placed on an equal footing with him.

2. Pursuant to the Guardians and Wards Act, District Court has jurisdiction to resolve guardianship cases. The term 'District Court' has been defined in the said Act to include the High Court Division. Later on, through the Family Court Ordinance, the Family Courts have been conferred the status of District Courts (for this Act) and also given exclusive jurisdiction to decide guardianship cases. But in practice, guardianship cases are exclusively decided by the Family courts. Accordingly, either due to the less of experience or due to some other reason a very sensitive matter like the guardianship cases is handled very lightly. Therefore, the Family Courts should be separated from the Assistant Judges Courts and should allow an independent identity. Also, a Family Court should be a higher court of judiciary and should not be left at the lower end of the judiciary.¹⁷⁶

3. Control of the person and property of a minor should be placed in one person, either father or mother with the prime consideration of the child. Because if the mother gets the custody of the child and if the child endures under guardianship of the father, all other people of the father's family are intricate

¹⁷⁶ Mahmood, Tahir, Personal laws in crisis, 1986, p. 87

in the child's management which leads to the child becoming multi-disciplinary. But if the child is with the mother and all his/her affairs are supervised by the mother, there would be no disturbance in the child's mental and physical state.

Scope for further study

1. During this research, it is found that a significant number of guardianship cases are filed in the Family courts of Dhaka for guardianship of children uninhibited by their biological parents. It appears that the scope for such applications has unlocked due to the means in which section 7 of the Guardians and Wards Act is being construed. Yet, it needs to be mentioned that these processes do not expance to adoption per se. Since, they do not provide the child with the same legal securities or rights. Furthermore, Muslim personal law as applied in Bangladesh does not yet permit adoption. This research, therefore, creates a scope for further study in the field of adoption by the Muslim to explore the gender equality and welfare of the minor child without dismantling the basic principles of Islamic law. ¹⁷⁷
2. The Family Courts of Bangladesh have now become the foremost fount of guardianship issues as very few cases essentially come up to the higher courts. To make a full valuation of how the law is developing today, a detailed learning of unreported cases from several parts of the country would be necessary. In this research this could only be done in a slender viewpoint, as the unreported decisions of Family Courts of the capital city of Dhaka were composed, assembled and analysed. This research, hence, generates a possibility for supplementary study on the unreported cases on guardianship of minors throughout the country to show that there is a need for more systematic activation of judiciary to ensure mother's right to guardianship of minors.
3. During the research it is seen that in 90% cases father or other members of the family are not concerned about the responsibilities of the disable child either girl or boy. This piece of information will create a possibility to work in near future in the arena regarding the responsibilities of father of his disable child.

¹⁷⁷ Sulayman, Abul Hamid. Abu, *Marital Discord Recapturing the Full Islamic Spirit of Human Dignity*, published by the International Institute of Islamic Thought, London, 1st edition 2003, from Forwarded by Bullock, Dr. Katherine.

4. There could also be a beneficial work involving the argument about the mother's right to guardianship suggesting to encompass more women Judges in Family Courts to ensure the absence of patriarchal attitude in case of declaration or appointment of guardian of minors.

Conclusion

The Legal framework on guardianship of minors emerged under the Roman law. Later on, Islamic Law also addressed the issue in a progressive and dynamic manner. During the British rule in the Indo-Pak Sub-continent, the Principal legislation governing the guardianship and custody of the children in Bangladesh was enacted, keeping the personal laws intact. The law apparently favours fathers and in practice tilted towards father as an absolute guardian of minor in any case irrespective of the interest and betterment of the children. International law dealing with the rights of the children also called upon the states to give the paramount importance on the best interest of the children on any matter including the guardianship. But the precedent setting courts of Bangladesh could not go beyond the black letters of law and largely remained indifferent on their role in removing justice and in establishing substantive equality and justice in the society. Only exceptionally, the higher court has given the guardianship to mothers.

But as a matter of fact, those progressive decisions have not received mainstream attention by the country-wide Family Courts. However, as a routine matter, Family Courts are granting the absolute right to guardianship to father and refusing the mothers' rights to guardianship in any case without fully understanding the implications of existing laws and judicial decisions. Mother is the painter of the child's personality and even his creator. Motherhood is a state that knows all the exquisite traits of beauty in a child's upbringing and sacrifices all her personal facilities and domains in this regard. A mother can educate her child only when her spiritual and mental peace is provided for at home. Clearly, the nature of a woman is such that she is prepared for accepting the responsibility of a child's upbringing and if we prevent her from this action, she will suffer from physical and psychological illnesses because her essence and nature is based on love and affection and this affection reaches its peak in her love towards her children. The submission in this research is to break down the silence which leads to grave injustice. It is found in the

present research after an in-depth doctrinal analysis that, there is no bar legally to grant the guardianship to the mothers. The empirical studies showed the competence of mother to work better as a guardian of minor children. It is further submitted to have more proactive role by the higher judiciary of Bangladesh at the same time the lower judiciary i.e. Family Courts should not hesitate to grant guardianship to the mother when they are found as a competent. The Supreme Court has delivered a number of judgments on guardianship applying the “welfare of child” doctrine in an assortment of situations. According to many, these judgments are regarded as the ‘best practices’ from the part of higher judiciary in Bangladesh. These cases, from side to side applying the existing statutory provisions, have contributed progressively towards expounding the law. The significant input of these cases to the jurisprudence is perchance their conciliation of the stiffness between secular general law and the religious personal laws applicable in this area. Lower courts are, therefore, required to apply the welfare doctrine in guardianship cases, to ensure Muslim mother’s right to guardianship of minor children.

Appendix 1

STATISTICS OF DISPOSAL OF GUARDIANSHIP AND CUSTODY SUITS

Through the following tables an attempt has taken to show the rate of custody and guardianship cases among the total family suits.

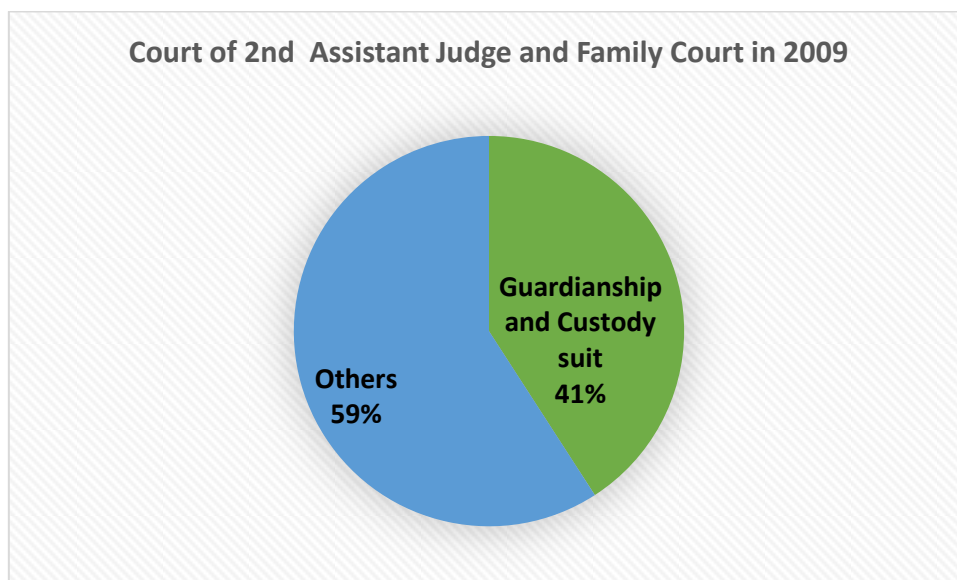
TABLE 1: STATISTICS ON DISPOSAL OF CASES IN 3 FAMILY COURTS OF DHAKA

Year	Court of 2 nd Assistant Judge and Family Court		Court of 3 rd Assistant Judge and Family Court		Court of 5 th Assistant Judge and Family Court	
	Total Family Suit	Guardianship and Custody suit	Total Family Suit	Guardianship and Custody suit	Total Family Suit	Guardianship and Custody suit
2009	893	365	850	309	1102	327
2010	936	363	958	395	706	339
2011	128	56	113	57	79	38

From Table no 1 it is found that in the year of 2009 out of a total family suit of 1102, 327 suits were related to custody and guardianship issues which were filed in 5th Assistant and Family Judge Court. Where as in 2010 out of 706 suits, 339 suits were related to custody and guardianship matters in the same court. Almost the same thing happened in 2011, where out of 79 suits 38 suits were related to guardianship matters. In the 2nd Assistant Judge and Family Court in 2009 the total number of family suits were 893 and custody-guardianship issue was related in 365 suits, in 2010 the total family suits were 936 and custody and guardianship suits were 363 in number.

However, out of 128 family suits 56 suits were filed in the 2nd Assistant and Family Judge Court regarding custody and guardianship matters. In the year of 2009, the total numbers of family suits were 850 and the family suits were 309 in the 5th Assistant and Family Judge Court. In 2010 the total family suits of the same court were 958 and the guardianship and custody suits were 395. In 2011, 113 family suits were filed in 5th Assistant and Family Judge Court out of which 57 suits were filed regarding custody and guardianship matters. Which indicates that almost in every year and every Court mentionable number of suits relating to custody and guardianship matters are filed.

