**Guardianship over a Property**

**Written by:**

***Muhammad bin Abdelazeez Al-Numay***

**Presented by:**

***Sheikh Abdullah bin Abdelrahman bin Jibreen may Allah show mercy on him***

**This book and its Hadith are transmitted by: *Sheikh Ali bin Abdullah Al-Numay***

**Translated by:**

***Ayat Ayman***

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| In my opinion, this message is considered the best thing written about this subject:  Sheikh Abdullah bin Abdelrahman bin Jibreen |

Ali bin Abdullah bin Abdelazeez Al-Numay, 1432

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| ***By the Name of Allah, Most Gracious, Most Merciful*** |

**By the Name of Allah, Most Gracious, Most Merciful**

Praises be to Allah, Who created us, provided us with sustenance, made us be Muslims, legalized rules for us and showed us the lawful and the unlawful. I praise and thank Him, Glory be to Him, seek His forgiveness, witness that He is our God Alone and there is no god but He, and witness that Muhammad is His slave and Messenger to all of His creation, peace be upon him, upon his family and companions.

To proceed: Allah has made it easy for me to read this valuable message which was written by our brother and friend Sheikh Muhammad bin Abdelazeez Al-Numay may Allah show mercy on him and honored him Abode. This message talks about guardianship over property, characteristics of the one who guards the property, the one whose property is under guardianship, the provisions that should be achieved for both of them, how the one who guards the property dispose of it, when his guardianship ends, how to return the property back to its owner, and other subjects related to this matter. He has given this subject its due, covering all matters related to guardianship, interdiction for foolishness and so on, showing disagreements about this matter, the evidences of each group, the replies over each group and the preponderant opinion. The author was fair in presenting this subject; he was not partial to any saying or group. He concluded the preponderant opinion according to strong evidences and general interests. Accordingly, in my point of view, this message is considered the best thing written about this subject.

This message shows that the writer may Allah show mercy on him was of wide acquaintance, was of fairness and moderation in choosing the preponderant opinion that the evidence supports. It also shows what the Islamic Shari'ah includes of seeking all matters that benefit the Islamic Ummah, collectives and individuals; such as caring for fool people and children, saving their rights, and severe warning of act wrongfully towards them and taking their money without right. In addition, the Islamic Shari'ah commanded to increase and trade in their money, provided that it is saved for them when they need it. The Islamic Shari'ah did not neglect the right of these weak people; it urged to take care of them and do the better that bring benefits for them. We ask Allah to make Muslims beware of what is necessary for them, to direct us to guidance and to save us from destruction ways. And we ask Us to show mercy on our brother, the writer of the message, and make its good return to his descendants. May Allah send blessings and peace to Muhammad, his family and companions!

**(13-10-1419 AH)**

**Abdullah bin Abdelrahman Al-Gebreen**

**Introduction about the Writer of the Message**

**His Name:** Sheikh Abu Ibrahim Muhammad bin Abdelazeez bin Abdullah Al-Numay At-Tamimy Al-Hanbaly

**His Birth:** He was born in (Al-Qasab) city at the area of Al-Washam in 1360 AH.

**His Education:** He accomplished his primary stage at Ar-Riyad Institution, general Department in 1378 AH.

Then he accomplished his secondary stage, general department at Ar-Riyad Institution, scientific department in 1383 AH.

After that he accomplished his high education at Faculty of Shari'ah in Ar-Riyad in 1387/1388 AH. He was excellent in his study.

He was appointed as a teacher at Harimla' city in 1388 AH, and then he transferred to Ar-Riyad Institution, scientific department in 1391 AH.

Then he was granted the master degree in the Islamic Shari'ah after succeeding in the test of High Institution of Judiciary in 1394 AH. Accordingly, he was appointed as a teacher in at Faculty of Shari'ah in Riyad.

**His Life:** He, may Allah show mercy to him, was charitable, caring for good deeds. He was loved by those who knew him. He also often sat with scholars and students; such as Sheikh Abdullah bin Abdelrahman Al-Gebreen and others.

In addition, he was excellent at Inheritance science and was perfect in facilitating and explaining it. His students at the faculty were known with their excellence in this science.

**His Death:** He (may Allah show mercy on him) died at (12:30) on Saturday on 11/1/1405 AH, in (Washington – George Tawn College Hospital) due to cancer. Then he was carried to Ar-Riyad, and the (funeral) prayer was observed for him in the Great Masjid, and was buried in Al-'Od tomb.

**His Children:** He had eight children; six sons and two daughters. May Allah make us and them guide others and be guided, and may Allah forgive us, our parents and all Muslims.

**Introduction about the Supervisor on the Message**

**Sheikh Abdelrazeq 'Afify (1)**

**His Name:** Abdelrazeq bin 'Afify bin 'Atyah An-Noby

He was born in Shanshor; a village in Al-Monofiyah Governorate in Egypt, in 1325 AH. (It was mentioned at the introduction of the book 'Collection of Fatwa of the Committee that he was born in 1323 AH). He accomplished his high education at Al-Azhar Mosque, and was graduated from it in 1351 AH, with an international certificate. Then he studied at Al-Fiqh and its fundamentals section, seeking to specialize in it. He continued his study, taking from books of various scholars. Those who realized him described him that he was like an encyclopedia of knowledge, of various faculties and of being skillful in other sciences.

He worked as a teacher in schools of Al-Azhar in Egypt. He was a master for the group of supporters of Muhammad Sunnah. Then he migrated to countries of the Two Holy Mosques. (It was mentioned at the introduction of the book 'Collection of Fatwa of the Committee that he was deputed to the Kingdom of Saudi Arabia in 1368 AH). He studied in different places, including At-Ta'if where he studied at Dar At-Taweed. He also studied in Ar-Riyad and 'Unaizah.

After that he was appointed as a teacher at Faculty of Al-Shari'ah in Ar-Riyad after it was built. Then he was appointed as a manager of the High Institution of Judiciary in 1385 AH.

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(1) Taken from the book 'A Scientific Interview with Sheikh Abdelrazeq 'Afify).

In 1391 AH, he was appointed at Dar Al-'Ifta (Fatwa Council). He was a member at Major Scholars Council and at Permanent Committee of Fatwa. After that he became a deputy to its head, until he died, may Allah show mercy on him.

He supervised at some high, scientific messages, doctorate and master degree. He also has scientific episodes in interpreting Allah's Book. He was delivering them at Masjid of Sheikh Muhammad bin Ibrahim in Ar-Riyad. Then he delivered his lessons at his house.

He was leading people at prayers at the Masjid next to his house. In addition, he used to deliver some scientific lessons and legal admonitions at different times.

He had five sons and three daughters. Three sons among them died before him. His care was directed to teaching, education, guiding and giving Fatwa. As a result, he did not have time to write books.

However, 'A Notebook of monotheism' was published for him. It is considered a useful message that represents his thoughts that he delivered to his students at the college.

He also has useful comments on the book 'Perfection in Fundamentals of Rules' for Al-Amedi.

What represent his wide knowledge, accurate view and collective recognitions are his comments, of little words and great value, which he wrote as notes in the book 'Explanation of At-Tahawiyah Belief' for Ibn Abu Al-'Iz Al-Hanafi that explain books of Sheikh of Islam Ibn Taimiah and his student Ibn Al-Qayem may Allah show mercy on both of them.

The knowledgeable Sheikh Al-Albany described him that he is among the best scholars and among the few whom we see through them characteristics, manners, kindness and understanding of scholars.

He (Sheikh Al-Albany) also said about (Sheikh Abdelrazeq 'Afify): "I met him some times during performing Pilgrimage. Sometimes, I listened to his scientific answers for various questions of pilgrims. His answers were accurate, referred to his perfect Fiqh and clearly showed that he was following approach of the antecedents.

He - may Allah show mercy on him - died on Thursday morning, on twentieth fifth of Rabi' al-Awwal in one thousand, four hundred and fifteen year (1415). He was buried in Ar-Riyad after Friday prayer. May Allah show mercy on him and make him be with the righteous, and gather us and him in Paradise with the master of the Messengers, may Allah send blessings and peace upon him, all of his family and companions.

**Students of the Sheikh:**

Among the prominent students of the Sheikh may Allah show mercy on him are:

\_Sheikh Abdullah bin Gebreen, a member in Fatwa council

\_Sheikh Abdullah bin Qa'ood, a member in great scholars committee

\_Sheikh Saleh Al-Fawzan, a member in great scholars committee

Indeed, members of great scholars committee in kingdom of Saudi Arabia are students of the Sheikh may Allah show mercy on him, except Sheikh Abdelazeez bin Baz may Allah show mercy on him and few others.

I ask Allah to reward the Sheikh with good, for what he introduced of serving knowledge and its people, and to make him dwell in His wide Paradise. For Allah is the All-Hearer, All-Knower.

**Introduction about the Investigator of the Message**

Praises be to Allah Who made just people of every generation carry this knowledge, and Who made over times scholars who call for following the two revelations (the Book and the Sunnah), help for understanding them, showing their meanings and concluding their rules. To proceed: Allah the Al-Mighty has honored me by working on transmitting and investigating this valuable message, called as **(Guardianship over Property)**, which was prepared by the brother of my father, Sheikh Muhammad bin Abdelazeez Al-Numay may Allah show mercy on them. I transmit it to the readers after working on it, so that it would be published and its benefit would become public.

The Eminence Sheikhs Abdullah Al-Gebreen and Muhammad Al-Numay, the writer of the message, have showed the importance and value of this message and so there is no need to repeat this.

**What caused me to transmit and investigate this message are the following:**

**First:** Its importance which is represented through its subject, for it talks about one of the most important sides of guardianship; managing and investing on money of those who are in need to others to manage their money.

**Second:** The urgent need of the guardians to know rules of the guardianship.

**Third:** Fulfilling the urgent need of judges and students for a book that shows rules of guarding over property, and so it would it would make their mission easy and save their time.

**Fourth:** Showing the favor of Islam, for it has regulated affairs of guardianship and guaranteed for the weak; young, mad, insane, fool and stupid, management and protection of their money.

**Fifth:** Value of the scientific message and excellence of the researcher and supervisor on the message.

**I would like to guide the honorable reader that my work in this message and in transmitted its Hadith are summarized in the following:**

\_I added on its introduction some information about the writer and supervisor of the message. I also added an introduction written by my knowledgeable Sheikh Abdullah bin Abdelrahman Al-Gebreen may Allah show mercy on him.

\_I added on the footnote some Hadith that I saw that there is need to mention them, and they are few.

\_I transmitted Hadith and traditions, showing their degree regarding their authentication and weakness according to rules of this science and the transmitted chain.

It was a good from Imam Ibn Kathir that he said: "Benefit of the book is not perfected without knowing its weakness and authentication;" (1) referring to its Hadith and traditions.

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(1) Masterpiece of the Student p. 98

I used these brackets ( ) around the number as a sign for what I added and the transmitting (of Hadith); and used these brackets [ ] as a sign for what is mentioned by the writer of the message.

\_When the Hadith is mentioned in one of the two most authentic books, I only based on the seven books when transmitting; otherwise, I would follow its transmitted chain.

\_I added an index for the Qur'anic verses, another one for Hadith, and a third one for traditions.

In conclusion, I ask Allah the Al-Mighty to show mercy on my proficient teacher and Sheikh Abdullah bin Abdelrahman Al-Gebreen, for reading this message and introducing for it. This was not his first favor on me, but I am indebted to him for spending about twenty years benefiting from his knowledge and from his guidance.

I do not miss to excuse for any shortage or mistake in this message. Humans are exposed to such matters, and infallibility is for Allah, His Book and His Messenger. I seek forgiveness of Allah for all of these matters. And it is only Allah Whose help is sought.

