

# **GUARDIANSHIP OF A CHILD'S PROPERTY: RIGHTS OF THE CHILD v. RESPONSIBILITIES OF THE GUARDIAN\***

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## **Introduction**

Guardianship is a management by an adult of a child and his property. The guardianship of a child's property becomes an issue where the child acquires significant assets particularly through succession to the deceased's estate *via* testamentary succession under the deceased's will or succession by operation of law. The guardian is responsible for managing the child's property honestly and in his best interests, using it to pay for normal living expenses, health and education. A guardian is a fiduciary and is subject to a very high standard of care in exercising his powers. However, there are cases where the guardian fails to discharge his duties accordingly and wastes or mismanages the child's property causing financial loss to the latter's property.

Hence, this paper will focus on the guardianship of a child's property giving emphasis on the rights of a child to property acquired through succession and the guardianship over his property throughout his minority. As the term 'succession' is defined as a process of becoming entitled to the property of the deceased under a will or by operation of law,<sup>1</sup> the discussion will analyse the rights of the child under both processes. The guardianship of the property will be discussed to examine the scope of the guardian's duties and the extent of his responsibilities in guarding such property. The rights of the child against the unlawful acts of the guardian will also be highlighted so that the child's rights are legally ascertained and protected.

## **Rights of a Child to Testamentary Succession**

Testamentary succession is also known as succession through a will. Whilst the non-Muslims have an unfettered right to dispose of their property by a will, the Muslims' testamentary disposition is subject to limitations. The Wills Act 1959 (Act 346) which governs the making of a will in West Malaysia, does not apply to the wills of persons professing the religion of Islam whose testamentary powers shall remain unaffected by the Act.<sup>2</sup> For the Muslims, the distribution and the right to succession are dependent on and governed by Islamic rules of succession.

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\* A paper presented at the National Conference on Child Law 2010: Issues & Challenges, Social Institute of Malaysia, Sungai Besi, Kuala Lumpur, 2 & 3 October 2010, organised by Faculty of Law and International Relations (FUHA), Sultan Zainal Abidin University.

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<sup>1</sup>LB Curzon, *Dictionary of Law*, 3<sup>rd</sup> Edition, International Law Book Services, 1989, p. 422.

<sup>2</sup> Wills Act 1959, s. 2(2).

## ***Testamentary Succession of non-Muslims***

A child may be entitled to the estate *via* a valid will which specifically provides for the child's entitlement. According to section 2(2) of the Wills Act 1959,<sup>3</sup> the word 'will' means a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death. This includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child. A will in the physical sense may, then, be defined as a declaration in a prescribed form of the intention of the person making it of the matters which he wishes to take effect on or after his death, until which time it is revocable.<sup>4</sup> For a will to be valid, it must satisfy three requirements as to the age,<sup>5</sup> testamentary capacity<sup>6</sup> and formalities<sup>7</sup> for the execution of a will.

## ***Testamentary Succession of Muslims***

A *wasiyyah* or will<sup>8</sup> means an *iqrar*<sup>9</sup> of a person made during his lifetime with respect to his property or benefit thereof, to be carried out for the purposes of charity or for any other purpose permissible by Islamic law, after his death.<sup>10</sup> Therefore, as the will is effective only after the death of the testator, it follows that the transfer of the property will only take effect on such death. Consequently, no claim can be made by the beneficiaries of a *wasiyyah* before the testator's death and the testator is free to deal with the property during his lifetime. The pillars of a *wasiyyah* according to Islamic law consist of the testator (*al-musi*), the beneficiary (*al-musalahu*), the subject (*al-musabihi*) and offer and acceptance (*sighah*).<sup>11</sup>

At present, only the states of Selangor, Negeri Sembilan and Malacca have successfully enforced Wills Enactments namely, Muslims Wills Enactment (Selangor) 1999, Muslims Wills Enactment (Negeri Sembilan) 2004 and Muslims Wills (Malacca) Enactment 2005. The Enactments govern the making of a will by a Muslim.

