CUSTODY OF MUSLIM INFANTS

Section 27 of the Civil Law Act, 1956 provides that in all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of the Act, regard being had to the religions and customs of the parties concerned, unless other provision is or shall be made by any written law.

Other provision has been made by the Guardianship of Infants Act, 1961. Section 1 (2) of that Act provides that nothing in the Act shall apply in any State to persons professing the Muslim religion until the Act has been adopted by a law made by the legislature of that State and any such law may provide that –

(a) nothing in the Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of eighteen years who professes the Muslim religion and whose father professes or professed at the date of his death that religion or in the case of an illegitimate child whose mother so professes or professed that religion;

(b) in the case of any other person, the provisions of this Act so far as they are contrary to the Muslim religion, shall cease to apply to such person upon his professing the Muslim religion, if at the date of such professing he has completed his age of eighteen years or if not having completed such age he professes the Muslim religion with the consent of the person who under the Act is the guardian of the person of the infant."

It might be noted that the Act has been adopted with modifications in Selangor(Enactment No. 6 of 1961). The Act was considered by Abdul Hamid J. in the case of *Myriam v. Mohamed Ariff*[1]. He said (at p. 268) –

> "In general in applying the provisions of the Guardianship of Infants Act, 1961, regard must be had to the religion and custom of the parties concerned. This does not however mean that any decision must be made in accordance with the rules of the religion and custom of the parties concerned except of course, when it relates to or concerns any person under the age of 18 and professing the Muslim religion in which case any provision which conflicts or is contrary to the Muslim religion or custom of the Malays will not apply.

[1] [1971] 1 M.L.J. 265.

Under the English law it is settled law that the primary consideration is the welfare of the children. Under the Mohammedan law certain rules have been laid down regarding the custody of infants. However, it would be seen that even under the Muslim law the general principle that governs the custody of infants is the welfare of the infants. In "Mohammedan Law" by Syed Ameer Ali 6th Ed. Vol. II p. 225/6 the learned author said —

"Though the period of hizanat varies among different schools, the general principle, which governs its duration, is founded essentially on the interests of the child."

After referring to the Singapore case of *Re Omar bin Shaik Salleh*[2] and the other cases cited, the learned Judge said —

"The decisions of some of the other cases cited — also tend to establish that despite the rules under the Muslim religion, custody of infants has been awarded to one in preference of the other where the interests and welfare of the children demand. It will therefore be seen that it is by no means easy to make a decision on an application such as this. In my endeavour to do justice, I propose to exercise my discretion and have regard primarily to the welfare of the children. In so doing it is not my intention to disregard the religion and custom of the parties concerned or the rules under the Muslim religion but that does not necessarily mean that the court must adhere strictly to the rules laid down under the Muslim religion. The court has not, I think, been deprived of its discretionary power".

The learned Judge went then on to deal with the rule under Muslim law. He said —

"In the instant case both parties to the proceedings profess the Islamic faith and under Muslim law, it seems to be the rule that where parents are separated and the mother has not married, the custody of a boy until he has reached his seventh year and of a girl to the age of puberty belongs to a mother and a woman entitled to the custody of a boy or girl is disqualified if —

(a) she remarries a man not related to the minor within the prohibited degree, so long as the marriage subsists;

(b) she resides at a distance from the father's place of residence,

(c) she fails to take proper care of the child; and

(d) she commits an act of gross and open immorality.

I do not propose to deal at length with each of these disqualifications. I am of opinion that the court is not disentitled to make an order for custody, giving the infant to any of the parents if the

[2] [1948] M.L.J. 186.

welfare of the infant so demands."

In that case, the order made by the learned Judge was that the custody of the male infant be given to the mother (despite the fact that she had married a stranger) until he reached the age of 7 or 8 years; while the custody of the girl aged 8 years was allowed to remain with the father.

In the Singapore case of *Re Omar bin Sheik Salleh*[2] the custody of the infants was given to the mother (despite the fact that she had married a stranger). The decision in that case was based on the Singapore Guardianship of Infants Ordinance, which was a law of general application, with no exception for Muslims. The Court of Appeal in effect held that the learned Judge had rightly regarded the welfare of the infants as the primary consideration and had exercised his discretionary power correctly. However Brown J. also observed that even in Muslim law, the court had a discretion to depart from the ordinary rule. He said —

> "In the appellant's memorandum of appeal the second ground read as follows—
>
> That according to Mohammedan law where a divorced woman contracts a second marriage and has issue by such second marriage she is not entitled to the custody of her infant children by her prior husband.
>
> I think it right to point out if the above statement of the law is intended as a hard and fast rule it cannot be accepted without qualification.
>
> It seems to me that Ameer Ali in his book on Mohammedan law at p. 257 (5th Edition) makes this quite clear. I think the true position is that just as section 5 of the Guardianship of Infants Ordinance ordinarily gives the custody to the father but allows the court a discretion, so by the rules of the Mohammedan law a woman who marries a stranger is ordinarily deprived of the right to the custody of her infant children by a former marriage, but there too the court has a discretion to depart from the ordinary rule. In this case if the learned Judge had applied the ordinary rule whether under the Guardianship of Infants Ordinance or under Mohammedan law he would have given the father the custody. But believing this to be a case in which he ought to exercise his discretion he gave the custody to the mother and this discretion would have been exercisable as well under the Mohammedan law as under the Guardianship of Infants Ordinance. I only mention this because it would appear to me even if the learned Judge had taken Mohammedan law into account the result in this case would have been the same."

The Islamic law deals with *hizanat* which means the rearing or breeding of a little child, derived from "hidhn" (bosom). "The mother is of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband, unless she be an apostate

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or wicked or unworthy to be trusted" (Baillie, I, 435). The mother is entitled to the custody of her male child until the age of seven years and of her female child till puberty. Failing the mother (by absence or disqualification) the following female relations are entitled to custody in order of priority (i) mother's mother, how high soever; (ii) father's mother how high soever and (iii) full sister and other female relations including aunts. Failing the mother and female relations, the following male relations are entitled to the custody of a Muslim child in the order of priority (i) the father; (ii) nearest paternal grandfather (iii) full brother (iv) consanguine brother and other paternal relations.

As regards the mother or a female guardian marriage to a person not related to the child within the prohibited degrees is a bar to guardianship. This disqualification would appear not to be absolute. She only loses her preferential right and where there is no other suitable person, she may be appointed a guardian by the court.

Although the mother generally has the custody of a child of tender years, this does not imply that the father has no rights whatsoever. In *Imambandi v. Mutsaddi*[3] Mr. Ameer Ali in giving the opinion of the Privy Council said –

> "It is perfectly clear that under the Mohammedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone or, if he be dead, his executor (under the Sunni law) is the legal guardian. Thus where the father and mother are living together their child must stay with them and the husband cannot take the child away with him; nor can the mother take it away without the permission of the father, even during the period when she is entitled to the custody of the child. Where the child is in the custody of one of its parents, the other is not to be prevented from seeing and visiting it. The father's supervision over the child continues in spite of the child being under the care of female relations, for it is the father who has to maintain the child."

In the case of *Mst. Bibi Fatma v. Bakarshah and others*[4] the court gave custody of a boy to the mother. Kincaid J.C. said:

> "it is clear that other things being equal the mother is the proper guardian of her infant boy only two years old. It has also been laid down in Mohammedan law that the custody of a boy until at any rate, the age of seven belongs to the mother (Wilson's Anglo-

[3] (1918) 45 I.A. 73; A.I.R. 1918 P.C. 11

[4] A.I.R. 1921 Sind. 45

Mohammedan law, 3rd. p. 182). The burden of proving that the mother in particular case this case is not entitled to be the guardian of her infant son lies heavily on anyone who would assert it."

The learned Judge also stated *obiter* that the mother would forfeit the right if she married any stranger to her husband's family.

In *Mt. Ulfat Bibi v. Bafati*[5] the father of a minor had applied to be appointed the guardian of a boy who was about to reach the age of seven years. The District Judge made the order but the High Court held that the procedure was wrong. It was unnecessary for the father to be appointed the guardian as he was already the legal guardian. What ought to have been done was to say that the mother was no longer entitled to the custody and that the father was and if necessary to order the mother to hand over the boy to the father. The court however went on to say that there was no reason why an application should not be made on proper grounds to deprive the father of the custody of the young son, and such an application would have to be made out by somebody who was able to show that he was a more suitable person than the father. The court expressed the opinion that in this case the mother was not a more suitable person than the father. The court (Walsh and Banerji J.J.) said – "We are of opinion that a woman who has been divorced, if this appellant has been divorced and has married a second husband, is not a person either herself better suited than the father, however unsuitable the father may be, and not a person who ought to be heard to say that the father is unsuitable. She has abandoned her home and husband either of her own free will or as a result of her conduct and in the eyes of the law she has lost the right to assert a claim against the father for the child and probably the right to assert this appeal."

In the case of *Ansar Ahmad v. Samidan*[6] the court in effect held that a mother who had married a stranger is disqualified from the guardianship of her infant daughter and the case was remitted to the lower court to consider the claims of other persons who may be willing to be guardian, including their maternal grandmother. Pullan J. said "All the authorities on Mohamedan law are agreed that the mother is disqualified from the guardianship even of her minor daughter if she is married to a man who is not related to the minor within the prohibited degrees. In this case Mt. Samidan has married a man who is a stranger and under S.17 Guardians and Wards Act, a court in appointing a guardian must make an appointment consistently with the law to which the minor is subject. Where the law definitely lays down that an appointment cannot be made, it is not proper for the court to disregard the law even in the interests of the minor".

[5] A.I.R. 1927 All. 581.

[6] A.I.R. 1928 Oudh 220.

In the case of *Mt. Siddiqunissa Bibi v. Nizamuddin Khan*[7] the facts were that the mother of the girl died after her birth at Sasaram which was the residence of the father; the maternal grandmother was residing in another district at Zamania. The girl was allowed to be brought by the grandmother from Sasaram to Zamania and had been maintained and brought up by the grandmother. The maternal grandmother applied to be appointed guardian of her person. The girl was then about 7 years old. The District Judge held that he had no power to appoint a guardian and he granted an application for the return of the girl to the father. The maternal grandmother appealed and the appeal was dismissed.

Sulaiman Ag. C.J. said –

"There can be no doubt that so far as the power to appoint and declare the guardian of a minor under S.17 of the Act is concerned the personal law of the minor concerned is to be taken into consideration, but that law is not necessarily binding upon the Court, which must look to the welfare of the minor consistently with that law. This is so in cases where S.17 applies. In such cases the personal law has to this extent been superseded that it is not absolutely binding on the Court and can be ignored if the welfare of the minor requires that someone else, even inconsistently with that law, is the more proper person to be appointed guardian of the minor. S.19 then provides that:

"Nothing in the chapter shall authorize the Court. . .to appoint or declare a guardian of the person (a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person; or (b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or (c) 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."

The language of the section, as it stands, obviously implies that when any of the three contingencies mentioned in the subclauses exist, there is no authority in the Court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the Court conferred upon it by S.17 to appoint or declare a guardian is ousted where the case is covered by S. 19.

[7] A.I.R. 1932 All. 215; See *Kachi Muhaidin Tharaqamar v. Samambu Ammal* A.I.R. 1941 Mad. 582 where Abdul Rahman J. pointed out that there is a distinction between the Hanafis on the one hand and the Malikis, Shafees and Hambalis on the other. According to the Hanafis, the mother is entitled to the custody of her daughter until she attains puberty while according to the latter she is entitled to her custody until she is married. The maintenance of children is obligatory on the father and so long as he is in a position to do so and the children have no independent means of their own, it remains his duty to provide for them.

The learned advocate for the respondent has argued before us that the section must be read as if it was meant that nothing shall authorise the Court to appoint or declare a guardian of the person of the minor "other than the husband or the father as the case may be." This, in my opinion, would be interpolating new words into the section which are not there. If an application for appointment of a guardian is made to the Court, and it is brought to its notice that the minor has a husband who is alive and is not unfit to be the guardian of the minor, or that he or she has a father who is living and is not unfit to be the guardian of the person of the minor, then there is no authority in the Court to appoint or declare a guardian of the person of the minor. The section means not only that in the presence of the husband or the father no one else should be given preference when either of them is fit to be appointed the guardian, but on its language it even ousts the jurisdiction of the Court altogether and prevents it from appointing even the husband or the father as a guardian when both of them are not unfit to be the guardian: The legislature apparently did not intend to settle the competition that may arise under the personal law governing the minor between the husband and the father of the minor. In the same way no appointment or declaration of a guardian can be made when the property of the minor is under the superintendence of a Court of Wards which is competent to appoint a guardian of the person of the minor. This, in my opinion, is the plain meaning deduced from the language of the section as it stands. The learned advocate for the respondent has argued that by enacting S.19 the legislature intended to declare that the husband is the guardian of the married female minor and after him her father, and therefore the section does not prohibit their being appointed or declared to be the guardian. In my opinion the legislature intended that nobody should be appointed or declared the guardian at all when the husband and the father are alive and both of them are not unfit, without attempting to settle the competition between them which may arise under the personal law. There is no justification for interpreting the section as if it is confined only to the appointment or declaration of a guardian other than the husband or the father.

This conclusion, though possibly not for the same reason, has been arrived at in several cases of which mention may be made of the case of *Sukhdeo* v. *Ram Chandar Rai*[8]. It may also be apointed out that in the case of *Annie Besant* v. *Narayaniah*[9] their Lordships of the Privy Council remarked

[8] A.I.R. 1924 All. 622.

[9] A.I.R. 1914 P.C. 41

"And further no order declaring a guardian could by reason of S.19, Guardians and Wards Act, 1890, be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case."

It is not necessary to refer to cases which have taken a contrary view. But it can be briefly stated that the same view has been expressed in Oudh and at Madras.

The learned advocate for the respondent has argued that the personal law of the minor has been completely abrogated and superseded by the Guardians and Wards Act for all purposes. He has further urged that there is no right of suit for obtaining custody of the minor independently of this Act. He has relied on a passage in the judgment of their Lordships of the Privy Council in the case quoted above. On the other hand in another case the Bombay High Court has expressed the view that where no application can be made by father under the Guardians and Wards Act he may maintain a regular suit. It is not necessary to express any opinion on this point.

The personal law has been abrogated to the extent laid down in the Act. Where however the personal law is not in conflict with any provision of the Act, I would not be prepared to hold that it has necessarily been superseded.

It is urged before us that the husband and the father are the natural guardians of the minor child and are always entitled to apply under S.25 as against the mother or other relations. S.25 provides that if a ward leaves or is removed from the custody of a guardian of his person, 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, may make an order for his return. The necessary condition for the exercise of the discretion given by S.25 is that the ward should have left or have been removed from the custody of the guardian of his person. If the ward has not left or has not been removed from such custody, it is difficult to see how the section would apply. At the same time it must be conceded that the custody need not be the actual physical custody of the minor and may even be a constructive custody of the guardian. This view was expressed by Lindsay, J., in the case of *Mushaf Husain* v. *Mohammad Jawad*[10] and has been followed by the other Courts also, except perhaps in Bombay. There is no reason to restrict the meaning of the world "custody" to the physical or actual custody of the minor. Even if the ward is in the actual custody of another person with the permission of the guardian, he or she would be under the guardian's constructive custody. S.25(3) indicates that the residence of a ward against

[10] 48 J.C. 60.

the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship. Accordingly the constructive guardianship will continue.

At the same time I would not be prepared to hold that if under the personal law governing the minor she is for the time being in the custody of the *de jure* guardian, the Court has full power to remove the child from that custody and place it in the custody of another person who may also come within the definition of the expression "guardian of the person" though not duly appointed or declared by the Court. In my opinion in such a case the ward cannot be said to have left or have been removed from the custody of a guardian.

Under the Mohammedan law a minor wife has the option of repudiating the marriage on attaining puberty. Dr. Katju has contended before us that the legislature by enacting S.19 had laid down that the husband and after him the father is the natural guardian of a female minor and has superseded the personal law. I do not think that this is the result of the section. If she were living with her female relation who is entitled under the Mohammedan law to the custody of her person, I would be loath to hold that the District Judge would have power to direct that she should be handed over to her husband.

A question has been raised before us whether the right under the Mohammedan law of the female relation of a minor girl under the age of puberty to the custody of the person of the girl is identical with the guardianship of the person of the minor or whether it is something different and distinct. The right to the custody of such a minor vested in her female relations, is absolute and is subject to several conditions including the absence of residing at a distance form the father's place of residence and want of taking proper care of the child. It is also clear that the supervision of the child by the father continues in spite of the fact that she is under the care of her female relation, as the burden of providing maintenance for the child rests exclusively on the father. Mr. Ameer Ali in his Treatise on the Mohammedan Law Vol. 2, p. 587 (Edn. 3), noted that the first and primary natural guardian of a minor is the father. In *Imambandi* v. *Mutasaddi*[3] their Lordships of the Privy Council in reviewing the provisions and principles of the Mohammedan law remarked:

> "It is perfectly clear that under the Mohammedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or if he be dead his executor (under the Sunni Law) is the legal guardian."

It would therefore seem to follow that the mere fact that a female relation is entitled to the custody or care of the minor girl up to a certain age would not result in the father not being the guardian of the child.

Under the Guardians and Wards Act however the word "guardian" has been defined as meaning a person having the care of the person of a minor

or of his property, or of both his person and property. Thus the word "guardian" is used in a very wide sense and does not necessarily mean a guardian duly appointed or declared by the Court. Any person who has the care of the person of the minor is a guardian of the person, and any person who has the care of the property of the minor is a guardian of the property within the meaning of this Act. I would accordingly feel inclined to hold that if a female relation is under the Mohammedan law entitled to the custody of the minor and is not disqualified in any way and the minor is actually in her custody, it cannot be said that she has left or has been removed from the custody of the guardian having care of the person of the minor.

In the present case as already pointed out the girl was born at Sasaram which is the residence of the father. She has the father's mother who is living at the place and her father is alive. The learned District Judge has found that the father is not unfit to be her guardian. There was some dispute as to the dower debt of the girl's deceased mother being still due, which was alleged by the appellant to amount to Rs. 40,000 in which the minor's share would come to Rs. 20,000. This amount was disputed by the husband but at the direction of the Court the father of the girl has executed a registered document settling property of the value of Rs. 20,000 on the minor girl. There is no longer any apprehension that she would be deprived of this inheritance if she were placed in the custody of her father. On the other hand, it is pointed out by the Court below that the maternal grandmother has not got her name entered in the revenue papers in respect of her share in the inheritance left by her deceased mother, but that the grandmother has got her own name entered as against the entire estate and is in possession of it. The girl has attained the age of seven and needs education, and the learned Judge is satisfied that the proper education as desired by the father cannot be had at Zamania which place the grandmother according to her own admission is unwilling to leave. The mere fact that the father has married again is not necessarily a disqualification when he has got his own mother living with him who can take care of the child. We think that it is impossible to hold that the father is unfit to be the guardian of the person of the girl. On the other hand we are clearly of opinion that, having regard to the necessity of her being educated properly, it is for the benefit of the minor that she should be under the direction and control of her own father.

Any right which the maternal grandmother may have claimed under the Mohammedan law disappeared when the girl was brought over from Sasaram which is the place of the residence of the father. From that moment she was under the care of the maternal grandmother with the permission of the father and not by virtue of any right which the grandmother could claim under the personal law. The hizanat accordingly terminated and the next person who would be entitled to the custody of the

person of the minor would be the paternal grandmother, who has joined in this application with the father and is living with him. It is therefore impossible to hold that the District Judge had no jurisdiction to proceed under S.25, Guardians and Wards Act. The custody of the girl with the grandmother was in law a constructive custody of the father with whose consent and permission she had so far been living at Zamania. When the father served a notice upon the maternal grandmother that the child should be delivered to him and followed it up by this application, the permission was revoked as it was obviously revocable. The refusal of the grandmother to hand over the child amounted to a removal from the constructive custody of the father. In these circumstances S.25 applies and the order of the Court below was not without jurisdiction."