Written by

Ali bin Abdullah bin Abdelazeez Al-Numay

1/11/1419 AH

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| **Address of the Message and Plan of the Research** |

**Address of the Message and Plan of the Research**

**By the Name of Allah, most Gracious, Most Merciful** (1)

Praises be to Allah (2), Who said in His honorable Book: "To those weak of understanding, make not over your property, which Allah has made a means of support for you." (3)

Prayer and peace be upon the most honorable of His Prophets and Messengers Muhammad peace be upon him, who was sent as a mercy to mankind.

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(1) The author began with mentioning the name of Allah, as a means of following the example of the Holy Qur'an and of the master of the Messengers Muhammad peace be upon him in his letters; such as Hadith of Sufyan that reports story of Hercules and Hadith of Al-Bara' that reports story of Suhail bin Amr on the day of Al-Hudaibiya Compromise.

Another example is Hadith: "Every important matter which is not begun by mentioning the Name of Allah is maimed." (Narrated by Al-Khateeb and As-Sam'any, graded as weak) It was also graded as good by An-Nawawi, Al-'Agalony, Abu At-Tayeb, Al-Manawy and our Sheikh Abdelazeez bin Baz may Allah show mercy on him. As-Sayoty graded its transmitted chain as good.

(2) The Messenger of Allah peace be upon him said: "Every important matter which is not begun by an expression of praise to Allah is maimed." This Hadith was narrated by Abu Dawood, Ibn Majah, Al-Nesai, Ahmed, Ibn Abi Shaibah, Ibn Al-A'rabi, Ibn Heban, Al-Darqutney, Al-Baihaqi, Al-Khateeb, Al-Sobki, and As-Sam'any through the transmitted chain of Qurah, on the authority of Al-Zuhari, on the authority Abu Salamah, on the authority of Abu Hurairah may Allah be pleased with him.

Its transmitted chain was graded as good An-Nawawi, Al-'Agalony and Abu At-Tayeb.

(3) Chapter of the women, verse (5)

**To proceed:**

It is a pleasure to me that Allah has helped me to join the High Institution for Judiciary, and I have accomplished study in it. The system of the institution obliged on each student to introduce a scientific research that talks about one subject among specializations of the institution, and it referred to the researcher to choose the subject of the research. Accordingly, I

have chosen this subject (Guardianship over Property), for its great importance; for not all people can manage, invest in and save money, which is considered the basis of life. Among such people are the young, the mad, the insane, the fool and the stupid. All of such people are in need to others to manage their money and invest in it, so that they can eat from its fruit and lead a happy life in their community.

Islam has paid a great attention to this kind of people; and so it legalized guardianship over their property. But most people are not aware of system of Islam regarding the guardianship, and ignore that Islam has set a full system for it; showing provisions of guardianship, limits for guardians regarding behaving in money, what they should do, the way of punishing them for negligence; such as introducing guarantees, excluding them and so on, in addition to other matters that we will talk about them in details if Allah wills. Through this message, the honorable reader will realize that Islam is a religion of worship and state. It has perfectly regulated life; leaving no side in life without legalizing rules for it which would reform it and guarantee its continuity. Rules that man set do not reach what Islam has reached, regarding its accuracy in regulation, legalization and fulfilling needs of men in all fields of life.

When I intended to make the research in this subject, I presented the plan that I would follow to administration of the institution to be studied by the committee that supervises on researches. They studied it and agreed on the subject and the plan. Then the administration of the institution appointed for me one of the best teachers to supervise on the research, who was the Eminent Sheikh Abdelrazeq 'Afify when he was a teacher in the scholar. I called him immediately, and he specialized some of his time in spite of his many works. I found from him cooperation, understanding, wise direction, with modesty and patience. This is not strange for him. His Eminence was known with his abundant knowledge, wide recognition, quick-wit, perfect sincerity and experience in scientific researches. He worked on this job for many years, and he taught many Sheikhs and students in this country and others. May Allah give him the best reward him for (helping) me, Islam and Muslims. May Allah thank for him his good efforts, and bless his life and time.

**Plan that I follow in the research is shown in the following:**

The research consists of: an introduction, four chapters and a conclusion

**The Introduction:** It includes two subjects

The first subject: It shows the importance of money in Islam.

The second subject: It briefly shows the eligibility of behaving.

**The First Chapter:** Guardianship: It includes two parts

The first part: It shows definition of guardianship, its divisions, its reasons and provisions of the guardian.

The second part: It shows those whose money are under guardianship, their need to guardianship, the guardian for each of them and the time when guardianship over them begins.

**The Second Chapter:** Trusteeship over those who are interdicted of legal capacity: It includes three parts

The first part: It shows definition of trusteeship over those who are interdicted of legal capacity, its rule, evidences on its legality, the rule of accepting it and how it is done.

The second part: It shows who can be chosen as the trustee, definition of the trustee, provisions that should be provided in him and when the provisions are considerable.

The third part: It talks about multi-trustees; showing how they can act when disagreeing about the way of protecting money, and showing the rule when efficiency of one of them becomes disturbed, or when one of them dies or when eligibility of one of them is removed due to madness and so on.

**The Third Chapter:** Dispositions of Guardians, their rights and what determine removing them: It includes four parts

The first part: It talks about dispositions of the guardians, and what they should do.

The second part: It shows some duties related to money of those who are interdicted of legal capacity, whether these duties are for Allah or humans.

The third part: It shows rights of the guardians for their work.

The fourth part: It talks about removing the guardians, holding them accountable and what lead to removing them.

**The Fourth Chapter:** Ending of Guardianship and giving the money back to its owners: The Rule of making others witness on this giving: It includes three parts

The first part: It shows the reasons behind ending the guardianship.

The second part: It shows the provisions of giving property back to its owners.

The third part: It shows the rule of making others witness on giving the money back to its owners, and would the guardian be believed if he claimed that he gave the money to its owners without witnesses.

**The Conclusion:** It concludes the system of guardianship over property.

Through my research, I have followed the way of moderation. I mentioned sayings of scholars about each matter according to my ability, showing the evidence upon each saying. Then I would discuss it, showing the preponderant saying without being bias to any group.

I attempted that the research would be easy, of coordinated structure and clear meaning. Within each subject, I indicated to references on which I have based so that the reader can easily review it.

I ask Allah to provide me aid from Him, guide me to the right, make my deed be for His sake, and make me avoid mistake. Any right in this research is from Allah, and any mistake is from me. I seek forgiveness from Allah for any mistake. Perfection is only for Allah and infallibility is for Allah's Messengers. And my success can only come from Allah. Praises be to Allah firstly and lastly. May Allah send blessings and peace upon His slave and Messenger Muhammad and upon his Family!

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| **The Introduction** |

A brief presentation about the importance of money in Islam

And about eligibility of behaving in it

**(A) The Importance of Money**

Allah created man and made him be innate in loving money due to his need to it. Money is considered a main basis of man's life and a means of reforming his living in this world. Allah the Al-Mighty said, telling about the nature of man regarding loving money: "And violent is he in the love of wealth." (1) Allah also said: "And men's souls are swayed by greed." (2)

While money is considered among indispensable necessities of life, Allah commanded His believing slaves in many verses in the Qur'an to seek it. He the Al-Mighty said: "And when the prayer is finished, then may you disperse through the land, and seek of the Bounty of Allah." (3) Allah described His believing slaves that they travel through the land, seeking of Allah's bounty: "Others travel through the land, seeking of Allah's Bounty." (4)

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(1) Chapter of the Chargers: (8)

(2) Chapter of the Women: (128)

(3) Chapter of Friday: (10)

(4) Chapter of the One Folded in Garments: (20)

The Prophet peace be upon him praised money when it was with his family, saying: "Sound (legitimately acquired) wealth is very excellent for a righteous man." Al-Hafez Al-'Iraqi said: This Hadith was narrated by Ahmed, At-Tabrany, from Hadith of Amr bin Al-'As through a sound transmitted chain. (1)

The Prophet peace be upon him also showed that when the rich performs the duties of his money, this puts him in a position for which he is envied. He peace be upon him said: "Envy is permitted only in two cases: A man whom Allah gives wealth, and he disposes of it rightfully, and a man to whom Allah gives knowledge which he applies and teaches it." (Agreed upon) (2)

Islam paid a great attention to matters related to money and legalized system about this matter, which people need in their living. And so the money would become a means of man's happiness in this life. Islam has regulated rules of selling, gift, lease, mortgage, loan, insurance, deposit, partnership, and other dealings among people to which they are in need. On the other side, Islam has forbidden any dealing that harms people;

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(1) This Hadith is authentic: It was narrated by Ahmed, Ibn Abi Shaibah, Abu Ya'li, Al-Bukhari, Al-Baghawi, Al-Hakem, Al-Qada'y, Ibn Heban, Abu 'Ubaid, Al-Baihaqi, At-Tabrany, Ibn Abu Ad-Dunia, Ibn Qani' and Ibn 'Asaker. All of them narrated it through the chain of Musa bin Ali, on the authority of his father that he said: I heard Amr bin Al-'As may Allah be pleased with him … Narrators of this Hadith are trustworthy.

Our Sheikh Abdullah bin Abdelrahman As-Sa'd may Allah benefit us from his (knowledge) graded this Hadith as authentic.

(2) Al-Bukhari (73), Muslim (816), Ahmed in 'Al-Musnad' (1/385) and Ibn Majah (4208) (4208) through the transmitted chain of Isma'il bin Khaled, on the authority of Qais bin Abu Hazem, on the authority of Abdullah bin Masood may Allah be pleased with him.

such as usury, cheating, decreasing the measure and weight, monopoly and other dealings that harm the society. It has also forbidden devouring men's substance wrongfully; such as taking money through bribe, gambling and so on.

In addition, Islam has forbidden paying money in any forbidden thing; such as wine, dead animal, pig, dowry of adulteress and prohibited materials of amusement. The Prophet peace be upon him has told that (man will be accountable for his money on the Day of Judgment; from where he had earned it and for what he had spent it). (1)

Moreover, Islam has cared for money of others, and legalized systems that would protect and guarantee it. The Prophet peace be upon him prohibited taking anything from others by force, and showed the punishment of those who do such matter on the Day of Judgment. He said: "If anyone takes a span of land unjustly, its extent taken from seven earths will be tied round his neck on the day of resurrection." (Agreed upon) (2)

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(1) This Hadith was graded as authentic: It was narrated by At-Tirmidhi (2417), Ad-Darmy (543), Abu Ya'li (7397), Al-Khateeb (1) and Ibn Abu Ad-Dunia (30). All of them narrated it through the transmitted chain of Al-Aswad bin Amer who said: Abu Bakr bin 'Ayash reported to us on the authority of Al-A'mash, on the authority of Saeed bin Abdullah bin Gareeg, on the authority of Abu Barzah Al-Aslami who reported that the Messenger of Allah peace be upon him said: "Man's feet will not move on the Day of Resurrection before he is asked about his life, how did he consume it, his knowledge, what did he do with it, his wealth, how did he earn it and how did he dispose of it, and about his body, how did he wear it out."

There are other Hadith that witness for this Hadith; such as Hadith of Ibn Masood, Mu'adh, Abu Saeed and Abu Ad-Darda' may Allah be pleased with all of them.

(2) This Hadith was reported by Saeed bin Zaid may Allah be pleased with him =

The Prophet peace be upon him commanded those who take others property by force to return what they took to their owners. He said: "Anyone who takes his brother’s staff must return it to him." (Narrated by Ahmed, Abu Dawood and At-Tirmidhi) (1)

Anyone who forcefully took money of others should be punished in a severe way, and any effort he exerted in the property of others is not considered. Abu Dawood and Ad-Darqutney narrated that 'Irwah bin Az-Zubair reported: "Two persons brought their dispute to the Messenger of Allah peace be upon him. One of them grew palm trees in the land of the other. He (the Prophet) decided to return the land to its owner and commanded the owner of the palm-trees to remove his palm-trees from it." (2) Islam has also legalized the right of defending on money with all means, even if this leads to

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= It was narrated by Al-Bukhari (3026), Muslim (1610) and Ahmed (1/188).