The general principle of the Islamic law on bequest is that testamentary dispositions may not surpass one-third of the estate of the deceased. This rule is derived from the report by the Prophet's companion, Sa'ad ibn Abi Waqqas who said:

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<sup>3</sup> The Wills Act 1959 (Act 346) which governs the making of a will in West Malaysia, does not apply to the wills of persons professing the religion of Islam whose testamentary powers shall remain unaffected by the Act. See section 2(2) of the Wills Act 1959. For the Muslims, the distribution and the right to succession are dependent on and governed by Islamic rules of succession.

<sup>4</sup> Clive V Margrave-Jones, *Mellows: The law of succession*, 5<sup>th</sup> Edition, Butterworths, 1993, p. 6.

<sup>5</sup> Wills Act 1959, s. 4.

<sup>6</sup> Wills Act 1959, s. 3. See *Banks v. Goodfellow* (1870) LR 5 QB 549 for the rule on testamentary capacity.

<sup>7</sup> Wills Act 1959, s. 5.

<sup>8</sup> The words '*wasiyyah*' and 'will' will be used interchangeably throughout the discussion on *wasiyyah*.

<sup>9</sup> '*Iqrar*' means an admission made by a person, in writing or orally or by gesture, stating that he is under an obligation or liability to another person in respect of some right. See Muslim Wills (Selangor) Enactment 1999, s 2(1). Similar provisions can be found in and Muslim Wills (Negeri Sembilan) Enactment 2004 and Muslim Wills (Malacca) Enactment 2005.

<sup>10</sup> Muslim Wills (Selangor) Enactment 1999, s. 2(1).

<sup>11</sup> Al-Sharbini, Shams al-Din Muhammad bin al-Khatib, *Mughni al-Muhtaj ila ma'rifat ma'ani alfad al-Minhaj*, Dar al-Fikr, vol. 3, at 50.; Musa Fathullah Harun, *Masalah wasiat dan faraid*, Unit Penerbitan Akademik, UTM, 1994, at 4-15.

*The Prophet came to visit me in my sickness. I was then at Mecca and did not like to die at a place from where I had migrated. The Prophet of God said: "God shall have mercy on Ibn Nafra'." I said to the Prophet, "O Prophet! I am wealthy and my only heir is my daughter. Permit me that I make a will of my entire property." He said, "No". I said, "Should I make a will of two-thirds of my property?" He said, "No". I said, "Permit me for a third." The Prophet replied, "You may make a will of a third, although this is also too much. To leave after you your heirs well to do is better than you leave them poor and in want whilst others meet their needs."<sup>12</sup>*

A will of a Muslim which attempts to favour one heir by giving him a larger share of the estate than he is entitled to by Muslim law will also be completely invalid without the permission of the other heirs. This is based on a *hadith* reported by Abu Imamah:

*"I heard the Prophet said: "Allah has already given to each entitled relative his proper entitlement. Therefore, no bequest in favour of a legal heir."<sup>13</sup>*

### **Rights of a Child to Succession by Operation of Law**

The entitlements and rights of a child to the deceased's estate may also arise by the operation of law. This is commonly known as the intestate succession. For the Non-Muslims, the rules are governed by the Distribution Act 1958 (Act 300). For Muslims, the intestacy rules are also known as the rules of *faraid*.