Sen. J. said -- "I fully agree with the judgment delivered by the Hon'ble the Acting Chief Justice. The facts which have given rise to this appeal have been dealt with very fully by my learned colleague and need not be recapitulated. The weight of authority is in favour of the propositions that under S. 19, Guardians and Wards Act, the learned District Judge had no jurisdiction to appoint or declare the father of the minor as her guardian and that the maternal grandmother could not be appointed her guardian where the father of the minor was living and was not unfit to be the guardian. S. 19, Guardians and Wards Act, overrides the provisions of S. 17. Under the Mohammedan law the maternal grandmother is not the guardian of the person of the minor granddaughter. She has the right of hizanat till the girl attains puberty, but hizanat is not the same thing as guardianship of the person. The guardianship of the person rests in the father. Mt. Siddiqunnissa Bibi, the maternal grandmother, is not a resident of Sasaram the place where the parents of the minor lived. Upon the death of the mother, the father took the girl to Zamania where the maternal grandmother lived and put the girl into the possession and custody of the latter. This did not confer upon her the right of hizanat. On the other hand, she became the custodian of the girl by the leave and license of the father. Possession or custody may be either actual or constructive. The possession of the minor by the maternal grandmother under the circumstances disclosed by this case was clearly constructive.

The father therefore was entitled to put an end to this constructive custody and to claim restoration of the girl to him as the legal guardian under the Mohammedan law. Moreover the father has, under the Mohammedan law, the right to put an end to the hizanat exercised by a female relative where the latter lived at a distance from the residence of the father with the result that it was not practicable for the father to exercise the rights of supervision and care over the minor. Although the father has not been appointed or declared the guardian under Act 8 of 1890, the definition of the term "guardian" in S.4, sub.Cl (2) is sufficiently wide to include a Mohammedan father, who has the right of

supervision over his minor daughter for the ends of her welfare. The father was therefore the "guardian" within the fold of S.25 of the Act and could thus maintain an application for recovery of the custody of the minor from the maternal grandmother. I would therefore dismiss the appeal with costs."

In *Mt. Mehraj Begum* v. *Yar Mohammad*[11] the court approved the order of the lower court that the grandfather of the minor be appointed guardian of the person and property of the minor in preference to the mother who had married a stranger. Abdul Qadir J. agreed with the decision of the Oudh Chief Court in *Ansar Ahmad* v. *Mt. Samidan*[6] and stated that the interpretation of section 17 of the Guardians and Wards Act in that case was supported by Wilson's commentary on Mohammedan law Ed. 6 (of 1930) at p. 182 where the learned commentator, after referring to certain cases in which the welfare of the minor was given great weight to, observes that --

> "it must not be inferred from these cases that the Act requires or permits the Court to subordinate the law to which the minor is subject to the consideration of what will be for his or her welfare. Its plain meaning is exactly the reverse".

In *Mt. Nur Begum* v. *Mt. Begum*[12] the facts were that the mother of a minor girl had remarried against the wishes of her relatives. The minor girl was looked after by the maternal grandmother. The paternal grandmother applied for guardianship of the girl, on the ground that the mother and her husband was living in the same house as the maternal grandmother. It was held that the mother's mother has a preferential right against the father's mother to the guardianship of the girl and strong reasons should therefore exist to deprive her of this preferential right. In this case it was held that the mere fact that the mother of the minor girl was staying in the same house as the maternal grandmother was not sufficient cause to deprive the maternal grandmother of her preferential right to the guardianship of the minor girl.

In *Mt. Kundan Begum* v. *Mt. Aisha Begum*[13] the Court set aside an order appointing the mother of a girl as the guardian of her person. The learned Disctict Judge in that case had held that although the mother Aisha Begum had married outside the prohibited degree of relationship to the girl, she was entitled to be appointed guardian in preference to the grandmother who, though she was a very old woman, was still living in the same house with her nephew Hari Singh whose sisters were professional prostitutes. The grandmother appealed and Misra J. said "on behalf of the appellant it is contended that the mother is disentitled

[11] A.I.R. 1932 Lah. 493.

[12] A.I.R. 1934 Lah. 274.

[13] A.I.R. 1939 All. 15.

under the Mohammedan law to be appointed as guardian of the girl, and the learned District Judge was therefore wrong in appointing her as such. We consider that this contention is right and must be accepted. The learned District Judge has given no reasons for overriding the express provisions of the Mohammedan law on this point. It cannot be disputed that a female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody if she marries a person not related to the child within the prohibited degrees, for example, a stranger. Section 17, Guardians and Wards Act, on which learned counsel for the mother relies says that the Court appointing the guardian of a minor shall be guided by what appears in the circumstances of the case to be for the welfare of the minor but that the appointment shall be in consonance with the personal law to which the minor is subject. As was pointed out in the Lahore Cases of *Mt. Mehraj Begum v. Yar Mohamed*[11] the Guardians and Wards Act does not permit the court to subordinate the law to which the minor is subject to the consideration of what will be for the minor's welfare. The learned Judge of the Lahore High Court quoted with approval the observations in the Oudh case of *Ansar Ahmad v. Mt. Samidan*[6] in which it was held that where the law definitely lays down that an appointment cannot be made inconsistently with the personal law to which the minor is subject, the Court cannot disregard that law even in the interest of the minor." On the facts of the case the Court found that the girl had already attained the age of 18 years and was therefore a major and it was ordered that she be at liberty to live with her grandmother or with her mother as she liked.

In *Tumina Khatun* v. *Gaharjan Bibi*[14] the facts were that the parents of the infants were both dead. Tumina Khatun the sister of the mother of the infants applied for the guardianship of the person and property of the two infants. The father of the mother of the infants Isumaddi also applied to be appointed guardian of the property only of the minors and Tumina gave up her claim in this respect. The paternal grandfather of the infant Gahar Ali opposed the applications. The learned District Judge appointed Isumaddi guardian of the property of the infants and no appeal was made against this part of his order. The District Judge also dismissed Tumina's application to be appointed as guardian of the person of the minors and appointed Gahar Ali's wife the step-mother of the father of the infants as such. Tumina Khatun appealed against this part of the order. It appeared that Tumina had married a person who was not related to the minors in the prohibited degrees. The High Court allowed the appeal and appointed Tumina the guardian. Sen J., with whom Biswas J. agreed said –

[14] A.I.R. 1942 Cal. 281.

"The next question for decision is whether Tumina has disqualified herself from being appointed guardian by reason of the fact that she has married a person who is not related to the minors in the prohibited degrees. It is true that, in his petition in opposition to the application for guardianship, Gahar Ali makes this allegation, but there is no evidence given that Tumina had married such a person and there is no finding in the Court below to that effect. If I thought that the fact that Tumina was married to such a person would disqualify her from being appointed guardian of the minors, I would have sent the case back for the ascertainment of this fact, but I hold the view that such a marriage would not disqualify her. Under the Mohammedan law, as I have stated before, Tumina being a maternal aunt, she would have a preferential right to the custody (hizanit) of the infants to that of Gahar Ali or his wife Gaharjan. It is, however, laid down by the Mohammedan law that a female otherwise entitled to the custody of a child loses the right of custody if she married a person not related to the child within the prohibited degrees: vide the Hedaya, Chap. 14, p.138; Baillie's Digest 432. If, therefore, Tumina has married a stranger to the minors she has lost the right to the custody (hizanit) of the children, which she had under the Mohammedan law prior to her marriage, but it does not necessarily follow from this that she is disqualified from being appointed a guardian of the minors by a Court acting under the Guardians and Wards Act. Under that Act a stranger, who, prior to the order of appointment, had no right whatsoever to the guardianship of the minor, may be appointed guardian. All that the section says is that, subject to the welfare of the minor, the appointment should be made consistently with the personal law of the minor. Thus, preference should be given to persons, who, under the personal law of the minor, would be entitled to guardianship and persons, who are prohibited from being guardian by such personal law, should not be appointed. A stranger, however, may be appointed guardian under the Act if the welfare of the minor demands such appointment. This is perfectly clear from the Act. Now, if, in certain circumstances, a stranger may be appointed, I can see no valid reason for excluding, in those circumstances, a maternal aunt who has married a stranger. She cannot be in a worse position than a stranger as regards her eligibility to be guardian.

It is argued, however, by learned advocate for the respondents that by her marriage to a stranger the maternal aunt has "disqualified" herself from being appointed guardian and reliance is placed for this view upon the case of *Yakub Sheikh v. Nafujan Bibi*[15]. It is true that there are

[15] 11 C.L.J. 632 at p. 635.

certain observations in that case which seem to indicate this view; but the question under discussion now was not one which required decision in that case and it was not raised in this form. There the mother, who had married a stranger, claimed a preferential right to the guardianship of her child over that of the child's paternal uncle. Mookerjee J., after referring to the Mohamedan law on the subject rejected her claim and, in doing so, her made certain observations to the effect that the mother had disqualified herself from claiming the custody of the child by her marriage to a stranger. In another part of the judgment, when considering the question of guardianship of the property of the minor, the learned Judge stated that: "If a person is disqualified for the office of guardian by the law to which the minor is subject, he cannot be appointed guardian." These remarks falling, as they do, from an eminent Judge of this Court, require the most careful consideration and it is with the greatest respect and not without some hesitation that I say that I am unable to agree with the view – if that be the view of the learned Judge – that a Mohamedan mother or aunt, who would otherwise be eligible for the guardianship of an infant, becomes 'disqualified' from being appointed guardian under the Guardians and Wards Act, because she has married a stranger to the infants. I have consulted the texts in the Hedaya and also Baillie's Digest. In the Hedaya, the reason is given as to why a woman loses the right of hizanit upon her marriage with a stranger to the infant. It is said that the husband of the woman, being a stranger, may illtreat the child. It is further said that on the dissolution of such marriage, the right to custody revives. Baillie gives no reason, but merely states the fact that the right to custody is "made void" by marriage with strangers and that the right revives on the marriage being dissolved. It is clear from these passages that, under the Mohamedan law, a woman, who marries a stranger to the infant, is not considered as having done something which would render her personally unfit to be the guardian of a child. The Mohamedan law nowhere directs that a woman, having minor relations, should always marry the relations of such minors or that the marriages of such women with strangers are looked upon with disfavour. It laid down this rule regarding the custody of minors by females, in order to protect them as far as possible from harsh treatment by strangers. Further, the passages in Baillie and the Hedaya, stating that a woman loses the right of hizanit by marriage with a stranger to the minor, occurs where the question of the preferential right of guardianship is being discussed. It is nowhere suggested that, where there are no other eligible relations, the Judge cannot appoint a woman who has lost her right of hizanit by her marriage to a stranger. The word 'disqualified' is nowhere used. I do not consider, therefore, that the Mohamedan law lays down that a woman, who has married a stranger to the minor, is 'disqualified' from being appointed a guardian under any circumstances. It merely lays down

that such a woman loses any preferential right which she had by virtue of her relationship to the minor.

As I pointed out before, the terms of Sec. 17, Guardians and Wards Act, are perfectly clear. The welfare of the infant is the primary consideration and a stranger may be appointed a guardian, in preference to a relation, if the Court considers that the welfare of the infant demands it. I realise that the section also enjoins that the Court should, wherever possible, make an appointment, which is consistent with the personal law to which the minor is subject; and that, when the personal law definitely forbids the appointment of a certain person as guardian, such person should not be appointed. The Mohamedan law, however, has not forbidden the appointment of a woman who has married a stranger to the minor to be guardian of the minor; all that it has laid down, as I have explained above, is that a woman who has a preferential right to the custody of an infant loses such right on her marriage to a stranger. I am of opinion, therefore, that the appellant is not disqualified from being appointed a guardian. If she has married a stranger, she has only lost her preferential right as aunt. She is in no worse position than Gaharjan, who is stranger to the minors. As between the two, I consider that the welfare of the minors would be better served by appointing the appellant Tumina as guardian. Gaharjan is a step-mother of the infants' father, while Tumina is the infants' mother's sister. It is far more likely that she will look after them with more affection and care than Gaharjan.

There remains Gahar Ali himself. Under the Mohamedan law, the grandfather, in the absence of certain relations, has a right to be appointed guardian. Gahar Ali, as grandfather, would have a preferential right to that of Tumina under the Mohamedan law, if Tumina has married a stranger. The learned Judge has, however, found him to be unfit to be guardian of the property of the minors, inasmuch as his interests are adverse to theirs and inasmuch as he is claiming a right adversely to the minors in certain property left by the minors' father. The learned Judge also points out that he was prosecuted from executing a decree which had already been executed. In these circumstances, I do not consider that it would be proper to appoint him as a guardian of the minors' persons. In my opinion, the welfare of the minors will be best secured if Tumina is appointed the guardian of their persons and I, accordingly, appoint her as such; the minors shall remain in the custody of Tumina."

In *Mt. Samiunnissa* v. *Mt. Saida Khatun*[16] the appellant, the grandmother had applied to be appointed the guardian of the person of a minor Rashida Khatoon, who was then a girl ten years old. The application was opposed by the mother of the minor, Mt. Saida Khatun. It appeared that

[16] A.I.R. 1944 All. 202

the mother was originally Daisy Lal and married to a Christian. On the death of her husband, she embraced Islam and assumed the name of Saida Khatoon and married Jamil Ahmad. The minor was the daughter of Jamil Ahmad by Saida Khatoon. After the death of Jamil Ahmad the mother remarried Abdul Aziz, a medical practitioner, who was not related within the prohibited degrees to the minor. The learned District Judge appointed the mother to be the guardian and the grandmother appealed. The appeal was dismissed and Malik J. said:--

> The learned counsel for the appellant, therefore, urges that the District Judge had no right to appoint Mt. Saida Khatoon as the guardian of the minor and he was bound to act according to the personal law of the minor and appoint the appellant Mt. Samiunnissa. Great reliance is placed on behalf of the appellant on S.17, cl(1), Guardians and Wards Act and the interpretation put on that section by a Bench of this Court in 1938 A.L.J.,982[17]. Section 17, cl. (1) Guardians and Wards Act reads as follows:
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> "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." The learned counsel for the appellant argues that the Court can, therefore, consider the welfare of the minor and appoint a guardian consistently with the law to which the minor is subject, and the personal law can, therefore, not be disregarded by the Court and must be obeyed. Reliance is placed as I have already said, on a Division Bench ruling of this Court reported in 1938 A.L.J. 982[17]. In that case a minor Muslim girl was living with her grandmother who before she had married was a prostitute, and after she became a widow she again went back to her former life and was living with some of her female relations who were still carrying on the profession of prostitution. The mother to have the child removed from such surroundings applied that she should be appointed the guardian of the minor. Her application was opposed on the ground that the mother, since she had married a second husband who was not related within the prohibited degrees to the minor was not entitled to guardianship under the Mohamedan law. Considering, however, all the circumstances of the case the learned District Judge of Moradabad had held that keeping in view the welfare of the minor, the mother should be appointed the guardian of the minor and not the grandmother who had during the pendency of the application of the mother also applied to be appointed a guardian. The grandmother appealed to

[17] *Kundan v. Aisha Begam* 1938 A.L.J. 982; AIR 1939 All. 15. See note 13.

> this Court and a Bench of this Court held that as the mother had remarried and to a person who was not related within the prohibited degrees to the minor, the mother could not, be appointed guardian of the minor, and as the grandmother was also an undesirable person to be put in charge of the minor girl, they held that the grandmother also could not be appointed guardian of the minor, and on the ground that the minor was aged about 17 and would soon become a major the Court decided not to appoint either the mother or the grandmother as guardian. The result of that decision must be that the choice was left to the minor to choose whether she would live with her mother or with her grandmother, the Court taking no responsibility in the matter.

If that case stood by itself, as it is a Division Bench ruling, I would be bound by it. With due respect to the learned Judges who decided that case I do not find it possible to accept their view. So far as I have been able to understand S.17, Guardians and Wards Act, the primary consideration for a Court, which has to deal with the question of guardianship of the minor, is the welfare of the minor. In considering what is for the welfare of the minor, the Court will act consistently with the personal law governing the minor. To illustrate this matter further with reference to the facts of this case the proper approach will be to see who is the guardian under the Mohamedan law, and in this case the guardian under the Mohamedan law being the grandmother, the Court will generally appoint the grandmother unless there were such overriding considerations which compelled the Court to appoint somebody else. In the case reported in 1938 A.L.J.982[17], the Court being definitely of the opinion that the grandmother, who was the guardian under the Mohamedan law was not the proper guardian I think the Court was not debarred by any provision contained in the Mohamedan law from appointing the mother merely because she had re-married outside the prohibited degrees. There can be no doubt that S.17, Guardians and Wards Act does apply to Muslims, and it is open to the Court to appoint a stranger as guardian to the person of a minor; the guardian so appointed not being a guardian under the Mohamedan law, if no guardian under the Mohamedan law is forthcoming or is available. The mother may have lost her right to guardianship under the Mohamedan law but she cannot be in a worse position than a stranger, and I cannot find any provision under the Mohemadan law which forbids her appointment as guardian, if the Court cannot find a more suitable person. Strictly speaking, under the Mohamedan law, the mother is not a natural guardian at all: see 45 I.A.73[18]. She has merely the right of hizanat, custody of the child, up to a certain age according to the sex of the child. To my mind, if

[18] *Imambandi* v. *Mutsaddi* (1918) 45 I.A. 73.

the Court, keeping in view the welfare of the minor, considers that the mother should be appointed a guardian in preference to any other natural guardian under the Mohamedan law, the order passed cannot be challenged on the ground that the Court had no power to do it. Though, as I have already stated, the Courts should make an attempt so far as possible to follow the line of guardianship fixed under the personal law of a minor, I am not prepared to hold that they must subordinate the welfare of the minor and must, whatever the consequence, appoint the natural guardian under the personal law.

The learned counsel for the appellant has relied on two other cases. One is reported in A.I.R. 1928 Oudh 220[19]. In that case the mother had remarried without the prohibited degrees and Pullan J. remanded the case to the District Judge to find out whether a suitable guardian under the Mohamedan law was available and willing to accept the guardianship. This view of the law is not in conflict with the view that I hold, as, to my mind, where a suitable guardian is available he or she should be appointed and not a disqualified person under the Mohamedan law. This case does not go further to hold that where there is no suitable person even then the mother should not be appointed a guardian because she has remarried. The other case relied on is A.I.R. 1932 Lah.493[20], a judgment of Abdul Qadir J. of the Lahore High Court. In that case the conflict was between the mother and the grandfather and the Court held that the grandfather be appointed the guardian. There are certain observations in that judgment approving of the observations of Mr. Wilson in his well-known commentary on Mohamedan law, that it was not possible to subordinate the law to which the minor is subject to the consideration of what will be for his or her welfare.

It must be borne in mind that the Court appointing a guardian to a minor does so under S.17, Guardians and Wards Act, and not under the personal law to which the minor is subject. Section 37, Bengal, Agra and Assam Civil Courts Act, 12 of 187, lays down that, "regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Mohamedan law, in cases where the parties are Mohamedans, and the Hindu law, in cases where the parties are Hindus, shall form the rule of decision." It will be noticed that the appointment of a guardian is not one of the matters included in that section. Section 17, Guardians and Wards Act no doubt lays down that the Court shall, consistently with the law to which the minor is subject, appoint a guardian for the welfare of the minor. The primary consideration, to my mind, is the welfare of the

[19] *Ansar Ahmad* v. *Samidan* AIR 1928 Oudh 220.

[20] *Mt. Mehraj Begum* v. *Yar Mohammad* AIR 1932 Lah 493.

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minor, but the appointment has to be made consistently with the law to which the minor is subject. I can find nothing in the Mohamedan law which makes the appointment of a mother under circumstances in which a stranger can be appointed a guardian inconsistent with any provision of the Mohamedan law. I have looked through Ch.14, Vol. 1 of Hamilton's Hedaya relating to hizanit or the care of infant children. That seems to be the only place where the question of the custody of the minor has been dealt with. The whole law on the subject seems to have been developed on a reply by the Prophet to a woman who had separated from her husband that she had a right in the child in preference to that of her husband so long as she did not marry with a stranger. The reason given in the Hedaya is that the stranger to whom the mother may be married will not have the same affection for the child and may ill-treat her and the context in which the whole matter is discussed is the respective merit of the various relations and the central idea is as to who is more likely to look after the welfare of the minor. There seems to be nothing in that chapter to indicate that it is a sort of punishment to the mother when she, by reason of the fact that she has married a stranger, is to be punished by not being allowed to have the custody of the child even though there may not be any other person capable of looking after the minor.

As I have already said I do not think that the mother who has remarried can be placed in a worse position than a stranger to the minor, and the mother can surely be appointed a guardian under circumstances under which a stranger can be so appointed. The learned counsel for the respondent has relied on the case reported in 29 All.210[21]. That was a case in which the conflict was between the grandmother and the father of a minor. The father was the natural guardian under the Hindu law, but the Court was of the opinion that it was for the welfare of the minor that the grandmother be appointed the guardian, and the Court appointed the grandmother in preference to the father. The case case relied on by Mr. Seth is 33 All.222[22]. That was a case of a minor Hindu widow whose guardian under the Hindu law after the death of her husband was her husband's kinsman but the Court held that in view of the welfare of the minor the father of the minor should be appointed in preference to the kinsman of the husband. The next case relied on is 54 All. 128[23]. The parties to that case were Muslims, and the case was decided by Sir Shah Mohammad Sulaiman, then Acting Chief Justice, and if I may say so with respect I entirely agree with the view of law expressed by him at p. 131 of the Reports which reads as follows:

[21] *Bindo v. Sham Lal* 29 All 210.