(1) This Hadith was graded as good: It was narrated by Ahmed in 'Al-Musnad' (4/221), Abu Dawood (5003), At-Tirmidhi (2160), Ibn Abu Shaibah in 'Al-Musnad' (682), Al-Bukhari in 'Al-Adab' (241), Ad-Dolaby in 'Al-Kana' (1948), At-Tabrany in 'Al-Kabeer' (22/241), Al-Baghawi in 'Explanation of the Sunnah' (2572), Al-Baihaqi in 'Al-Kubra' (6/92) and in Al-Shu'ab (5494), and Al-Mazi in 'Decency of Speech' (14/557). All of them narrated it through the transmitted chain of Ibn Abu Zi'b, on the authority of Abdullah bin As-Sa'ib bin Yazeed, on the authority of his father, on the authority of his grandfather about the Prophet peace be upon him. Al-Nesai and others authenticated Abdullah bin As-Sa'ib. At-Tirmidhi said: "This Hadith is good and sound. We only knew it through the chain of Ibn Abu Zi'b." Al-Baihaqi also narrated this Hadith and graded its transmitted chain as good.

Our Sheikh Abdullah bin Abdelrahman As-Sa'd said that this Hadith is acceptable.

(2) This Hadith is graded as weak: It was narrated by Abu Dawood (3074), Yahia bin Adam (274), Abu 'Ubaid (1/178), Ibn Zangawaih (1054), Ad-Darqutney (3/35), Al-Baihaqi (6/99), Ibn Abdelbar (22/282), and Abu Yusuf (p. 70). All of them narrated =

murdering the transgressor, and his blood becomes declared. And if the person is killed while defending on his money, he becomes a martyr. The Prophet peace be upon him said: "He who is killed in defence of his property is a martyr." (Agreed upon) (1)

In addition, Islam has legalized severe punishments on every transgressor. It legalized the punishment of cutting the hand on those who steal money secretly. Allah the Al-Mighty said: "As to the thief, male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is All-Powerful, All-Wise." (2)

Islam has declared the value of this precious organ, for his owner used it in transgressing on the money of others, even if the stolen object is a trivial thing.

Islam has decided that a man who stole ne fourth Dinar or what equals it, his hand should be cut. This is less than one Riyal of our present currency. This legalization aims at saving the property of others. The Prophet peace be upon him severely executed this punishment, and did not accept any intercession to cancel it; such as what was reported in Hadith of 'Aisha of the Makhzoom woman who was borrowing objects of others and then deny this. The Prophet peace be upon him

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= it through the transmitted chain of Muhammad bin Ishaq, on the authority of Yahia bin 'Irwah, on the authority of his father.

(1) This Hadith was reported by Abdullah bin Amr bin Al-'As may Allah be pleased with them. It was narrated by Al-Bukhari (2348), Muslim (141), Ahmed in 'Al-Musnad' (2/163), Abu Dawood (4771), At-Tirmidhi (1420), and Al-Nesai (4087).

(2) Chapter of the Table: (38)

commanded that her hand should be cut. The Prophet peace be upon him condemned the intercession of Usama bin Zaid. Thereupon the Prophet said to him: "Are you interceding regarding one of the punishments prescribed by Allah?" (1)

And if the money is taken by force in public, Islam obligated punishment more severe than cutting off the hand. This punishment is mentioned in Allah's saying: "The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite side, or exile from the land." (2) Ibn Abbas said about highway robbers: "If they killed and stole money, they would be murdered and crucified; and if they killed and did not steal money, they would be murdered without being crucified; and if they stole money and did not kill, their hands and feet from opposite sides would be cut off; and if they spread fear on the way without killing or stealing, they would be exiled." (3)

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(1) The story of the woman of Makhzoom and the intercession of Usama was narrated by the group: Al-Bukhari (6406), Muslim (1688), Ahmed in 'Al-Musnad' (6/162), Abu Dawood (4373), At-Tirmidhi (1430), Al-Nesai (4899), and Ibn Majah (2547), about 'Aisha may Allah be pleased with her, with different words.

(2) Chapter of the Table: (33)

(3) This tradition is weak: It was narrated by Al-Shaf'i in 'Al-Um' (6/ 151-152) and in 'Al-Musnad' (2/86). The transmitted chain of this tradition includes Al-Baihaqi who said in his book 'Al-Kubra' (8/283): Ibrahim told us, on the authority of Saleh, about Ibn Abbas may Allah be pleased with them.

It was also narrated by Ibn Abu Shaibah (6/589), Ibn Jarir (6/213), Abu Yusuf (p.192), Abu 'Ubaid (260), and Ahmed bin Hanbal (4/72). All of them narrated it through the transmitted chain of Hajaj, on the authority of 'Atyyah, about Ibn Abbas. =

Moreover, Islam does not permit the person to waste his own money. The Prophet peace be upon him said: "Verily, Allah the Al-Mighty disapproves for you irrelevant talk, persistent questioning and the wasting of wealth." (Narrated by Muslim) (1)

Islam has shown for man the permissible limit of spending. Allah the Al-Mighty said to his Prophet: "Make not your hand tied (like a niggard) to your neck, nor stretch it forth to its utmost reach (like a spendthrift), so that you become blameworthy and destitute." (2)

Allah the Al-Mighty dispraised spendthrifts, saying: "Verily spendthrifts are brothers of the devils; and the Devil is ever ungrateful to his Lord." (3) The point of similarity between them

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= It was also narrated by Abdelrazeq (18544), Al-Darqutney (3/138), Al-Baihaqi (8/283), Al-Hazemi (p. 464) through the transmitted chain of Ibrahim, on the authority of Dawood, on the authority of 'Ikremah, on the authority of Ibn Abbas. It was also narrated by Ibn Jarir (6/211) and Al-Baihaqi (8/283) through the transmitted chain Muhammad bin Sa'd who said: My father said: My uncle said: My father said, on the authority of his father about Ibn Abbas. There is argument about transmitted chain of this tradition.

This tradition was also narrated by Abu 'Ubaid (258), Ibn Jarir (6/214), and Al-Nahas (p.121) through the transmitted chain of Abdullah bin Saleh, on the authority of Mu'awyah bin Saleh, on the authority of Ali bin Abi Talha, who reported that Ibn Abbas said about Allah's saying, "The punishment of those who wage war against Allah and His Messenger…": "He who raised his weapon, spreading fear among people, and then he was arrested, Imam of Muslims can murder him, or crucify him, or cut his hand and leg …" The transmitted chain of this tradition is stronger than the preceding ones. And Allah knows best.

(1) This Hadith was narrated by Al-Bukhari (2277), Muslim (1715), Ahmed in 'Al-Musnad' (4/246), Al-Nesai in 'Al-Kubra' (8/296), about Al-Mughirah bin Shu'bah may Allah be pleased with him, about the Prophet peace be upon him.

(2) Chapter of the Night Journey: (29). (3) Chapter of the Night Journey: (27)

is that spendthrifts exceeded the limit in spending, disobeying Allah the Al-Mighty. They did not save money, giving the additional to the needy. On the other hand, devils exceeded the limit in disbelief and oppression. Both of them disobeyed Allah, deviating from His command.

Islam does not only follow the way of instructing and directing to save money. It also severely judged upon those who waste their money by making them be interdicted of legal capacity; whether this waste is because of losing the eligibility completely such as the insane and the young before the age of discretion; for they are unable to save their money because of losing the mind, or because of shortage of the eligibility such as the discrete young, the fool and the neglectful. All of such people are prevented from dealing in money. It should not be left for them, for they would waste it immediately and would become a burden on the society, waiting for charities from others. Also their need may resort them to follow ways of crime; such as theft, highway robbery, doing shameful acts like adultery and homosexuality, and other crimes of evil consequences.

Islam has cared for money of this kind of people. It legalized guardianship over their property. It provided that the guardians should be of perfect eligibility of mind, maturity, uprightness and faithfulness. Accordingly, they can save and fix property of those who are interdicted of legal capacity to eat from its fruit and lead a pleasing life. Performing this honorable mission is considered a means of unity of this Ummah, taking into consideration that benefit of every individual is benefit of others.

**(B) The Eligibility of Behaving in Property**

Religious scholars (may Allah show mercy on them) called those who can make contracts applying their provisions that they are eligible to behave. This takes us to search briefly about eligibility of behaving to distinguish between those who can behave and who cannot.

**Definition of Eligibility:**

**Linguistic meaning of eligibility**: It refers to capacity of man to do or demand something. Thus it is said: so and so is eligible to be a judge, or eligible to be a teacher, or eligible to sell and buy; meaning that he has the capacity to do such thing.

**Conventional meaning of eligibility**: It means capacity of man on imposing and commitment; meaning that the person is capable of performing rights of others, and have rights on others, and he is capable of committing to these rights. (1)

**Divisions of Eligibility:**

Eligibility is divided into two divisions:

**1- Receptive Legal Eligibility:** Capacity of man to imply the legal rights, for him and against him. (2)

This means that the person is eligible to have rights on others; such as manumitting, inheritance, kinship, bequest, worthiness of endowment and so on, and is eligible to have duties for others; such as financial fines, expenditure of wife and relatives and so on.

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(1) 'Fundamentals of Fiqh' for Abu Zahra (p. 329)

(2) 'Explanation of Al-Manar' for Ibn Malak (p. 936), 'At-Taqrir and At-Tahbir' (2/164)

This eligibility is stated for man till his death. Discretion and maturity are not provided for it. It is stated for the young and the old, male and female, sane and insane, freeman and slave. But this kind of eligibility may be perfect for some people and imperfect for others. And this is not the subject of our research.

**2- Active Legal Eligibility:** Capacity of man to perform an act on a way which is legally considered. (1)

This means that acts of man of acts of worshipping and dealings be legally considered, so he can gain rights from his acts and have duties towards others due to such acts. Consideration of dealings, actions and all religious obligations which Allah has ordained on His slaves is based on this kind of eligibility. Mind and ability to act are the pillars of this eligibility. When the mind is perfect, eligibility becomes perfect; and when the mind is imperfect, eligibility becomes imperfect. But if the mind is lost, then eligibility is not proven for the man, for actions cannot be obliged on a man while he is unable to perform it. Performance depends on two abilities: the ability to understand the speech, which is realized through mind; and the ability to work upon the understanding, which is realized through body.

Active legal eligibility is general. It includes the active legal capacity of acts of worshipping and the active legal capacity of financial actions. And we are going to talk about the active legal eligibility of behaving in money.

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(1) 'Explanation of Al-Manar' (936), 'At-Taqrir and At-Tahbir' (2/164)

**Eligibility of Acting:**

This kind of eligibility is divided into two divisions:

**1- Perfect eligibility of acting:** It is proved for the discrete and mature person. If a man is discrete, mindful and mature, then he has the right to make legal contracts of actions and dealings, and so their provisions are imposed on him. He has the right to appoint another man to represent him, and he can be representative for another man. No one can be guardian over him for his eligibility is perfect.

**2- Imperfect eligibility of acting:** It is proved for the discrete until reaching the age of puberty and maturity. The discrete crazy man has the same rule. Eligibility is not perfect for both of them for their mind is imperfect. If the discrete young boy committed an act with the permission of his guardian, his action would be acceptable, whether his action is beneficial or what is between benefit and harm. That is because he has the capacity to make contracts for his imperfect eligibility. This is the opinion of the three Imams: Abu Hanifah, Malik and Ahmed may Allah show mercy on them. (1) But if the discrete young boy committed an act without the permission of his guardian, his actions would be suspended until his guardian would admit it. This is the opinion of Abu Hanifah and Malik. Imam Ahmed sees that this is only acceptable in simple matters. (2) Discrete is the main core of eligibility for Abu Hanifah and Malik; and discrete with permission of the guardian are the cores of eligibility for

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(1) 'Showing the Facts' (5/219), 'Faculties of the Great' (5/60), 'Al-Mughni' for Ibn Qudamah (4/297)

(2) 'Footnote of Al-Moqni'' (2/04)

Ahmed. (1)

Al-Shaf'i (2) may Allah show mercy on him said in the most authentic narration about him: No actions or contracts are acceptable from the young boy, even if his guardian gave him a permission to do so. That is because reaching the age of puberty and discretion is the core of eligibility for him, and the young boy has not reached this age yet. Being mindful, without reaching the age of puberty, is not enough. That is because you cannot determine for him the limit of committing acts, for it is hidden. And so the religion has disciplined this by judging that the person should reach the age of puberty and discretion to admit his actions. And so his right to commit acts is not proved for him before puberty. (3)

The preponderant opinion: The young boy has an imperfect eligibility of acting; such as majority of scholars said. That is because Allah the Al-Mighty commanded to try the orphans as regards their eligibility. He, Glory be to Him, said: "Make trial of the orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them." (4) Trial can only be achieved through appointing them to sell and buy so that the guardian would see whether they are eligible or not.

