



Guardianship, Its Importance and Developments: A Comparative Study Between *Shariah* Law and the Positive Law

History of Author	Abstract
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A. Introduction

The institution of guardianship and trusteeship has been known to mankind from time immemorial. The guardian may be biological, natural or otherwise. Therefore, there is no gainsaying in the assertion that the institution shall remain very important to the society and the family system *ad infinitum*. This paper seeks to study the importance and relevancy of guardianship to the modern society from the Shariah and International Laws point of views. The study includes the noticeable changes to the institution in the modern society.

Guardianship relationship denotes the position of legal responsibility and duty to a person to another person.¹ Thus, a guardian can be 'a court appointed person that makes decisions on the needs and affairs of another person that is referred as a ward. These may include decisions on things like medical treatment, where the ward lives, and arrangements for services such as meals, personal care, training and education. Precisely, the duties and powers of a guardian toward his ward can be divided into two categories, based on this definition. That is (1) powers and duties that can be exercised without prior court approval, and (2) powers and duties that cannot be exercised without court's prior approval.

Thus, it can be said that, a guardian is 'a person who has the legal authority and the corresponding duty to care for the personal and property interests of another person that is referred to as a ward. Therefore, a person has the status of guardian because the ward is incapable of caring for his or

¹ Macmillan English Dictionary, (Macmillan Publisher, 2007) 2nd Ed. at 632.

her own interests due to infancy, incapacity or disability. Most countries and states have laws that provide that the parent of a minor child are the legal guardians of that child, and that the parents can designate who shall become the child's legal guardian in the event of their death.²

B. Literature Review

Basis of Guardianship in the Family Institution

Under Islamic Law, the right to the guardianship of a child belongs to the both parents. Thus, in the situation of the dispute that follows the dissolution of a marriage over the guardianship of minors, both parents are equitably given the right to the separate right of guardianship of the child. The divine law gives automatic right of custodianship, that is, care, to the mother of minors, while the duty of guardianship (financial responsibility) is given to the father. This practice is derived from the verse of the holy Qur'an that states that, '*The mothers shall give suck to their offspring for the two whole years if they desire to complete the term. But he shall bear the cost of their food and clothing on equitable terms*'.³ The provision of the verse is so lucid and crystal that even a lay person can grasp the intention of the Lawgiver in this respect.

However, although, the right of guardianship is given to both parents, nevertheless, the divine law is mostly concerned about the best interest of the child. Thus, in the case of a divorced couple that was brought to holy prophet (SAW), about the dispute as to whom the custodian of the child belongs. The prophet sought the consent of the child himself by asking him to make a choice between the two parents. He (SAW) said; 'Child here is your father and here is your mother, make a choice between the two as to whom you prefer,' and the child hold his mother's hand.⁴ The conclusion in this regard is that the divine Lawgiver gives the legitimate right of guardianship of child (minor) to the father while it gives the custodial right to the mother. However, the most important factor is that which inferred from the Hadith. That is, the best interest of the child.

In the same vein, under International Law the right of guardianship belongs to both parents on equitable ground. This means that, none of the parents can exercise any right on the child without the consent of the other parent. However, International Law does not differentiate between guardianship and custodianship. To the law, the two words mean the same thing and can be used interchangeably. Thus, the Article 16(1) (f) of The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, it is provided that; the same rights and responsibilities with regard to guardianship, wardship trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation in all cases the best interest of the children shall be paramount.⁵ More so, this equality between both parents in guardianship is also established in the Article 16 of the Universal Declaration of Human Rights' which declares that; 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution'.⁶ Therefore, both Islamic Law and the International Law agreed on the importance, necessity and relevance of the institution of guardianship with slight variation.

² See <http.Legal_guardian> (Accessed 26/07/2008)

³ 'Qur'an 2: verse 233

⁴ Abu Daud, *Sunan Abu Daud*, Kitabut-Talaq,(Bairut: Darul-Fikir) Vol. 2, at 617

⁵ Article 16(1)(f), CEDAW.

⁶ *Universal Declaration of Human Rights*, Article 16.

Types of Guardianship

While discussing the types of guardianship, two different important factors have to be taken into consideration. The first factor is the personality of the guardian and the second factor is duties of the guardian. Thus, guardianship can be divided into two categories, and each of the categories can also be subdivided into various segments. In short, there are two types of guardianship in terms of the personality of the guardian, namely: (1) guardianship of the parents, and (2) guardianship of person other than the parents.