[22] *Tota Ram v. Ram Charan* 33 All. 222.

[23] *Siddiq-un-Nissa Bibi v. Nizamuddin Khan* 54 All 128.

"There can be no doubt that so far as the power to appoint and declare guardian of a minor under S.17 of the Act is concerned, the personal law of the minor concerned is to be taken into consideration, but that law is not necessarily binding upon the Court which must look to the welfare of the minor consistently with that law. This is so in cases where S.17 applies. In such cases the personal law has to this extent been superseded that it is not absolutely binding on the Court and can be ignored if the welfare of the minor requires that some one else, even inconsistently with that law, is the more proper person to be appointed guardian of the minor." In A.I.R. 1933 Rang. 201[24] a Bench of the Rangoon High Court refused to appoint a Mohamedan father as guardian of his female child and held that S.17, Guardians and Wards Act, did not take away the discretion of the Court to consider what was primarily for the welfare of the minor. A comparison of S.17 with S.19, Guardians and Wards Act, shows that under S.19 certain persons mentioned in that section had to be appointed guardian unless they were in the opinion of the Court unfit to be so appointed. Section 17, to my mind, has to be read entirely different from S.19, and it cannot be interpreted in the sense that unless the guardian under the personal law is unfit to be appointed a guardian of the minor the Court is bound to appoint him. To my mind, S.17 gives a much wider discretion to the Court and whenever the Court is of the opinion, consistently of course with the law to which the minor is subject, that it is for the welfare of the minor that a certain person should be appointed guardian, the Court can exercise its jurisdiction and appoint such a person as the guardian. .

In my view, therefore, the correct approach to this case was that the Court should first try to consider whether the grandmother who was the guardian under the Mohamedan law should be appointed the guardian of the minor. In case the Court was of the opinion that the grounds against the appointment of the grandmother, in the interest of the welfare of the minor, were so weighty that the grandmother should not be appointed the guardian of the minor, then the Court should try to appoint other suitable person, and if the Court was of opinion that the mother of the minor who was married without the prohibited degrees was the only person who could in view of the circumstances be given the custody of the minor, then the Court should not hesitate to pass an order to that effect. The Court in this case has held that the grandmother is a destitute and she has got no means of supporting the minor. Further she is illiterate and has never taken any interest in this minor who is now aged about 14 years. The mother of the girl is a nurse and she therefore must have received some education. The girl lived all her life with her and her ways must be entirely different from the ways of this old lady. In view of these and

[24] *Ma Juli v. Moola Ebrahim* AIR 1933 Rang. 201.

other circumstances mentioned by the learned District Judge in his order under appeal he appointed the mother of the girl as guardian. The learned counsel for the appellant had not tried to challenge any of the findings of fact recorded by the Court below against the grandmother and in favour of the mother. His argument was entirely based on a question of law that under no circumstances could the mother be appointed guardian, and great reliance was placed by him on the case reported in 1938 A.L.J. 982.[17] To my mind the fact that the grandmother is a destitute and is living on charity and is not able to maintain the minor is a matter of primary importance, and as the minor has got no property of her own it is not possible to hand over this minor to her grandmother who will not be able to maintain her and is practically a stranger to the minor and whose ways must be entirely different from the ways of the mother with whom the child has been so long brought up. In the view that I take of the law, to my mind, the order passed by the learned District Judge under the circumstances of this case was perfectly right and I therefore dismiss this appeal with costs."

In *Mir Muhamed Bahauddin* v. *Mujee Bunnisa Begum Sahiba*[25] the father of the minor had applied for the removal of the guardian, the mother of the minor, from guardianship and for the appointment of himself as the guardian of the person of the minor. The ground of the application was that the mother had married to a stranger. The Court allowed the application and appointed the father to be the guardian. Krishna Swami Naidu J. said:

> The custody, or what is called 'hizanat' of a minor girl until she attains puberty and of a minor boy until he attains the age of 7 years, is with the mother. But even then the legal guardian is only the father. The right to the custody of the minor girl until she attains puberty continues with the mother, though she is divorced by the father of the child. However the mother cannot continue to have the custody of the child if she marries a second husband, in which case the custody belongs to the father. This is the proposition that has been laid down in 'Ulfat Bibi v. Bafati',[5] Mulla in his book on Principles of Mohamedan Law's 13th Edition, page 295 states as follows:
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> > "The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father."
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> The principles laid down in 'Ulfat Bibi b. Bafati' have been

[25] AIR 1952 Mad. 280.

approved by the author in his book, referred to. There is no dispute as to the Petitioner being the legal guardian. But it is contended on behalf of the Respondent that the mother is entitled to hizanat or custody until the minor attains puberty and that this right is not taken away, even if she marries a second husband. That is contrary to what is laid down in 'Ulfat Bibi b. Bafati'. But the learned counsel relies on certain observations made in 'Jumina Khatun v. Gaharajan Bibi'.[26] In that case a maternal aunt was held to have a preferential right to the custody of the minor over that of paternal grandmother. It was held that having regard to the welfare of the minor, a maternal aunt who has married a stranger, in the absence of any preferential person, is not disqualified from being appointed guardian of the minor, that the Mohamedan Law does not lay down that a woman who had married a stranger to the minor is disqualified from being appointed a guardian under any circumstances and that it merely lays down that such a woman loses any preferential right which she had by virtue of her relationship to the minor. The question that arises in this case is not whether by reason of the marriage to a stranger the mother loses the right to continue to have the custody of the minor, but whether she has forfeited her right to be the guardian by virtue of her second marriage. That is not the point that was considered in that decision.

The Mohamedan Law fixes the order of preference as regards custody in the case of a boy under the age of seven years and of a girl who has not attained puberty as follows: failing the mother, mother's mother, how high soever; father's mother, how high soever; full sister; uterine sister; consanguine sister and so on in the order prescribed; and only such female relation in the said order of preference would be entitled to the custody of the minor. But she loses the right to custody under certain circumstances – if she marries a person not related to the child within the prohibited degrees e.g. a stranger; or, if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or, if she is leading an immoral life, as where she is a prostitute; of if she neglects to take proper care of the child.

The question that arose for decision in 'Tumina Khatun v. Gaharajan Bibi',[14] was whether by reason of her marriage to a stranger, the maternal aunt was disqualified to be the guardian, and Sen.J. observed as follows:

> "The Mohamedan Law nowhere directs that a woman having minor relations should always marry the relations of such minors or that the marriages of such a woman with strangers are looked upon with disfavour. It laid down this rule regarding the custody of the minors

[26] 76 Cal. L.J. 302 at p. 305.

> by females in order to protect them as far as possible from harsh treatment by strangers. Further the passages in Baillie and the Hedaya stating a woman loses the right of Hizanit by marriage with a stranger to the minor occurs where the question of the preferential right of guardianship is being discussed. It is nowhere suggested that where there are no other eligible relations the Judge cannot appoint a woman who has lost her right of hizanit by her marriage to a stranger. The world 'disqualified' is nowhere used. I do not consider therefore, that the Mohamedan Law lays down that a woman who had married a stranger to the minor is 'disqualified' from being appointed a guardian under any circumstances."

Considering the welfare of the minor, the maternal aunt was held to be not disqualified from being appointed guardian of the minor, in the absence of any preferential person, though she has married a stranger.

To a similar effect is the decision in 'Sami-un-nissa v. Saida Knatun'.[27] relied on behalf of the Respondent. In that case the learned Judge relied on section 17 of the Guardians and Wards Act and held that the primary consideration for the Court is the welfare of the minor, that it is open to the Court to appoint a stranger, if it cannot find a more suitable person and that there is no provision of Muhammadan Law, which forbids such appointment.

In 'Ulfat Bibi v. Bafati',[5] as in the present case, the mother married a second husband, and she was held disentitled to have the custody of the child. The learned Judges observed as follows:

> "We are of opinion that a woman who has been divorced, if this appellant has been divorced, and has married a second husband, is not a person either herself better suited than the father, however unsuitable the father may be, and not a person who ought to be heard to say that the father is unsuitable. She has abandoned her home and husband either by her own free will, or as the result of her conduct, and in the eyes of the law she has lost the right to assert a claim against the father for the child and probably the right to assert this appeal."

Though it cannot be stated that however unsuitable the father may be, he may be appointed in preference to the mother, or any other near relation or stranger, certainly the mother, who has chosen to leave the father — though in this case under alleged ill-treatment — is not the person to whom the child could be entrusted, since it is unlikely that a woman who has married a second husband would be in a position to pay as much attention to the upkeep and well-being of the child as she would, if she had not taken to a second husband. It cannot be denied that she is answerable to

[27] AIR 1944 All. 368.

the husband primarily and to look after his comforts and answer his behests and whatever attention she may bestow on the child could only be after she has been of such service to the second husband as he would require. In my view, unless the father is totally unsuitable, or there is any other relation who would take charge of the child, the mother who has married a second husband, is not at all the person to whom the child of the first marriage should be entrusted. It would be impossible for her under her changed circumstances to look after the child and care for her well-being.

Section 17 of the Guardians and Wards Act provides that the Court should 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. The paramount consideration in cases coming up under the Guardians and Wards Act for appointment of guardian should be the welfare of the minor. But it must be as far as possible consistent with the personal law relating to the parties. The preferential right of any person to the guardianship cannot be ignored unless he is totally unfit to be appointed as guardian and Courts must necessarily consider his claims in preference to any others. If in this case, keeping in view, the welfare of the minor, no other person than the father could be considered as a fit person to be appointed as guardian there is no reason why the father should be passed over as he is also guardian under the personal law.

It is argued strenuously on behalf of the Respondent that the Petitioner is unfit to be the guardian, since he has brutally treated the mother and it is not likely that he will have any affection for the child, that the child is of indifferent health and often put to medical treatment and that the Respondent alone can bestow the necessary attention. Further, his character is attacked as being loose. But it must be noticed that apart from the treatment which he is alleged to have meted out to the mother, there is nothing against the father personally otherwise. He is an official in Government service employed as a Lecturer in Government Central Polytechnic, Madras, drawing a decent salary. He has also married a second wife; but he has no issue by the second wife. That, however, is not a very material circumstance in considering his claims for the guardianship. I do not find on the allegations made in the affidavits filed in this case that he is a person who could not be thought of for the guardianship of the minor. I consider him as a fit and proper person to take charge of the custody of the minor. It is also the duty of the legal guardian to look after the child, maintain her, educate and arrange for her marriage at all his cost. To take away the child from his custody and keep her with the mother until she attains puberty and then send that minor to him would be to deprive him of the attachment to the child, which must be cultivated by association and such association must commence at a very early age. It cannot be said that the child is of such tender years that she could not leave the mother's care. The child is about 7 years of age and could very well live with the

father and it is stated that the father's mother is in the family to look after the child.

It was also argued that the application is not maintainable and that it is filed only with a view to escape the liability to pay maintenance which the Petitioner is already paying under the orders of the Criminal Court, and that it is an attempt to dispute his liability in a suit which is said to have been instituted in the City Civil Court for the maintenance of the minor. I am not satisfied that the Petitioner has an ulterior motive in filing this Petition. Naturally, he wants to have the child as he is the rightful guardian and is entitled to custody.

An argument was advanced that no grounds had arisen for removal of the mother, who has already been appointed as the guardian and unless she could be validly removed, no fresh guardian could be appointed. Section 39 of the Guardians and Wards Act lays down the grounds and circumstances under which a guardian could be removed. One of the grounds on which a guardian may be removed is "by reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject." I have already held that by reason of the marriage with the second husband, the Respondent has forfeited her rights to be the guardian. I therefore remove her from the guardianship and appoint the Petitioner as the guardian of the person of the minor. He will be entitled to the custody of the minor and the Respondent will deliver custody of the minor on or before the 15th February 1951."

In *Mohamed Amin Shah* v. *Mst. Asteeka Banu*[28] the appellant who was a step-cousin of the minor girls had applied for guardianship of the person and property of the minors. The application was opposed by the mother of the minors. The District Judge after considering the evidence appointed the mother the guardian and the appellant appealed. The High Court allowed the appeal and Fazl Ali J. (with whom Wazir C.J. agreed) said—

"Learned counsel for the appellant submitted that respondent No. 1, the mother of the minors, has disqualified herself from being the guardian of the minor daughters firstly because she has remarried after the death of her husband and secondly because the girls have crossed the age of "Hazinat", the age under which they could be under the "Hazinat" of their mother under the Mohamedan Law but are now nearing the age of puberty. It is further contended that not only respondent No. 1 has remarried but has married a complete stranger who does not belong to the particular sect to which the parties belong, that is to say, that the second husband of the respondent No. 1 is a Pathan and not a Peer Zada to which caste the appellant and the minor daughters belong. It is also contended by learned counsel for the appellant that the second husband has got three

[28] A.I.R. 1963 J.K.K. 321.

sons, two of whom are grown up and are living with their step mother and it will not be safe to allow the girls who have just stepped into their teens to live with these boys. There is also a possibility, it is suggested, of the second husband attempting to secure the marriage of these daughters with his sons which is permissible under the Mohammedan law.

In our opinion, the contention of the learned counsel for the appellant seems to be well founded. There is, no doubt, that the minors cannot be looked after properly in all respects if they are allowed to live with their mother in the same house where the stepfather is also living with his two grown up sons. Even under Mohammedan Law respondent No. 1 has forfeited her right to be appointed as guardian of the minors by virtue of her remarriage and having regard again to the fact that she had remarried not only outside the family but outside the particular sect to which the members of the family of the minors belong, is an additional reason why Mst. Ateeka Banu is not a fit person to be appointed as guardian of the minors.

The court below had ascertained the desire of the minor to live with the appellant. The Court below, however, was of the opinion that the minors gave their statements in absence of their mother and, therefore, their statements had been inspired by the influence of the appellant with whom they had been residing when they were produced before the Court. We, however, examined the girls before us also in order to ascertain their wishes in the matter. Their statements were taken not only in presence of respondent No. 1 but after respondent No. 1 was allowed to meet the girls. In spite of that the girls stated very clearly that they would like to live with the appellant, and they have been happy with him. They have also stated that the appellant has a daughter of the same age as the girls and they find it more convenient to stay with the appellant so that they may have, apart from anything else, a play-mate in the daughter of the appellant.

The learned Judge refused to consider the case of the appellant merely because he thought that he has got an adverse interest against the minors. The learned Judge relied on the statement of the appellant that the house in question was claimed exclusively by him although it was claimed by the minors to be the joint property of the father of the minor girls in which the minor daughters would have their legal share. It appears that not only the appellant but also other cousins had made out a case before the Court below that the original ancestral house was divided between the parties and Abdul Rashid the uncle of the appellant and the appellant's father had purchased the share of the father of the girls. In spite of this, the appellant gave a clear statement on oath before us that he would certainly give the legal share of the daughters in the house in question. In view of this statement, no adversity of interests now exists between the appellant and

the daughters so far as this property of the deceased is concerned.

Furthermore, it appears that in the application filed by the appellant he has clearly mentioned that steps should be taken to recover the property of the minors because a portion of the agricultural land appears to have been sold by the uncle of the daughters without any legal sanction. This clearly shows that the appellant has come with clean hands and intended to protect the interests of the minors rather than to put their interests in jeopardy. Although the girls had lived with the mother for a number of years before they came to live with the appellant, yet respondent No. 1 never made an application to the Court that she may be made the guardian of the minors. This shows to begin with somewhat lack of interest which Mst. Ateeka Banu has exhibited in the daughters. It was only when the appellant made an application for the appointment of guardian of the minors, that she came forward to resist that application.

It was strenously contended by Mr. Karim, counsel for respondent No. 1 that as the appellant is only a step cousin he is completely disqualified from being the guardian of the person of the minors under the Mohammadan Law and he also appears to be" "(Urdu word omitted) (not within the prohibited degree). It is true that in appointing a guardian the Court will certainly be guided by the personal law of the parties but the primary consideration which would determine decision would be the welfare of the minor and if the Court considers that it is in the welfare of the minor to appoint even a stranger it can do so, irrespective of the parties. As respondent No. 1 herself is disqualified from being appointed the guardian of the minors, it does not lie in her mouth to say the same thing regarding the appellant. Moreover, the appellant is an elderly man and has got a daughter and a wife in his house. In these circumstances, there is no danger of the minor daughters not being looked after properly. The daughters themselves have preferred to live with the appellant rather than their own mother and as the daughters are possessed of sufficient intelligence their wishes have to be respected by the Court. The respondent Peer Banu who is the father's sister of the daughters is the most preferential guardian even under the Mohammadan Law and excludes every other candidate that has been arrayed in this contest for the guardianship of the minor girls. The difficulty, however, in leaving the minor daughters with her is first of all that she is an old woman and secondly that she has got a grown up unmarried son and it is not safe to entrust the minor girls to her in these circumstances.

Having regard, therefore, to the welfare of the minors from all points of view we are clearly of the opinion that the appellant is most suitable to be appointed as the guardian of the person and property of the minors. We also think that it will be better to appoint Peer Banu also as the guardian of the propety of the minors jointly with the appellant. The appellant has stated that he has no objection if this is done. Learned counsel for the

respondent No. 1 clearly stated that if she was not given the custody of the children, she will not be interested in the property of the minors at all. We also feel that having regard to the gesture shown by the appellant in admitting the legal share of the daughters in the ancestral house, it will be more in the interest of the minors that they should be placed under the guardianship of the appellant. The appointment of the appellant as the guardian of the person and property of the minors will not, however, stand in the way of the other parties namely, the mother, the cousins, and Peer Banu in meeting the minors at the house of the appellant and he will afford all facilities for such a meeting as and when required. The court below will also certainly consult these parties at the time when an application is made to it for the marriage of the girls, when such an occasion arises."

In the recent Indian case of *Smt. Ainunnisa* v. *Muktar Ahmad and another*[29] the facts were that a minor boy aged 10–11 years was in the custody of his mother and he had intelligently exercised his preference to continue to stay with her. Mehrotra J. held that this custody could not be disturbed and given to the father though he was the legal guardian. A mere claim to legal guardianship in such a situation will not stand on a higher footing than the claims of the real mother to continue to have custody of the minor who has remained in her custody or in the custody of her mother since the birth of the child. After reviewing the case law the learned Judge said – "In my view the trend of the recent decisions is clear namely that in these matters the welfare of the minors is of supreme importance and not much weight is to be attached to the rights of the natural guardian. The cases also have laid down that if an intelligent preference is exercised by the minor that should be given recognition."

In Pakistan in the case of *Muhammad Bashir* v. *Ghulam Fatima*[30] the contest was between the father and the mother in regard to the custody of a girl aged 12 years. The father had divorced the mother when the child was about six years old. The girl was in the custody of the mother and was brought up and educated properly. In 1950 the mother remarried a man who already had another wife and children from that wife. The father also had remarried. Kaikaus J. in that case said –

"The contention put forward by learned counsel for Mst. Ghulam Fatima in respect of the forfeiture of her right to custody is an interesting one. According to him the provision of Muhammadan Law that if the mother of the minor girl marries a person not within the prohibited degrees of the minor she loses her right to custody has no application to the present case, because by the very marriage of the mother with the present husband the husband is within the prohibited degrees of the minor

[29] A.I.R. 1975 All. 67.

[30] P.L.D. 1953 Lah. 73.

as stated in Para. 261 of Mulla's Muhammadan Law. When asked whether such an interpretation would not make this rule wholly infructuous he replied that till there is consummation of marriage the second husband is not within prohibited degrees as stated in the same section. According to him this rule was only intended to cover a period from the time when the mother remarries till the consummation of her marriage takes place. I have no hesitation in rejecting this argument. It is clarified at page 265 of Muhammadan Law by Ameer Ali (Volume II, 1929 Edition) that the second husband of the mother should be within the prohibited degrees of the minor by consanguinity. The original saying of the Holy Prophet, on which this rule is based, is that a woman loses her right when she marries a stranger. Baillie's Muhammadan Law, (page 432) also mentions a stranger, and Radd-ul-Mukhtar says the person should be Mahram'. The contention does not need further consideration.