#### ***Intestate succession for non-Muslims***

The rights and entitlements of a child to the deceased intestate estate are provided by the Distribution Act 1958. For the purpose of the Act, section 3 provides that 'issue' includes the intestate's children referring to only the legitimate children and the child adopted under the provision of Adoption Act 1952. The definition of 'issue' also includes the descendant of deceased children. The Act also provides for the persons held to be similarly related to the deceased that there shall be no distinction between those who were actually born in the deceased's lifetime and those who at the date of his death were only conceived in the womb but who are subsequently been born alive.<sup>14</sup> Section 6(1) the Act provides for the right portion of a child as follows:-

- i) If an intestate dies leaving issue but no spouse and no parent or parents, the surviving issue shall be entitled to the whole of the estate.<sup>15</sup>
- ii) If the intestate dies leaving a spouse and issue but no parent or parents, the surviving spouse shall be entitled to one-third of the estate and the issue the remaining two-thirds.<sup>16</sup>

<sup>12</sup> Al-Bukhari, *Sahih al-Bukhari*, translated by Muhammad Muhsin Khan, Kazi Publication, vol. 4, 1979, p.3.

<sup>13</sup> Al-Bukhari, *Sahih al-Bukhari*, p. 6.

<sup>14</sup> Distribution Act 1958, s. 5.

<sup>15</sup> Distribution Act 1958, s. 6(1)(c).

- iii) If the intestate dies leaving no spouse but issue and a parent or parents, the surviving issue shall be entitled to two-thirds of the estate and the parent or parents the remaining two-thirds.<sup>17</sup>
- iv) If an intestate dies leaving a spouse, issue and parent or parents, the surviving spouse shall be entitled to one-quarter of the estate, the issue shall be entitled to one-half of the estate and the parent or parents the remaining one-quarter.<sup>18</sup>

### ***Intestate Succession for Muslims***

As far as a child is concerned, he or she will be entitled to the deceased's estate in his or her capacity as one of the legal heirs. The right of a legal heir is that of a defined quota share in each and every item of property that comprises the estate. Under Islamic law, the subsequent twelve relations are entitled to inherit according to individual circumstances: the husband, wife, father, mother, daughter, grandfather, grandmother, son's daughter, a full sister, a sister by the same father as the deceased, a brother by the same mother as the deceased and a sister by the same mother as the deceased. In the context of the discussion, a child may inherit in all capacities hereinbefore mentioned except as a husband, wife, father, mother, grandfather and grandmother as all these people would not be considered as a child anymore.

In cases of residuary heirs, a child may be entitled to the residue in his capacity as sons how low so ever or full brothers and brothers by the same father as the deceased. The existence of the residuary heirs may disqualify other heirs based on the rules of priority to succession and by the closer degrees of relationship.

In cases of Muslims, the male constantly inherits double the female share. So, sons get double the share of daughters in the inheritance of Muslims. Daughters and sons are in an exclusive situation according to Islamic law and how much they get depends on the survival of other heirs. A daughter in her own right, where there is no son or other descendant through the male line is entitled to receive half of the estate through the male line. If it is established that there are more than one daughter, they will share collectively and cooperatively two-thirds of the estate the deceased. However, if there is a son, then the daughter only receives half the share allotted to him.

Generally, the rules of distribution according to the Islamic law are that the male takes precedence over the female. The female constantly takes half the share of the male and persons of additional degrees of relationship are disqualified by those of closer degrees of relationship.

### **Power of Court Relating to Estate Dispositions**

There may be situations where the deceased's estate effected by a will or by operation of law, is not such as to make reasonable provision for the maintenance of his dependant. In these

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<sup>16</sup>Distribution Act 1958, s. 6(1)(e).

<sup>17</sup>Distribution Act 1958, s. 6(1)(f).

<sup>18</sup>Distribution Act 1958, s. 6(1)(g).

circumstances, under the Inheritance (Family Provision) Act 1971,<sup>19</sup> if the court is of the opinion that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable provision for the maintenance of his dependant (which includes an infant son and a daughter who has not been married), the court may, upon application by or on behalf of the dependant, order that such reasonable provision as the court thinks fit, be made out of the deceased's net estate for the maintenance of that dependant.<sup>20</sup>

### **Appointment of *Guardian ad litem***

In cases where the beneficiaries of the deceased's estate are minors, an application for the appointment of a guardian *ad litem* must be made. The purpose of such appointment is to enable the guardian to represent the minor beneficiaries, especially in cases where consent from the minors are required in an application to divest their interest. In such a case, the guardian *ad litem* may give consent on behalf of the beneficiaries.