And regarding the saying of Al-Shaf'i that the mind cannot

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(1) 'Variations' for Al-Qirafy (3/532)

(2) 'Mughni Al-Mohtaj' (2/170)

(3) 'The Great Explanation' with 'Al-Mughni' (4/6)

(4) Chapter of the Women: (6)

determined is not granted, for it can be realized by its consequences; such as acting according to what the benefit requires. And this is the way of realizing mind of the adult. Realizing discretion of a person is the provision of giving his money to him; and this can only be known through his actions. (1)

**Divisions of Actions of the Discrete Young:**

Actions of the discrete young are of three divisions:

**First Division:** Actions which are completely beneficial. They result in increasing his property for free; such as accepting a gift, charity and bequest. Such actions are accepted from the young without need to permission of the guardian. (2)

**Second Division:** Actions which are completely harmful. They result in losing some of his property without any interest; such as giving a gift, manumitting a slave, giving a charity, giving an endowment, divorcing, and guaranteeing. Such actions are not accepted from the discrete young, even if the guardian permits them; for the guardian does not own these things himself, and his guardianship is for reconsideration and it is not beneficial to permit what leads to harm. (3)

**Third Division:** Actions which can lead to benefit or harm. Winning and loss are probable. Such actions include selling, buying, marriage, preemption and so on of contracts of compensation. Such actions are acceptable from the discrete

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(1) 'The Great Explanation' with 'Al-Mughni' (4/6)

(2) 'Showing the Facts' (5/219)

(3) 'Faculties of the Great' (5/60)

young with the permission of his guardian because of imperfection of his eligibility. If the guardian permits it, it becomes acceptable; for permission of the guardian replaces imperfection of eligibility of the young and those like him. Accordingly, the contract becomes like those made by people of perfect eligibility.

**Eligibility of the Fool:**

Abu Hanifah may Allah show mercy on him sees that the fool has full eligibility in behaving in money, for he is free, addressee and of responsible age to perform all religious duties; and so he cannot be interdicted of legal capacity. (1) Disagreement about interdicting a mentally retarded person of his legal capacity will be mentioned in the first chapter if Allah wills.

Imam Al-Shaf'i may Allah show mercy on him sees (as mentioned in the most authentic narration about him) (2) that the fool is not eligible to behave in money at all, even if his guardian permits him to do so. That is because interdicting his of legal capacity is for his benefit, fearing of his extravagance and ill-management. And so if his guardian allowed him to behave in money, he would be allowing him to do something that would harm him. Accordingly, the permission would not be acceptable; such as allowing him to sell what is of ten with five. (3)

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(1) 'Showing the Facts' (5/195)

(2) 'Explanation of the Magnificence' at the footnote of 'Qailoby and 'Umairah' (2/303) and 'Al-Mughni' (2/171)

(3) 'The Great Explanation' with 'Al-Mughni' (4/7)

Malik (1) and Ahmed (2) and Al-Shaf'i in one saying see that the fool can behave in his money if his guardian permits him to do so. He can also make contracts and different actions. But if his guardian does not give him permission, he cannot behave in his money such as Al-Shaf'i and Ahmed said. And Malki said nothing more after providing the permission of his guardian.

The preponderant opinion – and Allah knows best: The fool can behave in his money with the permission of his guardian in case that his behavior does not result in clear harm; such as giving a gift or a charity; for he is mindful more than the discrete young and interdicting the legal capacity of the discrete young is preceded over interdicting him. Also, it is permissible for the discrete young to behave in his money with the permission of his guardian as majority of scholars said. Accordingly, permissibility matter in this here is more preponderant. In addition, if we prevented him to behave in his money with the permission, we would not know or try his maturity. And this results in interdicting him of his legal capacity forever, and this is not permissible; for if his foolishness ends, then it is not permissible to interdict him, with no disagreement.

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(1) 'Faculties of the Great' (5/61)

(2) 'Al-Moqni'' (2/4)

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| **First Chapter**  **Guardianship over Property** |

**This chapter consists of two parts:**

**First Part:**

It shows definition of guardianship, its divisions, its reasons and provisions of the guardian.

**Second Part:**

It shows those whose money are under guardianship, their need to guardianship, the guardian for each of them and the time when guardianship over them begins.

**First part**

**Definition of Guardianship, its Divisions, its Reasons and Provisions of the Guardian**

**Definition of Guardianship**

**The linguistic meaning:** Guardianship is an infinitive that means help and power. It is said: "They are on guardianship"; meaning they are gathered for help. Allah the Al-Mighty said: "You owe no duty of protection to them." (1) It means that you cannot help them. It is said: "He guards an object"; meaning that manage it and have power over it.

Sibawaih said: Guardianship is a noun that refers to what you manage and take over.

Al-Fara' said: Guardianship means management, ability and action. And if it does not combine these three matters, then the subject is not called the guardian. (2)

**The conventional meaning:**

Author of 'Enlightening the Sights' (3) said: Guardianship is to execute a saying on the other, whether he accepted or not.

Muhammad Abu Zahra (4) said: Guardianship is a legal power,

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(1) Chapter of the Spoils of War: (72)

(2) 'Tongue of the Arab' (20/227), 'Crown of the Bride' (10/398)

(3) 'Enlightening the Sights' printed with 'Footnote of Ibn 'Abdeen' (3/55)

(4) 'Rules of Marriage and Divorce in Islam' for Abu Zahra (p. 143)

allowing the person to behave in affairs of the other, even against his will.

Mustafa Az-Zarqa' (1) said: Guardianship means that an old, discrete man takes over an underage person by managing his personal and financial affairs.

**Discussion about these Definitions:**

These previous definitions were exposed to objections. The first and the second definitions do not cover kinds of guardianship. They only include forcing guardianship. They do not include the optional guardianship which is proved for the person when guarding over marriage of a previously married woman. Scholars agreed that she cannot be forced, for the Prophet peace be upon him said: "A woman who has been previously married has more right to her person than her guardian, and a virgin must be asked for her consent for herself, and her consent is her silence." (Narrated by the group except Al-Bukhari) (2)

In addition, the first definition of guardianship is to show its rule not its meaning.

As for the third definition, it only shows guardianship over underage people. However, it can also be over non-underage people; such as old previously married woman and old virgin when seeking marriage. Their marriage cannot be right, except

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(1) 'General Inference of Fiqh' (2/7815)

(2) Narrated by Muslim (1421), Ahmed in 'Al-Musnad' (1/242), Abu Dawood (2098), At-Tirmidhi (1108), Al-Nesai (3260), Ibn Majah (1870), from Hadith of Ibn Abbas may Allah be pleased with them.

with a guardian as majority of scholars said, in contrast with Abu Hanifah. Also, the expression of 'an action of an old, mature person' is a manifestation of guardianship, not the meaning of guardianship.

**The preponderant saying in defining guardianship:** Guardianship is a legal power, which is proved to those who have the right to behave in affairs of those under guardianship; whether this guardianship is in their selves, money or in both of them.

**Divisions of Guardianship**

Guardianship has some divisions according to different considerations (1):

**1- According to generality and specialization, it is divided into two divisions**

**The First: General Guardianship:** It is the guardianship of the ruler and his representatives of the judges. Guardianship is proved for each of them over all those who are in need to be under guardianship, and who have no special guardians. This guardianship can be in financial affairs and others. He (the ruler) has the right to guard over money of orphans, insane and fool people. He can also take over marriage of women who have no guardians. The Prophet peace be upon him said: "The ruler is the guardian of the one who does not have a guardian." (2)

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(1) 'Personal States' for Ahmed Al-Husary (p. 02)

(2) An authentic Hadith: It was narrated by Ahmed in 'Al-Musnad' (6/47), Abu Dawood (2083),, At-Tirmidhi (1102), Al-Nesai in 'Al-Kubra' (5394), Ibn Majah (1879), Al-Shaf'i in 'Al-Um' (5/13) and in 'Al-Musnad (2/11), Ibn Al-Jarood (700), Saeed bin Mansoor (528), Abu Na'eem (688), Al-Darmy (2190), Al-Hamidi (228), Al-Sahmi (554), Ibn Abu Shaibah (3/272), Abdelrazeq (6/195), Al-Baghawi (9/39), Al-Darqutney (3/221), At-Tahawy (3/7), Ibn Heban (4074), Al-Hakem (2/168), Al-Khateeb (p. 380), Al-Baihaqi in 'Al-Kubra' (7/105) and in 'Al-Ma'rifah' (13506), At-Taialesy (1463), Ibn Al-Jawzi (1929), Ibn Hajar (2/205), and Ibn 'Udai (3/266).

All of them narrated it through the transmitted chain of Ibn Juraij, on the authority of Suliman bin Musa, on the authority of Al-Zahri, on the authority of 'Irwah that 'Aisha may Allah be pleased with her reported that the Messenger of Allah peace be upon her said: "Any woman whose marriage is not arranged by her guardian, her marriage is invalid, her marriage is invalid, her marriage is invalid. If (the man) has had intercourse with her, then the dowry belongs to her in return for his intimacy =

**The second: Special guardianship:** This is like the guardianship of father over his young child, or the guardian of master of his slave.

This special guardianship is stronger than the general one for the strength of its reason. It is built on kinship or ownership; which evoke perfect pity and consideration. And so it is introduced over general guardianship. The general guardianship is only proved when this kind is not existed.

**2- Dividing the guardianship according to its source:**

It is divided into two divisions: immanent guardianship and dutiful guardianship

**The Immanent Guardianship:** It is proved for the person for his person, without taking it from others. It is like guardianship of relatives. Such guardianship is a duty over the guardian. Ibn Najeem (1) reported that Al-Sobki said: It was unanimously agreed that if the father or grandfather abstained from guarding over their young or insane child, their abstaining is not acceptable.

**The Dutiful Guardianship:** It is proved for the person, not for his person, but he gets it from others. It is like guardianship of the judge, representative and trustee. Such guardianship is not a duty upon the guardian, in exception to the judge. The representative has the right not to accept the representation. Also the trustee has the right not to accept the trusteeship.

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= with her. And if there is any dispute, then the ruler is the guardian of the one who does not have a guardian." This is the word of Ahmed.

(1) 'Similitudes and Parallels' for Ibn Najeem (p. 160)

**3- Dividing guardianship according to the one who is under guardianship**

It is divided into two divisions: guardianship on the self and guardianship on the money

**Guardianship on the Self:** It is a legal power, which is proved to those who have the right to behave in personal affairs of those under guardianship; such as educating him, teaching him and arranging his marriage. Such guardianship is proved for the agnate relatives according to their arrangement in the inheritance. And this is not the subject of research.

**Guardianship on the Money**: It is a legal power which is proved to those who have the right to behave in financial affairs of those under guardianship; such as making contracts and executing them. This is the only division among the others which the research discusses.