It has been argued further that the question of losing the right to custody does not arise in this case as the application is under section 25, under which only the benefit of the minor is to be considered. It is pointed out by the learned counsel that while under section 17, which relates to the appointment of a guardian, the Court is to 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 section 25 reference to law to which the minor is subject is omitted and the welfare of the minor is the sole consideration. It is contended that the question of welfare should be decided without reference to the rules of Muhammadan Law.

This argument is based on a misconception of the provisions of Muhammadan Law. All rules of Muhammadan Law relating to the guardianship and custody of the minor are merely the application of the principle of benefit of the minor to diverse circumstances. Welfare of the minor remains the dominant consideration and the rules only try to give effect to what is minor's welfare from the Muslim point of view. A consideration of the provisions of Muhammadan Law amply supports the above proposition. Ameer Ali (Muhammadan Law Page 252, Volume II, 1929 Edition) after stating the different periods of hizanat by the female relations provided by different schools of Muhammadan Law says:—

> "It will be seen that, though the period of hizanat varies among the different schools, the general principle, which governs its duration, is founded essentially on the interests of the child. "At the age of nine", says D'Ohsson, "a boy passes from the care of his female relations into the hands of his father, in order to receive from the father, a masculine education analogous to the paternal status, condition, and fortune."

and further on the same page:—

"It may be stated, as a general rule, that as the right of hizanat has in view the exclusive benefit of the infant each particular case would be governed by the doctrine in force among the sect to which the child is supposed to belong; or, if that cannot be ascertained, by a consideration of what would be best for the child as a Moslem child. This rule has been adopted by the Court of Algiers, and no difficulty has been found in its application to individual cases."

After stating the preferential order of persons entitled to custody he makes it clear that the whole of this order of preference is subject to the dominating consideration of the minor's interests. He says at page 255:—

"Although the right to the guardianship of the minor passes in the order mentioned above, in the case of a contest between two persons one preferentially entitled as against the other, the Judge has to consider not only the respective qualifications of the claimant, but also the interests and well-being of the minor as a Musalman child."

After stating the circumstances which cause forfeiture of the right of the mother to hizanat, the learned author appends the invariable qualification (page 257):—

"Although ordinarily the woman entitled to the custody of a child forfeits her right on contracting a marriage with a stranger, special consideration regarding the interest of the child may require that its custody should be retained by her. For example if a woman separated from her first husband, were to marry a second time in order to secure for her infant child better and more comfortable living, she would not forfeit her right of hizanat.

The Court would preserve to the mother the custody of the child if it be in its interest that it should remain with her."

The learned author when explaining what conduct of the mother would forfeit her right to custody quotes Fatawa-i-Alamgiri as saying "such wickedness as would prove injurious to the child". While dealing with the question whether a mother being a Kitabia will make any difference he says (page 258):—

"Some jurists have stated that the distinction between a Moslemah and a Kitabia is beside the point, for what must be considered in each case is what is good for the child, and its proper bringing up. Mufti Abu Saud has laid down that all cases of misconduct do not necessarily destroy the right of hizanat; what must be considered is the detriment to the child, the question being, is the woman's misconduct likely to injure the child? So also it is stated in Hashiat-ul-Madani. The injury to be considered may be either physical or moral."

After stating the rule that by removing the child to a place where the father would not be able to exercise supervision, the mother will forfeit

her right to custody, the learned author hastens to add "when the 'change of residence' has been made for the benefit of the child, the right of hizanat is not lost", and further "If a woman were to attempt to remove with her child from the usual place of residence, and the husband were to apply to the Judge to obtain the person of the infant upon the ground of its removal, he would be bound to inquire into the facts of the case, and, on being satisfied that the removal is only temporary or undertaken in the interests of the child, to allow it to remain in the mother's custody." After stating that according to Maliki doctrine the father has a right to removal, the learned author stated "This power also is strictly subordinate to the interests of the child." After referring to a decision of Court of Algiers he says (page 262):—

> "This decision shows plainly the governing principle in all questions of hizanat. The right is founded primarily for the benefit of the child and is to be exercised by those relations who are most likely to bestow care and kindness on it."

Tyabji Muhammadan Law (1940 Edition) deals directly with the question whether there is any inconsistency between Muhammadan Law and the benefit of a minor, though he deals with it not in connection with section 25 but section 17 of the Guardians and Wards Act, which directs a decision according to the welfare of the minor but 'consistently with the law to which the minor is subject'. Courts having differed as to whether the welfare of the minor or personal law should have preference, it is thus that the expresses his views (page 291):—

> "The terms of the Act (Guardians and Wards Act), its history, and the decisions of the Courts, support the view that the law governing the minor is the paramount consideration. But on examination it will be found that to contrast the welfare of the minor with the law by which the minor is governed, is to overlook certain fundamental notions underlying the law and its administration. As the Judges are themselves required to follow the law, not to give decision in accordance with their own views of expedience, it is almost a contradiction in terms to say that the paramount consideration should be, not the law, but any other matter, e.g. the opinion of the Court as to the welfare of the minor. Moreover, the law is professedly based on a regard for the welfare of the minor. Assuming that it fails in its purpose, it is not the function of the judicial tribunals to set right the shortcoming of legislators," and further on:—
>
> "Similarly legal principles show who is entitled to the custody, because the law places the right to custody where it deems that it will be exercised most for the welfare of the minor; and it is not for the Court to say that it is against the minor's welfare that custody should be taken away from the person (if any such there be) who is

by law entitled to the custody, as of right; since, when the law lays down that the custody shall be with a specified person, the law presumes (to adopt Coleridge, J.'s words) that where the legal custody is, there it is the greatest welfare of the minor to be placed. The Court is bound by the provisions of the law in forming its opinion as to whose custody is most for the welfare of the minor. The occasional dicta, therefore, that the minor's welfare is the paramount consideration must be understood (it is submitted) in the sense, that the principle on which the Legislature proceeds, is that the welfare of the minor shall be the paramount consideration, and that this fact may be borne in mind in interpreting the words of the enactments. Sometimes the welfare of the minor clearly points who should be selected as the guardian and in the confidence that the ultimate object of the law is the minor's welfare, it is a short cut to consider the law from this aspect other than through the portals of technicality and over scrupulous interpretation. The dicta must consequently be read with the reservation that Judges cannot set their own views above those of the legislator, and if the law does lay down that a certain person is entitled to the custody of a child without any reservation (which, it may be stated, it rarely does) the Court are bound to give the custody to him in order to safeguard the welfare of the child in the manner in which the law requires it to be safeguarded: for the Courts cannot put their own ideas of what is to be deemed to be the welfare of the minor, above the behests of the Legislature. Where the law leaves a discretion to the Judge, that discretion will of course be exercised primarily with the object of promoting the welfare of the minor in accordance with the Judge's understanding; but in doing so the Judge acts in accordance with the law by which the minor is governed, — which requires the Judge to exercise his own discretion. Even the father may lose the right to custody. The law recognizes his prima facie claim, which must be borne in mind, before refering to particular considerations about the welfare of the child in question: for as already stated by giving a prima facie right to custody, it is indicated that the welfare of the minor will prima facie be best safe-guarded if he is in the guardianship of that person."

It may be objected that if every rule of Muhammadan Law is subordinate to the interests of the child, how do the rules affect a case under section 25 at all. The answer is simple. We will regard the rules as raising a presumption of welfare till exceptional circumstances are proved. The above quotation from Tyabji's Muhammadan Law is substantially to the same effect. If I were dealing with an application under section 17, I would have to apply Muhammadan Law because of the words 'consistently with the law to which the minor is subject' in that section. But the Act

recognises the father as natural guardian and the only application he can file is under section 25. If I do not apply Muhammadan Law in this case it would create an anamoly in that if a relative other than the father applies under section 17 he can have all the rights which personal law gives him. whereas the father, because he has to apply under section 25, would not get the benefit. The Muslim Law of pre-emption has been applied in the Allahabad Courts between Muslims merely as a principle of equity, justice and good conscience. I see no reason why I should not apply the principles of Muhammadan Law as to the welfare of the minor particularly when in matters of guardianship and minority, the Muslims in the Punjab are governed, on account of the Muslim Personal Law (Application) Act, by the rules of Muhammadan Law. I would, therefore under the circumstances, presume that the welfare of the minor would be in being restored to the father unless facts leading to contrary inference are proved.

It may be stated that there is an additional reason for the forfeiture of her right to the custody which occurred even while the mother had not yet contracted the second marriage. Though the mother has a right to hizanat, the father is the natural guardian and entitled to exercise control and supervision over the child and if the mother removes the child to a place where the father is unable to exercise his control the mother loses her right to custody. (Muhammadan Law by Ameer Ali, pages 260 and 261, Hidaya, Volume 1, Pages 390 and 391, and Muhammadan Law by Wilson, (1930 Edition), para 108). In Mulla's Muhammadan Law, paragraph 354, no doubt the rule is stated in these terms, "If she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence". The words 'during the subsistence of the marriage' are not justified. Hidaya, pages 390 and 391, deals exclusively with the case of a divorced woman and prohibits the removal of the child by her from the place of the father except to her own native place, or where the marriage was celebrated. Ameer Ali states the rule thus, while quoting Fatawai-i-Alamgiri, (page 261, Volume II):—

> "When a separation has taken place between the parents, the mother is entitled to return with her infant child to her native city (if the marriage took place there), however distant it may be from the residence of the father. "But", adds the Fatawa-i-Alamgiri, "she cannot do so if the marriage did not take place there, unless it is so near the place of separation that if the husband should leave his own residence in the morning to visit the child he can return home before night," nor can she "remove to any other city or any other condition."

In this case the father belongs to Lyallpur. As far as it appears on the record, Mst. Ghulam Fatima does not belong originally to Rawalpindi, and applying the above mentioned rule she would forfeit her right even on this account.

I now come to the question of the father's conduct and the general consideration of the child's welfare. It has been urged against the father that he took no interest in the child till he put in the present application. The father replies that as far as he knew the right of custody belonged to the mother till she remarried and that as soon as she remarried he put in this application. It does seem that he was only waiting for an opportunity. No doubt he has not been paying any maintenance but none was asked for, and the child was only six years old when the divorce took place. It is not a case which calls for an exhaustive discussion of the question as to when a father by his conduct loses his right to custody. It is sufficient to point out that even by a deliberate agreement a guardian cannot make an irrevocable transfer of his authority over his children to another. His authority is in the nature of trust and should the minor's welfare require that he be restored to the parent, no agreement can stand in the way. The only exception to this rule, recognized by Their Lordships of the Privy Council in *Annie Besant* v. *Narayaniah*[9] is, where "the authority (transferred authority) has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create association or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint." There is no doubt that it is hard for the mother to part company with the daughter, she probably being her strongest interest in life, but sooner or later the girl is to be married and she is not always to live with the mother. The mother gets only about Rs.60 as pay and this income would be hardly sufficient to meet the expenses of both if the girl is to be properly educated. The father seems to be possessed of some means. He has paid about Rs.400 as income tax. He has offered to deposit Rs.10,000 at once in the name of the girl to meet the expenses of her marriage, an undertaking by which I am going to bind him. He has also ordered to educate her properly and is even prepared to put her in a hostel of some girls' school at Lahore. If the minor lives with her father there is a far better chance of her getting a suitable husband than if she stays with her mother. At the same time as the mother is entitled to see the child it would be the duty of Muhammad Bashir to afford all reasonable opportunities and facilities to the mother for meeting the child. This is necessary not only on account of the right of the mother but in the minor's interest for she should not be absolutely deprived of the company of her mother. The learned Judge had ordered that the custody of the girl be handed over to the father after the 20th November 1953 when she will be thirteen years of age. But the minor is studying at a school and if she is taken away from Rawalpindi in the middle of the school year this will interfere with her studies. The proper time for her being handed over to the father would be the first

of April when the school year begins. In view of what is stated above I pass an order for the restoration of the minor Nasim Akhtar to her father Muhammad Bashir from the 1st April 1953. The father shall, in accordance with his undertaking, deposit Rs.10,000 in the name of the minor and show the receipt to the Guardian Judge before the 1st April 1953. At the same time he will allow all reasonable facilities to the mother for seeing the child. If he does not abide the conditions or acts in any other way to the detriment of the child it is always open to the mother to move in the matter."

In the case of *Amar Ilahi* v. *Rashida Akhtar*[31] it was held that a father applying under section 25 of the Guardians and Wards Act for restoration of the custody of a minor on the mother's marrying a stranger will only succeed if it is for the welfare of the minor to return to the custody of her guardian. On the facts in that case it was held that the father was not entitled to succeed in his application. Akhlaque Husain J. said –

"It was strenuously contended by the learned counsel for the appellant that on account of her remarriage with a person who is not related to the minor within the prohibited degrees the respondent has absolutely disqualified herself from being the custodian of the minor's person and, therefore, there is no alternative to the grant of the appellant's petition Reliance was placed upon a Single Bench decision of this Court in *Mst. Mehraj Begum* v. *Yar Muhammad*[11], and the ruling of a Single Bench Judge of Baghdad-ul-Jadid High Court in *Mst. Ghulam Janat* v. *Babar Shah and others*[32]. In both these cases a ruling of the Oudh Chief Court in *Ansar Ahmad* v. *Samidan*[33] was followed without any discussion. In *Ansar Ahmad's case* Pullan J., without reference to any authority, laid down: "Where the law definitely lays down that an appointment of a certain guardian cannot be made, it is not proper for the Court to disregard the law even in the interests of the minor." I regret I am unable to agree that these rulings have correctly stated the law on the subject. The abstract proposition stated by Pullan, J. is unexceptionable; but the question is, has the Muslim law absolutely prohibited a mother who marries a person not related to the minor within the prohibited degree from being appointed as a guardian under all circumstances? It is true that such a view has been expressed in some reported cases, but there is no warrant for it in the original texts of Muslim law. In the chapter on "Hizanat" in Baillie's Digest of Muhammedan Law it has been stated: "The rights of all the woman before mentioned are made void by marriage with strangers." Keeping in view the entire scheme of Muslim law regarding Hizanat, there can be

[31] P.L.D. 1955 Lah. 412.

[32] P.L.D. 1952 Lah. B.J. 53

no doubt the "the right" referred to in this sentence is the preferential right of certain female relations of the minor to its custody. The females possess this right in the following order: –

(1) mother;
(2) mother's mother, how high soever;
(3) father's mother, how high soever;
(4) full sister;
(5) uterine sister;
(6) consanguine sister;
(7) full sister's daughter;
(8) uterine sister's daughter;
(9) consanguine sister's daughter;
(10) maternal aunt, in like order as sisters; and
(11) paternal aunt, also in like order as sisters.

The right referred to above can only mean the right of a particular female who, failing those mentioned prior to her, has a right to the custody of the minor in preference to those whose rights have been subordinated to hers. It is a well accepted maxim of Muslims that, failing any female or male relations possessing the right to the custody of a minor or such relations as there may be having lost their "right" on account of some defect or disqualifications, the care of the person of the minor is a concern of the Judge who may make such an order as he may deem proper and may appoint even a stranger for that purpose. From this it is clear that when it is said that the right of a certain relation has been lost, it can only mean that all things being equal, he or she, as the case may be, must be relegated to a position in the order of priority below those follow him or her. Thus there can be no room for supposing that the Muslim Law does not permit a disqualified relation to rank even with strangers.

The corresponding rule in Hamilton's Hedaya has been discussed and explained in *Mst. Samiunnisa* v. *Mst. Saida Khatun*[16] by Malik J., in the following passage, with which I respectfully agree: –

> "The whole law on the subject seems to have been developed on a reply by the Prophet to a woman who had separated from her husband that she had a right in the child in preference to that of her husband so long as she did not marry with a stranger. The reason given in the Hedaya is that the stranger to whom the mother may be married will not have the same affection for the child and may ill-treat her and the context in which the whole matter is discussed is the respective merit of the various relations and the central idea is as to who is more likely to look after the welfare of the minor. There seems to be nothing in that chapter to indicate that it is sort of punishment to the mother when she, by reason of the fact that she

had married a stranger, is to be punished by not being allowed to have the custody of the child even though there may not be any other person capable of looking after the minor."

It would thus appear that by marrying a stranger a mother, or a female relation, only loses her preferential right to the custody of a child which means that if there is another relation of the minor who possesses a right under the Muslim law to the custody of the person of the minor and to whom the welfare of the minor can be safely and properly entrusted such a female relation cannot claim the custody of the child as of right. In this view I am supported by the rulings in the case of *Mst. Samiunnisa* v. *Mst. Saida Khatun Tumina Khatun* v. *Gobarjan Bibi*[14], *In re Ghulam Muhammad*[33] and *Gunna and another* v. *Dargahi*[34]. It would be wholly wrong to suppose that the Muslim law of guardianship creates rights in respect of minors for the benefit of their guardians. On the contrary, that branch of the law was evolved for the benefit and welfare of the minor; and certain relations were given preferential right to the custody of the minor because normally those persons are more interested in the welfare of the minor and are, therefore, better suited to act as guardians.

Even if the appellant's contention were sound it would not be decisive in this case because here the Court is not called upon to appoint a guardian at all. This is a case where a guardian is asking for the return of the minor to his custody. The distinction between the two cases is apparent from a bare perusal of section 17, subsection (1) and section 25 subsection (1) of the Guardians and Wards Act, which are in the following terms:—

Section 17, subsection (1):

"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."

Section 25, subsection (1):

"If a ward leaves or is removed from the custody of a guardian of his person, 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, may make an order for his return, and, for the purpose of enforcing the order, may cause the ward to be arrested and to be delivered into the custody of the guardian."

It will be noted that the Court is not required, while dealing with an application under section 25 for the return of the minor to the custody of its guardian, to make an order "consistently with the law to which the minor is subject", as in the case of appointment of guardian. All that the

[33] A.I.R. 1942 Sind 154.

[34] A.I.R. 1925 Oudh 623.

Court has to consider is whether 'it will be for the welfare of the ward to return to the custody of his guardian'.

Applying the test laid down in section 25 it cannot be said that in the circumstances of this case it would be for the welfare of the minor, Kishwar Sultana, to return to the custody of her father. The appellant, in order to avoid his liability for the maintenance of the minor, and for the dower debt of her mother, gave up all claim to the custody when the child was of tender age. Since then he has not only taken no interest whatever in her existence but has never cared even to see her; and the girl is now unable to recognise her father and unwilling to go to him. These facts demonstrate the appellant's selfish nature and his utter indifference to the minor. On the other hand the mother and her sister have done creditably by the minor. They have not only brought her up as best as their means permitted but have also given her education. The girl is now of a sufficiently mature age and discretion and her refusal to go to the appellant must, in the absence of special circumstances to the contrary, be respected. The appellant had launched upon the present litigation apparently for the purpose of being able to marry the girl to some one of his choice. He is hardly the right person to select a husband for the girl: and the latter's refusal to go to him also impliedly includes her refusal to accept a husband of his choice. Moreover, she would be eighteen years of age within a few months and there is now no question of any one inflicting upon her a husband contrary to her wishes."

In the case of *Ali Akbar v. Mst. Kaniz Maryam*[35] the facts were that when the parties were divorced the wife took custody of the children, a boy aged 11 years old and two younger girls. The mother took the children to live in Karachi where her brother was employed. The father applied for custody of the boy. The question was whether it would be to the welfare of the body to return him to the custody of his father. Kaikaus J. reiterated his view which he explained in *Mohamed Bashir* v. *Mst. Ghulam Fatima*[30] as to the correct approach in such cases with respect to the determination of the welfare of the minor. He said –

> "If by Mohammedan law a particular relative is entitled to the custody of a minor we should presume, in the absence of proof to the contrary that the welfare of the minor is (in) being delivered to that person. There is no conflict between the Mohammedan law and section 25 of the Guardians and Wards Act which deals with the welfare of the minor. I have fully explained in *Mohammed Bashir* v. *Mst. Ghulam Fatima* that all the rules of Mohammedan law governing custody of minors are rules relating to the welfare of the minor and are in all cases subject to this dominant consideration.

[35] P.L.D. 1956 Lah. 484.

They are rules which simply raise the presumption of welfare. It should be obvious that there cannot be any conflict between the right of custody under Mohamadan law and section 25 of the Guardian and Wards Act. It cannot possibly be assumed that Mohammedan law grants the custody to a person the grant to whom of custody is not in the interest of the child. Any other interpretation of section 25 for the Guardians and Wards Act would as I have explained in the above mentioned case lead to an anomaly"

In this case the learned judge held that there were no reasons shown to deprive the father of his custody of the boy and therefore custody should be given to him.