Guardianship of the Parents in Islamic Law

Guardianship of the parents refers to the rights and duties of the parents over their minor child or children. All the Islamic Schools of Law unanimously agree that, the father of a child is his / her natural guardian and that the right of custody of such child belongs to the mother. They, also agree that the guardianship of the father continues until the minor child attains the age of majority, if the child is a male or until she marries in case of a female child. The decision of the schools of law is informed by the provision of the holy Qur'an which says; *'The mothers shall give suck to their offspring for two whole years if they desire to complete the term. But he shall bear the cost of their food and clothing on equitable terms.'*⁷ This opinion is also buttressed with Hadiths that says; *'Child here is your father and here is your mother, make a choice between the two as to whom you preferred'* and the son took hold of his mother's hand and they went away⁸ In another Hadith a woman came to the holy Prophet and protested that she had been deprived of her right as the custodian of her child. Then Prophet said: *'you have the first right to your child as long as you do not remarry'*⁹

However, the scholars of the schools of law disagree over the duration of the custodianship of a mother on her minor child. There are three different opinions; (1) Hanafiyah School of Law, hold the opinion that, the custodianship of a mother ends when the child attains the age of seven years for males and the age of nine years for females. (2) The Malikiyah School slightly disagrees with this opinion and contends that the custodianship of a mother ends when the child attains the age of puberty (*ihtilam*) for males and until a female marries. (3) In the other hand, Shafi'yahh and Hanabilah Schools jointly agree that the period of the custodianship over both male and female child simultaneously ends when they attain the age of seven or eight.¹⁰

Developments in Islamic Family Law

However, the practices of the above schools of law have undergone tremendous changes in the present era. Various reforms are effected in order to make the rules more relevant to the modern society. For example, Pakistan which is one of the major *Hanafiyah* jurisdictions, is now lenient in its applications of the ancient doctrines. The most notable instance of the simplicity can be seen in the case of *Atia Waris v. Sultan Ahmad Khan*.¹¹ In the case, dispute erupted between divorced couple over the custody of their minor child. The presiding judge gave preference to the best interest of the child above any other consideration and granted the custodianship of the minor to the paternal grandmother despite that, the maternal grandmother who is the rightful custodian was alive by then.

⁷ Qur'an 2: Verse 233

⁸ Abu Daud, *Sunan Abu Daud*, Kitabut-Talaq, (Bairut: Darul-Fikir) Vol. 2, at 617

⁹ *ibid*

¹⁰ Ibn Rushd, *Bidayatul Mutahid wa Nihayatul Muqtasid* (Bairut: Darul Fikir) Vol.1, at 7.

¹¹ *Atia Waris v. Sultan Ahmad Khan*.

But, there was believe that the best interest of the child will be affected.¹² In the same accord, Egypt, another Hanafiyyah country amended her family law No. 100/1985 and stipulates that ‘Custody may be extended till the age of 15 for boys and till marriage for girls if the judge deems such an extension to be in the best interests of the ward.’¹³

Moreover, Malikiyah jurisdiction is not left out of this development. For example, in Morocco, the new law allows a mother to retain the custody of her child even upon remarrying or moving out of the area where her husband lives.¹⁴ Likewise in Sudan, courts have utilized some of their discretion in the modern time, to allow a woman who remarries not within the prohibited degrees of relationship to the child (i.e., a *mahram*) to retain custody if the interests of the ward so demands.¹⁵

Furthermore, Malaysia, a *Shafi’iyyah* Jurisdiction with a very developed legal system, has it Law Reform Act (LRA) stipulates the applicability of Shariah (*Shafi’iyah*) to Malaysian Muslims, which means that, father his the natural guardian of his child. That is in parallel with the Guardianship of Infants (Amendment) Act 1999 amended the 1961 Act to grants mothers equal guardianship rights as fathers. However, whenever dispute over guardianship of a minor arises as a result of the conversion of either of the parents, the court gives the best interest of the child preference over other considerations. This is expressed in the case of *Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah [2003] 5 MLJ 106*.¹⁶