**Reasons for Guardianship**

There are two reasons for guardianship over money (1):

**Fatherhood and Judiciary**

**Fatherhood Guardianship:** It evokes perfect consideration of rights of his young, insane and fool children. That is because of Allah's Handiwork of pity which He has placed in hearts of parents towards their children. No other man feels pity towards his children like him, due to his perfect pity and consideration. In addition, he cares more than others to exert his efforts to benefit them. Trustee of the father can replace him, for it is the father who has chosen him from among people, and it is for sure the father knows that he is of full pity and consideration and cares more anyone else for the benefit of his children. And so the trustee replaces the father in guardianship. His guardianship is like that of the fatherhood, for it is taken from it. The grandfather has the same rule like the father. He is like the father in pity towards his grandchildren, and cares for taking care of and helping them. He is responsible for them in spending on them, and they are also responsible for him if he needs them. But guardianship of the grandfather comes after that; of the father, for his guardianship is proved when the father is not existed. Accordingly, guardianship of the grandfather is a fatherhood guardianship.

Moreover, trustee of the grandfather can be appointed as guardian over children by their grandfather, for he replaces

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(1) 'Magnificent Acts' (5/152)

him. It is for sure that the grandfather introduced him for Knowing about his pity and perfect consideration. Accordingly, his guardianship is a fatherhood guardianship because it is taken from the grandfather.

**Judiciary Guardianship:** Guardianship is proved for the judge over the disabled and deficient people, for his perfect knowledge, mind, piety and good manners. In addition, he is appointed in this position to benefit people by spreading justice among them and take their interests in his consideration. Also he cares for the underage people more than others. And so the Prophet peace be upon him gave him the right of guardianship over those who have no guardians. But his pity is less than that of fatherhood, and so his guardianship comes after that of the father. In addition, guardianship is proved to representative of the judge through judiciary, for he is secretary and deputy of the judge on the underage people. And so his guardianship is a judiciary guardianship according to its meaning because it is taken from it.

**Provisions of the Guardian over Property**

The following provisions should be existed on those who guard over the underage people:

**1- Freedom:** A slave cannot be guardian over his son, for he has no guardianship over himself. And so it is worthier that he cannot be guardian over others. In addition, keeping busy with fulfilling the needs of his master makes him unable to seek interests of others for he has no time. Also, he cannot be guardian over anybody else.

**2- Puberty:** A young boy cannot be guardian over the money of anybody. He cannot even be guardian over himself. And so it is worthier that he has no guardianship over others. In addition, the purpose of guardianship is to take care of those under guardianship, and the young is not eligible to take care of others for his deficiency and negligence.

**3- Mind:** There is no guardianship for the madman. He cannot be guardian over himself and so it is worthier no to be guardian over others.

**4- Islam:** If the person under guardianship is Muslim, then no disbelieving man can be guardian over him, for Allah's saying, "And never will Allah grant to the unbelievers a way (to triumph) over the believers." (1) In addition, guardianship gives superiority and honor; and so no unbeliever can be guardian over a Muslim, for Islam is high and nothing can be above it. (2)

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(1) Chapter of the Women: (141)

(2) It was reported that Ibn Abbas may Allah be pleased with them said: "Islam is always superior and should never be surpassed." (Narrated by Al-Bukhari)

But if the person under guardianship is disbeliever, it is not provided that the guardian should be Muslim. A disbeliever has guardianship over his disbelieving son, for they are equal in disbelief. But it is provided that this unbelieving guardian should be just in his religion.

It was said that the disbeliever has no guardianship over the money of his son, (1) but it is the ruler who guards it.

It was also said: If they resort to the ruler, we do not validate it and we would take the guardianship from them. That is because the purpose behind guardianship over property is honesty, and it is stronger in Muslims. But regarding guardianship over marriage, its purpose is adherence, and it is stronger with unity of religion.

**5- Justice:** It should be provided in the guardian with no disagreement, for giving it to the immoral person leads to waste of money. It is sufficient for the father and the grandfather, (according to those who see that he can be guardian), the apparent justice, for his pity (towards his children).

It was said that justice, externally and internally, should be provided for the guardian. (2)

**6- Being capable of guardianship:** If the person is disabled, guardianship is not proved for him. Accordingly, guardianship of the fool, the dumb whose signals are not understood and the old man cannot be accepted. That is because the purpose of

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(1) 'Al-Insaf' (5/325) and 'Mughni of Al-Mohtaj' (2/173)

(2) 'Al-Insaf' (5/33)

guardianship is to take care of those who are under guardianship and such persons are not eligible to do so.

**Second Part**

**Showing those under Guardianship, their Need to Guardianship, the Guardian for each of them, and the Time when Guardianship over them Begins**

Those whose money is under guardianship of others are those who are interdicted of legal capacity. Proving guardianship is based on proving the interdiction. Accordingly, when the interdiction is existed, guardianship is accepted; and when it is not removed, guardianship ends.

**Those Interdicted of Legal Capacity are of Two Divisions:**

**First Division:** Those whom scholars may Allah show mercy on them agreed on interdicting them of legal capacity; such as (the young, the madman and the insane). Scholars unanimously agreed that such people should be under guardianship.

**Second Division**: Those whom scholars may Allah show mercy on them disagreed on interdicting them of legal capacity; such as (the fool, the absent-minded and the virgin who reached the age of puberty before marriage). Those who see that they should be interdicted of legal capacity prove guardianship over them; and those who see that they should not be interdicted of legal capacity do not prove guardianship over them.

**The following will explain each division in detail:**

**First Division:**

**Those whom scholars agreed on interdicting them**

**Of legal capacity**

**(a) The Young;** it includes subjects

**First subject:** Definition of the young, showing his need to the guardian and evidences of proving interdiction over him.

**Second subject:** Showing guardian over the young.

**Third subject:** Showing the time when guardianship over him begins.

**(b) The Madman and the Insane;** it includes subjects

**First subject:** Definition of madness and insanity.

**Second subject:** Showing the need of mad and insane people to the guardian and evidences of proving interdiction over them.

**Third subject:** Showing the time when guardianship over them begins, and showing their guardian.

**(A) Guardianship over the Young**

**First Subject**

**Definition of the Young, showing his Need to the Guardian and Evidences of proving Interdiction over him**

**Definition of the young:** It refers to every male and female under the age of puberty.

**His need to the guardian:**

When the young is born, he is not eligible to do any action, for he does not have the mind, which is considered the core of eligibility. He does not understand selling and buying, and cannot differentiate between the beneficial and the harmful. He keeps on this state until reaching the age of discretion. Then he begins a new stage when mind and recognition begin, but they are still imperfect; and so he cannot correctly discrete his actions. He keeps on this state until reaching the stage of mindful maturity, which begins at the age of puberty.

Accordingly, the young is need to a guardian over his property because he is unable to guard it, for he has no eligibility before and after discretion. Even if he has eligibility after the age of discretion, his mind is still incomplete and so he cannot manage his property by himself. Thus he is in need to a guardian to save it for him, and to train him on selling, buying and other behaviors to gain experience and skill. And so when he becomes at the age of puberty, the guardian gives the property for him after realizing consciousness from him.

**Evidences of proving interdiction on him:**

Interdiction over the young was proved by the Book, the Sunnah, the meaning and consensus of scholars.

**The Book:**

1- Allah the Al-Mighty said: "Make trial of the orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them." (1)

The reason behind taking this verse as a proof: Allah provided that two provisions should be existed to give the orphans their property: maturity and consciousness. And such provisions are not existed in the young. Thus the verse shows that the young is interdicted of legal capacity and so it is not permissible to give his property to him.

2- Allah the Al-Mighty said: "And come not nigh to the orphan's property, except to improve it, until he attain the age of full strength." (2)

The reason behind taking this verse as a proof: Allah prohibited guardians over the orphans from coming nigh to their property, except for their (the orphans') interest, until they reach the age of puberty. That is because property of the orphans is in the hands of the guardians, and the orphans are interdicted of legal capacity; such any other young boy, for there is difference between young boys, orphan or not.

3- Allah the Al-Mighty said: "They Ask you concerning orphans.

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(1) Chapter of the Women: (6)

(2) Chapter of the Cattle: (152)

Say: "The best thing to do is what is to work honestly in their property." (1)

Orphan is the person whose father dies when he is young. He is still called so until reaching the age of puberty. (2) Allah has shown to guardians of the orphans that working honestly in their property is good; that is by investing in their property and working for it. Accordingly, this verse refers to interdicting the young of legal capacity, for Allah has permitted the guardians to work on fixing the orphans' property and there is no difference between orphans and other young boys.

**The Sunnah:**

1- The Messenger of Allah peace be upon him said: "The Pen has been lifted from three: from the child until he reaches puberty, from the sleeper until he wakes up and from the insane until he regains his sanity." (Narrated by Ahmed, Abu Dawood, Al-Nesai, Ibn Majah and Al-Hakem about 'Aisha) (3)

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(1) Chapter of the Heifer: (220)

(2) Ali bin Abu Taleb may Allah be pleased with him reported: I have retained in my memory the saying of the Messenger of Allah peace be upon him that: "No one is considered an orphan after he has attained the age of maturity." It was reported about Ali through different transmitted chains, and it was disagreed whether it is completely or incompletely transmitted. It was narrated by Abu Dawood, Al-'Uqaily and Al-Baihaqi. Its transmitted chain was graded as good by Al-Nawawi, and was defected by Al-'Uqaily, Ibn Al-Qattan and Al-Mondhri.

(3) An Authentic Hadith: It was narrated by Ahmed in 'Al-Musnad' (6/144), Abu Dawood (4398), Al-Nesai (3432), Ibn Majah (2041), Abu Ya'li (4383), Ad-Darmy (2301), Ibn Al-Jarood (148), Ibn Abu Shaibah (4/180), Ibn Heban in 'Al-Ihsan' (142), Al-Baihaqi in 'Al-Shu'ab' (87), Ibn Al-Jawzi in 'At-Tahqiq' (7/11) and Al-Hakem in 'Al-Mustadrak' (2/59). All of them narrated it through the transmitted chain of Hammad bin Salamah, on the authority of Hammad, on the authority of Ibrahim, on the =

This Hadith was taken as a proof, for the Prophet peace be upon him showed that the Pen of responsibility and legal capacity is lifted from these three persons, and that they will not be hold accountable on their actions. This proves interdiction the young from legal capacity, for he is not responsible.

2- The Messenger of Allah peace be upon him said: "O Abu Dharr! I see that you are weak and I like for you what I like for myself. Do not rule over (even) two persons, and do not manage an orphan's property." (Narrated by Muslim) (1)

**The Meaning:**

Guarding over property of the young is for his fortune and benefit, for he is unable to dispose of it. And the Islamic Shari'ah aims at protecting and achieving interests and warning of and preventing means of corruption.

**Consensus of Scholars:**

Scholars unanimously agreed on interdicting the young of legal capacity.

Ibn Rushd said (2): Scholars unanimously agreed that it is

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= authority of Al-Aswad who reported that 'Aisha may Allah be pleased with her reported from the Prophet that …

Al-Nawawi graded the transmitted chain of this Hadith as good.

(1) This Hadith was narrated by Muslim (1826), Abu Dawood (2868), Al-Nesai (3667) and Ahmed in 'Al-Musnad' (5/180), from Hadith of Abu Dharr may Allah be pleased with him.

(2) 'Beginning of the Active' (2/278)

dutiful to interdict on the orphans who have not reached the age of puberty yet, for Allah's saying: "Make trial of orphans." (1)

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(1) Chapter of the Women: (6)

**Second Subject**

**Guardians over Property of the Young**

**As scholars arranged them**

**1- Al-Hanafiah:** His guardian is his father, then his trustee, then trustee of his trustee, then his grandfather, then his trustee, then trustee of his trustee, then the judge, and then what the judge appoints. (1)

**2- Al-Shaf'iah:** His guardian is his father, then his paternal grandfather, then their trustee (i.e. meaning the trustee of one of them who died later), then the judge, and then his representative. (2)

**3- Al-Malikyah and Al-Hanabelah:** His guardian is his father, then his trustee, then trustee of his trustee for Al-Malikyah, then the ruler, and then the one whom the ruler appoints. (3)

It is noted that scholars agreed on guardianship of the father on his young child, and that he is preceded over any other guardian. That is because father is the closest one to his child and the most on feeling pity on him. He also will exert his effort in caring for him and introducing advices to him. In addition, both of father and son are responsible for each other when one of them is in need to the other. And so money of the son is for his father, and money of the father is for his son.