Figure: 1



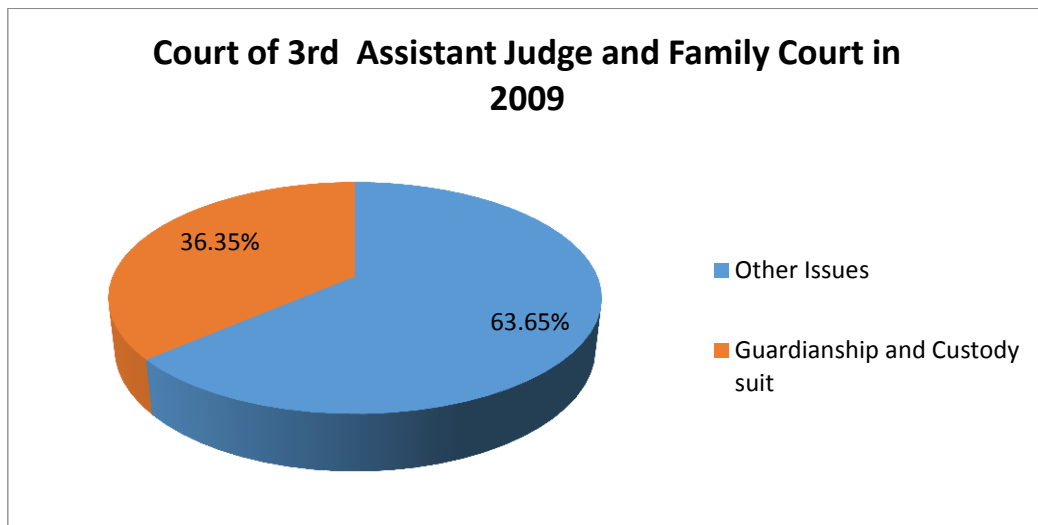
It is crystal clear from the above pie chart that in the year of 2009 out of total family suits , 41% suits were related to guardianship and custody issue in the 2nd Assistant and Family Judge Court. The data mentioned in this pie chart is indicating the rate of total suits relating to guardianship and custody matters and indicating the increasing trend of these cases.

TABLE 2: STATISTICS ON DISPOSAL OF CASES IN 3RD ASSISTANT JUDGE AND FAMILY COURT OF DHAKA

Court of 3 rd Assistant Judge and Family Court			
Year	Total Family Suit	Guardianship and Custody Suit	Percentage
2009	850	309	36.35
2010	958	395	41.23
2011	113	57	49.59

From the above table, it is found that whereas in 2009 the percentage of guardianship case was 36.3 in 3rd Asst. and Family Judge Court, it increased to 41.23% in 2010 and gradually increased to 49.55% in the year of 2011 in the same court.

Figure: 2



From the above pie chart, it is originated that in the year of 2009 out of total family suits ,36.35 % suits were related to guardianship and custody issue in the 2nd Assistant and Family Judge Court.

TABLE 3: STATISTICS ON DISPOSAL OF CASES IN 5TH ASSISTANT JUDGE AND FAMILY COURT OF DHAKA

Court of 5 th Assistant Judge and Family Court			
Year	Total Family Suit	Guardianship and Custody Suit	Percentage
2009	1102	327	29.67
2010	706	339	48.01
2011	79	38	48.10

From the above table, it becomes very clear that the rate of guardianship cases is increasing day by day. Because, in the year of 2009 the rate of guardianship and custody cases were 29.6% and in 2010 the rate was 48.01% where as in 2011 it increased to 48.10%.

Figure 3

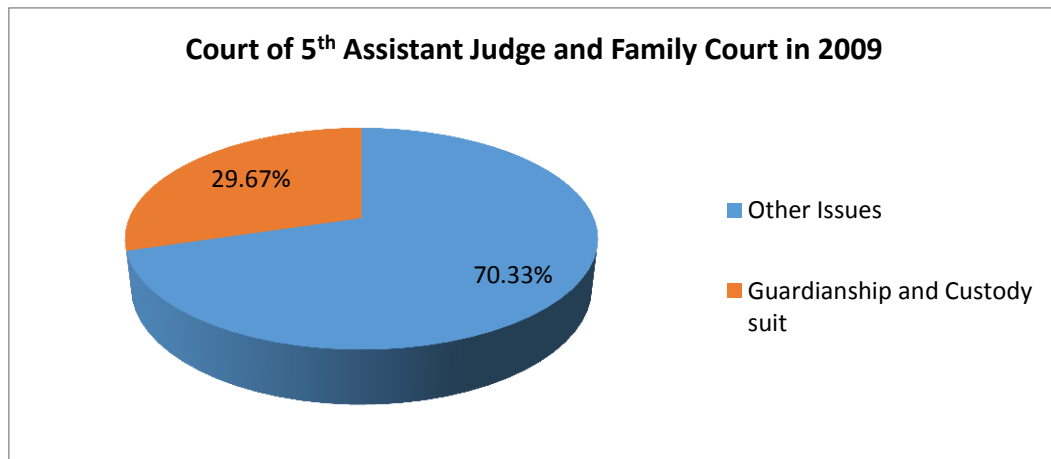


Figure 3 shows that in the year of 2009 out of total family suits 29.67 % suits were related to guardianship and custody issue in the 5th Assistant and Family Judge Court.

TABLE 4: STATISTICS ON DISPOSAL OF CASES IN THREE ASSISTANT JUDGE AND FAMILY COURT OF DHAKA

Year	Court of 2 nd Assistant Judge and Family Court		Court of 3 rd Assistant Judge and Family Court		Court of 5 th Assistant Judge and Family	
	Total Family Suit	Guardianship and Custody suit	Total Family Suit	Guardianship and Custody suit	Total Family Suit	Guardianship and Custody suit
2012	300	95	295	90	280	172
2013	279	100	285	110	284	103
2014	254	70	80	76	332	124

From the above table, it is found that comparatively, the custody and guardianship cases were increased in 2015, 2016 and 2017. Because in the 2nd Assistant Judge and Family Court out of 300 suits 95 suits were related to guardianship and custody matters. In the same court the total suits were 279 and guardianship related suits were 100 in 2013. Whereas out of 254 suits guardianship related suits were 70 in the year of 2014. In the 3rd Assistant and Family Judge Court, the ratio of total suits and guardianship suits were 295: 90 in the year of 2012 and the ratio was 285: 110 in 2013 and the ratio was 80: 76 in the year of 2014. However, 280 family suits were filed in 2012 in the 5th Assistant and Family Judge Court out of which 172 numbers of suits were related to guardianship and custody matters. In the same court, the ratio of total family suits and guardianship suits were 284:103 in the year of 2013 and it was 332:124 in 2014.

Figure 4

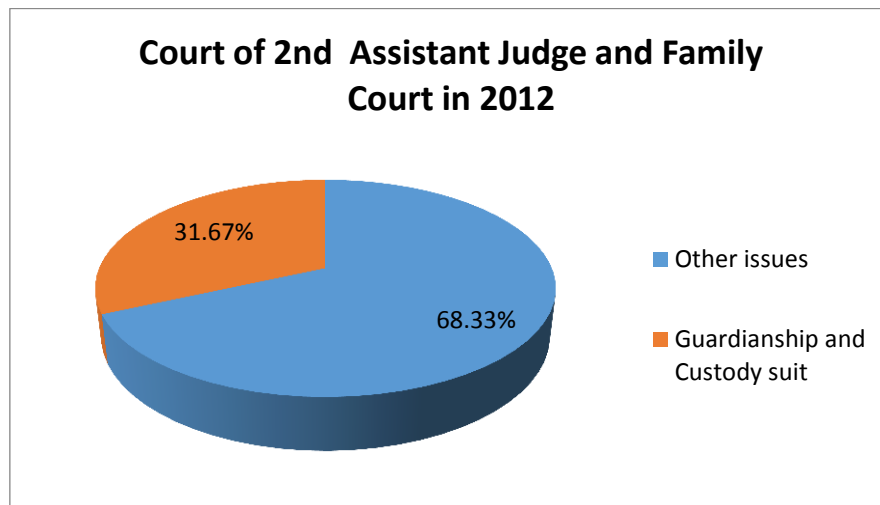
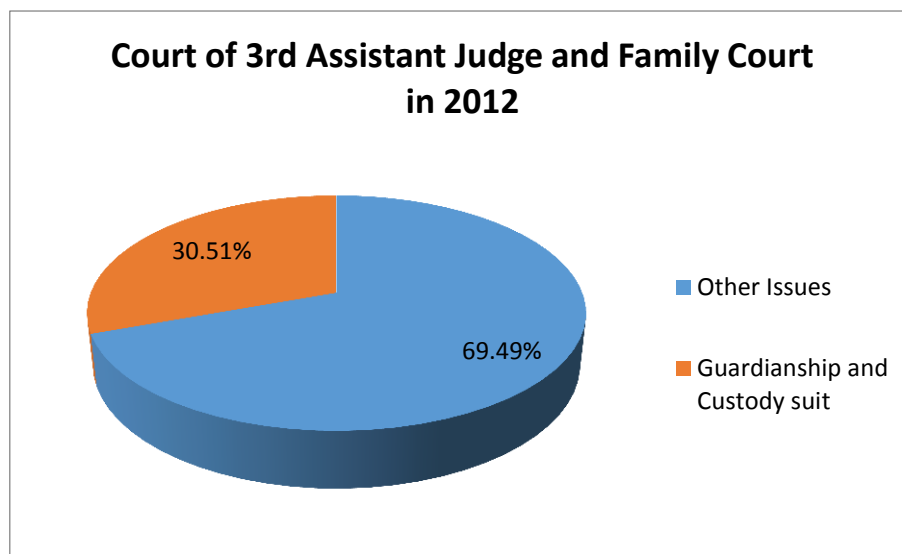


Figure 4 is showing the same trend. Because from the above figure it is found that in the year of 2009 out of total family suits, 31.67 % suits were related to guardianship and custody issue in the 2nd Assistant and Family Judge Court.