In that case, a father converted from Hindu religion to Islam and also converted his two children with him. The High Court ruled that the issue of the validity of the conversions by the father was within the purview of the Shariah Court and the Shariah Court was the only qualified forum to determine the status of the two minors, notwithstanding that the Wife had no right of audience before that forum, as regards the custody application, the Judge awarded legal custody jointly to both father and mother, with care and control to the mother, subject however to the caveat that the mother would lose the right to care and control if, in His Lordship’s words, “there are reasonable grounds to believe that she would influence the children’s present religious (i.e. Muslim) beliefs, for example teaching them the articles of her faith and making them eat pork”. The father was granted visitation rights and ordered to pay maintenance.¹⁷ The Indonesian Perpu 2/2007 in its Article 1 (5) also includes the Baitul-Mal as a guardian, considering the problem brought about by Tsmami disaster.

In addition, the United Arab Emirate (UAE) a *Hanbaliy* country, has reform its family Law. The amendment to the former principles of the school of law is apparently clear in the UAE Personal Law No. 28 /2005, Article 217, which stipulates that: A father may appoint a guardian of male or female for his minor child. These changes are significant because, there is consensus between Islamic Schools of Law that a female cannot be a guardian due to certain impediments which has diminished in the modern time or are no more.

¹² Atia Waris v. Sultan Ahmad Khan 1959 PLD (WP) Lah.

¹³ Egypt Law 25 (Personal Law) of 1926 amendment Law 100 of 1985.

¹⁴ See <<http://www.hrea.org/moudawana.html#21>>(accessed on 02/08/2008).

¹⁵ See <<http://www.law.emory.edu/ifl/legal/sudan.htm>> (accessed on 02/08/2008).

¹⁶ Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah [2003] 5 MLJ 106.

¹⁷ Chang Ah Mee v Jabatan Hal Ehwal Agama Islam, Majlis Ugama Islam Sabah [2003] 5 MLJ 106

Guardianship in the Case of *Mula'annah*

Perhaps the only area where all the Islamic schools of law agree that the right of guardianship belong to the mother is in the *Mula'annah* Case. *Mula'annah* is the situation whereby if a husband denies being responsible for the pregnancy of his wife, the court will declare eternal separation between the couple and will also order the naming of the child after the mother. The holy Qur'an stipulates that, 'and the punishment shall be race upon her when she makes four oaths by God that he is a liar...'¹⁸ Hence, the Guardianship of the child of such pregnancy solely belongs to the mother. In a nutshell, it will be noticed that the stipulated principles of various Schools of Islamic Law have undergone various amendments and developments in other to make the law relevant to the present generation. The developments are significant and proofs that Islamic Law is relevant to all time and places.

Guardianship of Parents Under Common Law

Under Common Law, parents were previously recognized as the *legitimi tutores* of their children. Children were, from birth, subject to the guardianship of their father. Their father was regarded as their "natural guardian. By virtue of that guardianship system the father exercised paternal power in relation to his child and his child's property. The mother was excluded from the role of guardian as far the father lives, although she was eligible for appointment as a guardian by her husband after his death. Children born out of wedlock had no legal guardians.

However, pursuant to the stipulation of CEDAW: Article 16(1) (f)¹⁹ which states that, 'The same rights and responsibilities with regard to guardianship, warship trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation in all cases the interest of the children shall be paramount', both parents are given equal rights in regard to the guardianship of their child.

Nevertheless, like the Islamic Law, a lot of developments have taken place in Common Law Countries in modern days. For example, in Scotland, the Common Law rules which gave the right of guardianship to the father alone were modified by section 10 of the Guardianship Act 1973,²⁰ which made mother a guardian during her lifetime alongside the father. This policy was continued by section 2 of the Law Reform (Parent and Child) (Scotland) Act 1986²¹ which also, for the first time, made the mother the guardian of her children, irrespective of whether she was married to the child's father or not. The father was not, however, guardian unless if he married to the child's mother or appointed as such by a court order.²² Moreover, the Children (Scotland) Act 1995,²³ excludes the guardianship of parents from the definition of parental rights. A parent, therefore, will no longer be the "natural guardian" of his or her child. The parental role is now defined in terms of parental responsibilities and parental rights.

