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Child Custody in Bangladesh: Why the Child's Welfare Overrides Traditional Rules

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Child custody disputes in Bangladesh are often framed around parental entitlement, the father's status as natural guardian, the mother's traditional right of *hizanat*, or other rules of personal law. However, the controlling judicial principle is more child-centred, and the child's welfare is the paramount consideration. While Islamic personal law provides a foundational framework, navigating custody requires understanding how modern courts prioritize the child's best interests over the traditional laws.

1. The Doctrinal Baseline vs. Statutory Supremacy

Under classical Islamic jurisprudence, the primary framework for custody is rooted in the Quran and prophetic tradition. While the Quran does not explicitly detail post-divorce custody rules, Surah Al-Baqarah **(2:233)** establishes the paramount importance of early maternal care and the child's welfare, mandating that the father bears the duty of financial provision without either parent suffering harm. As for authentic hadith, the most widely cited and foundational hadith regarding custody is "*A woman said: O Messenger of Allah, this son of mine, my womb was a vessel for him, my breast was a source of drink for him, and my lap was a refuge for him. His father has*

divorced me and wants to take him away from me. The Prophet Muhammad ﷺ said: 'You have more right to him as long as you do not marry.'" (Reported by Ahmad, Abu Dawud 2276, and authenticated by scholars). Another important hadith is *"the maternal aunt is like the mother"* (Sahih al-Bukhari, 2699, 2700), which solidifies the preference for the maternal line in early upbringing.

In Muslim custody disputes, these traditional rules of *hizanat* remain an important part of the legal framework, often establishing a preferential right of custody at particular stages of a child's life. Under Mulla's Principles of Mahomedan Law, a mother typically holds physical custody of her son until age seven and her daughter until puberty. Yet the Supreme Court of Bangladesh has made clear that these rules do not operate as an indefeasible entitlement where the child's welfare requires a different arrangement.

Section 17 of the Guardians and Wards Act, 1890 directs the Court, in appointing or declaring a guardian, to be guided by what is, consistently with the law applicable to the minor, for the welfare of the minor. The Court must consider factors including the child's age, sex and religion, the character and capacity of the proposed guardian, the relationship between the guardian and child, and, where the child is sufficiently mature, the child's intelligent preference. Accordingly, personal law remains relevant, but the statutory scheme requires the Court to examine the actual circumstances of the child rather than apply a custody formula.

2. The Remarriage Disqualification and Supreme Court Precedents

The most heavily litigated controversy arises from the rigid traditional interpretation that a mother automatically forfeits custody if she remarries a "stranger." Fathers frequently weaponize this premise to unilaterally disqualify mothers. However, a closer textual analysis of the foundational Hadith reveals a critical nuance.

By stating in the hadith, "You have more right to him as long as you do not marry," the text indicates that remarriage merely removes the mother's automatic priority, or "upper hand." It does not decree an absolute forfeiture, nor does it explicitly subordinate her rights below the father's. Therefore, it cannot be legitimately utilized as a blanket defense to completely extinguish a mother's right to custody, particularly when the overriding welfare of the child dictates that they remain in her care.

The Appellate Division of the Supreme Court of Bangladesh has, however, consistently declined to treat entitlements under personal law, including the remarriage rule, as automatically determinative. The same welfare-first approach is visible even outside the remarriage context: in *Md. Abu Baker Siddique v. S.M.A. Bakar* (38 DLR (AD) 106), the Appellate Division upheld custody with the mother notwithstanding the classical Hanafi rule that a son past the age of seven presumptively belongs with the father, because the evidence showed the mother's

care better served the child's welfare. The case did not itself concern remarriage, but it establishes the general principle that a traditional entitlement whatever its source, yields to welfare where the two conflict.

That principle was subsequently reinforced, and applied more directly to the remarriage question, in *Abdul Jalil and others v. Sharon Laily Begum Jalil* (50 DLR (AD) 55 = 18 BLD (AD) 21). In *Abdul Jalil*, the Appellate Division stated that, in determining custody, the welfare of the children is paramount and that neither the parties' rights under personal law nor statutory provisions can supersede that consideration. The practical effect is significant. A parent cannot secure custody merely by establishing a traditional legal entitlement, including the remarriage rule. The Court must determine where the child's interest and welfare actually lie.

3. Custody vs. Guardianship: The Procedural Framework

The Guardians and Wards Act 1890 distinguishes between guardianship and the custody or day-to-day care of a minor. A parent's status as a natural or legal guardian therefore does not, by itself, resolve every custody dispute. The Court must still consider whether the proposed arrangement serves the child's welfare. Currently, the Family Courts Act, 2023 gives the Family Court jurisdiction over suits relating to the guardianship and custody of children. The substantive welfare principle, however, continues to operate principally through the Guardians and Wards Act, 1890 and the Supreme Court's interpretation of that Act.

4. The Child's Voice and Evaluating the Welfare Paradigm

Section 17(3) of the Guardians and Wards Act 1890 permits the Court to consider the preference of a minor who is old enough to form an intelligent preference. In *Anika Ali v. Rezwanul Ahsan* (2012) 17 MLR (AD) 49, the Appellate Division of Bangladesh emphasized the importance of the child's views and recognized that custody arrangements may be revisited when circumstances change. A custody order should not necessarily be treated as permanent; as the child's age, education, health, and material circumstances change, the Court may respond accordingly.

When determining custody, the Court usually conducts a broad inquiry into the following factors:

- Physical safety and protection from abuse or neglect.
- Emotional stability and the child's relationship with each parent.
- Continuity of education, residence and day-to-day care.
- Health and developmental needs.
- The character, capacity and actual caregiving ability of each parent.
- The child's own views where the child is sufficiently mature.

- The ability of each parent to maintain an appropriate relationship between the child and the other parent.

Shifting the Paradigm: What Does the Child Need?

Bangladesh law has not abolished traditional rules of custody or personal law. Rather, the courts have placed those rules within a broader welfare-based framework. The modern approach is fundamentally child-centred. The Court is not simply deciding which parent has the stronger legal claim; it is deciding which arrangement best protects the child's welfare in the circumstances of the case. In modern litigation, the central question is no longer merely "Who is entitled to custody?" but "What does the child need?".

How can we assist?

Accord Chambers provides legal assistance in family and child-related disputes, including custody, guardianship, and related proceedings. For any strategic assistance, please feel free to reach us any time.

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