Figure: 5



The above figure is showing that in 2012 almost 30.51% suits out of the total family suits were related to guardianship and custody matters in the 3rd Assistant and Family Judge Court.

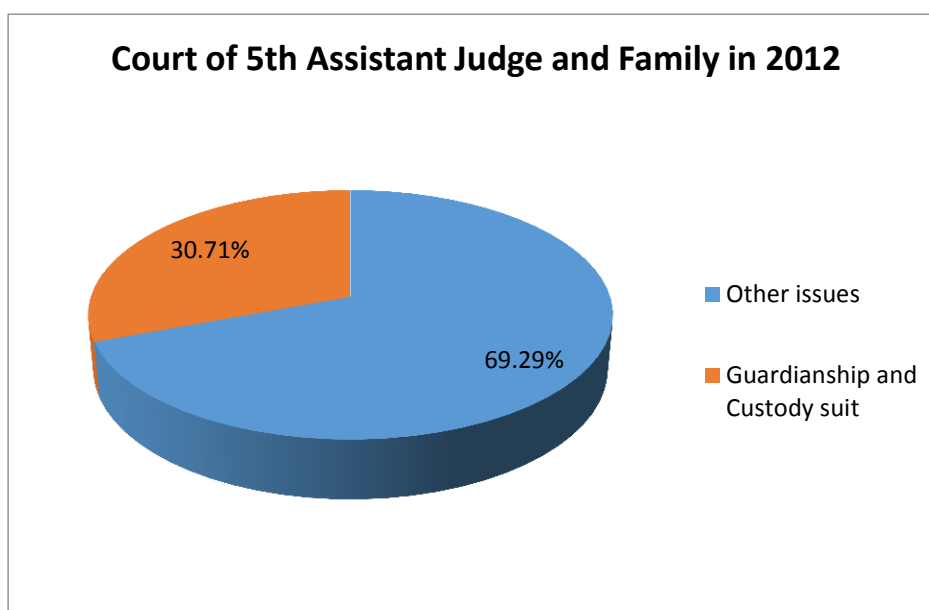


Figure: 6

In 2012, 30.71% suits were filed in 5th Assistant and Family Court regarding guardianship whereas percentage of others

TABLE 5: STATISTICS ON DISPOSAL OF CASES IN THREE ASSISTANT JUDGE AND FAMILY COURT OF DHAKA

Year	Court of 2 nd Assistant Judge and Family Court		Court of 3 rd Assistant Judge and Family Court		Court of 5 th Assistant Judge and Family	
	Year	Guardianship and Custody suit	Total Family Suit	Guardianship and Custody suit	Total Family Suit	Guardianship and Custody suit
2015	315	110	268	83	300	157
2016	196	56	285	110	237	105
2017	273	106	80	80	313	118

From the above table, it is found that in the year of 2015 almost one-third of the total Family suits of 2nd Assistant and Family Judge Court was related to guardianship and custody matters. In the same way, the number of guardianship cases remains almost one-third of the total family suits in the 5th Assistant Judge Court in the year of 2017. Therefore, this sensitive issue is to be handled with sincerity and certainty.

TABLE 6: STATISTICS ON DISPOSAL OF GUARDIANSHIP AND CUSTODY CASES IN THREE ASSISTANT JUDGE AND FAMILY COURT OF DHAKA

Year	Court of 12 th Assistant Judge and Family Court		Court of 13 th Assistant Judge and Family Court		Court of 15 th Assistant Judge and Family Court	
	Total Family Suit	Guardianship and Custody suit	Total Family Suit	Guardianship and Custody suit	Total Family Suit	Guardianship and Custody suit
2000	893	365	850	309	1102	327
2001	936	363	958	395	706	339
2002	128	56	113	56	79	38
2003	300	95	295	90	280	172
2004	279	100	285	110	284	103
2005	254	70	80	80	284	122
2006	315	110	268	83	300	157
2007	196	56	285	110	237	105
2008	273	106	80	80	313	118

Composition of Unreported Cases

Unreported Suit No. 1

HIGH COURT FORM NO J (2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Additional Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Saud Hossain

Dated: Tuesday, the 23rd day of March 2001

Family Suit/Case No 34/ 2015

Munir Hossain and ors.....Plaintiff

Vs.

ShalinaKhanom¹⁷⁸Defendant

This suit was filed by the Plaintiff for custody and guardianship of the minor children. Here the Plaintiff and the defendant got married on 22nd September of 2001. The husband was a shop keeper. The wife was a nurse. However, the couple was blessed by a daughter in the year of 2004. Very unexpectedly the husband died in the year of 2006. Then the Plaintiff started to live with her parent's house along with the daughter. In

¹⁷⁸ Family Suit/case No. 97/2012

the year of 2009, the Plaintiff got married to another person. Thereafter, the uncles of the minor daughter filed this suit for the custody and guardianship of the child. The Court declared that though the mother has lost her right to be appointed as the guardian of the child the custody will remain with her for the best interest of the child.

Unreported Suit No. 2

HIGH COURT FORM NO J (2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Mohammad Zubayer

Date: 15/4/1997

Family Suit No. 100/1998

Dr. Md. Rashidul Islam.....Plaintiff

Vs.

Morsheda ParveenDefendant

In the presence of the Advocate for the Plaintiff and Defendant of the suit, the following judgment is delivered. This is a suit for custody and guardianship of the minor children.

Very briefly the fact of the case is that the Plaintiff instituted this family suit against the defendant for the custody and guardianship of his two minor sons. The Plaintiff married the defendant on 14/12/1988 and in the wedlock one son was born on 30/7/1991 and another son was born on 31/7/1996. The Plaintiff divorced the defendant on 18/12/1997 and she left the Plaintiff's house and went to the house of her father in the district of Rangpur taking with her two minor sons and has been living there. The Plaintiff was a doctor and he was practicing in Bogra. After the divorce, he has been sending money and clothes for his children but the defendant

refused to accept those. He also argued that the defendant and his father had no capacity to educate and maintain the minor sons properly. Therefore on 8/1/1998, the Plaintiff sends his mother and cousin to bring his sons from the defendant and his father but they refused. In the circumstances, the Plaintiff was constrained to bring the suit. But the defendant contested the suit by filing a written statement and contended that after divorce the plaintiff had driven her away from his house along with two minor sons and thereafter the defendant has been living at Mohammadpur in Dhaka where she has been working as a school teacher and her elder son is admitted in class 1 in the same school and she also contested that the plaintiff had not paid any money for their maintenance. The defendant also filed a suit being No. 228 of 1998 in the Family Court and the Court of Assistant Judge, 1st Court, Dhaka to keep her sons in her custody as well as for the guardianship but the suit was decreed exparte. During our interview, this woman informed us that she had not been summoned properly and therefore failed to appear at the court but the court has given exparte decree in favour of the Plaintiff.

Unreported Suit No. 3

HIGH COURT FORM NO J (2)

Heading of Judgment in Original Suit/Case

In the Court of 2nd Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: M. Ruhul Amin

Date: 6/11/2003

Family Suit No. 284/2005

Rezwanul AhsanPlaintiff

Vs.

Anika Ali.....Defendant

In the presence of the Advocate for the Plaintiff and Defendant of the suit, the following judgment is delivered. This is a suit for custody and guardianship of the minor children.

Very briefly the fact of the case is that the Plaintiff and the defendant were married on 23/12/2002 under Muslim Law and the dowry was fixed at TK. 10,00,000/- of which 2,00,000/- was shown as paid, although, according to the defendant, no money was paid. A child Farzana Ahsan, was born during their wedlock on 24.12.2003. Soon thereafter, the relationship between the petitioner and the respondent deteriorated. The defendant claims that she was physically and mentally tortured by the defendant, who was a drug addict. However, all this information suppressed at the time of the marriage. It is alleged by the defendant that in July 2004 the defendant pushed her out of his house during the night after torturing her, but she went back to the house of the plaintiff for the

sake of her son. On 26.07.2004 according to the defendant, the plaintiff again pushed her out of his house. However, in the presence of the guardians from both the parties they came to reconciliation and started to live together. But she has been tortured again very inhumanely on 17/12/2004 and compelled to divorce him on 18/12/2004. But the Plaintiff said that after the wedding both families were quite happy. But when his wife became pregnant she and her parents were not happy. After their son was born, he was under the care of his mother. Still, the defendant was not happy and she left him and went away with their child. Later he came to know that she had gone abroad leaving his son to her mother. Therefore he instituted this suit. The court ordered by granting both the guardianship and the custody to the father. Though as per the Muslim law in absence of mother the maternal mother should get the preference in case of custody but in this case, by giving the custody and guardianship to the father it is proved that mothers are not entitled to take higher degrees though they are eligible. Because after getting the information that mother compelled to come back to Bangladesh and when she lost her child's custody she became so helpless that she tried to get back the custody of her in any way but failed and thus the child became deprived of the mother's love and the mother also lost her legal right to get the custody and guardianship of her child.