Nevertheless, the court must be satisfied that the consent is given for the benefit of the minors. In *Re Lua Kin Suai & Anor*,<sup>21</sup> the deceased died leaving her husband and four infant children. Letters of administration in respect of the deceased's estate were granted to the husband and the deceased's sister. The latter was also appointed as the guardian *ad litem* of the infant children. In this instance, the administrators applied to have two properties of the deceased transferred to the husband. No reasons were given for the application of the said transfer except that the guardian *ad litem* had no objection. It was held that the consent of the guardian *ad litem* must not be taken to be a mere rubber stamp of approval. Even the guardian must state, in her view, why such a transfer to the husband/administrator would benefit the infant beneficiaries. The application was then dismissed.

An appointment of a *guardian ad litem* may also be inferred from section 10(1) of the Small Estates (Distribution) Act 1955. Based on the section, where any person, who is named in the petition as a beneficiary of or claimant to the estate or any interest therein or who appears to the Land Administrator to be interested in the distribution of the deceased's estate is a minor, the Land Administrator may, by order in writing, appoint some suitable and proper person to be the guardian of the minor for the purposes of all proceedings for the distribution of the estate. All such proceedings shall then be effective and binding upon all persons concerned as if that person had not been a minor.

Section 15 of the same Act further provides that a representative *cum* guardian may also be appointed to represent a minor especially when the distribution of the estate is to be made according to an agreement entered into by all the beneficiaries. If in any of such agreement there is any beneficiary who is a minor or a person not in full capacity to do so, section 15(2) of the

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<sup>19</sup> The Inheritance (Family Provision) Act 1971 is applicable throughout Malaysia, but is not relevant to the estates of deceased Muslims or natives of any of the States in East Malaysia.

<sup>20</sup> Inheritance (Family Provision) Act 1971 (Act 39), s. 3.

<sup>21</sup> [1999] 5 CLJ 549.

Small Estates (Distribution) Act 1955 empowers the Land Administrator to assent to the agreement on behalf of the minor or such person if he is of the opinion that it is for the interest of such person.

However, in cases where representatives of the minors or of the persons of unsound mind has been appointed under section 10(1) of the Act, it would not be necessary for the Land Administrator to have himself assented on behalf of such beneficiary. In *Re Mamat bin Dat San & Anor.; Mek Som v. Awang bin Senik*,<sup>22</sup> it was held that section 15(2) of the then Small Estates (Distribution) Ordinance 1955 should be read together with section 10(1) of the same Ordinance. In this case, one of the beneficiaries to the estate was of unsound mind. The plaintiffs contended that since the Land Administrator had not himself assented to the agreement on behalf of the said beneficiary, the order of distribution made by the Land Administrator was null and void on the ground that the provisions of the said section 15(2) had not been complied with. The record of the distribution proceedings however, showed that another beneficiary had been appointed by the Land Administrator to be a guardian of the said beneficiary as provided by section 10(1) of the Small Estates Distribution Ordinance 1955. It was held that as the said beneficiary's guardian had entered into the agreement with the other beneficiaries and assented to the scheme of distribution, it would not be necessary for the Land Administrator to have himself assented on behalf of the said beneficiary. Such an assent would only be required if no guardian had been appointed for the said beneficiary.