In the case of *Atia Waris* v. *Sultan Ahmad Khan*[36] the facts were that on the death of her husband the minor's mother, the appellant, wanted to leave her parents-in-law with whom she and her husband had been living, the minor having been looked after from infancy by her father's sister. The mother was told however that she was at liberty to leave but she could not take the minor daughter with her. The mother was originally a Christian but had adopted the Muslim religion before her marriage. After she left her husband's house she returned to her Christian parents and it appeared that she was not likely to bring up the child in the Muslim religion, in spite of her profession that she was still a Muslim. Mahmud J. said —

"It is not denied that the appellant, under the Shariat, is a natural guardian of the female minor and that there is not an iota of evidence on the record that she was in any way immoral in character. Her character is beyond reproach. The important question that remains to be considered is issue No. 5 i.e., "is it in the welfare of the minor that she should remain in the custody of the respondents?" In this connection it is necessary to set out the provisions of section 25 of the Guardians and Wards Act —

Section 17 of the Act may also be quoted:—

"17. (1) 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.

(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 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.

(3) If the minor is old enough to form an intelligent preference,

[36] P.L.D. 1959 Lah. 205.

the Court may consider that preference.

(4) As between parents who are European British subjects adversely claiming the guardianship of the person, neither parent is entitled to it as of right, but other things being equal, if the minor is a male of tender years or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father.

(5) The Court shall not appoint or declare any person to be a guardian against his will."

Section 25 of the Act enjoins the return to custody of the minor "if it will be for the welfare of the minor". This is, therefore, the deciding consideration.

A comparison of this section with section 17 also goes to indicate that the dominant consideration in a application under section 25 of the Act is the 'welfare' of the minor. In section 17 in appointing a guardian the welfare of the minor has to be considered consistently with the law to which the minor is subject. Section 25 does not contain the words "consistently with the law to which the minor is subject". It thus appears that in an application under section 25 which can be made by a legal guardian or a natural guardian, the dominant consideration is the welfare of the minor. This does not, however, mean that the personal law to which the minor is subject is of no consequence. If a guardian has been appointed under section 17 it will be presumed that the welfare of the minor lies in his or her restoration to the lawful guardian, until it is proved to the contrary. Similarly if a person is a natural guardian under the personal law, it shall be presumed that the interest of the minor lies in his restoration, to him or her, until the contrary is proved, for the personal law must be deemed to enjoin what is for the welfare of the minor. Under the Muslim Personal Law the mother is entitled to the custody of a girl up to her attaining the age of puberty, and, consequently if she applies for the restoration of her minor daughter the Court must raise an initial presumption in her favour. In *Muhammad Bashir v. Mst. Ghulam Fatima*[30] Kaikaus J., has held that "all rules of Muhammadan Law relating to guardianship and custody of the minor are merely the application of the principle of benefit of the minor to diverse circumstances. Welfare of the minor remains the dominant consideration and the rules only try to give effect to what is minor's welfare from the Muslim point of view". The conclusion is that "we will regard the rules as raising a presumption of welfare till exceptional circumstances are proved". Mr. Jafery the learned counsel for the appellant contends that the minor must be restored to the natural guardian entitled to the custody under the personal law, even if the minor's welfare lies elsewhere and it may even be against her welfare. His argument is that the welfare of the child can be ignored if it conflicts with the personal law and he relied for this proposition on *Ansar Ahmad* v.

Sameedan (2), *Mst. Miraj Begum* v. *Yar Muhammad* (3) and *Mst. Kundan Begum* v. *Aisban Begum*[13]. These are cases under section 17 of the Guardians and Wards Act. In the first case, the mother of a minor girl had married a stranger i.e., outside the prohibited degree. In considering her right to the custody of a female minor and rejecting her claim to her custody it was held as follows:—

"All the authorities of Muhammadan Law are agreed that the mother is disqualified from guardianship even of her minor daughter if she marries a man who is not related to the minor within the prohibited degrees. Under section 17 of the Act a Court in appointing a guardian must make an appointment 'consistently with the law to which the minor is subject'. Where the law definitely lays down that an appointment cannot be made, it is not proper for the Court to disregard the law even in the interest of the minor."

The other two cases being alike on facts followed the first case, and a direction was given that in place of the mother the other persons eligible for appointment as guardian under the Muhammadan Law be considered for appointment as guardian bearing in mind the welfare of the minor. These three cases illustrate the principle that in face of a positive prohibition in the personal law the mother should not be appointed a guardian of the person of a female minor and other persons eligible should be considered and appointed, bearing in mind the welfare and interests of the minor. The cases do not lay down the principle contended for by the learned counsel, and his contention is also opposed to the weight of authority and large majority of decisions in cases under section 25 of the Guardians and Wards Act. The learned counsel for the respondents relied, on the other hand, on *Mst. Siddi-un-Nisa* v. *Nizam-ud Din*[7] a Division Bench Case under section 17 of the Act which holds that "as to the power to appoint and declare the guardian of a minor the personal law of the minor is to be taken into consideration, but that law is not necessarily binding upon the Court which must look to the welfare of the minor consistently with that law". Again in *Nadir Mirza* v. *Munir Begum*[37] it was held as follows:—

"Under the Guardians and Wards Act a Court in appointing or declaring a guardian of the minor is guided first by the provisions of section 17 of the Act, and secondly, by what appears to be for the welfare of the minor consistently with the law the minor is subject. If the Court had only got to consider the law, the mother, even although she is no longer a Muhammadan, would be able to take this child away from his father's house and act as his guardian, but the Act allows a Court much wider discretion than this. By placing the provisions of the section above the law

[37] A.I.R. 1930 Oudh 471.

to which the minor is subject the Act makes it open to the Court to consider other matters as well as the personal law even if they are opposed to that law."

In *Winifred MacQuillan* v. *Winifred Chapman*[38] it has been held that in appointing a guardian the welfare of the child must outweigh all other considerations even though the effect may be to deprive the mother of custody of the child. In *re Gulbai and Lilbai, Minors, Dhaklibai widow*[39] it has been laid down that the entire well being and happiness of the minors ought to be the main and paramount consideration of the Court in selecting a guardian. *Mst. Haidri Begum* v. *Jawed Ali Shah*[40] decides: that the main question for consideration is what would be more conducive to the child's welfare i.e., the child would be better looked after and the personal law of the parties should also be taken into consideration. In *T.N. Muthuveerappa Chetti alias T.N. Batcha Chetti and another* v. *T.R. Pnoouswami Chetty*[41] also it was held that the welfare of the minor was the main consideration though regard must be had to well recognised right of guardianship. *Saraswatibai Shripad Ved* v. *Shripad Vasanji Ved*[42] lays down that the paramount consideration is the interest of the minor rather than the right of the parents.

That welfare of the minor is the paramount consideration; that material, moral and spiritual well being is the deciding and governing consideration in awarding custody of the minors is illustrated by the following cases, which also throw a light on what constitutes their welfare. In the case of *W.* v. *W*[43] Lord Merrivale emphasised that the welfare of the minor was the first and foremost consideration (on the construction of the enactment) and that many elements entered into the welfare of an infant and such matters, which were of immediate consideration were the comfort, the health and the moral, intellectual and spiritual welfare of the child. In *Mookand Lal Singh* v. *Nobodip Chander Singha and another*[44] the question of money, comfort and moral and religious welfare are emphasised in the words below:—

"Then we have to consider what is really for the welfare of this minor using the term "welfare" in its wider sense and looking not only to the question of money and comfort but to the moral and religious welfare of the child and to the ties of affection."

In *Bindo (opposite party)* v. *Sham Lal (applicant)*[45] the consideration

[38] A.I.R. 1920 Cal. 346.

[39] I.L.R. 32 Bom. 50.

[40] A.I.R. 1934 All. 722.

[41] 13. I.C. 16.

[42] A.I.R. 1941 Bom. 103.

[43] [1926] P. 111.

[44] I.L.R. 25 Cal. 811.

[45] I.L.R. 29 All. 210.

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was whether the girl would be as happy in the new home as in the previous one so that her 'happiness' was her welfare. In *re Gulbai and Lilbai, Minors, Dhaklibai, widow*[39], petitioner, the welfare is more exhaustively defined as the paramount consideration. It was held that:

"But the mere legal right to be appointed a guardian, the preference of the minors and the existing or previous relations are very minor considerations as compared with the main question — what order would be for the welfare of the minor? In making orders appointing guardians for the persons of minors the most paramount consideration for the Judge ought to be — what order under the circumstances of the case would be best for securing the welfare and happiness of the minor? With whom will they be happy? Who is most likely to contribute to their well being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents if they had been alive? In fact the main question for the Court to consider in the case of the unfortunate minors who have lost their natural guardian is who amongst the relations or for the matter of that, friends of the minors can you select who will supply as nearly as possible the place of their lost parent or parents? The interest, well being and happiness of the minors ought as I said before to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor."

In cases of female minors the consideration of who can provide a dowry and marry off the minor suitably is also a strong consideration affecting her welfare as in *Muhammad Bashir v. Mst. Ghulam Fatima*[30]. All these cases lead me to the conclusion that the welfare of the minor is the dominant consideration. In considering the welfare the Court must presume initially that the minor's welfare lies in giving custody according to the dictates of the rules of personal law, but if circumstances clearly point that his or her welfare dominantly lies elsewhere or that it would be against his or her interest, the Court must act according to the demand of the welfare of the minor, keeping in mind any positive prohibitions of personal law.

Under the law, a minor must be presumed to have the father's religion and corresponding civil and social status and it is the duty of a guardian to train and bring up his award in his father's religion. *Helen Skinner* v. *Sopha Evelina Orde* etc.[46] and *Canon S.S. Allnutt* v. *Mst. Badamo and another*[47] This is conceded by the learned counsel for the appellant, and he points out that the appellant has undertaken in her statement to bring up the minor as a Muslim. The learned counsel for the respondents relying on

[46] (1871) 14 M.I.A. 309.

[47] 32 I.C. 897.

Nadir Mirza v. Munir Begam[48], *Mookand Lal Singh v. Nobodip Chander Singha and another*[49] and *Ram Parasad v. District Judge of Gorakhpur another*[50] insists that she would not do so and that the minor's faith is not safe in her hands, as she could not bring her up as a Muslim. In *Nadir Mirza v. Munni Begam* the following observations were made:—

"Generally speaking a Court of justice is loath to take sides in a case between rival religions, and where a male child has been born and brought up in the faith of his father, he should not be handed over to his mother who left that faith, and has thereby stepped outside the family in which she was married, with certainty that the boy will be induced to leave the religion of his father for the new religion of the mother.

Where a child is born to a Shia Muhammadan and has been brought up in that faith by the father till his death, and has not lived for two years with his mother after she changed her religion, the mother should not be allowed to come forward on the father's death and take away from the custody of his paternal grandfather the son, whom she had herself left with his father, from the religion and surroundings in which he has so far been brought up."

As the mother had been separated from the child for about two years so that the ties of affection were no longer strong, had left her son with his grand-parents, as she had one child already with her, as she could not even look after the son, who was with her, as she was living in a charitable home due to her poverty and had changed her religion, it was not considered in the minor's interest to hand over the child to the mother, who was entitled under the personal law to his custody.

In *Mookand Lal Singh v. Nobodip Chander Singha and another* the father who was originally a Hindu had become a Christian and had abandoned his family residence leaving the minor with the paternal and maternal uncles of the boy. It was held that the father though, prima facie, entitled to the custody of the infant child could be deprived of the paternal right if the circumstances justified it, and, in case of a child who had been brought up as a Hindu, had expressed a desire to remain a Hindu, by living with his Hindu relations, who were maintaining him and were looking after his education properly, it was not in the welfare of the child that he should be handed over to the father and brought up in the Christian faith. The restoration of the minor to the father was, therefore, refused. The following observation may be quoted with advantage, as applicable to the present case, for the suspicion that the child's custody was desired to bring him up in a different religion weighed for disentitling the father from the custody of his son:—

[48] I.L.R. 6 Luck, 350.

[49] I.L.R. 25 Cal. 881.

[50] 57 I.C. 651.

"There are some matters incidental to his question, -- and one can scarcely avoid, if not concluding, at any rate suspecting, that the real question in this litigation is as to whether this child is to be brought up as a Christian or as a Hindu – which to my mind are fairly well established".

Reliance was placed on the observations of Lord Justice Lindley in the case of *In re Newton*[51]

"But as a legal proposition, it is clear that the Court has jurisdiction in a proper case to deprive a father of the custody of his children, and it also has jurisdiction to decline to change the religion in which the children have been brought up."

It was pointed out that the judiciary administered the law, that the Judge could not say that one religion was better than another, and that under the Guardians and Wards Act the welfare of the child must be looked to. As the child had been allowed by his father to remain with his Hindu relations, who were willing to educate and take care of him, who had in fact maintained and educated him for some years at their own costs, as the child had been permitted to be brought up according to the rites of the Hindu religion, and if the child was handed over to the father it would have resulted in the breaking of the ties of affection and destroying the associations connected with his Hindu relations, the father was regarded as having abdicated his parental rights this demand of the child's custody was held to be "a capricious, if not a cruel, resumption of his paternal authority" to compel the child to be brought up henceforth as a Christian. In *Ram Pershad v. District Judge of Gorakpur and another* which is a case under section 17 of the Guardians and Wards Act, it was held that in considering the question of the custody of a young girl and the appointment of a guardian, regard should be had to the material and spiritual welfare of the child. Having regard to section 17 of the Guardians and Wards Act preference should be given to one who will bring her up in the religion of her people. In this case Mst. Rajeshri was the daughter of Mst. Zagmag, a prostitute, and Ram Prasad, the minor's uncle, in whose custody she was, wanted the child to be taught singing and dancing with a view to adopting the profession of a dancing girl. The Guardian Judge had placed the child in the custody of Miss Booth of the Zenana Bible and Medical Mission, Gorakhpur. Miss Booth was a lady very highly respected and there was no doubt that the work she did was a labour of love and work done well; but all the same it was held by the Allahabad High Court (Sir Grimwood Mears, Chief Justice, and Sir P.C. Benerji) that she was a Christian and unconsciously it must be that the daily teaching in her institution would have a tendency to remove the early traces of the

[51] [1896] 1 Ch. D. 740.

religion, Hindu or Muhammadan, from the minds of children who were in her care and to instil into them the principles of the Christian religion. It was not doubted for a moment that this was done by way of proselytising, but as the mind of the child was very impressionable, even the simple Bible stories which were only taught, told beautifully and with feeling must, it was held, sink into the mind and bear fruit. Therefore, when the child had reached an age when she could make up a decision for herself, it was very likely that the decision would be one to embrace the Christian faith, and that would particularly be the case if, as was stated, Mis Booth treated the children with loving kindness and they were happy with her. The uncle of the minor having been found unsuitable, a Hindu gentleman Avadh Behari Saran, a stranger, was allowed to have the custody of Mst. Rajeshri, so that she could be brought up as a Hindu, and was removed from surroundings in which she was likely to change her religion for Christianity.

On the basis of the above decisions the learned counsel for the respondents urges that it was impossible for the minor to be brought up in the faith of her father if she was entrusted to her mother's custody. In this connection it is pointed out that the appellant had been a devout Christian before her marriage, had had no interest in Islam even after conversion and had started attending the Church regularly after the death of her husband on her return to her parents. In these circumstances, it was argued that there could not be the least doubt that the minor would not be brought up according to the faith of her father, and she must inevitably grow up as a Christian especially because the petitioners' parents are so strongly devoted to Christianity as to entertain the feelings which are contained in Exh. D.1, i.e., the father wanted to poison the appellant rather than that she should marry a Muhammadan. The father is a Protestant and the mother is a Roman Catholic and both are devout Christians, the mother more so. It is argued that no arrangement could be made in the house of her mother for beinging her up a as Muslim for the mother knew nothing at all about Islam. The Guardian Judge has mainly relied upon this consideration in refusing the custody of the minor to the mother. The fear that the minor would not be brought up in the faith of her father, which undoubtedly is the duty of the guardian to do, is real and substantial, in spite of the finding that it cannot be held that the appellant has been reconverted to Christianity. It is clear by her own conduct where her choice lies and what feelings she entertains towards the Christian religion and her parent's feelings are also clear. The minor has to be brought up in her grand-parents' house and as such must depend upon them and was bound to be influenced by their faith and beliefs. It is thus argued with good reason that she was bound to grow up as a Christian by being influenced by them and there could be no possibility of the minor being brought up as a Muslim even if the mother left her parents, which was

unlikely. I, therefore, agree, on the basis of the above discussion, with the view of the trial Court that it is not in the welfare of the minor to entrust her custody to the mother, for the minor would not be brought up in the faith of her father. There is really more to this. The application seems to be motivated by an ulterior motive and that appears to be to obtain the minor so that she grows up as a Christian. Mr. Matheus though deadly opposed to the marriage and though he had not cared to meet the children during the life time of Waris Sultan Khan, suddenly supported his daughter for the custody of this minor. He has a large family consisting of a wife, four daughters and a son to feed, clothe and educate. He was a guard in the N.W. Railways, and is now on leave preparatory to retirement getting about Rs.225 p.m., as he told me. He is due to retire on 13th August 1959 when his service will cease. His wife has also no income now as they are now living at Rawalpindi. Mr. and Mrs. Matheus have not the means, nor affection for the child to show such sudden anxiety for the care of the child, and the only reason one can think of is that they are anxious that the minor should grow up in the fold of Christianity and add to the number. The view expressed in *Mookand Lal Singh* v. *Nobodip Chander Singh and another* has an important bearing on this application. It will not be in the interest of the minor to grant such an application.

This is not the only consideration which leads me to the decision that it is not for the welfare of the minor that she should be entrusted to her mother. Her welfare in my view lies in her remaining with her paternal aunt and grandparents who admittedly are looking after her and are bringing her up well. It is established on the evidence on the record that the child was fed by and brought up by her aunt Mst. Qamar Sultan, and she used also to sleep with her so that as admitted by the appellant, the child is intensely devoted to her and her parental grand-parents. As the first child as is not unusual, she was left to be looked after by the grand-parents, for the appellant and her husband must have been engrossed in their own love as young people happily married are, and cared more for their own happiness than the care of the child, whose upbringing was welcomed by her aunt and grand-parents. The minor is now devoted to her aunt and grand-parents after four year's association, and it is not in her interest to tear her away from them and break up the ties of affection (which would be a cruel exercise of her maternal right) and hand her over to the mother, whose ties are not so strong and who left the child of her own choice to go to her parents, which shows that her desire to leave for personal comfort was stronger than the affection she had for this child. The child has now been parted from the mother for over a year and a half, has not been seen or visited by her so that the ties of affection are very slender, and it is not the motherly love and affection which could have prompted this application.

The next and a very important consideration is that the mother is practically penniless and has not the means to support herself or her children. Though at the time of her making the application she was employed as a teacheress at Rs. 75 per mensem in Y.W.C.A., Multan, she is out of a job now. On the evidence it is clear that even at Multan the son, who is with her, was provided for and looked after by the maternal grandparents. A sum of Rs. 75 could hardly have been sufficient for the needs of the mother and the child for there was an Aya to pay Rs. 20 or Rs. 25 p.m. as salary. They were thus being supported by the appellant's parents. They are now entirely on their mercy, for the appellant is now without a job and has no means even to feed herself or her child, what to speak of providing for their education or their growing needs as time passes. Therefore, she is wholly unsuited, because of her utter lack of resources to have the custody of the minor. It is stated at the Bar on the basis of a letter a copy of which has been placed on the file, that the appellant is likely to get a job in the Bern Hall School in the first week of March 1959. No salary is mentioned and no definite post is offered in the letter. It is, however, mentioned orally that the salary that she is likely to get is going to be about Rs. 150 a month. Even so, her resources will be too meagre to bring up two children besides maintaining herself. The job may be of uncertain duration even if the offer be taken as firm. The minor, if handed to her custody, would be placed in straitened circumstances from a position of security and comfort and her prospects would be jeopardized. The minor is being cared for and well looked after by the respondents on the appellant's own admission and the respondents love her dearly. Another consideration to bear in mind is her happiness. Apart from being taken away from the people to whom she admittedly is devoted she would be extremely unhappy in the new and changed circumstances where she will be in a home with so many strangers. It is admitted before me that besides the appellant, four daughters and one son are living with Mr. and Mrs. Matheus at Rawalpindi. One of the daughters is married to Mr. Daniels. They have two children and they are also living jointly with them. In this home she could neither have an equal or same status nor consideration or affection as she is getting now. Her position amongst them would be that of a stranger and an interloper particularly if she is to be brought up as a Muslim. She will also be among persons, who are not in the prohibited degree and for this reason on grounds of dictates of rules of personal law also this home is not suitable for her.