Unreported Suit No. 4

HIGH COURT FORM NO (J) 15

Heading of Judgment in Original Suit/Case

In the Court of 1st Assistant Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Md. Abdul Monem

Dated: Monday, the 27/6/2014

Family Suit/case No. 11/2013

Morsheda Banu alias Moshu.....Plaintiff

Vs.

Hanif Jowerder.....Defendant

This case was filed by the Plaintiff to get the custody and guardianship of her minor child who was taken away by the father after their divorce. Both the Plaintiff and the defendant got married on 4th July of 2009. During the marriage, the defendant took 2, 00,000 taka as dowry from the father of the Plaintiff as dowry. Though the father of the Plaintiff was supposed to pay him taka 3 Lac he failed to manage the amount during the marriage. After the marriage, the defendant used to torture the Plaintiff a lot for the remaining amount of money. However, in 2011 the Plaintiff gave birth to a male child. Thereafter, out of a family clash the husband sends her to her father's house and told her to come back with the remaining amount of money. All of a sudden in 2012 the Plaintiff received a divorce letter from her husband. Then April 2013 the husband took away the child without informing her and refused to send him back.

He told that the boy is his own child and he is the only entitled to keep the child with him. Consequently getting no other way she filed this suit for custody and guardianship. Though the court granted the custody to the mother but appointed the father as the legal guardian.

Unreported Suit No. 5

HIGH COURT FORM NO (J) 13

Heading of Judgment in Original Suit/Case

In the Court of 1st Additional Asst. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Md. Idris Ali

SI No. 59

Date: 23/5/2016

Family suit /case no. 21/2014

Shah Shamim Delower.....Plaintiff

Vs.

Morjina Akter.....Defendant

It was a suit for custody and guardianship of the children. In this suit, the Plaintiff and the defendant got married in February 2003. Here the Defendant was a teacher of Government Primary School and the Plaintiff was a small businessman. However, after their marriage, the Plaintiff used to torture the defendant mentally a lot out of his suspicious mentality. Though the wife had no relation with anybody the husband used to blame her for extramarital relationship. In the year of 2004, the couple was blessed by a male child. Though the Plaintiff and the defendant used to live together it was the defendant who would maintain herself and her child out of her own income. Even in the case of treatment of the child, the Plaintiff had no care. However, finally, the defendant divorced the Plaintiff in 2013. Thereafter, the Plaintiff filed this suit for the custody and guardianship of the child. It was stated by the Court that

as per Shariah Law the father is the right one to get the custody.
Moreover, He is the only fittest one to be the guardian of this child.

Unreported Suit No. 6

HIGH COURT FORM NO (J) 19

Heading of Judgment in Original Suit/Case

In the Court of 5th Additional Judge and Family Court, Dhaka

District: Dhaka

Present: Mrs. Monika Khan

Dated: Sunday, the 25th day of September 2007

Family Suit No. 89/2010

Sajeda Begum.....Plaintiff

Vs.

Kalimullah.....Defendant

This suit was filed by the Plaintiff to get the custody and guardianship of her two minor children. Sajeda got married with Kalimullah in 2007. After her marriage, she came to know that Kalimullah got married for another two times before marrying her. However, in 2008 she gave birth to a daughter and in 2010 she gave birth to another daughter. Without telling her anything Kalimullah got married to another woman in September 2010 and forced Sajeda to leave his house. He refused to give the children to her. Finally, she filed this suit. Court ordered to handover the children to the Plaintiff but appointed the father as the legal guardian.

Unreported Suit No. 7

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Assistant Judge and Family Court, Dhaka

District: Dhaka

Present: Mrs. Hafsa Zhuma

Dated: Wednesday, the 2nd day of June 2010

Family suit/case No. 43/2012

Sheema Afrin.....Plaintiff

Vs.

Ashraful Khan.....Defendant

In this suit, the Plaintiff and the defendant got married by themselves out of a love affair in 2007. Consequently, the Plaintiff's father refused to accept them. However, Defendant took her to his parent's house. After a few days, the Plaintiff's father-in-law and mother-in-law started to pressurize her to bring money from her father. While she refused to do so they threatened to get her out of the house. She was a worker in a local parlour. She was supposed to hand over the full salary to her husband. In the year 2009, she gave birth to a son. Then she somehow managed to rebuild her relationship with her parents. However, in 2010 her husband and father-in-law and mother-in-law again forced her to bring taka 1 Lac from her father's house. She refused to do so. Then her husband along with the other members of her family beaten her a lot and send her to her father's house along with the child. In 2011 the husbands send a divorce letter to the wife. Thereafter the husband and other members of his family

began to pressurize her for handing over the child to them. They also came to her parent's house to take away the child. Finally getting no other way she filed this suit. The court declared that as the child is minor yet therefore it is the mother who should get the custody and as per shariah law the father will remain the legal guardian of the child.

Unreported Suit No. 8

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 1st Additional Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Abul Hossain

Date: 27/5/2014

Family Suit No. 33/ 2012

KhorshedMrida.....Plaintiff

Vs.

Sufia Nasrin Rita.....Defendant

Here Plaintiff filed this suit for getting the appointment of his minor niece whose mother that means the Defendant of this suit got married for the second time after the death of her husband. From the fact of the suit, it is come to know that the defendant was a mother of a minor girl Shyama. However, Shyama's father died while she was 1 and a half years old. Before his death, he gifted the house to the extent of 3/4th of the property to his child and the rest to his wife by a deed of Heba-bill ewaz. However, after his death, they continued to live in that same house but after his death, his brother khorshedMridha started to conspiracy to grab the properties. Sufia also said that the Plaintiff often tortured her to grab that property. Therefore, she had to marry for the second time only for the safety and security of the minor and herself. Plaintiff's advocate pleaded that by marrying a stranger she violated both the condition as well as the Rule of Mohammedan Law. Considering section 17 of the Guardian and

Wards Act 1890 the Court stated that the welfare of the minor would be best secured and achieved in the custody but refused to appoint her as the guardian only due to the fact that she got married for the second time.

Unreported Suit No. 9

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 2nd Assistant Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Kamal Mazumder

Date: 14/8/2011

Family Suit No. 61/2013

Shahida Begum.....Plaintiff

Vs.

Matiur Rahman (Sojol).....Defendant

This was a suit for maintenance, custody, and guardianship of children. In this suit, Mrs. Shahida Begum got married to Mr. Matiur Rahman in 2006 out of a love affair. Just after the marriage Matiur Rahman and Shahida fled away to Matiur's friend's house situated in Mohammadpur. Here, Shahida started to work in a garment factory. At the end of the month, Matiur used to take her full salary from her forcefully. Matiur used to lead his life as a vagabond without doing anything. In 2007 shahida got pregnant and managed to come back to her parent's house along with his husband. After few days Matiur left that house and did not come back. In May 2008 she gave birth of a daughter. She tried to communicate with her husband but failed. After a few days, he divorced her. He refused to provide maintenance to the child also. Getting no other way, she filed this suit for maintenance, custody, and guardianship of the child. Here, Mr.

Motiurraised the question about the character of Shahida. He stated that the child is the result of her immoral life. The Court ordered that for the welfare of the child the mother will be the custodian and the father will be bound to provide maintenance to the child. Though the father raised a false allegation against the mother of the child still the court declared the father as the legal guardian of the child.

Unreported Suit No. 10

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Additional Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Shantosh Adhikari

Date: 04/7/2013

Family Suit No. 78/2013

Sheema Begum.....Plaintiff

Vs.

Rehanuddin.....Defendant

In this suit, Sheema Begum got married to Reazuddin. But unfortunately due to a road accident he died. During his lifetime he made a fixed deposit of Tk. 50, 00000 for his only son Mahin. After the death of Sheema's husband, sheema along with her son continued to live in her husband's house. The owner of the house was her husband. In the absence of the father, the paternal uncle of Mahin started to handle all the matters relating to their property. In the name of necessity, he filed a suit to the Family court to get the guardianship of the child and achieved the guardianship. Later Sheema found that in fact the paternal uncle that means Rehanuddin is trying to grab all of their properties. Then she challenged the judgment and files an appeal to the District Judge court to get the guardianship for the welfare of the child. The paternal uncle tried to say that she might go for second marriage which will be crucial for the child. However, finally, the Court handed over the guardianship to the

mother for the welfare of the child with a condition that as the child is nearly 18 so no one will raise money from his account until he attains the age of 18.