In short, it will be noticed that this amendment is not restricted to Scotland alone; it cut-across all common law countries. South African is a very good instance, the country's Guardianship Act, 1993. (2) NO. 192 OF 1993 states that 'Whenever both father and mother have guardianship of a minor

¹⁸ Qur'an 291:Verse6-9

¹⁹ CEDAW: Article 16(1)(f)

²⁰ Section 10, Guardianship Act 1973

²¹ section 2 of the Law Reform (Parent and Child) (Scotland) Act 1986

²² Geoge Jamieson, *Parental Responsibilities and Rights*, (Edinburg: Sweet & Maxwell, 1995) at 9.

²³ Children (Scotland) Act 1995

child of their marriage, each one of them is competent, subject to any order of a competent court to the contrary' can be sought. To exercise independently and without the consent of the other parent, any right or power or to carry out any duty arising from such guardianship. However, unless if a competent court orders otherwise²⁴

Non-Parental Guardianship

Guardianship of persons other than parents is different from the natural guardianship of parents. The guardianship usually occurs by appointment of the parent of a person in the last will or by the appointment of a judicial authority. A further possibility is appointment by the Sovereign (the king or community leader). There are thus two types of guardian in modern practice and the said guardianships are *testamentary guardianship* (those appointed by last will) and *legal guardianship* (those appointed by the judicial authority).

Testamentary Guardianship

Testamentary Guardian is the person that is appointed by the parents to be guardians for their children or ward after their death. Accordingly, a testamentary guardian has the power to appoint a person to take his place in the event of his death and he has the same parental responsibilities and parental rights in relation to the child as the parent had. Moreover, Shariah permits parents to appoint testamentary guardian of their choice for their wards or children prior to their death. This is contained in the holy Qur'an as follows: 'O you, who believe, let there be two just witnesses when you are appointing a guardian prior to your demise'²⁵ However, the testamentary guardian must not be an heir to the ward.

In the same vein, in the common law countries, the court has the power to appoint a guardian for a child in accordance to the best interest of the child. Example of this is the stipulation of the Law Reform (Parent and Child) (Scotland) Act 1986.²⁶ But, the court can only do so if it could be shown to be in the best interests of the child that the applicant should have the custody of the child. In some countries, it is required that before being appointed a legal guardian, the applicant should be in a position to exercise all parental responsibilities and rights, including having the child living with him or otherwise regulating the child's residence.²⁷

Duties and Responsibilities of a Guardian

The duties and responsibilities of guardians vary in accordance with their status and categories as discussed above. For instance, a guardian may have responsibility over the person of his ward as in the case of Islamic law of 'Al-Wilayatu 'ala nafs' (Guardianship on Person). In the other hand, the guardianship may be restricted to the ward's property, known as 'Guardianship on Property (Al-Wilayatu 'ala mal). It could also be a legal representative of the person concerned which is *the Guardian Ad Litem* (Legal Representative). In short, the duties of a guardian are entrenched in any of the following categories of guardianship.

First of all, guardianship over person simply means, having control as a guardian over the

²⁴ South African GUARDIANSHIP ACT, 1993. (2) NO. 192 OF 1993.

²⁵ Qur'an 5: Verse: 106

²⁶ Law Reform (Parent and Child) (Scotland) Act 1986

²⁷ George Jamieson, *Parental Responsibilities and Rights*, (Edinburg: Sweet & Maxwell, 1995) at 11.

personal activities of the child or ward. In Islamic law there is a difference between guardianship over a minor person (*wilayat ala-nafs*) and guardianship over his property (*wilayat ala-māl*). Father is the natural guardian of the child, and in his absence other male paternal relatives to the child take position of the guardianship according to the order of his heirs. This starts with the birth of the child until he or she attains the age of majority. Likewise, the minor child's custody at this stage belongs to his or her mother. If the mother is not capable of performing her duty, the right passes to her mother (the minor's maternal grandmother), followed by the child's paternal grandmother, sisters, sisters' daughters, and aunts. The preference given to female maternal relatives is justified on the ground that they will show greater love and compassion for the child than his female paternal relatives.²⁸

The powers that a guardian can exercise here (except if he is a natural guardian) include, providing for the care, comfort and maintenance of the ward, including appropriate training and education intended to maximize the ward's potential; assisting the ward in developing maximum self-reliance and independence; ensuring that the ward receives necessary emergency medical services and routine medical care.