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(1) 'Magnificence of Actions' (5/155)

(2) 'Moghni Al-Mohtaj' (2/173)

(3)'Great Explanation' with 'Al-Moghni' (4/323) and 'Jawahir Al-Iklil' (2/99)

Then they disagreed on the guardian after the father. The three Imams (Malik, Abu Hanifah and Ahmed) preceded trustee of the father, for he is the father's representative after his death, and so he is like his deputy during his life. In addition, the father preceded him over the others because he saw that he is the most one eligible to guard the money of his son, for he (the father) knows his consideration and experience in affairs of behaving in property and for he knows that he is adviser to him and to his son.

On the other side, Al-Shaf'i may Allah show mercy on him sees that grandfather is worthier of guardianship than trustee of the father, for grandfather replaces the father. In addition, guardianship over property is like guardianship over marriage, in which grandfather is preceded. Also, guardianship of the grandfather is personal; he does not take it from others, and so it is stronger than that of the trustee.

Abu Hanifah may Allah show mercy on him agrees with Abu Hanifah that there is guardianship for the grandfather, but he sees that trustee of the father is preceded over him. That is because trustee is representative of the father; he is like his deputy during life. And so he is preceded over the grandfather.

Al-Malikiah and Al-Hanabelah see that there is no guardianship for the grandfather. He is not presented for himself. He is like the brother. He is presented by the father, and so he has no guardianship. Grandfather is not like the father, for he differs from him in inheritance. (1)

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(1) 'Great Explanation' with 'Al-Mughni' (4/518)

After grandfather and trustee of the father comes the ruler. That is because when guardianship of kinship is cut, it is proved for the ruler; such as guardianship over marriage, for generality of his guardianship. And after him comes the one whom the ruler appoints, for he takes his power from him (the ruler).

**The preponderant opinion:**

It appears from the above-mentioned that proving guardianship for the grandfather is more preponderant. That is because grandfather replaces the father in most rules. In addition, grandfather is an origin, and so he does not resembles the brother, for brother is one of his descendants and origin is stronger than descendant. And regarding that he is not presented by himself does not mean that he has no guardianship. It is also preponderant that trustee of the father is preceded in guardianship over the grandfather as Al-Hanafiah said. That is because it is for sure that the father preceded his trustee over his father because he sees that he is more eligible to guard the money, for his perfect consideration and experience in financial affairs. Although the grandfather has pity more than the trustee, this does not make him worthier of the guardianship than the trustee, for pity is not the only purpose of guardianship over property. And if the pity was the only purpose of guardianship, then the mother would be preceded over anybody else, for she feels pity towards her child more than anybody. But purpose of guardianship depends on several accounts; including pity, strength and full consideration. And there are many relatives who cannot realize close benefit for ignoring its means. That is why the Prophet peace be upon him prevented Abu Dharr from guarding over the orphan, for he is weak and cannot achieve benefits to the young.

**Can anybody other than the above-mentioned guard over property of the young?**

Abu Saeed Al-Istakhri (1), one of Al-Shaf'iah, mother has guardianship after father and grandfather, for she is one of the parents, and feels pity and mercy towards her child more than trustee of the father. And so she is preceded over him.

In addition, Sheikh of Islam Ibn Taimiah and some scholars see that guardianship over property of the young is proved for other agnate relatives. They depended on that this is a guardianship and so it is proved for them like that over marriage.

He (Ibn Taimiah) said in 'Jurisprudent Choices': (2) "Specializing father, grandfather and ruler with guardianship is so weak. And disabled ruler is like not-existent."

Majority of scholars see that there is no guardianship over property for mother and other agnate relatives. That is because betrayal can be in money, and agnate relatives other than father and grandfather are not entrusted to guard over money.

**The preponderant opinion:**

It appears – and Allah knows best – that mother has no

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(1) 'Al-Mohadhab' (1/328) and 'Paradise of the Seekers' (4/187)

(2) 'Jurisprudent Choices' (P. 137)

guardianship over money, for guardianship of money is not relied on pity alone, but it depends on full consideration, strength and experience in financial affairs. And the mother does not have such faculties. She is a woman, and women have imperfect mind and religion (1), of weak consideration. She does not also have experience that would enable her to guard the money, for she is busy with serving her husband and children, and managing her house.

It also appears – and Allah knows best – that other agnate relatives have guardianship over property, for no evidence was reported about specializing father and grandfather with guarding over property. It was not also reported to us that the Messenger of Allah peace be upon him took property of the young children from their brothers and uncles. They also feel pity towards the young children more than other foreign people, and will exert their efforts in reforming money of their young relatives, for they are responsible for him in spending and fulfilling their needs. It is dutiful upon the rich to spend on his relative. Also if the relatives be in need, they would take from money of the young children. In addition, the relative pleases with seeing his other relative be rich, for he would feel pity towards him more than others and would help him with money if he is in need to it.

And regarding their saying that betrayal can be in money, and people other than father, grandfather, trustee and ruler

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(1) Al-Bukhari (298) and Muslim (80) narrated that Abu Saeed Al-Khudri may Allah be pleased with him reported that the Prophet peace be upon him said: "I have seen none lacking in common sense and failing in religion but (at the same time) robbing the wisdom of the wise man, besides you."

are not entrusted on money: We say that we cannot take this for granted, for we provided justice and honesty be achieved in the guardian over property. Also if any negligence or betrayal appears from the guardian, he should be immediately removed, even if he is the father. It also appears – and Allah knows best – that trustee of the father and trustee of the grandfather are preceded over other agnate relatives, for the trustee replaces the father and the grandfather; he resembles their deputy in life. That and Allah knows the right.

**Third Subject**

**When Guardianship over the Young begins?**

Guardianship over the young begins since his birth. Most scholars see that guardianship over him before this time is not proved.

Sheikh Muhammad Al-Shirbiny Al-Khateeb (1) said in 'Mughni Al-Mohtaj' said about the saying of the author of 'Al-Menhaj', "Guardian of the young is his father", he said: "Expressing with the word 'the young' refers that the above-mentioned guardians have no guardianship over property of embryo."

Ibn Abdeen reported (2): Al-Mohtar replied on Ar-Ramli saying: "There are many traditions showing that there is no guardianship for the father or the trustee over property of the embryo."

The author of 'Al-Dur Al-Mokhtar' said (3): "It was said that the embryo has no guardianship and does not fall under guardianship."

The reason why they do not prove guardianship over property of the embryo is that before the birth, his property is not asserted. He may die in the womb of his mother. In

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(1) 'Mughni Al-Mohtaj' (5/174)

(2) Footnote of Ibn Abdeen (6/654)

(3) 'Ad-Dur Al-Mokhtar' with 'Footnote of Ibn Abdeen' (6/654)

addition, period of pregnancy is not too long and so there is no need to guardianship during it.

Ibn Abdeen reported (1): Al-Hamawi in his 'Footnote' said: "If the property is something that may be wasted, then the guardian can sell it; such as the animal for its food needs money. But if the property is real-estate, then it is not permissible for the guardian to behave in it. That is what appears for me according to what rules require."

Some scholars said: It is permissible to appoint trustee on property of the embryo. Al-Shirbiny said in 'Moghni Al-Mohtaj': "It is permissible to appoint trustee on property of the present embryo as Ar-Royani and others showed." (2)

The preponderant opinion is that it is permissible to guard and appoint a trustee on property of the embryo, for preventing this badly affects his benefit and his money. He may stay long in his mother's womb, and leaving his property without counting, tenting, receiving, developing and saving is harmful. And Islam does not permit harm.

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(1) Footnote of Ibn Abdeen (6/654)

(2) 'Moghni Al-Mohtaj) (3/75)

**(B) Guardianship on the Madman and the Insane**

It includes three subjects:

**First Subject:** Definition of madness and insanity

**Second subject:** Showing the need of mad and insane people to the guardian and evidences of proving interdiction over them.

**Third subject:** Showing the time when guardianship over them begins, and showing their guardian.

**First Subject**

**Definition of Madness and Insanity**

**Definition of madness:**

**\_Its linguistic meaning:** Covering.

**\_Its conventional meaning:** It was said that (1) it is an affliction that causes man to commit actions which contradicts with the mind, with no weakness.

It was also said that it is an illness which prevents mind from realizing matters on their proper way, almost accompanying with disorder and agitation. (2)

**Definition of Insanity:**

**\_Its linguistic meaning:** Shortage, loss or confusion of the mind.

**\_Its conventional meaning:** It was said that it is an affliction that causes disorder in the mind. Accordingly, the person becomes of confused speech; some of his speech resembles that of the mindful people and the other resembles that of the mad people. The same is for all his matters. (3)

It was also said that it is an illness which prevents the mind from realizing matters in a complete and real way. (4)

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(1) 'Facilitating Access to Fundamentals Science' (P. 309)

(2) 'Personal States' for Abu Zahra (P.473)

(3) 'Discovering Secrets' for Abdelazeez Al-Bukhari (4/1394)

(4) 'Personal States' for Abu Zahra (P.473)

**Difference between the madman and the insane:**

Religious scholars consider madness and insanity one thing. And s they only mention in their books the madman, for insanity, as it appears, is a kind of madness. (1)

On the other side, fundamentalists differentiate between them. They consider the person who has no mind or recognition be mad, and the person who has incomplete mind and recognition be insane. They also see that the madman has almost disorder and agitation, and he may cause harms to others; he may hit or curse others. But the insane does not hit or curse anyone. Al-Zai'ali said in defining the insane (2): The best definition is: "A man of less understanding, confused speech and ill management, but he does not hit or curse as the madman does."

Disagreement between religious scholars and fundamentalists is a difference in the concept only. They agree that the person whom madness controls his mind until he cannot recognize anything is like the boy before reaching the age of discretion. And so his actions are not acceptable at all, for the core of eligibility is mind and he has no mind. And the (insane) person who has (incomplete) mind and recognition is like the boy at the age of recognition. He can behave with the permission of his guardian, in matters which cause no harm. This is the opinion of majority of scholars as we mentioned before when talking about eligibility of disposition. And so the

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(1) 'Completion of Fath Al-Qadeer' (7/311)

(2) 'Showing the Facts' (5/191)

name has no effect; it does not matter whether the person is called mad or insane.

**Is there others have the same rule like the madman and the insane of interdicting them of legal capacity?**

The followings are like the madman regarding being interdicted of legal capacity: Old man whose mind became disordered due to his old age and became senile. He cannot behave in his money or save it because of losing eligibility of disposition. (1)

Also the dumb whose signs are not understood cannot behave in his money and should be interdicted of legal capacity for his disability to act. (2)

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(1) 'Discovery of the Mask' (3/452)

(2) 'Moghni Al-Mohtaj' (2/166)

**Second Subject**

**Showing the Need of Madman and the Insane**

**To the guardian**

Both of madman and the insane are in need to a guardian, for they are unable to take care of their affairs. Mind of the madman is completely lost, and mind of the insane is incomplete. He (the insane) is of less consideration due to shortage of his mind and recognition. And so guardianship over them is indispensible, over their property and their selves. For through guardianship over them, their money will increase. Accordingly, all their needs of food, drink, clothes and other necessities of life will be fulfilled. In addition, interest of money will be for those whom he must spend on them; such as wives and relatives.

And if the money was left for them, they would waste it. Then they would become burdens on others. And this is a great harm.

**Evidences on proving interdiction over them:**

Interdiction over madman and the insane is proved by the Book, the Sunnah, the meaning and consensus of scholars.