Unreported Suit No. 11

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Additional Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Shantosh Adhikari

Date: 04/7/2013

Family Suit No. 112/2014

Marjina Khatun.....Plaintiff

Vs.

Mr. Ataur Rahman.....Defendant

In this suit, Marjina got married to Mr. Ataur Rahman on 21st May of 2011. In the year of 2012 Marina gave birth to a son. Thereafter in the year of 2013 Marjina came to know that her husband involved with an extramarital relationship with one of his second cousin. Marjina tried a lot to bring her husband out of that relationship but she failed. In the year of 2014, she has been divorced by her husband. The husband did not let her take their son with her. Therefore, she filed this suit both for custody and guardianship of her children the court ordered to handover the child to Marjina but appointed the father as legal guardian.

Unreported Suit No. 12

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Additional Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Shantosh Adhikari

Date: 04/7/2013

Family Suit No. 20/2014

Mst. Aleya Begum.....Plaintiff

Vs.

Mr. Abdur Rahman.....Defendant

In the presence of the Advocate for the Plaintiff and for the defendant the Court delivered the following judgment.

This is a suit for custody and guardianship. Mst. Aleya Begum got married to Mr. Abdur Rahman on 21/2/ 2011. In the year of 2012, Aleya gave birth to a son. A few days after the birth of the child Abdur Rahman started to create pressure on the Plaintiff to give him Tk. one lac as dowry. It is also found that soon after their marriage he claimed for 50,000 Tk. as dowry which she managed to give him by taking the money from her father. This time she refused to ask for the money to her father. Therefore the defendant rid her from the house for the inability to meet the demand of dowry. He forced her to leave his house without her son.

Aleya is a school teacher of a primary school situated in Savar. But Mr. Abdur Rahman was unemployed and was leading a very unruly life. Therefore, she filed this suit both for custody and guardianship of her children. The court ordered to handover the child to Aleya but appointed the father as legal guardian.

Unreported Suit No. 13

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Additional Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Shantosh Adhikari

Date: 04/7/2013

Family Suit No. 19/2015

Mst. SefuAker.....Plaintiff

Vs.

Mr. KamalDefendant

In the presence of the Advocate for the Plaintiff and Defendant in this suit/case, the Court delivered the following Judgment.

The Plaintiff's case, in brief, is that Mst. Sefu and Kamal got married to each other in the year of 2011 out of a love affair. Both of their parents denied accepting them. Thereafter Kamal took her in his friend's house situated in the old town where they started their married life. Mst. Sefu also got a job in a local garment factory. In the year 2013, she gave birth to a child. During this time Sefu's in-laws accepted them and brought her to his in-law's house. But a few days after the birth of the child they claimed a large amount of money as dowry. Sefu failed to pay the money as she had no connection with her parents. In the year of 2014, Kamal

forcefully sends her to his parent's house and refused to take her back. All of a sudden on 29th July Kamal came to her home and wanted to take her back even without the dowry. She went back to her in-law's house. But on 30th July they forced her to leave her husband's house leaving the child to his father. Therefore she filed a suit for divorce, dower, custody, and guardianship of the child. The defendant claimed that she is a characterless woman. Therefore he is not willing to stay with her. Finally, the Court declared that the Plaintiff is entitled to get the divorce and 40,000/-Tk. as per whole unpaid dower. The Court granted the custody to the mother but the father is appointed as the guardian of the child.

Sd/-

Shantosh Adhikari

04/7/2013

Asstt. Judge

Unreported Suit No. 14

HIGH COURT FORM NO J (2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Additional Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Shantosh Adhikari

Date: 04/7/2013

Family Suit No. 17/2001

Mst. Kajol Rekha.....Plaintiff

Vs.

Mr. Khurshid MiaDefendant

In the presence of the Advocate for the Plaintiff and Defendant in this suit/case, the Court delivered the following Judgment.

This is a suit for claiming custody and guardianship of the children.

The Plaintiff's case, in brief, is that she got married to Mr. Khurshid Mia in the year of 2010. It was a settled marriage. They were leading a happy life. Aleya was involved with the handcrafted business. In the year 2011, she gave birth to a daughter. But she was continuing her business. After few days Kamal claimed that Aleya a woman of immoral character, therefore, he has no desire to carry on their conjugal life. In the same year, Kamal divorced her and fled away to his parent's house along with that infant child. Getting no other way she filed this suit. The Court declared that the defendant has shown his low mindedness by alleging the

Plaintiff is of immoral character, therefore, is not entitled to get the custody of the child. The Court handover the child to the mother but appointed the father as the legal guardian of the child.

Unreported Suit No. 15

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 2nd Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Jainul Abedin

Date: 13/4/2005

Family Suit No. 27/2009

Torab Ali.....Plaintiff

Vs.

Mst. Shirin BanuDefendant

In the presence of the Advocate for the Plaintiff and Defendant of the suit, the following judgment is delivered. This is a suit for custody and guardianship of the minor children.

Very briefly the fact of the case is that the Plaintiff instituted this suit against the defendant for the custody and guardianship of his two minor sons. But the family suit was decreed *ex parte*. After talking to the defendant it is found that the said decree was obtained by suppressing summons and practicing fraud upon the court. And it is also found that she had no idea that she might file a Family Miscellaneous Case under section 9 of the Family Court Ordinance for the restoration of the family suit on setting aside the *ex parte* decree.

Unreported Suit No. 16

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 3rd Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Sheik Kallimullah

Date: 17/8/2015

Family Suit No. 15/2013

Mst. Kajol Rekha.....Plaintiff

Vs.

Mr. Khurshid MiaDefendant

In the presence of the Advocate for the Plaintiff and Defendant in this suit/case, the Court delivered the following Judgment.

This is a suit for claiming custody and guardianship of the children.

The Plaintiff's case, in brief, is that the defendant married the Plaintiff on 05.03.2011. In the year 2012, she gave birth to a son. After a few days of the birth of the child, the Plaintiff came to know that it was the defendant's second marriage and still he was continuing his conjugal life with the first wife. She told him to divorce either the first wife or to her. But the husband started to torture her physically and mentally instead of doing so. Later she divorced him. Consequently, the defendant took away the child and refused to hand over the child to the Plaintiff. Therefore the

Plaintiff filed this suit of custody and guardianship. The defendant alleged that his wife is a service holder and therefore will not be able to take care of the child. But he is staying with his mother so his mother can take good care of the child. The Court decreed in favour of the father and granted him both the custody and guardianship to ensure the welfare of the child.

Ed.

Unreported Suit No. 17

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Mohammad Zubayer Rashid

Date: 13/4/2005

Family Suit No. 11/2002

Mr. Hafizuddin.....Plaintiff

Vs.

Karima KhatunDefendant

In the presence of the Advocate for the Plaintiff and Defendant of the suit, the following judgment is delivered. This is a suit for custody and guardianship of the minor children.

Very briefly the fact of the case is that the Plaintiff instituted this suit against the defendant for the custody and guardianship of his minor son. But the family suit was decreed *ex parte*.

Unreported Suit No. 18

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 3rd Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Sheik Kallimullah

Date: 17/8/2015

Family Suit No. 17/1997

Mst. Shyamoli Akter.....Plaintiff

Vs.

Mr. Sabur Fakir Defendant

In the presence of the Advocate for the Plaintiff and Defendant in this suit/case, the Court delivered the following Judgment.

This is a suit for claiming custody and guardianship of the children.

The Plaintiff's case, in brief, is that on 11/2/2000 the Plaintiff and the defendant got married. In the marriage, the Plaintiff's father gave huge goods and ornaments as a gift. As a result of the marriage, a daughter was born in 7/6/2001. But the defendant did not maintain the Plaintiff and their daughter. The Plaintiff had a small business of Poultry farm wherefrom she used to manage their life. Later finding no other way she went to her parent's house along with the child. So that she can manage

both her business and the child with the assistance of her parents. But the defendant alleged that she is an extrovert lady and highly ambitious therefore on 21/2/2004 he divorced her. In this case, the court has given exparte decree in favour of the father because of the absence of the Plaintiff.

Ed.

Unreported Suit No. 19

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Mohammad Zubayer Rashid

Date: 13/4/2005

Family Suit No. 31/1997

Shahadat Hossain (Kanchon).....Plaintiff

Vs.

Mst. Saima BegumDefendant

In the presence of the Advocate for the Plaintiff and Defendant of the suit, the following judgment is delivered. This is a suit for custody and guardianship of the minor child.

The fact of the case is that the Plaintiff and defendant got married on 3/5/2003. A daughter was born out of their wedlock. Later for having an extramarital, he divorced his wife and the defendant went away to her father's house along with their child. Therefore, the Plaintiff instituted this suit against the defendant for the custody and guardianship of his minor son. But the family suit was decreed *ex parte* and the father got the custody and the guardianship of the minor child.

Unreported Suit No. 20

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 3rd Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Md. Mahabub Hossain

Date: 23/9/2013

Family Suit No. 21/2011

Mst. KaziShaila.....Plaintiff

Vs.

Mr. Ankur DewanDefendant

In the presence of the Advocate for the Plaintiff and Defendant in this suit/case, the Court delivered the following Judgment.