However, the duty of Guardianship on Property (*Al-Wilayatu 'ala mal*) is only to defend the minor's rights over property he or she had inherited, to make the property profitable, and to use the proceed of the property for the child's maintenance.²⁹ Moreover, the duty of a *Guardian Ad Litem* (Legal Representative) is only to legally represent the interests of the ward of minor. *Guardian ad litem* are also used in other family matters involving grandparents obtaining custody or grand-parenting right as well as protection orders where one parent is attempting to get an order against another party with a legal connection to the child.

The kinds of people that are appointed as a guardian *ad litem* vary. It may be a social worker or a regular attorney with the appropriate qualifications. The two divorcing parents are usually responsible for paying the fees of the guardian *ad litem*, even though the *guardian ad litem* is not responsible to them at all.³⁰

In short, the duties of a guardian can be summarily stated as, safeguarding the ward's Health, given him or her proper education, taking care of the welfare and development, protecting and managing of his / her property, acting as the ward's legal representative and consenting to marriage of the ward, as directed by the Islamic Law. In the other hand, the duties terminates when the minor attains eighteen (18) years of age (age of majority), by the death of the guardian, or the termination of the appointment by court order.

C. Result and Discussion

Guardianship of the Child that is Born Out of Wedlock and Same-Sex Marriage

When a child is born outside wedlock, the right of the custody and the guardianship of the child belongs to the mother solely, although the putative father may also have the guardianship right through court order, if he can prove to make a superior arrangement for the children or by the agreement of the mother, nevertheless, the right is revocable. However, there has been much

²⁸ Ron Shaham, *Family and Court in Modern Egypt*, (New York: Brill Leiden, 1997) at 178.

²⁹ *ibid* at 185.

³⁰ See < http://en.wikipedia.org/wiki/Legal_guardian>(accessed 01/08/2008).

development on this issue in the common law countries. For example, the Law Reform (Parent and Child) (Scotland) Act 1986, s 1, provides for legal equalities to children whether or not their parents are or have been married to each other. S.2, confers parental right (including the right of custody) on the mother whether or not she is or has been married to the child's father and on the father if he is married to the child's mother or was married to her at the time of the child's conception or subsequently.³¹

Eligibility for Appointment as a Guardian

Before a person can be appointed as a guardian, such person must meet all the lay down criteria. The general requirements that cut across laws are that, such person must be a major, responsible and must be sane. However, Islamic law includes other conditions, which are that; the guardian must be a Muslim, must be a male and that is, for a mother to have the custody of her minor child after divorce with the father; she must not marry a person other than the child's *Maharam* (people that are prohibited for the child to marry).

However, the condition that women cannot be appointed as guardians under Islamic law has been heavily challenged in the modern days. During the middle age, women were excluded from playing certain leadership roles due to some impediments. The position includes being a judge or a guardian. Although, some jurists are still conservative about this issue 'Alamat Ibn Hazmi Al- Zahiri, in his opinion, advocated for the appointment of women into judicial position and any other position of responsibility. He argued that the only position that cannot be given to a woman is the position of *Al-Imamtul huzmah* (The World Supreme Leader of the Faithful).³²

In addition, Egypt, a Centre of Islamic Legal Studies in the ancient time, has brought a revolution to this practice. The country appointed one hundred and twenty four (124) qualified women as justices in the country, in 2007.³³ Thus, the question is that if women can be appointed as justices which are a more fragile position, why should they not be appointed as guardians?

New Types of Guardianship System

In the modern days a lot of innovations and development have been brought to the guardianship system across the globe, some of the examples of the new systems include the followings:

a. Conservatorship

A conservator is responsible for making decisions about the financial affairs of the ward. The conservator is appointed by court. The ward's financial affairs include assets such as stocks, bonds, bank accounts, cash and real estate for which the conservator has assumed responsibility. Generally, the conservator controls all of the ward's income and property, takes care of paying bills, and handles other financial matters.³⁴

b. Community Guardianship (Australia)

Many adults in Western Australia have limited capacity to make decisions. These may include decisions about where they live, who cares for them or what medical treatment is appropriate

³¹ A. B. Wilkinson and K. Mck. Norrie, *Parent and Child*, (W. Green / Sweet & Maxwell) at 34.

³² Ibn Hazmi , *Muhala*, (Bairut: Darul-Fikir) Vol. 8, at 528.

³³ See< <http://www.mg.co.za/article/2007-04-16-egypts-first-ever-women-judges-stir-controversy>> (accessed 26/08/2008).