**a. The Book:**

1- Allah the Al-Mighty said: "Make not the foolish over of your property, which Allah has made a means of support for you." (1)

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(1) Chapter of the Women: (5)

The reason behind taking this verse as a proof: Allah prohibited the guardians to give their property to the fool people as long as they are described with this characteristic. The fool includes anyone waste and corrupt property, whether he is mindful or mad. This proves interdiction over the fool.

2- Allah the Al-Mighty said: "Make trial of the orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them." (1)

The reason behind taking this verse as a proof: Allah provided that maturity and discretion should be found in a person before giving the property to him. Maturity and discretion are signs of existence of the mind. And so a person who has no mind or an incomplete mind is not considered mature or discrete. Accordingly, his property should not be given to him. He should remain under interdiction until maturity and discretion be achieved in him.

**b. The Sunnah:**

1- The Messenger of Allah peace be upon him said: "The Pen has been lifted from three: from the child until he reaches puberty, from the sleeper until he wakes up and from the insane until he regains his sanity." (Narrated by Ahmed, Abu Dawood, Al-Nesai, Ibn Majah and Al-Hakem about 'Aisha) (2)

The reason behind taking this Hadith as a proof: Madman is not accountable or responsible, for provision of responsibility is existence of the mind. As long as he is not responsible, he is

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(1) Chapter of the Women: (6)

(2) Its transmission was mentioned in P. (54-55)

interdicted of legal capacity, for he is not eligible to disposition due to losing the mind completely or incompletely.

**c. The Meaning:**

Interdiction over mad and insane people is for their disability of disposition; they are unable to save their property. And so interdiction over them is for their benefit and the Shari'ah aims at caring for and achieving benefits and warning of and preventing means of corruption.

**d. Consensus of Scholars:**

Scholars unanimously agreed that madness is a reason for interdiction. And no one disagrees with this. (1)

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(1) Footnote of Al-Shalaby on 'The Illustration' (5/190)

**Third Subject**

**When Guardianship over madman and the insane begins?**

**And who is their Guardian?**

Guardianship over mad and insane people begins when their madness and insanity begin, for interdiction over them also begins at that time. And rule of the ruler is not provided to prove interdiction over them, for such illness appears to all people; and so there is no need to seek to prove it.

**Guardian of the madman and the insane:**

Guardian of the madman and the insane is their guardian when they were young if madness and insanity continued after their maturity. This was mentioned before when talking about guardian of the young. And guardianship over them does not end when they reach the age of puberty, for they are still indiscrete; and so there is no need to renew interdiction over them. That is because madness and insanity are not in need to seek to prove them, for they clear to all people. Accordingly, guardianship over them remains for their guardian when they were young. And if madness and insanity occurred after maturity and discretion, most scholars see that guardianship over them would be for their guardian at their young age (i.e. father, grandfather, trustee and ruler). Guardianship returns to them because it was removed from them due to maturity and discretion. And so if the mind was lost or became disordered, guardianship would return to them. This is the opinion of Al-Shaf'iah, the authentic opinion of Al-Hanabelah and well-known

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opinion of Al-Hanafiah. (1)

Some scholars said: Their guardian at this state is the ruler, and guardianship does not return to their guardian when they were young. That is because guardianship over them became null and void due to their maturity. And what ends does not return as included among rules of Al-Hanafiah. This is the opinion of some of Al-Hanafiah, Al-Malikiah and Al-Hanabelah. (2)

**The preponderant opinion – and Allah knows best:**

Guardianship over them is for guardian during their young age and does not be for the ruler. This is the opinion of most of Al-Hanafiah. They disagreed with rule of their group; giving preponderance to returning of the guardianship, considering this of benefit which is preceded over the rules. And the benefit here is full pity of father and grandfather towards their children. And it is not reasonable that the guardianship would be for the judge who would appoint a trustee for being busy. And for sure this trustee would not have pity like that of the father and grandfather.

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(1) 'Al-Insaf' (5/333), 'Paradise of the Seekers of Knowledge' (4/187), 'Footnote of Ibn Abdeen'

(2) 'Al-Insaf' (5/333), 'Footnote of Al-Dosoky' (3/263) and 'Footnote of Ibn Abdeen'

**Second Division**

**Those whom scholars disagreed on interdicting them**

**Of legal capacity**

**They are:** (The fool, the absent-minded and the virgin who reached the age of puberty)

**(a) The fool and the absent-minded;** it includes three subjects

**First subject:** Definition of the fool and the absent-minded, showing the difference between them.

**Second subject:** Evidences of proving guardianship and interdiction over them.

**Third subject:** The time when guardianship over them begins and their guardian.

**(b) The virgin woman who reached the age of puberty before marriage**

**We will explain each subject in detail in the following:**

**First Subject**

**Definition of the Fool and the Absent-minded**

**And the Difference between them**

**Definition of the fool:**

**\_Its linguistic meaning:** Lack of wisdom or ignorance.

**\_Its conventional meaning:** A person who wastes money in a way that opposes religion and mind. (1)

That is like a person who deals in an aggressive way while knowing this, who pays his money to the singers, who spends his money in forbidden things, and who wastes money by throwing it in sea or fire, or any other acts which contradict with religion and mind. (2)

**Definition of the Absent-Minded:**

**Its linguistic meaning:** A person of no witness.

**Its conventional meaning:** A person who is cheated in trade and cannot forbear it for soundness of his heart. (3) Also, he may be called 'the weak'.

**Difference between the fool and the absent-minded:**

The fool differs from the absent-minded in that the fool

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(1) 'Carefulness' with 'Completion of Fath Al-Qadir' (7/0304)

(2) 'Moghni Al-Mohtaj' (2/168) and 'Showing Facts' (5/0192)

(3) 'Guidance' with 'Completion of Fath Al-Qadir' (7/322)

wastes money intentionally without caring for it. On the other side, the absent-minded does not intend to waste money but he is not guided to the winning dispositions, for his absent mind and for being cheated easily.

In addition, they look each other in ill management, corrupted opinion, and wasting money. And so they share the same rules of interdiction. Some scholars see that absence of mind is included in foolishness. They do not mention 'the absent-minded' in their books. That is because being cheated results from weakness of opinion and lack of wisdom (1); and so it is included in the meaning of foolishness as it appears in definition of 'the fool'.

**Is guardianship proved over the property of the fool and the absent-minded?**

**There are two states of foolishness and absence of mind:**

**The first:** Foolishness and absence of mind are attached to puberty; that is a person reaches the age of puberty while being fool or absent-minded, and continues at this state. Scholars may Allah show mercy on them agreed that, in this state, guardianship over their property continues. But they disagreed on the time of giving their property to them. Majority of scholars see that nothing is given to them until foolishness and absence of mind end. And if foolishness and absence of mind do not end, then their property remains under guardianship of the guardian; for these scholars prove

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(1) 'Showing Facts' (5/192) and 'Explanation of Al-Jalal on the Approach with the Footnote of Qailoby and 'Umairah' (2/302)

interdiction the fool and the absent-minded of legal capacity.

On the other side, Abu Hanifah may Allah show mercy on him see that property is given to them when they reach twenty five years, even if foolishness and absence of mind do not end; for he sees that the fool and the absent minded are not interdicted of legal capacity. We will talk about the time of giving property to them when talking about provisions of giving the property in the fourth chapter, if Allah wills.

**The second:** Foolishness and absence of mind occur after puberty and discretion. In this state, scholars may Allah show mercy on them disagreed whether guardianship over them is proved or not?

**The first opinion:** Majority of scholars see that guardianship is proved over their property, but this occurs after being interdicted of legal capacity by the ruler.

**The second opinion:** Abu Hanifah see that guardianship is not proved over their property, for he sees that they cannot be interdicted of legal capacity.

Accordingly, proving guardianship over them or not depends on proving the interdiction or not.

**Second Subject**

**Evidences of Proving Interdiction and Guardianship**

**Over them**

Interdiction and guardianship over property of the fool and the absent-minded are proved by the Book, the Sunnah and the clear deduction.

**a. The Book:**

1- Allah the Al-Mighty said: "Make not the foolish over of your property, which Allah has made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice." (1)

The reason behind taking this verse as a proof: Allah prohibited guardians of the fool people to give their property to them. And the reason for this is their foolishness. Thus this verse shows that they are interdicted of legal capacity, and that their property remains with their guardians until their foolishness ends.

2- Allah the Al-Mighty said: "Make trial of the orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them." (2)

The reason behind taking this verse as a proof: Allah commanded guardians of the orphans to give their property to

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(1) Chapter of the Women (5)

(2) Chapter of the Women (6)

them when reaching the age of puberty and realizing their discretion. This verse shows that when the guardian does not realize discretion of the person, he should not give his property to him. The guardian should keep the money with him, for the person is interdicted of legal capacity because the provision is not achieved in him.

3- Allah the Al-Mighty said: "If they party liable is mentally deficient, or weak, or unable himself dictate, let his guardian dictate faithfully." (1)

The reason behind taking this verse as a proof: It proves guardianship over the fool, the weak, which means the absent-minded, and the person who cannot dictate. Allah commanded the guardian for each of them to dictate instead of him.

**(b) The Sunnah:**

1- The Messenger of Allah peace be upon him said: "Take care of your fool people." (Narrated by At-Tabrany through an authentic transmitted chain) At-Tabrany reported this Hadith in 'Moghni Al-Mohtaj. (2)

The reason behind taking this Hadith as a proof: The Messenger of Allah peace be upon him commanded the guardians to take over property of the fool people, and not to let them waste their money. (3)

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(1) Chapter of the Heifer: (282)

(2) Ibn Al-Molaqin attributed transmission of this Hadith to At-Tabrany, saying that it was narrated through a good transmitted chain.

(3) There is another Hadith which threats of abstaining from caring for the fool: Abu Musa Al-Ash'ari may Allah be pleased with him reported that the Prophet peace be =

**(c) The Clear Deduction:**

Preventing the fool from disposing in his property is like preventing the discrete young from disposing in his property, fearing of wasting the money. Moreover, it is worthier to prevent the fool than the young, for wasting money is certain for the fool, and is probable for the discrete young.

**Discussion of Abu Hanifah to evidences of the majority of scholars and replying on him:**

1- Allah's saying, "Make not the foolish over of your property", does not refer to proving guardianship over property of the fool. Address in this verse is not for the guardians, but it is for all responsible people. Also property is not for the fool, but it is for the addressee. And what witnesses for this is the addition. Allah had added property for the addresses. And if we supposed that property is for the fool people, then it is meant the young and the madmen among them not the adults. Accordingly, this is not a proof upon what you have mentioned, and probability makes the proof be ineffective.

**Reply of the scholars:** Address in the verse is for the guardians, and property is for the foolish people, for this verse is among verses which talk about rules of the orphans. And if the address was for owners of properties in general, composition of the

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= upon him said: "There are three men who supplicate to Allah and their supplications are not answered: A man who married a woman of bad manners and does not divorce her, a man who has money with another person and does not claim against him, and a man who gave a fool his property while Allah says, "Make not the foolish over of your property." Al-Hakem said: This is an authentic Hadith according to provisions of the two Sheikhs (Al-Bukhari and Muslim), but they did not transmit it.

verse would be disunited and would not suit what is before and what is after it. On the other side, if the address was for the guardians, composition of the verse would be united, for the verse before it includes a command to give the orphans their property, and this verse includes a prohibition to give it to them if they are fools. And then comes the verse after it to show provisions of giving them their property.

And what supports that the property is for the fools and the address is for the guardians is Allah's saying: "But feed and clothe them therewith, and speak to them words of kindness and justice." (1)

And if property is for the addresses, there will be no need to the command of speaking with kindness and justice for two reasons:

**The first:** Man, by his nature, feels pity towards his children and family. He will not speak with harshness with them.