This is a suit for claiming custody and guardianship of the children. The Plaintiff's case, in brief, is that the defendant married the Plaintiff on 5/11/1999. During the time of marriage, the Plaintiff's father had to give approximately 1,00,000 Tk/- to the defendant's family. But soon after the marriage, the in-laws of the plaintiff including the defendant started to pressurize her for more dowries. The Plaintiff was a government service holder. Therefore she tried to keep them happy by giving them almost all the amount of her salary. She used to do the whole household work also.

After one year of her marriage in the year 2001, she gave birth to a son. During this time she got seriously sick. Consequently, she failed to join her office again. She was on leave without pay. As the defendant was not involved with any job, therefore she was in a great crisis to manage her little kid and herself also. During this time again her in-laws started to pressurize her for dowry. Getting no other way she went to her parent's residence and decided to divorce the defendant. But the defendant stated that the Plaintiff had no intention to live with his parents. He tried a lot to take her back. But instead of going back she divorced him. Therefore he asked the court to handover the custody and guardianship of the child to him. He also submitted a document where the plaintiff entered in an agreement to give the custody of the child to him. But considering the welfare of the child, the court handed over the custody to the mother and guardianship to the father.

Ed.

Unreported Suit No. 21

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Mohammad Zubayer Rashid

Date: 13/4/2005

Family Suit No. 15/1996

ShahebAli).....Plaintiff

Vs.

AlponaDefendant

In the presence of the Advocate for the Plaintiff and Defendant of the suit, the following judgment is delivered. This is a suit for custody and guardianship of the minor children.

The fact of the case is that the Plaintiff and defendant got married on 3/8/1999. Though the plaintiff was physically disabled the defendant's maternal uncle arranged this marriage. However, on 21/9/2001 a male child was born out of their wedlock. The defendant alleged that though the plaintiff was handicapped both the plaintiff and his parents tortured her lot both physically and mentally. Later she decided to leave her husband but her in-laws arranged a local *Shalish* where it is decided that she is a characterless woman and if she wants to go she must leave the child to his husband. But for the sake of the child, she started to lead her life with him. Later on 18/6/2003 her husband divorced her and pushed her from his house. But the Plaintiff said that his wife was a characterless

woman. She involved with a lot of extramarital relationships. That's why he divorced her. But he wants to grow up his child by himself and he does not let the child be with his characterless mother. That's why he instituted this suit against the defendant for the custody and guardianship of his minor son. But the family suit was decreed *ex parte*. After talking to the defendant it is found that the said decree was obtained by suppressing summons and practicing fraud upon the court.

Unreported Suit No. 22

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 2nd Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Md. Shahabuddin Mondal

Date: 2/1/2010

Family Suit No. 43/2007

Mst. Mansura Akter.....Plaintiff

Vs.

Mr. Nazrul IslamDefendant

In the presence of the Advocate for the Plaintiff and Defendant in this suit/case, the Court delivered the following Judgment. This is a suit for claiming custody and guardianship of the children. On 10.02.1998 the Plaintiff and Mr. Abid Afsari got married to each other. They were leading a happy life in her in-law's house. The Plaintiff was a teacher of social science of a private college and Mr. Abid Afsari was involved with their family business. In fact, he was running the business. Consequently, though his father died at an early age due to his hard work they became the owner of a five-storied building and 10 Katha lands adjacent to the house. In the year 2001, the Plaintiff gave birth to a son. In the year of

2002, Mr. Abid gifted that building to his minor son. Unfortunately, in the year of 2003, Mr. Abid died due to a car accident. Thereafter, she continued to stay at that house along with her son. In the year of 2005, the Plaintiff married another man who started to live with her and her son at the same house. Thereafter, the defendant Mr. Nazrul Islam who is the paternal uncle of that child started to threaten her to file a suit for custody and guardianship of that boy. However, in the year of 2007, all of a sudden without informing her Mr. Nazrul took away that child somewhere else without her permission and refused to return the child to her. Therefore, to get back her child she filed this suit.

The court declared that in fact, the defendant is more concerned about the property of the child rather than his welfare. Therefore, only due to a marriage with a stranger, she cannot lose her right of custody and guardianship of her minor child if she is otherwise fit. Thus the court directed the defendant to handover the child to the mother and considering the welfare of the child appointed the mother as his legal guardian.

Unreported Suit No. 23

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 2nd Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Md. A. S. M. Aslamuddin

Date: 8/1/2008

Family Suit No. 13/2003

Mst. Zabinkhanom.....Plaintiff

Vs.

Mr. MollaMasud (Rana)Defendant

In the presence of the Advocate for the Plaintiff and Defendant of the suit, the following judgment is delivered. This is a suit for custody and guardianship of the minor children.

Very briefly the fact of the case is that the Plaintiff got married to the defendant on 11.12.1999. During the marriage, the Plaintiff and her family had the notion that the defendant is involved with their family business. But after a few days of the marriage, they came to know that the defendant is a vagabond and he is not involved with any kind of earning or activities. However, the Plaintiff was a teacher a kindergarten school. After her marriage, she used to handover her total salary to her husband. As per her statement still; neither the defendant nor his family was satisfied. They started to give her pressure to manage near about Tk.

1, 00,000/- for the defendant so that he can start his own business. After informing the matter to the Plaintiff's parents they managed to give him that amount of money to keep their daughter happy. But he did not start any business instead of that he started to give her pressure to manage 50000/- Tk. Again. But in the year 2002, she gave birth to a son. But the defendant did not maintain the Plaintiff and their son. Finally, she compelled to go to her parent's house in 2003. But the defendant never goes there to bring them back. On the 26th of September, 2006 she came back to her in-law's house along with the child. But No one welcomed her. The defendant informed her that instead of taking a huge amount of power he is going to marry another lady. Therefore he would like to divorce her. Finally, on 29th September the defendant divorced her and forced her to back to her parent's house without her son. To meet up the total matter a *Shalish* was done on 1st October 2006. But in the *Shalish* it was decided that she is divorced by her husband lawfully, therefore, she has no right to stay with her husband anymore and the child should remain with the father. Therefore she filed this suit for custody and guardianship of the child.

The court declared that s the mother is a working lady and the father is an unemployed person so it is the mother who should get both the custody and guardianship of the minor child to ensure the welfare of the child.

Unreported Suit No. 24

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Mohammad Zubayer Rashid

Date: 13/4/2005

Family Suit No. 19/2008

Fateh Ali Khan(Rustom).....Plaintiff

Vs.

Mst. Nazma BegumDefendant

In the presence of the Advocate for the Plaintiff and Defendant of the suit, the following judgment is delivered. This is a suit for custody and guardianship of the minor children.

Very briefly the fact of the case is that the Plaintiff instituted this suit against the defendant for the custody and guardianship of his minor son. But the family suit was decreed *ex parte*. After talking to the defendant it is found that the said decree was obtained by suppressing summons and practicing fraud upon the court. And it is also found that she had no idea that she might file a Family Miscellaneous Case under section 9 of the Family Court Ordinance for the restoration of the family suit on setting aside the *ex parte* decree.

Un-Reported Suit 25

High Court Form No.- (Justice) 2

Heading of Judgment in Original Suit/Case

In the Court of Senior Assistant Judge, 1st Court, Dhaka

District: Dhaka

Present: Mr. Md. Mahbubul Islam

Dated: Wednesday, March 10, 1993

Family Suit/ Case No. 96/ 1991

MosammatRoksana Begum alias Kakoli.....Plaintiff

Vs.

Md. Abu Khair.....Defendant

This suit/case coming in for a final hearing on 11.10.1992, 18.11.1992, 09.03.1993 and having stood for consideration to this day. In the presence of the Advocate for the Plaintiff in this suit/case: Mr. Aulad Hossain Khan & Mr. Mijanur Rahman the Advocate for the Defendant in this suit/case:

This is a family suit for claiming dower, maintenance, and custody of the children.

On 10.2.1988 the plaintiff and the defendant got married by fixing Tk. 50,000/= as dower. In the marriage, the Plaintiff's father gave huge goods as well as gold ornaments as a gift. As a result of their marriage, a daughter was born in 25.08. 89. The defendant did not maintain the Plaintiff and their daughter since 1 year 2 months. The Plaintiff complains maintenance in the local Mahila Samity but did not achieve

any compromise. The Plaintiff said that though 20,000/= had been written in the *Kabinnama* as being paid (Ushool), the aforementioned amount was not actually paid (Ushool). On 16.3.91 the Plaintiff claimed Tk. 30,000/- (dower) but the Defendant did not pay. So, on 30.03.90 the plaintiff has brought the suit to receive a decree for the realization of the prompt dower of Tk. 30,000/= with 1000/= as maintenance of the Plaintiff and 500/= as maintenance for the daughter. Plaintiff filed a case demanding for the ornaments which her father's wedding gift worth Tk. 2 lac 99 thousand and for custody of her daughter till adulthood.

