

## GUARDIANSHIP UNDER HINDU AND MUSLIM LAW: COMPARATIVE ANALYSIS

**Riddhi Chopra\***

### ABSTRACT

*Guardianship is a crucial aspect of Indian law, particularly regarding the welfare and protection of minors. As such, it is essential to understand the nuances of guardianship under different legal systems, such as Hindu and Muslim law, to protect children's best interests. This article provides a comprehensive overview of guardianship under Hindu and Muslim direction, highlighting the different types of guardianship recognized under each system, including natural guardians, testamentary guardians, and guardians appointed by the court. The article also discusses essential case laws that have shaped the understanding of guardianship in India. Furthermore, the article compares and contrasts guardianship under Hindu and Muslim law, highlighting key differences and similarities. For instance, while both legal systems recognize natural custody, Muslim law also recognizes Hizanat and Kafalah guardianship, which are not recognized under Hindu law. In conclusion, this article emphasizes the importance of guardianship in India. It underscores the need for a more nuanced approach to guardianship to ensure the protection and well-being of minors. The article suggests that future developments in guardianship laws in India should consider the diverse cultural and religious contexts of guardianship to ensure that the interests of children are protected regardless of their background.*

**Keywords:** Guardianship, Hindu law, Muslim law, child custody, Hindu minority, natural guardian, Geeta Haran.

### INTRODUCTION

Guardianship refers to the legal responsibility of a person to take care of a child's essential needs such as education, health, and general well-being. When someone other than the child's mother or father is granted legal custody of the child, they become a guardian with the right to make decisions concerning the child's welfare. The guardian has a legal responsibility to care for the child and ensure their well-being.

---

\*BA LLB, SECOND YEAR, UNIVERSITY OF ALLAHABAD.

Guardianship is typically granted to someone other than the child's mother and father when they are not able to provide adequate care. This applies to children who are under the age of eighteen since they are physically, intellectually, and emotionally immature and require the care, attention, and protection of another person. Guardianship may be granted by a court or through other legal processes. The guardian is legally responsible for making decisions that will promote the welfare and development of the child. Any act by the guardian that violates the best interests of the child can lead to legal action against the guardian.

In India, guardianship laws are governed by different personal laws, including Hindu and Muslim laws. Under Hindu law, guardianship is significant as it is vital in determining a child's custody and upbringing rights. The natural control of a child is based on the principles of gender and age. A father is considered the natural guardian of his children, and after him, the mother. However, in the case of a minor's welfare, the court may appoint a guardian to care for the child.

Under Muslim law, guardianship is equally essential, as it is also based on the welfare of the minor. The guardianship principles in Muslim law are mainly based on *hizanat* and *kafalah*. This article will discuss guardianship under Hindu and Muslim law in India and analyze the similarities and differences between the two legal systems. We will also examine some relevant case laws that have significantly impacted guardianship laws in India.

Hindu law is a set of personal laws that governs the rights and obligations of individuals who follow Hinduism. It is based on ancient Hindu texts and customs and has been codified in various statutes, including the **Hindu Minority and Guardianship Act 1956**. This act lays down the rules and procedures for determining the guardianship of a minor child.

## **GUARDIANSHIP UNDER HINDU LAW**

Types of guardianship in Hindu law:

**Natural guardians** - A natural guardian has the legal right to make decisions on behalf of a minor child without needing any legal appointment. Under Hindu law, the father is the first natural guardian of a child, followed by the mother. However, in certain circumstances, such as the death or absence of the father, the mother becomes the natural guardian. In recent times, courts have expanded the scope of natural guardianship to include maternal grandmothers, other female relatives, and the father and mother.

**Testamentary guardians** - A parent appoints a testamentary guardian through a will to care for their minor child after a death. The person appointed as the testamentary guardian is responsible for managing the child's needs and protecting their interests until the child reaches the age of majority. The appointment of a testamentary guardian is subject to the condition that it does not adversely affect the child's welfare.

**Guardian appointed by the court** - In certain situations, such as when the parents cannot care for their child, or there is a dispute over the guardianship of a minor, the court may appoint a guardian to act on behalf of the child. The appointment of a guardian by the court is subject to the condition that it is in the child's best interest. Before appointing them as guardians, the court will consider various factors, such as the guardian's financial status, ability to care for the child, and personal character.

### CASE LAWS

The court held in the case of *E.M. Nadar v. Shri Haran* in 1992 that the father remains the guardian of a minor child even if he is living separately from the child. Similarly, in the case of *Chandra v. Prem Nath* in 1969<sup>1</sup>, it was established that if a child is below the age of 5 years, the mother shall be considered the natural guardian. However, in some cases, if the father is unable to fulfill the duties of a guardian due to financial constraints, the mother may be appointed as the natural guardian instead. The court had given this decision in the case of *Smt. Geeta Hariharan v. Reserve Bank of India* in 1999.<sup>2</sup>

### GUARDIANSHIP UNDER MUSLIM LAW

Muslim law, also known as Islamic law, is the legal system based on the principles and rules derived from the Quran, the Hadith (sayings of the Prophet Muhammad), and the Ijma (consensus of Islamic scholars). The principles of Muslim law govern all aspects of a Muslim's life, including family, property, contracts, and inheritance.