The appellant is still young and may well marry and in such an event she would be disentitled, under the personal law, to have the custody of the minor. It is not in my view for the welfare of the minor, that she should now be removed from the people, who are looking after her, to be handed over to a new family and she may have to be driven out of that house, back again. Frequent breaking of ties of affection is not in the

interest of the minor.

The Court has also to bear in mind the welfare of the minor with regard to her prospects of marriage and dowry. It is clear that the appellant will be in no position to provide her with a dowry or to marry her suitably. The respondents are in a far better position to do so. To leave her with them, is, therefore, in her larger interests. Mr. Sultan Ahmad respondent No. 1 has had his claim verified to the tune of Rs. 2,96,000 in respect of property left by him in India. He has offered to make a will giving this minor and her minor brother in the custody of the appellant, the share which their deceased father, Waris Sultan Khan, would have got according to Shariat on his death as if he were alive. He undertakes to execute the will and I propose to bind him by this order and direct that he shall make a will and deposit it in Court within a month of today. This is a very material advantage which the minor gets by remaining with the respondents and she cannot hope to get any property from her mother. The circumstances of the respondents' family are such that the minor can be brought up suitably according to her social status and position. Mst. Qamar Sultan and her sister run a private K.C. School so that they can look after the education and bringing up of the child even in case anything happens to the grandparents of the minor.

The appellant's father, who was present during the hearing of the appeal, has stated that he is getting Rs. 225 p.m. as pay preparatory retirement as a guard and is due to retire on 13th of August 1959, when he will cease to have any income. He claimed that he had received Rs. 20,000 as gratuity and another Rs. 9,000 was due to him. This was pressed before me as income of the family. It cannot be considered as income of the appellant and in any case the gratuity must be treated as a capital saving and not as income which the Matheus will need for themselves and their own children and they are getting on in years. Theirs is not, in my view, a home suitable for the minor and she should not be thrown on the charity of the Matheus.

In view of what is contained in Exh. D.1, it is clear that the father of the minor would not have desired the minor to be brought up in the home of her maternal grand-parents. He would undoubtedly have liked her to brought up by her paternal grand-parents in accordance with Muslim traditions. This circumstance must also be borne in mind. With the mother having no income and considerations of the material, intellectual, moral and spiritual welfare of the minor as stated above outweigh the demands of rules of personal law, and overwhelmingly demand that the minor shall remain with the respondents. The finding on issue No. 5 must, for all these above reasons, be in favour of the respondents. It is not, therefore, for the welfare of the minor that she should be handed over to the appellant. I, therefore, dismiss the appeal but, in the peculiar circumstances of the case,

the parties shall bear their own costs.

The respondent shall at all times allow the appellant to see and meet Mst. Samar Waris minor without any hinderance."

The whole question has been considered from first principles in the case of *Mst. Rashida Begum* v. *Shahab Din*[52]. In that case one Umar Din had died leaving a widow Rashida Begum and two minor daughters. He also left some landed property. Shahab Din, the brother of Umar Din, made an application to be appointed the guardian of the persons and property of the two minors. The application was resisted by Rashida Begum. The District Judge gave judgment in favour of Shahab Din and the mother appealed. The appeal was allowed. Mohamed Shafi J. referred to the rules set out in the textbooks. He said —

> "In practically all the textbooks some of which have been written by most eminent and distinguished jurists, lawyers and judges for whom I have profound respect there are certain sets of rules laid down which had been governing the Muslim minors in India and Pakistan both in regard to their property and their persons since a very long time. These rules, in fact, have been tenaciously followed by all Courts of India including the Privy Council right from the date of the advent of the British rule in pre-partitioned India up to the present time. It is, however, possible that these rules were followed by the Judges and the jurists even before the British conquered India, and they were continued to be followed thereafter because the Muslim jurists did not want the British or other non-Muslims to interpret the Holy Quran and enunciate law to suit their own purpose. The importance which is attached to the Fatawi-i-Alamgiri on all questions relating to Muslim Law is clear indication of this fact. The conditions have, however, completely changed now. In brief, these rules are as follows: Under the Hanafi Law, the mother, is entitled to the custody of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child unless she marries a second husband in which case the custody belongs to the father. Under the Shia Law the mother is entitled to the custody of a male child until he attains the age of two years, and a female child until she attains the age of seven years. After the child has attained the above-mentioned age, the custody belongs to the father. If the mother dies before the child has attained that age, the father is entitled to the custody. On the death of both the parents, the custody belongs to the father's father. It is doubtful to whom the custody belongs in the absence of the father's father under the

[52] P.L.D. 1960 (W.P.) Lah.1142

Shia law. Under the Shafii law, the mother is entitled to the custody of her daughter even after she has attained puberty or until she is married. Under Hanafi Law failing mother, the custody of a boy under age of seven years and of a girl who has not attained puberty belongs to the following female relatives in the order given below:—

(1) mother's mother, how highsoever;
(2) father's mother, how highsoever;
(3) full sister;
(4) uterine sister;
(5) consanguine sister (not mentioned in Hidaya or the Fatawa Alamgiri);
(6) full sister's daughter;
(7) uterine sister's daughter
(8) consanguine sister's daughter (not mentioned in Hamilton's Hidaya or Fatawa Alamgiri);
(9) maternal aunt, in like order as sisters; and
(10) paternal aunt, also in like order as sisters.

(In certain text-books, before full sister, mother's grandmother howsoever high and father's grandmother howsoever high are mentioned at serial Nos. 3 and 4).

Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her.

All those females, including the mother, who is otherwise entitled to the custody of the child, lose the right of custody —

(1) if she marries a person not related to the child within the prohibited degree;

(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or

(3) if she is leading an immoral life, as where she is a prostitute; or

(4) if she neglects to take proper care of the child.

In default of the mother and the female relations mentioned above the custody of the minor belongs to the following persons in the order given below —

(1) the father;
(2) nearest paternal grandfather;
(3) full brother;
(4) consanguine brother;
(5) full brother's son;
(6) consanguine brother's son;
(7) full brother of the father;
(8) consanguine brother of the father;

(9) son of father's full brother; and

(10) son of the father's consanguine brother.

Under Hanafi law, the guardian of the property of the minor child is his father and after the father's death his executor; after the father's executor the paternal grandfather and after him his executor. In the absence of the father, his executor, the grandfather and failing him his executor, the Court may take charge of the property or appoint a guardian of it. Under Shia law, the father and after him the grandfather are the guardians of the minor's property and their survivor may appoint a guardian of the property. The Shia authorities are divided as to the effect of an appointment by the father of minor child's property while the paternal grandfather is living. Neither the mother's mother, nor uncle, nor brother, nor sister, under both systems, is entitled to act as the guardian of the minor's property except on being appointed by the father or paternal grandfather of the minor or by the Court."

The learned Judge then proceeded to consider the basis of Islamic law and said that this was to be found in the Holy Quran. He then said –

"So far as the minors are concerned the principles laid down in practically all the text books which have gained the force of law in India and Pakistan are not derived from the Holy Quran. Some of the provisions of this august Book which deal with the minors may be reproduced here:–

"And the mothers should suckle their children for two whole years for him who desires to make complete the time of suckling, and their maintenance and their clothing must be borne by the father according to usage; no soul shall have imposed upon it a duty but to the extent of its capacity; neither shall a mother be made to suffer harm on account of her child, nor a father on account of his child, and a similar duty (devolves) on the (father's) heir; but if both desire weaning by mutual consent and counsel, there is no blame on them, and if you wish to engage a wetnurse for your children there is no blame on you so long as you pay what you promised for according to usage; and be careful of (your duty) to Allah and know that Allah sees what you do." (Chapter II, verse 233).

"Lodge them where you lodge according to your means, and do not injure them in order that you may straighten them; and if they are pregnant, spend on them until they lay down their burden; then if they suckle for you, gave them their recompense and enjoin one another among you to do good; and if you disagree, another (woman) shall suckle for him." (Chapter XIV, verse 6).

According to these verses, the mothers have to suckle their children for the whole two years. The father has to bear all the expenses; presumably both of the child and the woman who suckles him. This lends support to the Shia Law that a son should remain with the mother for a period of two

years, but then I have not been able to see any justification from the Holy Quran for the distinction which is made between a son and a daughter. The Holy Quran casts a duty on both the parents to look after and bring up their child. Neither the mother nor the father can be deprived of their child. In any case, there is no provision in the Holy Quran that a woman should be bereft of the child if she marries a man not related to the minor within the prohibited degrees. Strictly speaking, if a woman is to be deprived of the company of her child simply because she has married a person who is not related to her child within the prohibited degrees then on the same analogical reasoning I do not see why a man who marries for the second time should not be deprived of the custody of his child. Step-mother is just as obnoxious and dangerous if not more to the child as stepfather is. In any case, it is for the State to lay down the law with regard to the minors because the Holy Quran is completely silent about it. The Guardians and Wards Act can be considered as the law which governs the minors. It was adopted as a law after the Islamic State of Pakistan came into being by the chosen representatives of this country. But even the Guardians and Wards Act does not lay down any hard and fast rule as to who should be entitled to the custody of the child, in case mother marries the second husband. The only consideration both from the point of view of the Holy Quran and that of the Guardians and Wards Act is the welfare of the minor. If it is for the welfare of the minor to keep the child with the mother, then despite her marriage she must have a right to keep the child. Every case shall have to be decided on its own peculiar merits."

Besides the Holy Quran, the Hadith or Sunnah has been regarded as a source of Muslim law. The learned Judge considered the validity of the Sunnah as a source of law and then said —

> "The next question which has to be considered is that assuming that the traditions as compiled by the different compilers are accurate, genuine and have as much binding force as the commands of the Holy Quran whether the law written in the text books with regard to the minors derives its authority from such traditions.
>
> The entire Muslim Law with regard to the minors which has been reproduced in the earlier part of this judgment is based on a somewhat doubtful tradition reported by Ahmad and Abu Daud which is as follows:—
>
> "Amr-b-Shuaib reported from his father from his grandfather that a woman asked: O Messenger of Allah, my belly was a resting place of this son of mine, my breast a drinking place for him, and my lap a soothing place for him, but his father divorced me and wishes to snatch him away from me. The Messenger of Allah said: You have got better right to take him till you are not remarried."
>
> Al-Hadis — Miskhat-ul-Masabih — 1939 Edition,
> Volume II, page 272 — Tradition II

We do not know what were the circumstances under which the Prophet told the woman to keep her son till she remarries. By analogy this provision would also apply in the case of a daughter as well but then according to this Hadith, the mother loses the right of the custody of her child irrespective of the fact whether she marries a person related to the minor within the prohibited degree or without it. That is putting a premium on the remarriage of widows which is both against the Holy Quran as well as some of the traditions. This Hadith also does not show as to who would be entitled to the custody of the minor in case the mother remarries. The inference which can be drawn from this Hadith is that the child shall in that eventually be handed over to the father. Imam Shafi has gone to the other extreme. According to him the mother is not entitled to retain the custody of her minor children even if she marries their Mehram if he does not consent to it. This Hadith however runs counter to other traditions reported from Prophet Muhammad by comparatively better authority. Tirmizi reports as having been stated by the Prophet and heard by Abu Ayub that whose creates separation between a mother and her child, Allah will create separation between him and those dearest to him on the Resurrection Day.

"Abu Ayub reported: I heard the Messenger of Allah say: Whoso creates separation between a mother and her child, Allah will create separation between him and those dearest to him on the Resurrection Day." Al-Hadis – Mishkat-ul-Masabih – 1938 Edition, Volume 1. Page 228 – Tradition 98.

In another case Prophet Muhammad cancelled the sale of the slave girl because she was being separated from her son.

"Some reported that he made separation between a slave girl and her son. The Holy Prophet prevented him from that. Then he cancelled the sale." Page 229 – Tradition 100.

So far as the son is concerned, Ibn Majah reports from Abu Musa that the Holy Prophet cursed him who separates a father from his son and a brother from his brother.

"Abu Musa reported that the Messenger of Allah cursed him who makes separation between a father and his son, and between a brother and his brother." Page 229 Tradition 103.

Where our Holy Prophet prohibited the separation of the child from his mother he did not say that such a separation was permissible if the mother re-marries. It is difficult to say as to which tradition was the first in time. In the very nature of the things, what was said subsequently by Prophet Muhammad would abrogate his earlier opinion.

Again, in the case of a boy, Abu Huraira reported that Prophet Muhammad gave option to the minor to choose between his father

and his mother.

"Abu Hurairah reported that the Messenger of Allah gave option to a boy (to choose) between his father and mother." Al-Hadis – Miskhat-ul-Masabih – 1939 Edition Volume II page 728 – Tradition 12.

Another incident is reproduced by Abu Daud, Nisai and Darimi:–

Same reported that a woman came to the Prophet and said:

"Verily my husband intends to go away with my son while he gave me water to drink and gave me benefit. The Prophet said: This is your father and this is your mother. Take the hand of any of them which you like. He took the hand of his mother and so she went with him." Page 728 – Tradition 13.

The same incident perhaps is differently given in the following Hadith also collected by Abu Daud, Nisai dan Darimi:–

"Hilal-b-Osamah reported: While I was sitting with Abu Hurairah a Persian lady came to him, with a son while her husband divorced her and both claimed him. She then spoke in Persian to him saying: O Abu Hurairah, my husband intends to go away with my son. Abu Huraira said: Cast lottery about him. He spoke with her about it. Her husband then came and said: Who disputes with me about my son? Abu Huraira said: O Allah, verily I don't say this, except that I was sitting with the Prophet. Then a woman came to him and said: O Messenger of Allah, verily my husband wishes to go away with my son, while he did me some service, and gave me drink from the well Abu Enabah. (And according to Nisai from sweet water). Then the Prophet said: Cast lots about him. Her husband said: who is here to dispute with me about my son? Then the Messenger of Allah said: This is your father, and this is your mother. Take the hand of either of them whom you like. Afterwards he caught the hand of his mother." Pages 728 & 729 – Tradition 14.

These traditions clearly show that the boy was given an option to choose the father and the mother and there is no indication that this choice was not intended to be given to the child if the mother has re-married. There is yet another tradition in which Prophet Mohamed handed over the hand of a girl to her mother's sister because according to him the mother's sister was like a mother.

"Bara'a-b-ajab reported that the Prophet entered into a treaty on the Day of Hudaibiyyah on three conditions – on condition that if anyone of the polytheists came to him, he would return him to them, and if anyone of the Muslims went to them, they would not return him; on condition that he would enter it in the following year and stay there for three days. When he came to it (Mecca) and the fixed time elapsed, he came out. The daughters of Hamjah followed him proclaiming: O Uncle, O Uncle. Ali overtook her and caught her by

her hand. Ali, Zaid and Jafar began to quarrel about her. Ali said: I have taken her as she is the daughter of my uncle. Ja'far said: She is daughter of my uncle and her mother's sister is my wife. Zaid said: She is daughter of my brother. The Prophet handed her over to her mother's sister and said: Mother's sister is in the place of a mother. He then told Ali: You are of me and I am of you. He said to Ja'far: My appearance and character resemble with those of yours. And he said to Zaid: You are our brother and our master." (Page 726 – Tradition 10).

There are numerous traditions which enjoin the children to serve their parents and in particular the mother, which shows that Prophet Muhammad considered the mother better person to have the custody of the child than the father. All these traditions only show that Prophet Muhammad decided the questions as the facts of each case required and his decisions therefore could not be accepted as of general application. Lastly, did Prophet Muhammad (peace be upon him) himself not marry Umme Salmah who had children from her previous husband who were not related to the Prophet within the prohibited degree. Were the children taken away from Umme Salmah after she married the Prophet for this reason? History shows that they were not, then why should the children be taken away from other mothers?

With regard to the property of the minor, I have not come across any tradition laying down any hard and fast rule. After giving my anxious consideration to this question, I have arrived at the conclusion that there is no law in Islam which governs the guardianship of the person and the property of the minor. The overall consideration should be the welfare of the minor. The child should not be taken away from the mother if it is in its welfare simply because the mother has remarried a person not related to the minor within the prohibited degree. I don't see why should the mother, or mother's mother or whoever has the custody of child lose that custody after a certain age. Why should such person not retain the custody if it continues to be for the welfare of the minor. Mother and mother's mother are the only two persons who can guard the minor against any onslaught. They have that love and affection for their minor children or grand-children as the case may be, which nobody else can claim to have.

In this case, the contest is between the mother who has remarried a person not related to the minor girls within the prohibited degree and the paternal uncle of the minors. I have seen the second husband of the mother who is considerably old and very respectable looking fellow. I see no justification whatsoever to snatch the girls from the mother and hand them over to the petitioners whose sons and

other relations will certainly not be related to the minors within the prohibited degree. In the case of the girls it is necessary to see if the person who wants their custody has himself not got boys who may prove dangerous to them. In the case of the father married to another woman, that woman's relations who must certainly visit his house may be absolutely undesirable persons. It should not be forgotten that the mother or mother's mother stands in a better position to protect the minor girl from men even if they be their husband than the father or other male relations. I consequently accept this appeal, set aside the judgment of the Guardian Judge of Gujranwala and dismiss the application of Shahab Din."

In the case of *Khushi Mohamed* v. *Muhammedunnissa*[53] the appellant who had divorced his wife, the respondent, claimed custody of three children of the marriage (aged 8–11 years old) on the ground that the respondent was a woman of bad character and had no means to support the children. It was ordered in that case that the children should be delivered to the custody of their father. Bashir Ahmad J. said – "On the premises the crucial point for determination is whether the custody of the children, which the personal law recognises to be the respondent's right as against the appellant could be denied to her. The mother under the present law loses the right to custody of the children if she marries a stranger. She has so married and is therefore within the prohibition. There is no doubt that the present law favours the custody of the minors in the case of the boy until he attains the age of seven and of a girl before she attains puberty to remain with the mother. The principle is unexceptional if it advances the welfare of the minor which in all cases remains the primary consideration. Hazrat Umar (may God be pleased with him) is reported to have divorced his wife who had a minor child. Hazrat Abu Bakar (may God be pleased with him) stated the rule in the presence of several companions of the Holy Prophet (God be pleased with them all) that the sticky water which flowed from the mouth of the mother is more invigorating for the child than the purest honey which a father could provide. It merely illustrates the anxiety of our law givers to provide for the physical and emotional development of the child. At the age of seven, a small child is sufficiently advanced in years to be denied the tender care of the mother and entrusted to the father who is more appropriate to give him the proper training. The mother being better qualified in the case of a minor girl, who has not attained puberty to train her for the responsibilities of her sex takes preference over the father. But these are not the only two considerations which are germane to the issue. The moral and spiritual values constitute the life and soul of any religious system and it is only in cases where the physical and emotional development of a standard level could

[53] P.L.D. 1961 (W.P.) Lah 768.

be secured only by the sacrifice of moral and spiritual values that the former consideration yields to the former. In essence therefore the welfare of the child remains the paramount consideration. The rules of personal law in the last analysis resolve in the formulation of those principles which contribute to the maximum welfare of the minor. The normal rules are to be departed from only on the consideration that otherwise it will result in denying the minor a benefit more fundamental in character. And that rule is part and parcel of the personal law itself.

In the present case there is no escape from the conclusion that the respondent had been living a life and chosen for herself an environemnt which has the inherent danger of impairing their moral and spiritual values. The courts are always anxious and indeed it is their duty to secure the moral and social development of the minor even though in so doing they have to depart from the normal rule governing the custody of minors."

In the case of *Mst. Munawar jan* v. *Muhammed Afsar Khan*[54] it had been ordered that the custody of a boy aged about 9 or 10 years be handed to the father and the custody of two girls aged 16 years and 7–8 years be handed to the mother. Both parties appealed but on appeal the orders for custody were confirmed. J.H. Rizvi J. in giving judgment referred to the authorities and said –

> The sum and substance of these authorities is that the paramount consideration in the matter of the custody of a minor of tender years is the interest of the child rather than the rights of the parents. Under Mohammedan law, there is a presumption that the welfare of the minor lies in living with the party entitled to hizanat, but this presumption can be rebutted and if in a given case circumstances are brought out to justify depriving the party entitled to the custody under Mohamedan law, an order can be made to that effect."

In this case the learned judge found that no such circumstances had been shown and therefore he confirmed the order of custody made in the lower court.