### **Administration of a child's property acquired *via* succession**

Due to his lack of legal capacity to own or hold property, the property of a child is considered as an undistributed fund for the purpose of administration of estate in Malaysia. By virtue of section 86 of Probate and Administration Act 1959, undistributed funds may be passed to the Public Trust Corporation. The section provides as follows:

*(1) Where upon the conclusion of the administration of the estate of a person dying testate or intestate, there remain in the hands of any personal representative funds of which he is unable to dispose immediately by distribution in accordance with law by reason of the inability of the person entitled to give discharge, through lack of legal capacity or otherwise, or by reason of any cause which to the Corporation<sup>23</sup> shall appear sufficient, the personal representative may, if the Corporation consents to accept the same, pay the funds to the Corporation which shall not be required to make any inquiry whether the administration has been conducted in accordance with law, but may accept the same for the benefit of that person and may for the purpose exercise all the powers conferred on the Corporation under section 19 of the Public Trust Corporation Act 1995.*

Section 16 of the Small Estates (Distribution) Act 1955 which provides for the procedure after hearing particularly on the distribution order made by the Land Administrator also provides for

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<sup>22</sup> [1972] 1 M.L.J. 59.

<sup>23</sup> "Corporation" means Amanah Raya Berhad, a company incorporated under the Companies Act 1965 and pursuant to section 3 of the Public Trust Corporation Act 1995. See s. 2, Probate and Administration Act 1959.

the administration of undistributed funds. The section provides that the Land Administrator shall deposit a sum of money which is payable to any person under or by virtue of distribution order with the Corporation in cases where such person lacks legal capacity which definitely includes a child.

The provision for undistributed funds can also be found in section 20 of the Public Trust Corporation 1995 which provides as follows:

*Where, upon the conclusion of the administration of the estate of a person dying testate or intestate, there remains with the Corporation funds of which it is unable to dispose immediately by distribution in accordance with law by reason of the inability of the person entitled to give discharge, through lack of legal capacity or otherwise, or by reason of any other cause which to the Corporation appears sufficient, the Corporation may apply the same for the benefit of that person and may for the purpose exercise all the powers under section 19.*

Once the money has been deposited with the Corporation, it shall hold such sum as trustee for the person entitled to it, and may apply the same for the benefit of that person, or may pay the said sum to that person if he makes a claim thereto in writing and the Corporation is satisfied as to his identity, entitlement and legal capacity to receive it.

#### ***Administration of Undistributed Fund***

The administration of an undistributed fund is governed by section 19 of the Public Trust Corporation Act 1995 which deals with the payment of minor's maintenance. The section provides:

*(1) Where any property not exceeding twenty thousand ringgit in value is held by the Corporation, whether by virtue of a grant of letters of administration to the Corporation or by virtue of the powers conferred on the Corporation by this Act, and the property is held by the Corporation upon trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interest or charged affecting that property. The Corporation may at its sole discretion, during the minority of any such person, make payments of the whole or such part of the income and capital money of the property as may in all the circumstances be reasonable for that person's maintenance, education or benefit.*

*(2) Where the property so held exceeds forty thousand ringgit in value, the Corporation may make payments of capital money to the extent of twenty thousand ringgit.*

*(3) Payments under subsections (1) and (2) may be made to parent or **guardian of such person** or otherwise as the Corporation may, in its discretion, determine and whether or not there is-*

*(a) Any other fund applicable for the same purpose; or  
Any person bound by law to provide for the person's maintenance or education.  
(emphasis added)*

At this point, the role of a guardian in relation to the guardianship of the child's property would commence. It is very unfortunate that the scope of the guardian duties and responsibilities have not been clearly provided under the Public Trust Corporation Act 1995. This is important for the purpose of monitoring and supervising the guardian in carrying out his duties accordingly.

### **Guardianship of a child's property**

As the Public Trust Corporation 1995 does not provide for the duties and responsibilities of a guardian in the administration of a child's property, reference may well be made to the Guardianship of Infants Act 1961 which is considered as the main legislation governing guardianship in Malaysia.<sup>24</sup>

Section 5 of the Guardianship of Infants Act 1961 provides that in relation to the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the laws allows to a father, and the rights and authority of mother and father shall be equal. However, in either case, it is not an absolute right. The High Court retains a discretionary power to appoint some other person to be the guardian or in the case where there is no living father, to appoint another person to act jointly with the mother.<sup>25</sup> Where no parent is living, the testamentary guardian, if any, appointed by the last surviving parent will be the guardian, subject of course, to the welfare of the child. In the absence of a testamentary guardian, an orphan may be taken before the High Court or a judge sitting in chambers. A guardian may then be appointed by the court or the judge, as the case may be. The guardian's duties in respect of the person of a child include custody and responsibility for its support, health and education, In appointing a guardian of a child's property, the court may define, restrict or extend the guardian's power and authority to such extent as is necessary for the welfare of the child.