On the other hand, the Defendants case, in brief, is that on 10.02.88 he married the Plaintiff with Tk. 50,000/- as *Kabinnama*, were the Defendant presented lots of gifts as well as gold ornaments worth Tk. 76,500/-, and took the Plaintiff to his home. He claimed that the Plaintiff's father didn't give sufficient wedding gift. He also said that the Plaintiff's father didn't pay any money to the Defendant. The Defendant gave plenty of goods to the Plaintiff. While residing at Narshingdi in Palash Electric Board Quarter the Plaintiff became crazy and started to mix with immoral friends and became extrovert. For this reason, a *Shalish* was done on 08.03.91 and it was decided to send the Plaintiff in the village home. But still, the Plaintiff goes to the house of the bad people and stays with them at night. If any objection made by the Defendants, instantly the Plaintiff claimed cash of Tk. 30,000/- as the prompt dower. On 23.03.91 the Defendant gave Tk. 30,000/- to the Plaintiff. Then the Plaintiff left and went to her father's home along with 9 and a half tola gold ornaments. On 23.04.91 Defendant divorced the Plaintiff. The Plaintiff got the whole dower money. The Plaintiff has given *Talaq*. So, the plaintiff will not have any maintenance or any dower

and his daughter are getting Tk. 400/- a month, Plaintiffs case should be dismissed.

Issues for Determination:

For the decision and for the convenience of the discussion the following issues are framed:

1. Whether the Plaintiff can continue the suit in this present form?
2. Whether the Plaintiff can get the dower?
3. Whether the Plaintiff can get any decree for the gold ornaments and other claimed money?
4. Whether the Plaintiff shall get maintenance for her and her child?
5. What another remedy can the Plaintiff get by the Law and Regulations?

Examination and Decision:

Issue no. 1:

It is agreed that the marriage occurred on 10.02.1988 by Muslim Shariah and Tk. 50,000/ was fixed as dower. The Plaintiff's opinion is that in the natural course when she had a conflict with the Defendant, she claimed for the dower money of Tk. 30,000/- and maintenance of the child, for failure she filed a case against the Defendant in the Family Court. As the Plaintiff could file a suit in the present form the 1st issue was in favor of the Plaintiff.

Issue no. 3:

About the matter of gold ornaments and other demanded money which is not an issue of Family Court to entertain. So this issue is considered against the Plaintiff.

Issue no. 2, 4, 5:

The defendant himself said in his opinion that, on 23.03.91 when he paid the Plaintiff Tk. 30,000/- as prompt dower the Plaintiff went to her father's house in his absence. The Plaintiff filed a suit on 26.04.91. Plaintiff said in her argues that the defendant does not maintain her and her daughter for the last 1 year and 2 months. In accordance with the circumstance, the Plaintiff's allegation could not be altered by the defendant's written statement. The defendant in his statement stated about the *Talaq*. But he did not give any proof for his statement. While having plenty of time and opportunity the Defendants did not give any evidence himself or gave any documents in favor of his statements. On the other side, the Plaintiff's statement has been proved by witnesses without any contradiction. The Ext.-1 the attested photocopy of the Kabinnama was submitted by the Plaintiff which shows the amount of Tk. 50,000/- as dower. It is also stated in the Ext. 1 that Tk. 20,000/- has been realized or Ushool. But the Plaintiff claimed in the suit that no amount was realized or Ushool. But, as the Plaintiff herself has submitted the Kabinnama and Tk. 20,000/- as *Ushool* in the Kabinnama. In these circumstances, the information of the documents is regarded as true. So it is held that the remaining dower is Tk. 30,000/- is true.

Within the parties, the Defendant claimed that the marriage has been dissolved. The Plaintiff did not accept this claim. Also, the Defendant could prove his claim. So it cannot be proved that the marriage is dissolved. In this perspective, the Exb-1 shows Tk. 30,000/- was unrealized. As the marriage has not been dissolved the Plaintiff is entitled to half of the realized money as prompt dower in accordance with Hanafi law.

Regarding the Plaintiff and the daughter's past maintenance, they are entitled to Tk. 1000/- monthly for the Plaintiff and Tk. 500/- for the

daughter from the day of filing of the suit i, e. from May 19 till now i,e. March 93, for 23 months. Plaintiff is entitled to get from the Defendant altogether Tk. 34,000/-. The Defendant's statement that he sends maintenance every month for his child is proved to be false. The Plaintiff tried to make a compromise in ways through the Mahila Samity. The Defendant did not keep any knowledge about the whereabouts of the Plaintiff or his child. On the other hand, the Defendant has shown his low mindedness by alleging the Plaintiff – his own wife, is of immoral character. On the facts and circumstances of the above discussion, the Plaintiff's case is partly proved.

Ed.

Unreported Suit No 26

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Mohammad Kaiser Ameen

Date: 10/4/2011

Family Suit No. 27/2009

Family Suit/ Case No. 95/2011

Mossamat Sharifa BegumPlaintiff

vs.

Yunus MiaDefendant

This was a family suit for claiming dower, maintenance, guardianship, and custody of the children. In this suit, the plaintiff stated that her husband took a lot of money from her father as dowry during her marriage. But later he denied maintaining her and her daughter. She compelled to come back to her father's house. She said that in the natural course when she had conflicts with the defendant, she claimed for the dower money and maintenance of the child, for failure she filed a case against the defendant in the Family Court. The defendant in his statement stated that he divorced his wife because of her immoral character. However, he failed to prove his statement. Finally, the court declared that the Plaintiff is entitled to get dower, maintenance, and custody but declared the father as the legal guardian of the child.

Unreported Suit No. 27
HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 3rd Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr.Abu Hanif

Date: 05/03/2014

Family Suit/case No. 31/2012

Monowara Parvin

Vs.

Shaheb Ali

It is a suit for custody and guardianship of minor children. The Plaintiff's case, in brief, is that she got married to the defendant on 3rd March of 2005. On 13th April 2006 Plaintiff gave birth to a child. Thereafter, the Defendant went to Saudi Arabia by her father's cost in 2007. In 2009 he came back and claimed dowry from the Plaintiff. But the Plaintiff refused to pay then the Defendant ousted her from his housekeeping the three years child with his own. Thereafter she filed this case before the Family Court to get back the custody and guardianship of her child. The Plaintiff was a teacher of a nongovernment college. As she was a working lady so it will be tough on her part to take proper care of the child, therefore, the court gives both the guardianship and custody to the father with the visitation right to the mother.

Unreported Suit No. 28

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 1st Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Hafsa Zhuma

Date: 09/05//2015

Family Suit/case No. 97/2012

Munir Hossain and Others.

Vs.

ShalinaKhanom

This suit was filed by the Plaintiff for custody and guardianship of the minor children. Here the Plaintiff and the defendant got married on 22nd September of 2001. The husband was a shop keeper. The wife was a nurse. However, the couple was blessed by a daughter in the year of 2004. Very unexpectedly the husband died in the year of 2006. Then the Plaintiff started to live with her parent's house along with the daughter. In the year of 2009, the Plaintiff got married to another person. Thereafter, the uncles of the minor daughter filed this suit for the custody and guardianship of the child. The Court declared that though the mother has lost her right to be appointed as the guardian of the child the custody will remain with her for the best interest of the child.

Unreported Suit No. 29

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 3rd Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Md. Saud Hossain

Date: 10/2/2016

Family Suit/case No. 11/2013

Morsheda Banu alias Moshu

Vs.

Hanif Jowerder

This case was filed by the Plaintiff to get the custody and guardianship of her minor child who was taken away by the father after their divorce. Both the Plaintiff and the defendant got married on 4th July of 2009. During the marriage, the defendant took 2, 00,000 taka as dowry from the father of the Plaintiff as dowry. Though the father of the Plaintiff was supposed to pay him taka 3 Lac he failed to manage the amount during the marriage. After the marriage, the defendant used to torture the Plaintiff a lot for the remaining amount of money. However, in 2011 the Plaintiff gave birth to a male child. Thereafter, out of a family clash the husband sends her to her father's house and told her to come back with the remaining amount of money. All of a sudden in 2012 the Plaintiff received a divorce letter from her husband. Then April 2013 the husband took away the child without informing her and refused to send him back. He told that the boy is his own child and he is the only entitled to keep

the child with him. Consequently getting no other way she filed this suit for custody and guardianship. Though the court granted the custody to the mother but appointed the father as the legal guardian.

Unreported Suit No-30

HIGH COURT FORM NO J (2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mohammad Rafiqul Bari

Date: 4/05/2016

Family suit /case no. 21/2014

Shah Shamim Delower

Vs.

Morjina Akter

It was a suit for custody and guardianship of the children. In this suit the Plaintiff and the defendant got married in February 2003. Here the Defendant was a teacher of Government Primary School and the Plaintiff was a small businessman. However, after their marriage, the Plaintiff used to torture the defendant mentally a lot out of his suspicious mentality. Though the wife had no relation with anybody the husband used to blame her for extramarital relationship. In the year of 2004, the couple was blessed by a male child. Though the Plaintiff and the defendant used to live together it was the defendant who would maintain herself and her child out of her own income. Even in the case of treatment of the child, the Plaintiff had no care. However, finally, the defendant divorced the Plaintiff in 2013. Thereafter, the Plaintiff filed this suit for the custody and guardianship of the child. It was stated by the Court that as per Shariah Law the father is the right one to get the custody. Moreover, He is the only fittest one to be the guardian of this child.