In the case of *Abdul Jabbar* v. *Fazal Jan*[55] the facts were that the appellant the father had filed an application for the custody of his two minor children, one of whom was a boy aged about 5 years. The application was dismissed. At the hearing of the appeal, it was argued that as in the meantime, the boy had attained the age of seven years, the appellant, the father was entitled to his custody. Rizvi J. in dismissing the appeal said –

> "In the present case the petition was dismissed at a time when the boy had not attained the age of seven years and the mere fact that

[54] P.L.D. 1963 Lah. 142.

[55] P.L.D. 1963 Kar. 90.

the boy had attained the age of seven years cannot be a conclusive factor in deciding about the custody of the boy in future. The paramount consideration in these cases is the welfare of the minor and this fact should be independently tried and a finding given thereon. The appellant can now file a fresh application as far as the custody of (the boy) is concerned. The Court will then try this matter on the contentions that might be raised by the parties. It will of course be for the respondent to bring out the reasons for not giving effect to the normal rule of law that a boy after attaining the age of seven years should be given to the hizanat of his father."

In the case of *Nazeer Begum* v. *Abdul Satter*[56] the facts were that the appellant had been divorced by the respondent and that there were two children of the marriage, a boy 2½ years old and a girl born after the divorce. Subsequently the appellant married a stranger and the respondent claimed custody of the children. It was contended that under the Muslim law the mother lost her right of hizanat when she married a stranger.

Inamullah J. said there can be no two opinions about that proposition of law but it has been held in some cases that though the mother loses her right of custody on the ground of her marriage to a stranger, the court has still to see whether in the interest of the minors she should be deprived of the custody of her minor children. He then said –

"Under the Muhammadan law the mother of all persons is best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution (Fatawai Alamgiri Vol 1 p. 728). The right of the mother to the custody of her minor children, in the case of a female until the children attain puberty cannot be questioned. As I have already mentioned the mother in the present case has lost her legal right of custody of the minor children under the Muslim law because of her marriage to a stranger. This however does not deprive her, if the court was of opinion that it would still be to the welfare of the minors if they remain in the custody of the mother. There are several grounds which have led me to the conclusion that it would be to the interest of the minors if they remain in the custody of their mother."

In the case of *Hurbai* v. *Usman*[57] the respondent claimed the custody of his children a son aged about 8 years and a daughter about 5 years old. The learned trial judge gave custody to the respondent as he held that the boy was over 7 years of age and the mother was unfit to have custody of the female minor as she was poor, did menial jobs and had no home of

[56] P.L.D. 1963 Kar. 465.

[57] P.L.D. Kar. 888.

her own. The mother appealed. The appeal in regard to the boy was dismissed but in regard to the girl the appeal judge gave custody to the mother.

Anwarul Haq. J. said –

> "As regards the custody of the daughter .... it is an admitted position that under the present law applicable to her the right of hizanat is with the mother i.e. the appellant. It is also clear that there is a presumption that the welfare of the minor lies in following the rules laid down by the Muslim law (see PLD 1953 Lah 73[30], PLD 1956 Lah 488[36] and PLD 1962 Lah 142[54]). The question therefore is whether in the circumstances of the present case the presumption stands rebutted; in other words has the mother rendered herself unfit for the custody of the female minor to which she is entitled under the Muslim law.
>
> There is no doubt that compared to the father the appellant is poor and because of that very poverty she has to work. It is however clear to me that the mere fact that a mother is poor and has to work for a living can never be allowed to operate to deprive her of her right of custody of her minor children, to which she is entitled under the personal law applicable in the case. The rule of Muslim law that the custody of a boy under seven years of age and of a girl under the age of puberty, should remain with the mother is based on certain fundamental human considerations, namely that it is only a woman and a mother who can look after the needs of the child under the ages specified and who can give that love, affection and guidance which are necessary for the proper development of the child. A mother can do all this even though she be poor. As regards the question of providing adequate education for the girl the responsibility clearly lies on the father who has to provide maintenance for his minor children, irrespective of the fact whether they reside with him or with the mother. The next circumstance that the appellant has no house of her own has really not much relevance as long as she has somewhere to live. If the appellant lives in the house of her aunt or in the house of her cousin, it should make no difference to the welfare of the minor child."

In the case of *Zohra Begum* v. *Latif Ahmad Munawar*[58] the dispute related to the custody of two minor children, a boy who had attained the age of seven years and a girl below the age of puberty. The mother had been divorced by the father and the children were in the custody of their mother, who was living with her parents. Yaqub Ali J. in giving the custody of the children to their mother said –

[58] P.L.D. 1965 Lah. 695.

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"The most important question which falls for determination in this case is "What is the law to which the minor is subject?" Mr. A.R. Shaikh (as he then was) learned counsel brought to my notice various textbooks on Muslim law in which there is a divergence of opinion as to the age of a minor son and a daughter at which a mother loses the right of custody. In view of this conflict one of the questions referred to the Full Bench was "In case of conflicting views expressed in textbooks on Muslim law such as the Hedaya, Fatawai-i-Alamgiri, Radd-ul-Mukhtar, Mohamedan law by Sayyed Ameer Ali etc. how are the Courts to determine which view is correct?" The answer given by the Full Bench is that where there is no Quranic text or traditional text or ijma on a point of law and if there be a difference of opinion between Aimma and Faqihs the Court may form its own opinion on a point of law. In support of this reliance was placed on (certain) question and answers in Al-Risala by Imam Al-Shafei. On this view it would be permissible for courts to differ from the rule of hizanat stated in the textbooks on Muslim law for there is no Quranic or traditional text on the point. Courts which have taken the place of the Qazis can, therefore, come to their own conclusions by process of ijtihad which according to Imam Al-Shafei is included in the doctorine of qiyas. It has been maintained earlier that the rule propounded in different textbooks on the subject of hizanat is not uniform. It would therefore be permissible to depart from the rule stated therein if on the facts of a given case its application is against the welfare of the minor. I am fortified in this view by the instances in which a Qazi finding hardship in the application of a rule of law to which the parties belonged sent the case to the Qazi of another school of law which took a liberal view of the matter."

The learned Judge found that it was in the welfare of the minors to remain in the custody of their mother and ordered accordingly.

In *Mst. Bharai* v. *Wazir Muhammad*[59] the learned trial judge had ordered the restoration of the custody of the minor to the father, as he relied on a statement in Mulla's Principles of Mohammedan law which provides *inter alia* that a divorced mother of a minor daughter retains the right to her custody until the daughter has attained puberty unless the mother marries a second husband in which case the custody belongs to the father. In allowing the appeal Muhammed Gul J. said -

"The main question that falls for determination in this case is whether the principle of Muhammadan law (enunciated in Mulla) is absolute in its application or is variable in a case where there are certain exceptional circumstances which go to show that to follow the above rule would conflict with the welfare of the minor. It is

[59] P.L.D. 1967 Lah. 332.

true that in some of the earlier precedents this rule has been accepted as absolute, particularly in the case of a female child where the mother contracts a second marriage with a person who is not related to the child within the prohibited degree. But of late this view has undergone a change."

The learned Judge then referred to the decisions in *Mst. Nazir Begum* v. *Abdus Sattar*[56] and *Mst. Zobra Begum* v. *Latif Ahmad Munawar*[58] and said –

"The authorities leave no manner of doubt that the rule enunciated in the Principles of Mohammedan Law by Mulla is not absolute but can be departed from if there are exceptional circumstances to justify a departure from the rule".

The learned Judge then considered the question whether there were any exceptional circumstances in the case which would justify to the girl remaining in the custody of her mother, notwithstanding her second marriage. The learned Judge referred to the following facts –

(i) The respondent, too had since taken a second wife from whom he has also some children. The respondent admitted in his evidence that he had not so far been able to send Mst. Sultan Bibi, his elder daughter from the appellant, to any school, though he qualified his statement that he now intended to send her to some school after he had been created a lancenaik implying thereby that would be able to foot the bill of her education. As against this, there was credible evidence on the record that Mst. Khurshid Bibi was not only receiving religious instructions but was also reading in a preliminary school in the village.

(ii) The respondent admitted in his cross-examination that since 1958 he had not paid a penny towards the maintenance of Mst. Khurshid Bibi. He further admitted that a maintenance order under section 488, Criminal P.C. was passed against him by a criminal Court though he had not so far discharged his liability under that order.

(iii) It was in the evidence of Khan Muhammad R.W.1, who is a common relation of the parties, that Mst. Sultan Bibi is being treated as a domestic servant by her stepmother and this incidentally also explained why she has not been sent to school.

(iv) Mst. Khurshid Bibi having lived her whole life with her mother it would scarcely conduce to her welfare if she were required to go over to live with her step-mother where her elder sister, as the evidence of Khan Muhammad would have us believe, is more of a domestic servant than a full member of the family.

(v) It is not possible to get rid of the impression that the respondent applied for the custody of Mst. Khurshid Bibi not out of any love or compassion for her but merely to avoid execution of the maintenance order that had been made against him.

From the above circumstances he concluded that it would be rather unkind if not cruel to require the child to leave her mother and to reside with her father, the respondent, where the prospects of a happy life are far from bright. He therefore gave the custody of the child to the mother.

In *Bashir Ahmad* v. *Mst. Aziz Begum*[60] the dispute was in regard to the custody of a girl aged about 8 years old who had been living with her maternal grandmother, since the divorce of the mother. The mother had remarried a stranger and so had the husband. The guardian judge gave custody of the child to the father but on appeal the Judge of the High Court held that the welfare of the child lay in her continuing to remain in the custody of the grandmother. The mother was passed over and the father was also denied the custody of the girl, because next to her mother, it was the maternal grandmother who under the Muslim law had the right to custody of the minor girl at the stage of the age at which she then was. Nothing was urged or proved against the grandmother to defeat her legal and natural right to the custody of her grandchild. A further appeal to the Federal Court was dismissed, as the Federal Court saw no valid ground to interfere with the order of the High Court judge.

In *Rahimullah Choudhury* v. *Sayeda Halila Begum*[61] the respondent-wife who was being illtreated by her husband was compelled to go away and stay with her elder sister and her husband and she took her children, two boys with her. The father claimed custody of the children. The trial judge found that the mother had forfeited her right to custody as she had taken the children from the place of residence of the husband but he considered that by reason of their tender age they were to remain with the mother. An appeal to the High Court having been dismissed the appellant appealed to the Federal Court. The Federal Court dismissed the appeal and Mohamed Yaqoob Ali J. said —

"In finding that the respondent No. 1 had forfeited her right of hizânat of the two boys the trial Judge relied on the rule enunciated in para. 354 of the Principles of Muhammadan Law by Mulla and other textbooks including Hedaya (Grady's Edition); Digest of Muhammadan Law by Baillie, Fatawa-i-Alamgri (Bengali Edition) and Commentaries by Syed Ameer Ali and Tayabji to which we shall refer presently. It was noticed that the mother is, of all persons, the best entitled to the custody of her infant child during marriage, and

[60](1973) S.C.M.R. 1.

[61](1974) S.C.M.R. 305.

after separation from her husband unless she be an apostate, or wicked, or unworthy to be trusted and her right to the custody of her infant male child continues till he is independent of her care, that is till he is seven years of age, but it was held that she lost that right as she had gone away from the place of residence of minor's father, along with the minors, on 10-10-1963, and resided till 31st October 1963, in a different place in Dacca, and from 31st October, to 21st July 1964, she had resided at Mymensingh, while the marriage between the parents was still subsisting.

The "Ordinary residence of father" was construed by the trial Judge as the house of the appellant 222-New Eskaton Road, Dacca and he relied for this purpose on Baillie page 439 wherein it is said "where the husband and wife are residing in the proper place of hizanat while the marriage subsists, so that the husband cannot leave the city where they are residing and take the child with him out of the custody of the woman to whom it properly belongs, until the child is independent of her care; and if the wife should desire to leave the city he can prevent her, whether she had the child with her or not". The same view is expressed by Syed Ameer Ali in his text-book on Muhammadan Law, Volume II; 5th Edition, at page 260: "Whilst the marriage subsists the conjugal domicile is the place of hizanat; thus the home where the parents usually reside and live together as husband and wife is the place where the child should be brought up" and further: "The right of hizanat is also liable to forfeiture in case the hizanee removes the child without the consent of his father or guardian to such a distance from his usual place of residence as would prevent him from exercising the necessary supervision or control over her". In Fatawa-i-Alamgiri (Bengali translation, page 730) the rule is stated as follows:—

> "Where the husband and wife are living together, the child must stay with them and the husband cannot take the child away with him nor can the mother, even during the period that she is entitled to the custody of the child, take it away without the permission of the father; when the child is with one of its parents, the father is not to be prevented from seeing and visiting it."

The rule is subject to the qualification that when the change of residence is caused by unavoidable exigencies or when it had been made for the benefit of the children, the right of hizanat is not lost, and if the mother removes the minor against the wishes of the father to a place, where the father cannot exercise supervision and control, she forfeits her right to the custody of the minor.

In support of the appeal Mr. A.K. Brohi relied on the two judgments of the High Court of West Pakistan and the quotations from the textbooks on the subject of forfeiture of hizanat referred to above.

The rule enunciated in para. 354 of Principles of Muhammadan Law by Mulla suffers from over simplification. Similarly quotations from text-

books on Muslim Law relied upon by the trial Judge are not comprehensive. Similarly the trial Judge has left out many relevant portions of the textbooks relied upon by him on the subject of hizanat.

The rules on hizanat of children of tender age under Muslim law are based on the following tradition of the Holy Prophet (may peace be upon him):

> "A woman once applied to the Prophet, saying 'O Prophet of God that is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own care'; to which the Prophet replied, 'thou hast a right in the child prior to that of thy husband, so long as thou does not marry with a stranger'."

The tradition is quoted in Hedaya (2nd Edition, Vols. I-IV, page 138) in Chapter XIV of hizanat, or the care of infant children" and under section "in case of separation, the care of the infant children belongs to the wife". It is followed by the comment that:—

> "A mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child and Siddeek alluded to this, when he addressed Omar on a similar occasion, saying, 'the spittal of the mother is better for thy child than honey, O Omar,' which was said at a time when separation had taken place between Omar and his wife the mother of Assim. The latter being then an infant at the breast, Omar desirous of taking him from the mother and these words were spoken in the presence of many of the companions, none of whom contradicted him."

At page 139 under the title "Length of the term of hizanat" it is said:—

> "The right of hizanat with respect to a male child, appertains to the mother, until he becomes independent of it himself that is to say, he becomes capable of shifting, eating, drinking and performing other natural functions without assistance after which the charge devolves upon the father, or next paternal relation. The hizanat with respect to a boy, ceases at the end of seven years, as in general a child at the age is capable of performing all the necessary offices himself, without assistance. But the right of hizanat with respect to a girl, appertains to a mother, grandmother, and so forth, until the first appearance of the menstrual discharge, that is to say, until she attains the age of puberty, because a girl has occasion to learn such manners and accomplishments as are proper to women, to the teaching of which the family relations are most competent, but after that period the charge of her properly belongs to the father, because a girl, after maturity, requires some person to superintend her conduct, and to this the father is most completely qualified."

The parties being agreed that the mother has the right of hizanat of the boys till they attain the age of seven years, the question to be considered is whether that right was lost on account of their removal from the ordinary place of residence of the father. In Hedaya the rule on this point is stated as under:—

> "If a divorced woman be desirous of removing with her child out of a city, she is not at liberty to do it; but if she removed with her child out of a city and go to her native place, where the contract of her marriage was executed, in this case her removal is lawful, because the father is considered as having also undertaken to reside in that place, both in the eye of the law, that according to common usage for the Prophet has said, "whoever marries a woman of any city is thereby rendered a Denizen of that city"; and hence it is, that if an alien woman were to come into the Mussulman territory, and there to marry an infidel subject, she also becomes an infidel subject; it is to be observed, however that this rule does not apply to an alien man, that is to say, if an alien man were to come in the Mussulman territory, and there to marry a female subject he is not thereby rendered a subject; for if he choose, he may divorce his wife and return to his own country.
>
> If a divorced woman be desirous of removing with her child to a place which is not the place of her nativity, but in which her marriage contract was executed she is not at liberty to do it. This is demonstrated by Kadooree in his compendium, and also accords with what is related in the Mabsoot. The Jama Sagheer says that she may take her child thither, because where a marriage contract is executed in any place, it occasions all the ordinances thereof to exist and have force in that place, in the same manner as sale amounts to a delivery of the article sold in the place of sale; and a woman's right to the care of her children is one of the ordinances of marriage, wherefore she is entitled to keep her child in the place where she was married, although she be not a native of that place. . . . . In short, to the property of the woman carrying her child from one place to another, two points are essentially requisite one, that she be a native of the place to which she goes; and the other, that her marriage contract has been there executed; this, however means only where the places are considerably distant; but if they be so near that the father may go to see his child and return the same night, there is no objection to the wife going to the other place with the child, and there remaining; and this, whatever be the size or degree of the places, whether cities or villages; nor is there any objection to her removing from the village to the city or chief town of a district as this is in no respect injurious to the father and is advantageous to the child, since he will thereby become known and acquainted with the people of the place."

In the Principles of Mohammadan Law by Mulla the rule is tabulated in paragraph 354 as follows:—

"A female including the mother, who is otherwise entitled to the custody of a child, loses the right of custody;

(1) if she marries a person not related to the child within the prohibited degrees; or

(2) if she goes and resides during the subsistence of the marriage, at a distance from the father's place of residence; or

(3) if she is leading an immoral life, as where she is a prostitute; or

(4) if she neglects to take care of the child."

Since the respondent No. 1 did not remarry and it is not even alleged that she suffered from the defects mentioned in principles 3 and 4, Mr. Brohi relied on her leaving the residence of the appellant and residing during the subsistence of the marriage at different places. By "place of residence" he meant 222-New Eskaton Road, Dacca.

The learned counsel did not dispute the proposition that a divorcee could take her minor children to a place outside the city where the father resided, but maintained that so long as the marriage subsists the place of hizanat is the ordinary place of the residence of the father. In other words a premium is placed on a divorced mother as against the mother who may have been driven out from his house by the husband or is otherwise separated from him. There is no logic in this view and we see no reason why the same rule should not apply in either case. The underlying consideration is not the status of the mother, but that "a mother, is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is an advantage to the child".

We did not have access to the Arabic text of Hedaya and other texts quoted above and, are, therefore, not certain whether the word 'place' is used in the sense of a 'house' or includes village, town or city where the parents last resided together. We are, however, inclined in favour of the later view, because in almost all the texts, the emphasis is on the mother leaving the "city" where the father resides. Mr. Brohi emphasised that distance to which the minor children are removed should not be measured in mileage, but from a functional point of view, namely, to ascertain whether the father can effectively exercise supervision and control over his children. This however, does not help the appellant, because at the time when he made the application under section 25 of the Guardians and Wards Act, the respondent No. 1 was residing and has continued to reside with the two boys in the city of Dacca, in the same locality where the appellant resides up to the 4th of August 1964, when the appellant attempted to take away the younger boy; the respondent No. 1 used to send both the boys to him every day and they stayed with him for several hours. Thereafter, of course, the relations between the parties became

restrained and for some time the appellant had no access to the boys, but this impediment has been effectively removed by the trial Judge in directing that the respondents Nos. 1 to 3 shall allow the appellant to have free access to the boys and to let them be with him by allowing either to visit the boys in the house of the respondents Nos. 2 and 3 wherever the boys remain or call the boys daily for short period to his own residence or elsewhere within the jurisdiction of his Court so as to enable the appellant to exercise effective supervision and control over the boys."