Types of guardianship in Muslim law:

---

<sup>1</sup> *Chandra v. Prem Nath* in 1969 AIR 1969 DELHI 283

<sup>2</sup> *Githa Hariharan v. RBI*, AIR 1999 SC 1149.

Under Muslim law, there are three types of guardianship: Hizanat, Kafalah, and guardianship appointed by the court.

**1. Hizanat:** Hizanat is the guardianship of a child who is too young to take care of themselves. It is the responsibility of the Hizanat to take care of the child's upbringing, maintenance, and education. The father is the natural Hizanat of the child, followed by the grandfather, and then the mother. However, in the absence of a natural guardian, any person who is considered to be suitable can be appointed as the Hizanat. In cases where the natural guardian is unavailable or unable to take care of the child, the court can appoint someone as the Hizanat. The court considers the child's welfare paramount in selecting the Hizanat. The Hizanat has a fiduciary duty towards the child and must act in the child's best interests.

**2. Kafalah:** Kafalah is a type of guardianship where a person takes on the responsibility of caring for and protecting a child who is not their biological child. Kafalah can be of two kinds, voluntary or court-ordered. In the case of voluntary Kafalah, the guardian takes the child under their care out of their own free will, without any court intervention. On the other hand, court-ordered Kafalah is where the court appoints a guardian for a child in cases where the child is an orphan or if the biological parents cannot take care of the child. The guardian has the same rights and responsibilities as a natural guardian and must act in the child's best interests. In addition, the guardian has a fiduciary duty towards the child and must ensure that the child's upbringing, maintenance, and education are taken care of.

**3. Guardianship appointed by the court:** When no natural or appointed guardian is available, the court can appoint a guardian for the child. The court-appointed guardian is responsible for the child's upbringing, maintenance, and education until the child reaches the age of majority. The court considers the child's welfare paramount in appointing the guardian. The guardian has a fiduciary duty towards the child and must act in the child's best interests.

## CASE LAWS

The Supreme Court of India, in the case of Ghulam Hussaini Qutubdin Maner v Abdul Rashid Abdul Razzaq Maner 2000, held that it is not permissible to appoint the mother of a minor as their guardian to accept gifts on the child's behalf during the father's lifetime. This decision establishes that the appointment of guardianship must be in accordance with the law, and not based solely on the personal preferences of the parties involved.

Similarly, in the case of *Rahima Khatoon v. Saburjanessa*, the court ruled that a mother loses guardianship over her minor daughter if she remarries someone not related to the child within the prohibited degrees of relationship. In this case, the court granted the certificate of guardianship to the child's paternal grandmother. This decision emphasizes the importance of considering the best interests of the child in guardianship matters, even if it means appointing someone other than the child's biological mother.

### COMPARISON OF GUARDIANSHIP UNDER HINDU AND MUSLIM LAW

Category	Hindu Law	Muslim Law
<b>Definition</b>	Hindu law governs Hindus and their personal laws.	Muslim law governs Muslims and their personal laws.
<b>Types of guardianship</b>	Natural guardians, testamentary guardians, and guardians appointed by the court.	Hizanat, Kafalah, and guardianship appointed by the court.
<b>Natural guardians</b>	Father, then mother, and then other relatives in specific circumstances.	Father, then grandfather, then mother, then other relatives in specific circumstances.
<b>Appointment of guardians</b>	Testamentary guardians can be appointed through a will. Guardians appointed by the court can be appointed in specific circumstances.	Court-appointed guardians can be appointed in specific circumstances.
<b>Duty of guardians</b>	Fiduciary duty towards the child and acting in the best interests of the child.	Fiduciary duty towards the child and acting in the best interests of the child.

<b>Mother's rights</b>	The mother has the right to be the natural guardian of her child only up to a certain age.	The mother has the right to be the natural guardian of her child until the child reaches the age of majority.
<b>Court's role</b>	The court's role is limited to appointing a guardian in specific circumstances.	The court's role is more extensive and includes appointing guardians, determining the welfare of the child, and overseeing the guardian's actions.

As for similarities between guardianship under Hindu and Muslim law, both laws:

- recognize the importance of the welfare of the child as the paramount consideration in appointing a guardian;
- impose a fiduciary duty on the guardian to act in the best interests of the child;
- provide for natural guardianship in specific circumstances; and
- allow for court-appointed guardians in specific circumstances.

In conclusion, while there are some differences between guardianship under Hindu and Muslim law, both laws ultimately aim to ensure the welfare and protection of minor children.

### WAY FORWARD

Guardianship is an essential aspect of family law in India, especially in cases where minor children are involved. The child's welfare is paramount in appointing a guardian, and both Hindu and Muslim laws recognize this importance. Guardianship laws in India aim to ensure that the child's best interests are protected and that a suitable guardian is appointed to care for the child. As society and family structures evolve, there may be a need to revisit and update the guardianship laws in India. For instance, there have been calls to increase the age at which the mother can be the natural guardian of her child under Hindu law. Similarly, there have been calls to recognize the rights of biological fathers as natural guardians in specific circumstances. The legislature and the judiciary will need to address these issues in the future. In conclusion, guardianship laws play an essential role in ensuring the welfare of minor children in India.

While there are differences between guardianship under Hindu and Muslim law, both directions aim to protect the child's interests and provide suitable guardianship arrangements. These laws must be updated to reflect changing societal needs and family structures.