Unreported Suit No. 31

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 3rd Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Mohammad Jalaluddin

Date: 13/4/2013

Family Suit No. 89/2010

Sajeda Begum

Vs.

Kalimullah

This suit was filed by the Plaintiff to get the custody and guardianship of her two minor children. Sajeda got married with Kalimullah in 2007. After her marriage, she came to know that Kalimullah got married for another two times before marrying her. However, in 2008 she gave birth to a daughter and in 2010 she gave birth to another daughter. Without telling her anything Kalimullah got married to another woman in September 2010 and forced Sajeda to leave his house. He refused to give the children to her. Finally, she filed this suit. Court ordered to handover the children to the Plaintiff but appointed the father as the legal guardian.

Unreported Suit No. 32

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Arif Jamil Sarder

Date: 07/9/2014

Family suit/case No. 43/2012

Sheema Afrin

Vs.

Ashraful Khan

In this suit, the Plaintiff and the defendant got married by themselves out of a love affair in 2007. Consequently, the Plaintiff's father refused to accept them. However, Defendant took her to his parent's house. After a few days, the Plaintiff's father-in-law and mother-in-law started to pressurize her to bring money from her father. While she refused to do so they threatened to get her out of the house. She was a worker in a local parlour. She was supposed to hand over the full salary to her husband. In the year 2009, she gave birth to a son. Then she somehow managed to rebuild her relationship with her parents. However, in 2010 her husband and father-in-law and mother-in-law again forced her to bring taka 1 Lac from her father's house. She refused to do so. Then her husband along with the other members of her family beaten her a lot and send her to her father's house along with the child. In 2011 the husbands send a divorce letter to the wife. Thereafter the husband and other members of his family began to pressurize her for handing over the child to them. They also

came to her parent's house to take away the child. Finally getting no other way she filed this suit. The court declared that as the child is minor yet therefore it is the mother who should get the custody and as per Sharia law the father will remain the legal guardian of the child.

Unreported Suit No. 33

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 1st Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Toufiqul Islam

Date: 11/05/2016

Family Suit No. 33/ 2012

KhorshedMrida

Vs.

Sufia Nasrin Rita

Here Plaintiff filed this suit for getting the appointment of his minor niece whose mother that means the Defendant of this suit got married for the second time after the death of her husband. From the fact of the suit, it is come to know that the defendant was a mother of a minor girl shyama. However, Shyama's father died while she was 1 and a half years old. Before his death, he gifted the house to the extent of 3/4th of the property to his child and the rest to his wife by a deed of Heba-bill-ewaz. However, after his death, they continued to live in that same house but after his death, his brother khorshedMridha started to conspiracy to grab the properties. Sufia also said that the Plaintiff often tortured her to grab that property. Therefore, she had to marry for the second time only for the safety and security of the minor and herself. Plaintiff's advocate pleaded that by marrying a stranger she violated both the condition as well as the

Rule of Mohammedan Law. Considering section 17 of the Guardian and Wards Act 1890 the Court stated that the welfare of the minor would be best secured and achieved in the custody but refused to appoint her as the guardian only due to the fact that she got married for the second time.

Unreported Suit No. 34

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Shah Alom Mridha

Date: 13/4/2017

Family Suit No. 61/2013

Shahida Begum

Vs.

Matiur Rahman (Sojol)

This was a suit for maintenance, custody, and guardianship of children. In this suit, Mrs. Shahida Begum got married to Mr. Matiur Rahman in 2006 out of a love affair. Just after the marriage Matiur Rahman and Shahida fled away to Matiur's friend's house situated in Mohammadpur. Here, Shahida started to work in a garment factory. At the end of the month, Matiur used to take her full salary from her forcefully. Matiur used to lead his life a vagabond without doing anything. In 2007 shahida got pregnant and managed to come back to her parent's house along with his husband. After few days Matiur left that house and did not come back. In May 2008 she gave birth of a daughter. She tried to communicate with her husband but failed. After a few days, he divorced her. He refused to

provide maintenance to the child also. Getting no other way she filed this suit for maintenance, custody, and guardianship of the child. Here, Mr. Motiur raised the question about the character of Shahida. He stated that the child is the result of her immoral life. The Court ordered that for the welfare of the child the mother will be the custodian and the father will be bound to provide maintenance to the child. Though the father raised a false allegation against the mother of the child still the court declared the father as the legal guardian of the child.

Unreported Suit No. 35

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 5th Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Mohammad Zubayer Rashid

Date: 09/02/2012

Family Suit No. 78/2013

Sheema Begum

Vs.

Rehanuddin

In this suit, Sheema Begum got married to Reazuddin. But unfortunately due to a road accident he died. During his lifetime he made a fixed deposit of Tk. 50, 00000 for his only son Mahin. After the death of Sheema's husband, sheema along with her son continued to live in her husband's house. The owner of the house was her husband. In the absence of the father, the paternal uncle of Mahin started to handle all the matters relating to their property. In the name of necessity, he filed a suit to the Family court to get the guardianship of the child and achieved the guardianship. Later Sheema found that in fact the paternal uncle that means Rehanuddin is trying to grab all of their properties. Then she challenged the judgment and files an appeal to the District Judge court to get the guardianship for the welfare of the child. The paternal uncle tried to say that she might go for second marriage which will be crucial for the

child. However, finally, the Court handed over the guardianship to the mother for the welfare of the child with a condition that as the child is nearly 18 so no one will raise money from his account until he is attaining 18.

Unreported Suit No. 36

HIGH COURT FORM NO J(2)

Heading of Judgment in Original Suit/Case

In the Court of 3rd Senior Asstt. Judge and Family Court, Dhaka

District: Dhaka

Present: Mr. Golam Kibriya

Date: 01/6/2016

Family Suit No. 61/2014

Marjina Khatun

Vs.

Mr. Ataur Rahman

In this suit, Marjina got married to Mr. Ataur Rahman on 21st May of 2011. In the year of 2012 Margina gave birth to a son. Thereafter in the year of 2013 Marjina came to know that her husband involved with an extramarital relationship with one of his second cousin. Marjina tried a lot to bring her husband out of that relationship but she failed. In the year of 2014, she has been divorced by her husband. The husband did not let her take their son with her. Therefore, she filed this suit both for custody and guardianship of her children the court ordered to handover the child to Marjina but appointed the father as legal guardian.

Questionnaire

Name of the Respondent

Respondent Code

Respondent's economic standing:

QUESTIONS

1. What is your marital status

Married

Divorced

Separated

Widow

2. What do you do?

Housewife

Govt. Job Holder

Non Govt. Job Holder

Others

3. What does your husband do?

Housewife

Govt. Job Holder

Non Govt. Job Holder

Others

4. Are you educated?

Yes

No

IF THE ANSWER IS NO GO TO QUESTION NO 7 OTHERWISE

CONTINUE

5. How far did you study?

Primary level

S.S.C.

H.S.C.

Graduate

Post Graduate

None

6. How far did your husband study?

Primary level

S.S.C.

H.S.C.

Graduate

Post Graduate

None

7. How many children do you have?

.....

8. How many girl children do you have?

.....

9. How many male children do you have?

.....

10. What is the number of a male child under seven?

.....

11. What is the number of a female child under puberty?

.....

12. How did your divorce take place?

By you

By your husband

13. Where do you stay now?

.....

14. Where are your children?

.....

15. If with you, are all the children with you?

Yes

No

16. Who provides maintenance of the children with you?

Their father

Yourself

Another person

IF THE CHILDREN ARE WITH FATHER CONTINUED OTHERWISE GO
TO QUESTION NO. 21

17. How many boys under seven are with the father?

.....

18. How many boys above seven are with the father?

.....

19. How many girls under puberty are with the father?

.....

20. How many girls above puberty are with the father?

.....

21. Did you go for any *shalish* for getting the custody and guardianship of your children before going to the court?

Yes

No

22. Was the decision of the *Shalishin* your favor?

Yes

No

23. Who filed the suit for Custody and Guardianship?

Father of the children

Mother of the children

Others

24. Finally to whom the Court handed over the custody?

Mother

Father

Others

25. Finally, who got the guardianship?

Mother

Father

Others

IF THE ANSWER IS FATHER CONTINUE OTHERWISE GO TO
QUESTION NO 27

26. Is the father giving maintenance to the children?

YES

NO

IF THE ANSWER IS NO CONTINUED OTHERWISE GO TO
QUESTION NO.

27. Are you maintaining the children by yourself?

Yes

No

28. Are you a service holder?

Yes

No

IF THE ANSWER IS YES CONTINUED OTHERWISE GO TO
QUESTION NO. 31

29. What is your profession?

.....

30. Where do you stay?

.....

31. Does your husband visit your children?

.....

32. Does he control your decisions relating to your children?

.....

33. Would it be better if you get the guardianship?

.....

34. Do you like to file an appeal against the order of the court?

Yes

No

IF THE ANSWER IS NO CONTINUE

35. Why don't you like to appeal against the order of the court?

.....

36. Do you know that you can also be appointed as a legal guardian?

Yes

No

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