³⁴ The Substitute Decision Makers, Task Force for the Iowa Department of Elder Affairs 'Alternatives to Guardianship and Conservatorship' see< www.justice.wa.gov.au> (accessed 24/07/2008)..

for them. Volunteers with the Public Advocate's Community Guardianship Program help some of these people. This is referred to as Community Guardianship.³⁵

c. Standby Guardianship

Standby Guardianship is one of the more recent approaches to transforming custodian laws. Many States in the United States of America developed these laws to address specifically the needs of families living with HIV or other disabling conditions and terminal illnesses who desire to plan a legally secure future for their children. The persons in charge of the affairs of such people are referred to as standby guardians.³⁶

d. Public Guardianship

This guardianship service helps to protect mentally incapable adults who are suffering or at risk of suffering, serious harm. Severe self-neglect, physical abuse and financial exploitation of incapable people are some of the problems that this service can, in certain circumstances, help to resolve. The people that responsible for these services are referred to as public guardians.³⁷

Doctrine of Best Interest of The Child' in Guardianship

Perhaps, one of the precepts that make guardianship more relevant to the modern society is that all decisions on guardianship are based on the doctrine of 'best interest of the child'. The doctrine is explained in many statutes as 'the welfare of the ward'. The supreme court of Canada gave a very lucid explanation of this doctrine as it stated that the "best interests" is 'ensuring that the interests and needs of the child take precedence over any competing considerations in custody and access decisions'. "Best interests" is a positive test, encompassing a wide variety of factors. It concluded that "The "best interests of the child" can be regarded as the term employed to refer to the spectrum of considerations encompassed by the needs of the child, as distinct from those of any other."³⁸

Guardianship of an Adult

The mentoring of an incapacitated adult is very important and also relevant to the present generation as can be seen in many countries. For example, the United States' state of British Columbia law of the Health Care (Consent) and Care Facility (Admission) Act - Consent to Health Care for Adults. The law confirms the right of adults (persons 19 years of age or older) to make their own health care decisions, either independently or with support from family and friends. The law formally recognizes the role of family and friends who support adults needing assistance with health care decision-making. But in the event that an adult is unconscious, mentally incapable, or otherwise unable to give consent, the law sets out procedures to follow.³⁹

These procedures are followed in the case of JDS' Medical Status/Future Medical Care. The matter came before the Court for consideration of the "Guardian's Report Regarding JDS' Medical Status/Future Medical Care." Having reviewed the Report and court file, the Court found that, J.D.S.

³⁵ See <www.justice.wa.gov.au> (accessed 02/08/2007)

³⁶ U.S. Department of Health and Human Services, see <www.childwelfare.gov> (accessed 03/08/2008).

³⁷ OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE, Publications Ontario 50 Governor Street Toronto, ON M7A 1N, see <www.attorneygeneral.jus.gov.on.ca/english/family/pgt> and www.gov.on.ca/MBS/english/publications/index.html (accessed 17/07/2008).

³⁸ public Guardian and Trustee British Columbia, see < Website: www.trustee.bc.ca> (accessed 15/07/2008)

³⁹ FAMILY LAW PROJECT, CHILD GUARDIANSHIP, CUSTODY AND ACCESS, Report for Discussion No. 18.4 , October 1998.

was an incapacitated adult with multiple disabilities who is currently housed at a Department of Children and Families approved home. As the result of an apparent rape, which occurred while she was housed in a different facility, J.D.S. is over six months pregnant. However, in accordance with the relevant sections of Chapter 744, Florida Statutes, the Court heard petitions for the appointment of a guardian for J.D.S. and appointed Patti Riley Jarrell as J.D.S.'s legal guardian.⁴⁰⁴¹

D. Conclusion

To sum up, as it can be seen clearly from the foregoing that, the institution of guardianship is still relevant to the modern society as enshrined in both Shariah law and the positive law. The institution is beneficial to the whole society as well as the interest and concern person of the ward. Its importance is embodied in the caring, upbringing, education, security and safety of the wards person and property. However, there is a need for effective government and court monitoring, for the purpose of deterring some unscrupulous guardians from taking the advantage of their ward and his property. This is because; all the fundamental rights and financial rights of the ward remain solely in the guardian's disposal and mercy.

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