The learned Judge found that in leaving the ordinary place of residence of the appellant and taking away with her the two boys the respondent, therefore, did not lose her right to hizanat. He continued:—

"The above finding, however, is not determinative of the main issue arising in the case, namely, whether it is for the welfare of the minors to return them to the custody of the appellant within section 25 of the Guardians and Wards Act. Section 25 which falls in Chapter III of the Act under the title "Duties, Rights and Liabilities of Guardians" provides that if a ward leaves or is removed from the custody of a guardian of his person, 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 may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian. Mr. Brohi argued that in determining the welfare of the minors under section 5 the Court will act consistently withth the law to which the minor is subject as provided for in section 17. In other words the two sections should be read as supplementary to each other and the question whether it is for the welfare of the minors to return to the custody of the appellant should be resolved according to Muslim Law which envisages that as a result of the forfeiture of the right of hizanat vesting in the mother there was no alternative, but to return the minors to the custody of the father. Support for this view was found from the judgment in *Mst. Mahmooda Khatun* v. *Syed Zainul Hasnain Rizvi*[62] and *Ali Akbar* v. *Mst. Kaniz Maryam*[35]

In *Mst. Mahmooda Khatun* v. *Syed Zainul Hasnain Rizvi* the parents having fallen out the mother removed her minor children from Karachi to Khanewal, a town situated in the old Province of the Punjab, at a distance of more than 600 miles from the place of residence of father. Both the children were of very tender age, but the learned Judge relying on a number of judgments from the Indian jurisdiction held that the father became entitled to the custody of the children both of whom were less than seven years of age as the mother had by removing them from the ordinary place of residence of their father, incurred the disqualification set out in clause (2) of paragraph 350 of the Principles of Mohammadan Law

[62] P.L.D. 1958 Kar. 150.

by Mulla. (It corresponds to para. 354 in the earlier edition). The question whether it was for the welfare of the minor within section 25 of the Guardians and Wards Act to return them to the custody of the father was neither raised in that case nor decided by the learned Judge. In *Ali Akbar* v. *Mst. Kaniz Maryam* it was held that welfare of a ward within section 25 of the Guardians and Wards Act would be presumed in returning him to the custody of his lawful guardian. The parties in that case had two daughters and a boy named Aftab aged 11 years. The mother was divorced whereupon she took the minors from Lahore where the father resided to Karachi where her brother was employed. An application for maintenance of the children under section 488, Cr. P.C., was later on moved by the mother at Karachi and an order of maintenance of Rs. 100 was obtained. Thereafter the father put in an application under section 25 of the Guardians and Wards Act for the custody of Aftab minor only. In determining the issue whether it was for the welfare of the minor to return to the custody of the father, the learned Judge with reference to an earlier judgment delivered by him in *Muhammad Bashir* v, *Mst. Ghulam Fatima*[30] observed that "If by Muhammadan Law a particular relation is entitled to the custody of a minor we should presume that the welfare of minor is in being delivered to that person" and "that there is no conflict between Muhammadan Law and section 25 of the Guardians and Wards Act which deals with the welfare of the minors and rules relating to the welfare of the minors are in all cases subject to this dominant consideration". The case is distinguishable on facts. The ward in that case was a boy aged more than 11 years. The right of hizanat vested in the mother had thus already ended while in instant case both the boys are below the age of 7 years. The rule then "there is no conflict between Muhammadan Law and section 25 of the Guardians and Ward Act" would in the present case therefore lead to the conclusions that it is not for their welfare to return them into the custody of the appellant if the respondent was found not to have forfeited her right of hizanat. However, if it was intended to lay down in *Ali Akbar* v. *Mst. Kaniz Maryam* that if such a right be forfeited then the minor must be returned into the custody of the father ipso facto as was done in the case of *Mst. Mahmooda Khatoon* v. *Syed Zainul Hasnain Rizvi* without determining whether it will be for the welfare of the minor or not to do so we find it difficult to subscribe to this view. The learned Judge observed that it raises a presumption of welfare of the minor, but this does not advance the argument for as against a mere presumption attributed to Muslim Law section 25 recognizes it as a right of the guardian that his ward who leaves or is removed from his custody be returned into his custody, but subject to his welfare. "Welfare" being a question of fact will, therefore, have to be resolved on the material placed before the Guardian Judge and not on the basis of any presumption.

We are, therefore, unable to accept the construction placed by Mr. Brohi, on section 25 of the Guardians and Wards Act. There are other reasons too. In the case of a certificated guardian the Court has in making his appointment already acted "consistently with the law to which the minor is subject". The question to be decided under section 25 is, however, not the right of the guardian to obtain the custody of the ward as the right is given to him by the statute but the welfare of the ward. A natural or certificated guardian may turn out to be an undesirable person or the Court may find it not for the welfare of the minor to deliver him into the custody of the guardian. It is, therefore, provided specifically that although the guardian is entitled to such custody no order will be made to that effect unless the Court is satisfied that it will be for the welfare of the ward. Moreover, while there are rules regarding appointment of guardians, their rights and duties and forfeiture of the right of hizanat there are no rules under Mohammadan Law for determining whether it would be for the welfare of a ward to deliver him into the custody of his guardian. Even if there be a presumption that it is for the welfare of the ward to deliver him into the custody of his guardian the Court will have to weigh it against the other weighty consideration that "a mother is not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child". A mother may, therefore, be deprived of the custody of the children of tender age only if the paramount consideration of their welfare so demands.

In the result we find that the respondent No. 1 did not forfeit her right of custody of the two boys by reason of removing them from the ordinary place of residence of the appellant and further that it was even otherwise not within section 25 of the Guardians and Wards Act in the welfare of the minors to deliver them into the custody of the appellant while they are of tender age."

It might be interesting to find out how cases of custody are dealt with in the Kathi's courts in Malaysia. Unfortunately reports of such cases are non-existent but recently the Kathi's courts in Kelantan have had to deal with this question. In the case of *Siti Aishah binti Abdul Rahman* v. *Wan Abdul Aziz bin Wan Ahmad*[63] the mother had claimed custody of her daughter Wan Anita Kartini. It appeared that the girl was being looked after by her paternal grandmother. The Kathi allowed the application and ordered the girl to be returned to the mother. He relied on a ruling in Ianat et Talibin Part IV (Hidhanah), that the mother has a better right to custody. This can also be based on the Hadith reported in Abu Daud to the effect that Amr b. Shuaib reported from his father from his grand-

[63] Kelantan Kes Mal. No. 40&74, See appendix.

father that a woman asked: O Messenger of Allah, my womb was a resting place of this son of mine, my breast a drinking place for him and my lap a soothing place for him, but his father divorced me and wishes to snatch him away from me. The Messenger of Allah (Peace be upon him) said "You have got better right to take him till you are not remarried". (Mishkat-ul-Masabih Book II page 727).

We are also told of the judgment of Syedina Abubakar which is related in Malik's *Al-Muwaththa*. It seemed that Umar Al Khattab had a wife from the Amer and from that marriage there was a son, after which the parties were divorced. One day Umar went to the mosque of Qubh and saw his son playing in the mosque. Umar took the boy and put him on his horse. At this point the grandmother came and both claimed the child. The matter was referred to Syedina Abubakar and he gave the child to the custody of the mother. In the Kelantan case the husband appealed and the appeal was allowed by the Appeal Board. The judgment of the appeal Board is to the following effect –

"According to the evidence recorded in this case it is clear that Wan Anita Kartini began to live under the care and custody of the father Wan Abdul Aziz and guidance of Hajjah Wan Zabidah from the time she was aged 2 years and 3 months and it was only after she had lived thus for over a year and a half that the mother took steps to claim custody and as at this date (7/6/65) Wan Anita Karim had stayed with Hajjah Wan Zabidah the mother of Wan Abdul Aziz for over two and a half years, that is a period in which Wan Anita Kartini has come to be used to and to love her grandmother. Because of this the Appeal Board feels that it would seriously affect her feeling if she were separated from her grandmother.

The basis and aim of custody is the welfare of the child who is to be looked after and this is a basic right of the child. This right must be paramount to the right of the person who looks after it as may be deduced from the fetwa of Ibni Salleh which is mentioned in the Tuhfah and the Nihayah and is supported by Ali Shabramlisi as is stated by Syed Sabik in Fiqh Al-Sunnah Part 8.

In this case there is no evidence to show that the welfare of the child has been affected by her staying under the care of Hajjah Wan Zabidah and the control of her father Wan Abdul Aziz.

It is well-known that it is wrong to break the good relationship among relatives, especially between a child and his father and mother and more so that a mother has more right to get the love of her child more than the father, as is laid down in the religion of Islam".

In Syed Sabik's Fiqh us Sunnah it is stated that custody (hadhanah) is the right of the child and of the mother. The child needs someone to look after it and to bring it up and the mother is the best person to look after the child. Reliance is placed on the hadith in which Amr b. Shuaib reported from his grandfather that a woman asked "O Messenger of Allah, my

Allah, my womb was the resting place of this son of mine, my breast a drinking place for him and my lap a soothing place for him, but his father divorced me and wishes to snatch him away from me. The Messenger of Allah said "You have got a better right to take him till you are not remarried".

Sayed Sabik also refers to the judgment of a Court at Jurga, Egypt on 23rd July 1933 where it was decided. "Both the person who has custody and the child who is in custody have their rights but the right of the child is stronger than the right of the custodian. If the right of the custodian lapses, the right of the child does not lapse".

Ibn Qudamah in dealing with the right of guardianship also says that the right and welfare of the child should be given preference especially if there is a danger that if the child is given to the custody of a non-Muslim parent, the child might be led away from Islam. Custody depends on the welfare of the child and should not be given where there is a danger to the child and its welfare.

In a later case involving the same parties in Kelantan, (Kelantan Civil Case No. 41/75) the father Wan Abdul Aziz claimed custody of his daughter, Wan Halimatul Tasman, aged 9 years who had been in the custody of her mother. In this case the girl had been in the custody of her mother and had been looked after by her maternal grandmother (the mother being a school teacher) for over three years before the claim for custody was made by the father. The Kathi in this case dismissed the claim of the father, holding that it was to the welfare of the child to remain with her mother and her maternal grandmother, especially as the girl herself chose to live with her mother and maternal grandmother.

It is heartening to see that the Shariah courts in Kelantan have stressed the welfare of the child in deciding disputes as to custody, even though the precedents relied on have perhaps been applied rather liberally.

In Kelantan Civil Case No. 41/75 reference was made to the exercise of choice by the child. There is a hadith related by Abu Hurairah in which it is reported that the Prophet gave a boy a choice between his father and his mother. In another hadith where a Persian lady had complained to the Prophet that her husband had divorced her and wished to take away her son, the Prophet told the boy, "This is your father and this is your mother. Take the hand of either of them whom you like". We are told that the boy took the hand of his mother.

In this respect Ibn Qayyim remarked that the custody of the child is given to the father or to the mother having due regard to the welfare of the child. He relates a case where there was a dispute before a Kathi as to who should have custody of a child. The Kathi asked the child to choose between them and the child chose to stay with the father. Then the mother asked the Kathi to ask the child why he chose to stay with the

father. The Kathi asked and the child replied, "My mother sent me to a school daily and the teacher there is very stern and often beats the pupils; but my father allows me to play with my friends. That is why I prefer to stay with my father." The Kathi then ruled that the custody of the child should be given to the mother, saying to her, "You are more fit to look after the child".

Appendix I

Siti Aishah binte A. Rahman lwn.
Wan Abdul Aziz bin Wan Ahmad

[Kes Rayuan (Dato Haji Mohamad Nor bin Haji Ibrahim (Mufti) Dato Hashim bin Mohamed dan Haji Mohamed bin Haji Yusoff) June 10, 1975] (Kelantan kes Mal No: 40/74].

1) Menurut catatan perbicaraan kes ini ternyata bahawa Wan Anita Kartini telah mulai menetap duduknya di bawah jagaan dan pengawasan bapanya Wan Abdul Aziz – dalam peliharaan dan asuhan Hajjah Wan Zabidah – dari masa ia berumur dua tahun tiga bulan dan setelah menetap kira-kira setahun setengah barulah dituntut oleh ibunya Siti Aishah dan sehingga ke hari ini (7/6/75) Wan Anita Kartini telah duduk bersama-sama Hajjah Wan Zabidah ibu kepada Wan Abdul Aziz lebih daripada dua tahun setengah iaitu satu tempoh yang dipercayai menjadi-Wan Anita Kartini telah berkemesraan penuh dengan neneknya Hajjah Wan Zabidah. Maka dengan berdasarkan kepada keadaan yang tersebut Jumaah Pengadilan percaya akan tersentuh jiwa hati Wan Anita Kartini kalau dipisah dari neneknya Hajjah Wan Zabidah.
2) Pokok dan tujuan Hadhanah ialah muslihat dan kebaikan budak yang dipelihara dan dijaga sebagai hak asasi bagi budak itu. Hak yang mesti diutamakan lebih daripada hak pihak yang memelihara sebagaimana yang fahamkan Ali Shabramulsi juga sebagaimana yang disalin oleh Syed Sabik dalam Fekah Al Sunnah juzu' 8. Maka di dalam perbicaraan kes ini tidak ada keterangan yang menunjukkan terjejasnya muslihat dan kebaikan hidup Wan Anita Kartini dalam peliharaan Hajjah Wan Zabidah yang dijaga dan diawasi oleh bapanya Wan Abdul Aziz.
3) Sedia maklum bahawa memutuskan silatul rahim di antara kaum kerabat adalah haram, khasnya di antara anak dan ibu yang terhad mendapat bakti anaknya lebih daripada bakti yang bapa berhak mendapatinya sebagaimana ditetapkan oleh Ugama Islam Ugama perikemanusiaan.

Wan Abdul Aziz bin Ahmad
dan
Siti Aishah bte A. Rahman

[Kes Sivil (Haji Yaacob bin Haji Taib (Kathi) 8hb. Februari 1976.] (Kelantan Kes Mal No. 41/75).

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Haji Yaaçob bin Haji 'Taib: — Mendakwa bahawa anaknya Wan Halimatul Tasma umur 9 tahun yang sekarang di bawah peliharaan kena dakwa, adalah hak peliharaannya dan menuntut supaya dihukum dan diperintah kena dakwa serahkan anak ini di bawah peliharaannya di tempat adiknya Anita Kartini yang sekarang di bawah peliharaan toknya di Besut. Katanya kena dakwa tidak layak pelihara anak itu kerana ia adalah seorang yang tidak beramanah, kerjanya sebagai Guru dan bertugas sebagai Penolong Guru Besar yang masanya banyak tertumpu kepada kerja-kerja tugasnya tidak kepada anak dan yang besarnya kena dakwa telah berkahwin lain dan seperkara lagi anak yang kedua Anita Kartini telah dihukum oleh Jumaah Pengadilan di bawah jagaan dan pengawasan Mendakwa.

2. Kena dakwa menjawab: Sebenarnya anaknya Wan Halimatul Tasma itu telah diserah untuk peliharaannya dengan kehendak Mendakwa sendiri dan Wan Halimatul Tasma sudah beberapa kali merayu kepadanya supaya ditetapkan bersamanya dan anak itu dari semenjak Mendakwa bercerai dengan kena dakwa diasuh dan dijaga oleh ibu kena dakwa bersekali dengannya begitu juga setelah kena dakwa berkahwin lain, anak itu masih kekal di bawah peliharaan dan jagaan ibu kena dakwa sebagai mengasuh, menyediakan makanan dan sebagainya, tentang pelajaran dibiayai oleh kena dakwa sendiri.

3 Dari kenyataan-kenyataan yang didapati daripada Mendakwa, kena dakwa, ibu kena dakwa dan anak itu sendiri bolehlah dibuat kesimpulan bahawa Mendakwa tuntut anak itu di bawah peliharaannya ialah sebagai pengawasan dan menanggung perbelanjaan terhadap anak itu dan yang memelihara sebagai mengasuh, menjaga makan minum dan sebagainya ialah toknya di Besut. Mendakwa sendiri sekarang tinggal di Kota Bharu tempat bertugas. Anak itu sekarang di bawah jagaan kena dakwa sebagai mengawasi dan menanggung perbelanjaan. Yang memelihara sebagai mengasuh, menjaga makan minum dan sebagainya ialah toknya di sebelah ibu bertempat di Kampung Surau, Kota Bahru.

4. Memandang kepada keadaan tersebut di perenggan (3) di atas maka seolah-olah rebutan peliharaan anak itu sebagai mengasuh, menjaga dan menyediakan makan minum adalah di antara tok sebelah ibu dan tok sebelah bapa. Anak itu berhak memilih kepada siapa yang disukainya dan anak itu sendiri telah memilih toknya sebelah ibu dan untuk mengawal dan mengawasi terutama pelajaran boleh dilakukan oleh Mendakwa dan kena dakwa bersama sebab mendakwa sendiri duduk di Kota Bharu dan anak itu sedang belajar di Sekolah Rendah Zainab Kota Bharu juga. Ini lebih mudah daripada Mendakwa mengawasi adiknya Anita Kartini yang duduknya di Besut yang jauhnya beberapa kali ganda.

5 Sebagaimana yang diterangkan di dalam Sijil Keputusan Ipil No. 1/75 bahawa pokok dan tujuan Hadhanah ialah muslihat dan kebaikan yang dipelihara dan dijaga sebagai hak asasi bagi budak itu. Hak yang mesti

diutamakan lebih daripada hak pihak yang memelihara sebagaimana yang difahamkan – daripada dasar petua Ibni AlSallah yang tersebut di dalam Tohfah dan Nihayah serta diakui muktamatnya oleh Ali Shabramulsi, juga sebagaimana yang disalin oleh Syed Sabik di dalam Fekah Alsunnah Juzu' (8) dan yang diterangkan oleh Ibn Qayyim.

Maka yang mesti diutamakan terhadap Halimatul Tasma menenangkan jiwanya yang telah mesra dan memilih sendiri untuk duduk bersama-sama tok sebelah ibunya.

6. Di dalam perbicaraan kes ini juga tidak ada keterangan yang menunjukkan terjejasnya muslihat dan kebaikan hidup Wan Halimatul Tasma di dalam peliharaan toknya Hajjah Wan Jah yang dijaga dan diawasi oleh ibunya Siti Aishah binti Haji A. Rahman kena dakwa dan besar kemungkinan bapanya Abdul Aziz boleh mengawasinya kerana tempat duduknya sekarang berdekatan dengan tempat Wan Halimatul Tasma. Sebaliknya kalaulah Wan Halimatul Tasma diberi pelihara kepada toknya di sebelah bapa boleh menjejaskan perasaan anak itu yang dibimbang akan menjejaskan pula pelajarannya yang telah sedia maju. Lebih-lebih lagi perpindahan itu seolah-olah perpindahan dari bandar ke kampung. Ini tidak diharuskan bagaimana pendapat kumpulan Ulama'.

7. Menurut kenyataan kena dakwa dan diakui oleh Mendakwa ternyata bahawa Wan Halimatul Tasma telah mulai menetap duduk di bawah jagaan dan pengawasan ibunya Siti Aishah di dalam peliharaan dan asuhan Hajjah Wan Jah dan setelah menetap kira-kira tiga tahun lebih baru dituntut oleh bapanya Wan Abdul Aziz iaitu suatu tempoh yang dipercayai juga menjadikan Wan Halimatul Tasma telah berkemesraan penuh dengan neneknya Hajjah Wan Jah, maka dengan berdasarkan kepada keadaan yang tersebut saya percaya akan tersentuh jiwa hati Wan Halimatul Tasma kalau dipisah dari neneknya Hajjah Wan Jah, tambah-tambah lagi Wan Halimatul Tasma sendiri telah memilih menetapkan di bawah peliharaan neneknya di sebelah ibu.

Oleh itu saya berpendapat tuntutan tidak sabit.

Ahmad Ibrahim

Professor of Malaysian Law, University of Malaya.

LEGAL EDUCATION AND DEVELOPMENT IN THAILAND

1. INTRODUCTION: THE SCOPE OF THE STUDY AND THE THEORETICAL FOUNDATION OF THE RELATIONSHIP BETWEEN LEGAL EDUCATION AND DEVELOPMENT[*]

To lawyers in an underdeveloped country, the title "Legal Education and Development" suggested for this conference is a provocative one because it patently indicates that the study should provide significant data in establishing a theoretical and pragmatic relationship between legal education planning and the development process in the country concerned, and in this context, viz., Thailand. It is far from being self-evident that at present in almost every underdeveloped country the proximity between law and development in general is quite remote because the concept of development is rather a new concept or an innovation introduced recently into the established legal system of such countries. Thailand provides no exception to this general rule. However, in the light of her present rate of economic growth which is of a high rate, viz. the projected growth range between nine to eleven per cent a year, the trend towards establishing a proximate relationship between law and development has already been perceived although not quite visible through the eyes of the majority. Therefore, the central theme of this study will place emphasis to a greater extent on the new trend of legal education planning rather than on the description of the existing relationship between law and development at present.

In this study, the "concept of development" is understood to mean the growth of the private sector of the economy mainly involving the establishment of new industries and the expansion, modernization and reorganization of existing ones. The range of activities has included agriculture, mining and extractive industries, manufacturing and processing industries and the import and export trade. The concept of development as aforesaid is a new economic policy introduced in Thailand in 1953 to replace the ineffectual policy of economic development through the initiative of the government sector which presupposes the maximum governmental interference in economic and development affairs. Theoretically, this new economic policy necessarily requires an efficient and a sound construction of the legal infrastructure of the economy to foster and boost rapid development. This new policy looks upon law as a means of economic control and organization and as a means or incentive to stimulate investment in the industrial, agricultural and trading sectors which form the core of development through the private sector initiative. It means that legal