

All she returned to
her original faith.



**ASSIGN
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All the schools of Muslim law also agree that a hazina will forfeit her right of hizanat in any of the following cases: (a) By her apostasy, (b) By her marriage to a person not related to the child within the degrees of prohibited relationship, (c) By her misconduct, such as negligence or cruelty towards the child, and (d) By her going away and residing, during the subsistence of marriage, at a distant place from father's place of residence.

(i) Insanity and Minority:

Insanity is a disqualification, and no person of unsound mind is entitled to the custody of a child. Minority is also a disqualification; but a minor mother is entitled to the custody of her children.

(ii) Apostasy:

A non-Muslim mother is entitled to the custody of her minor children, and she cannot be deprived of this right on the ground that she belongs to another faith, provided she was a non-Muslim at the time of her marriage. A Muslim mother, who converts to another religion, forfeits her right of hizanat. No other female who is a non-Muslim is entitled to the custody of a child. The orthodox Muslim rules laid down that a woman who changed her religion should be confined to prison till she returned to her original faith. In its modern ramification, it means that a hazina who ceases to be a Muslim forfeits her right of hizanat.

The Shia law is very categorical, and lays down that a person who has ceased to be a Muslim is not entitled to the custody of a child. It is submitted that apostasy is no longer a bar to the right of hizanat after the coming into force of the Caste Disabilities Removal Act, 1850. The Act provides that no

law or usage shall inflict on any person who renounces his religion any ' forfeiture of right of property'. The predominant judicial view is in favour of this interpretation. Ameer Ali takes the contrary view, while Mulla differs from Ameer Ali, Under the Guardians and Wards Act, 1890, the court, in deciding the question of guardianship, is required to consider the personal law of the child as well as the welfare of the child.

Under the Act in determining the question of custody, the paramount consideration is the welfare of the child. In several cases it has been held that the change of religion by the guardian by itself is not enough to deprive him or her of the right of guardianship or custody.

(iii) Subsequent Marriage of Hazina:

The Muslim law-givers of all schools have laid down that a hazina, who marries a person who is not related to the child within the degrees of the prohibited relationship, forfeits her right of hizanat. The underlying notion of this rule is that in the home of her new husband (if a stranger) she will not be able to look after the child with the same love and affection. Thus, according to the Rudd-ul-Muhtar, " The right of hizanat is lost by the mother [or any other female] marrying a ghair-mehram (i.

e., a person not related to the child within the prohibited relationship) of the minor, for a stranger will not be agreeable to her bringing up the child with affection and care". A corollary to this rule is that if the hazina marries mehram, i. e., a relation within the prohibited degrees, the right of hizanat is not lost. But the mehram must be by consanguinity. Thus, the mother will

not forfeit her right of hizanat if she marries child's paternal uncle, who is mehram by consanguinity.

The judicial opinion on this point is conflicting, though the predominant view is that the disqualification is not absolute. The Jammu and Kashmir High Court observed that though a Muslim mother may lose her preferential right of hizanat, if she marries a ghair-mehram, but the fact alone is not enough to disqualify her from being appointed a guardian by the court, the welfare of the child is the paramount consideration. In *Irfan Ahmed Shaikh v. Mumtaz*, it was held remarriage of mother to a stranger (ghair mehram) per se does not bar her from the custody of the minor. The treatment meted out by step-father is material. In the absence of any ill-treatment of the child and in view of the child's desire to stay with mother, custody was given to the mother.

It seems that the present law may be stated thus: (a) A Muslim female who marries a mehram does not lose her right of hizanat. (b) If a Muslim female has married a ghair-mehram, then she may lose her preferential right of custody, if a person preferentially entitled to it is suitable in all respects. But if the person preferentially entitled is not suitable, then the mother will continue to be entitled to the custody of the child, the disqualification being not absolute. (c) A mother or a female who has married a ghair-mehram may also be appointed as a guardian of the minor child by the court, if otherwise found suitable. (d) In all cases, the question is to be considered mainly from the point of view of the welfare of the child.

(iv) Misconduct of the Hazina:

The Muslim law-givers have laid down that a hazina who is unworthy of credit is not entitled to hizanat of the child. The term “unworthy of credit” is applied to a woman who habitually leaves her home, neglects the children, or allows them to starve. It is further laid down by the Muslim authorities that an adulterous woman is also not entitled to the custody of the child. The Rudd-ul-Muhtar lay down the general rule thus: hazina is not disentitled to custody in every case of misconduct, but only in the case of misconduct of such a nature which causes detriment to the child or is likely to cause injury to the child. Thus, a woman who remains outside the home for a considerable time, either on account of work or otherwise and she leaves the child in the home uncared for, is a woman of unworthy credit. But, if, before going out, she makes adequate arrangements for the case of the child, she cannot be deprived of the custody.

Similarly, a woman, particularly the mother, though leading an immoral life, may continue to leave the custody of the child, so long as no evil effect may be apprehended on the child, and so long, as her nurturing is necessary for the child. The cardinal principle of hizanat in Muslim law, as in most of the modern systems of law, is the welfare of the child. This is the reason why Muslim law always preferred mother to father in the case of children of tender years. Thus, if the hazina treats the child with cruelty or neglects it, she forfeits her right of hizanat. However, her right of hizanat cannot be lost on account of her poverty or want of funds to maintain the child. If the hazina has no funds to maintain the child, then it is the duty of the father to provide her with a house and with funds, together with such attendants

within his means, which are necessary for the maintenance of the child.

Poverty of the mother is no ground for depriving her from custody. In case the child has property, then, the hazina may provide habitation and maintenance out of that property.

In case the child has no property, then the father, or any other person, who has the obligation to maintain the child, must pay for the habitation and maintenance of the child. What is remarkable about the Muslim law of hizanat is that every other consideration is subordinated to the welfare of the child. A woman who is unworthy of credit may still retain the custody of child, if the welfare of the child so requires. This means that every misconduct which otherwise disentitled a hazina from the custody of the child is tested on the touchstone to welfare of the child. Thus, no misconduct is absolute, and what amounts to misconduct will vary from case to case.

(v) Removal of the Child by the Hazina:

The Muslim authorities lay down that the home where the husband and wife live together is the place where the child should be brought up.

Muslim law lays down that neither the father nor the mother has the right to remove the child from the matrimonial home. If either of them wants to do so, then the permission of the other is necessary. Thus, a hazina is liable to forfeiture of her right of hizanat if she removes the child, without the prior permission of the father of the child to such a distance from the matrimonial home so as to prevent the father from exercising the necessary control and supervision over the child. In the following two cases she may remove the child from the matrimonial home: (i) when the change of residence has been

made with a view to benefitting the child, or, on account of unavoidable circumstances. Thus, exigencies of her employment may compel a hazina to change her place of residence; (ii) when the mother of the child separates from the father of the child, then, she is entitled to return to her native place wherever it might be. The Fatwai Alamgiri lays down that she cannot go to a place where her marriage did not take place, unless the place is so near that if the father of the child should leave his residence to see the child in the morning, he should be able to return before nightfall. It is submitted that this rule relates to a period when the means of communication and transport were primitive, but now a days the rule has no validity. If the mother has to live away at a distant place for a justifiable reason, she should not be deprived of her right of custody.