The provisions regarding the appointment of a guardian can also be found in the Islamic Family Law Statutes in Malaysia.<sup>26</sup> For example, section 89(1) of the Islamic Family Law (State of Selangor) Enactment 2003 provides as follows:

*(1) Although the right to hadhanah or the custody of the child may be vested in some other person, **the father shall be the first and primary natural guardian of the person and property of his minor child**, and where he is dead, the legal guardianship devolves upon one of the following persons in the following order of preference,  
that is to say—  
(a) the father's father;  
(b) the executor appointed by the father's will;  
(c) the father's executor's executor;*

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<sup>24</sup> S.1(3) of the 1961 Act provides that the Act does not apply in any particular State to Muslims unless it has been adopted by the State legislature, and by para (a), any such law may provide that nothing in the Act which is contrary to the Islamic religion or the custom of the Malays shall apply to any person under the age of 18 years who professes the Islamic religion and whose father professes or professed that religion at the date of the child's birth.

<sup>25</sup> Guardianship of Infants Act 1961, s.6.

<sup>26</sup> Most of the provisions relating to the guardianship have been largely adopted from the Guardianship of Infants Act 1961 in so far as they are consistent with the Islamic law.



- (d) the father's father's executor;*
- (e) the father's father's executor's executor,*

*provided that he is a Muslim, an adult, sane and worthy of trust. (emphasis added)*

A mother who is a Muslim, may be validly appointed executrix of the father, and in that case she may exercise the powers as a testamentary guardian, or in the absence of a legal guardian, she may be appointed legal guardian by the Court, but in the absence of such appointment she shall not deal with the minor's property.<sup>27</sup>

Where a person is appointed by the Court to be the guardian of a minor's property he shall, unless the Court otherwise orders, give security in such sum as may be appointed for the due performance of his duties as guardian.<sup>28</sup>

### **Powers and Removal of a Guardian**

A guardian of the property of a child has control and management of the child's property. The guardian is required to deal with the property of a child as carefully as persons of ordinary prudence would deal with their own property. There is an expectation that guardians do all acts which are reasonable and proper for the realization or protection of the property in their charge.<sup>29</sup> The general rule is that a guardian, executor, or anyone who has the care of the person and property of a minor, can enter into a transaction which is (or likely to be) advantageous and not injurious to the child.

#### ***Power of a Guardian over immovable and movable property***

The power of a guardian in dealing with the immovable and movable property<sup>30</sup> of the child has been dealt with by the Islamic Family Law Statutes. For example, section 90 of the Islamic Family Law (State of Selangor) Enactment 2003 provides as follows:

- (1) As regards immovable property, a legal guardian shall have no power to sell, except in the following cases, that is to say—*
  - (a) where at least double the price of the property may be obtained by him from a stranger by the sale of the property;*
  - (b) where the minor has no other means of livelihood, and the sale is absolutely necessary for his maintenance, and the minor has no other property;*
  - (c) where the property is required to be sold for the purpose of paying off the debts of the testator, which cannot otherwise be liquidated;*
  - (d) where there are some general provisions in the will of the testator that cannot be carried into effect without the sale of the property;*

<sup>27</sup> Islamic Family Law (State of Selangor) Enactment 2003, s. 92.

<sup>28</sup> Guardianship of Infants Act 1961, s.14. See also Islamic Family Law (State of Selangor) Enactment 2003, s. 96.

<sup>29</sup> Guardianship of Infants Act 1961, s.4.

<sup>30</sup> There is no such provision in the Guardianship of Infants Act 1961.

*(e) where the income accruing from the estate is insufficient to defray the expenditure incurred in its management and the payment of the land revenue;*  
*(f) where the property is in imminent danger of being destroyed or lost by decay;*  
*(g) where the property is in the hands of a usurper, and the guardian has reason to fear that there is no chance of fair restitution; or*  
*(h) in any other case where it is absolutely necessary to sell the property on other grounds permitted by Hukum Syarak and the sale is to the manifest or evident advantage of the minor.*

*(2) As regards movable property, a legal guardian shall have power to sell or pledge the goods and chattels of the minor, if he is in need of imperative necessities, such as food, clothing, and nursing; and where the movable property of a minor is sold bona fide for an adequate consideration, with the object of investing the proceeds safely and for an increased income, its sale shall be held valid.*

### ***Limitation of Guardian's power***

A guardian of the property of an infant shall not, without the leave of the Court or a Judge, sell, mortgage, exchange or otherwise part with the possession of any of the movable or immovable property of the infant; or lease any land belonging to the infant for a term exceeding one year. Any disposal of an infant's property in contravention of this may be declared void, and on such declaration the Judge may make such order as appears requisite for restoring to the infant's estate the property so disposed of. The Court or a Judge shall not make any order under subsection unless it is necessary or advisable in the interests of the infant.<sup>31</sup>

A guardian of the property of an infant shall not, unless in any case the Court or Judge otherwise orders, be empowered to give a good discharge for any legacy or other capital monies payable or receivable by an infant.

### ***Removal of a Guardian***

It needs to be emphasized that by s 10 of the Guardianship of Infants Act 1961, the High Court is given an overriding power to remove 'at any time' a guardian, presumably in the interests of the welfare of the child. The Court or a Judge may at any time remove from his guardianship any guardian, whether a parent or otherwise and whether of the person or the property of the infant, and may appoint from time to time another person to be guardian in his place.

When a guardianship is instituted because of the age of the child, the guardianship may be terminated when the child reaches the age of majority. A guardian may also be removed when he or she has not provided adequate care for the child or when it is determined that the guardian is guilty of neglect. Neglect can include using the child's money or property for the guardian's

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<sup>31</sup> Guardianship of Infants Act 1961, s. 15. See also Islamic Family Law (State of Selangor) Enactment 2003, s.97.

own benefit and not obeying court orders. Upon court order, the guardian will be removed and a new guardian (or temporary guardian) will be substituted in place of the original guardian.<sup>32</sup>

It was also established in the case of *Re Estate of Yong Wai Man*<sup>33</sup> that a guardian holding the property of an infant was a trustee holding property under an implied trust which arose as soon as the guardian came into possession of such property. Hence, it follows that in this circumstance the acts of the guardian are subject to the Trustee Act 1949 in which case the breach of such a trust would give rise to an action be instituted on behalf of the child against the guardian.

## **Conclusion**

The role of a guardian in the guardianship of a child's property requires trustworthiness and someone who can actually carry out the responsibilities accordingly. The interest of the child should be the main and paramount consideration in selecting a guardian to a child's property. A guardian is subject to the regulations and control of the court in performing his or her duties and is required to understand and acknowledge the duties and liabilities. There should be a comprehensive law relating to the guardianship of a child's property acquired through succession in order to supervise and monitor the acts of the guardian in guarding the child's property. It is important for the law to guarantee the protection of the child's property against any misappropriation that may be committed by the guardian in order to ensure that the interest of the child and his property would not, in any way be adversely affected or prejudiced.

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<sup>32</sup> [www.enotes.com/everyday-law-encyclopedia/guardianship-2](http://www.enotes.com/everyday-law-encyclopedia/guardianship-2)

<sup>33</sup> [1994] 3 MLJ 514.