**The second:** As you say that these fools have no properties. Then they will not be attached to them seeking to get them, and so there will be no need to speak to them with kindness. But if the address is for the guardians and the properties are for the fools, there will be need to speak to them with kindness. That is because if the fools see the guardians dispose of their properties and prevent them from disposing of them, they cannot forbear this. They may protest against the guardians and try to harm them. And so the guardians will be in need to speak with kindness to them, and to explain to them that they

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(1) Chapter of the Women: (5)

are disposing in their properties for their benefit them so that their properties will be increased. They should also tell them that they will give them their properties when they grow up and be able to take care of them.

In addition, the prohibition of giving the fools their properties refers that they have no kinship with the addresses. That is because the Islamic Shari'ah does not forbid a man to give something of his property to his son or wife. All scholars agree on this, and the religious evidences also show this. Also there is no evidence upon your saying that 'the foolish' in the verse refers to the madman and the young boy; for 'the foolish' is more general than what you have mentioned. It includes the old wasteful.

And if we supposed that properties are for the addresses, and the verse prohibits them from giving their properties to the fools, among the descendants and women, the reason behind this prohibition would be for their foolishness and waste of money. And this also includes the old wasteful, for the religion prohibited wasting the money. Accordingly, giving the fool property, whether this property belongs to him or not, is a means of wasting money, which the religion has prohibited.

And regarding his (Abu Hanifah) saying that what appears of the addition is that property is for the addresses, we say:

The addition may not be as it appears, and this is common for the Arab. And this was reported in the Holy Qura'n: "And do not kill yourselves." (1) The verse means that you should not kill

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(1) Chapter of the women: (29)

one another, and expressing about people with the self is an exaggeration of prohibiting them from killing others; as if killing another person is like killing yourself. The same is for the addition here: It does not mean as it appears. It refers that properties of the fools is like that of the guardians, for what combines them of kinship. This also urges them (the guardians) to protect the properties. (1)

Al-Fakhr Ar-Razy (2) said: "Money is thing that man benefits from it and needs it. And for this unity of men, addition of properties of the fools to the guardians is good."

It was reported in 'Interpretation of Al-Manar': Properties of the fools were added to the guardians for three reasons:

**The first:** If the guardian wasted money, and nothing remained for the fool so that the guardian can spend on him from it, then it would be dutiful on the guardian to spend on the fool from his own money. This shows that wasting anything of property of the fool leads to wasting some money of the guardian. And so it appears that property of the fool is included in property of the guardian.

**The second:** If the fools became discrete while their properties are preserved, and they dispose from it in legal sides of public and special interests, the guardians would benefit from this.

**The third:** This shows solidarity and unity of the Ummah, considering interest of each individual is part of interests of the others. (3)

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(1) 'Interpretation of Abu As-So'od' (1/648) (2) 'Interpretation of Al-Fakhr Ar-Razy' (9/184) (3) 'Interpretation of Al-Manar' (4/380)

2- Allah's saying, "Make trial of the orphans" (1), suspends giving the orphan's their property on the provision of noticing their discretion. Suspension on a provision does not prove the opposite when the provision is not found. (2)

**Reply of the scholars:** We do not take for granted that Suspension on a provision does not negate the opposite (and that the provision is not a pretext). Absence of the provision proves the opposite. This is the opinion of majority of fundamentalists.

And if supposed that provision is not a pretext, and that it does prove the opposite when it is not found, we would prove interdiction over him for rule of the origin. His origin is foolishness, and this origin cannot be negated except when his state changes. And as his state does not change, he remains under guardianship.

3- Allah's saying, "If they party liable is fool" (3) does not prove guardianship over adult fools, for the word 'fool' in the verse refers to the young or the madman. (4) Foolishness means loss or deficiency of mind. And if the verse refers to the adult fool, then his guardian is not that of (the young) fool, but is the guardian of the debt. That is because Allah permitted giving debt to the fool, and judged that his testimony is right. But he differs from others in dictating the writers for shortage of his

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(1) Chapter of the Women: (6)

(2) 'Showing the Facts' (5/195)

(3) Chapter of the Heifer: (282)

(4) 'Al-Mabsot' for Al-Sarkhasy (24/161)

understanding and his ignorance in dictation. It is not reasonable that the guardian refers to that of the fool, meaning that the fool is interdicted and his guardian proves the debt on him. This is not permissible unanimously. Accordingly, we conclude that the guardian here means guardian of the debt, and it is he who commanded to dictate the writers, for deficiency of the fool to dictate them. And then the fool admits this. (1)

**Reply of the scholars:** There is no evidence that the fool only refers to the young and the madman. The word 'fool' is general; it includes the wasteful of bad management, as it is known in language and religion.

And regarding his saying that the guardian refers to guardian of the debt, it is not right; for how the fool becomes indebted with dictation of owner of the debt. Nothing like this is reported in Shari'ah.

Ibn Al-Araby (2) said after showing for whom the subject returns: "It is apparent that it returns to the debtor, for he is companion of the guardian. It is said: Guardian of the fool and guardian of the weak, but it is not said: Guardian of the debt. It is to be said: Owner of the debt.

And regarding his saying that it is agreed that acceptance of the guardian of the one interdicted of legal capacity is not permissible, it is replied on this as following:

This rule is not taken for granted, for scholars disagreed on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(1) 'Rules of the Qur'an' for Al-Gasas (2/213)

(2) 'Rules of the Qur'an' for Ibn Al-Araby (1/251)

permissibility of acceptance of the guardian on his interdicted. Ibn Al-Araby and Al-Qurtoby (1) permitted this.

4- The Messenger of Allah peace be upon him said: "Take care of your fool people." (2) The fool here means young boys and women. It does not mean the mindful adults.

**Reply of the scholars:** There is no evidence that the fool only refers to women and young boys. It includes young and adult of men and women.

5- Judging the fool like the young of preventing him from his money is not alike, for they are not equal. The fool has the ability of consideration, while the young has not. And so this judge is valid, for the reasons behind both of them are different.

**Reply of the scholars:** The young is able to have consideration before his puberty. However, his property is not given to him fearing of wasting it. The same is for the fool; he is prevented from his property, for he would, for sure, waste it.

**Evidences of Abu Hanifah upon negating interdiction over property of the fool, and replying on them:**

1- Allah the Al-Mighty said: "But consume it not wastefully, nor in haste fearing that they should grow up." (3)

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(1) 'Rules of the Qur'an' for Ibn Al-Araby (1/251) and 'Interpretation of the Qur'an for Al-Qurtoby' (3/389)

(2) This Hadith was transmitted in P. 79

(3) Chapter of the Women: (6)

The reason behind taking this verse as a proof: Allah prohibited the guardians to waste properties of the orphans, fearing that when they (the orphans) grow up, they will have no guidance over them. This shows that guardianship ends when the young grows up.

**Scholars discussed this saying and said:**

The verse prohibits exaggerate in spending money so that when the orphan grows up, he would find his property after ending the interdiction of them when reaching the age of puberty and discretion. And expressing with the word 'growing up' is for the majority, for the adult often refers to the discrete. The verse does not mean that property is given to the person when he grows up at all, and this appears in the verse after it: "If then you find sound judgment in them, release their property to them."

2- Allah the Al-Mighty said: "And give unto orphans their property." (1)

The reason behind taking this verse as a proof: Allah commanded to give the orphans their properties; meaning after reaching the age of puberty. But Allah called this so (the orphans), urging the guardians to haste in giving them their properties when orphanage is not called upon them.

**Scholars discussed this saying and said:**

Allah's saying, "If then you find sound judgment in them, release their property to them", explains this verse. It does not

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(1) Chapter of the Women: (2)

refer that they cannot be interdicted of legal capacity.

3- Allah the Al-Mighty said: "And come not nigh to the Orphan's property, except to improve it, until he attain the age of full strength." (1)

The reason behind taking this verse as a proof: Allah prohibited guardians of the orphans from coming near to their property, except to benefit them until they reach the age of full strength. Accordingly, this verse shows that guardianship ends at that age.

**Scholars discussed this saying and said:**

You are judging according to what is understood from the verse, while you do not judge according to this in general. In addition, this verse is general, and it is restricted by Allah's saying, "If then you find sound judgment in them, release their property to them" (2). And the general is to be judged according to the restricted.

4- Anas may Allah be pleased with him reported: During the time of the Messenger of Allah peace be upon him, a man used to buy (goods), and he was weak in his intellect. His people came to the Prophet of Allah peace be upon him and said: "Prophet of Allah, stop so-and-so (to make a bargain) for he buys (goods), but he is weak in his intellect." So the Prophet peace be upon him called on him and forbade him to make a bargain. He said: "Prophet of Allah, I cannot keep away myself

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(1) Chapter of the Cattle: (152)

(2) Chapter of the Women: (6)

from business transactions." Thereupon the Messenger of Allah peace be upon him said: "If you cannot give up making a bargain, then say: 'Take, and give, and there is no attempt to deceive'." (1)

The reason behind taking this Hadith as a proof: The Messenger of Allah peace be upon him did not interdict on his disposition, and did not take his property from him giving it to his guardian. This shows that the fool and the absent-minded are not to be fallen under guardianship.

**Scholars discussed this saying and said:**

This Hadith is a proof for our opinion. That is because if the interdiction was inacceptable, people of the man would not demand this from the Prophet peace be upon him. Also the Prophet did not deny their demand. And regarding that the Prophet peace be upon him did not interdict the man of his legal capacity and did not appoint a guardian over him, that is because the Prophet guided him to what protect him from being deceived; providing negation of deception. And so the contract is based on existence of the provision. If the provision is achieved, then the contract is valid; and if it is not achieved, acceptance of the contract is optional. This is the opinion of many scholars, including Ahmed (2) and Malik in a narration.

5- The fool is mindful and responsible, and so he is not to be \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(1) An authentic Hadith: It was narrated by Ahmed in 'Al-Musnad' (3/217), Abu Dawood (3501), At-Tirmidhi (1250), Al-Nesai (4485), Ibn Majah (2354), Ibn Al-Jarood (568), Al-Hakem (4/101), and Al-Darqutney (3/55). All of them narrated it through the transmitted chain of Saeed, on the authority of Qatada, on the authority of Anas.

(2) 'Nail Al-Awtar' (5/207)

interdicted like the discrete. That is because interdiction over him and taking his guardianship devalues his humanity and dignity and makes him like the animals. (1)

**Scholars discussed this saying and said:**

Interdiction over the fool and guardianship over his property honor him and saves his property, for if it is left for him, he would waste it with his bad disposition. And so he would become poor and his life would become depressed. In addition, he would suffer and live in humiliation, begging from people.

And being responsible does not prevent interdiction and guardianship over him. He has just become responsible because provisions of responsibility are achieved in him, but he does not have those of eligibility of disposition. No one at all, except the responsible and discrete, can dispose in money.

**The preponderant opinion:**

It appears from the above-mentioned that opinion of the majority of scholars is more preponderant, for what they have mentioned of strong evidences. And what supports validity of the opinion of scholars is that Allah has forbidden extravagance and wastefulness. He, Glory be to Him, said: "But spend not wastefully (your wealth in the manner of a spendthrift. \* Verily, spendthrifts are brothers of the devils, and the devil is ever ungrateful to his Lord." (2)

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(1) 'Guidance' with completion of 'Fath Al-Qadeer' (7/316)

(2) Chapter of the Night Journey (26-27)

Also the Prophet peace be upon him prohibited wasting of money, which is consider a characteristic of the fools. He said: "Allah disapproves for you irrelevant talk, persistent questioning and the wasting of wealth." (Narrated by Muslim) (1)

In addition, the Islamic Shari'ah aims at caring for and saving the interests, and preventing the evils. And it is an interest to interdict over the fool in order that his property would not be wasted. Also when he wastes his money, he would become a burden over the society and become a corrupting member for spending his money in corruption. Accordingly, interdiction over him has a great interest for him, for his relatives on whom he should spend so that they would find money with which they would not become in need, and for the society for it would be free from the corrupting people who uselessly waste their money.

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(1) This Hadith was previously transmitted.

**Third Subject**

**When Guardianship over the Fool and the Absent-minded begins? And who is their Guardian?**

**There are two states of foolishness and absence of mind:**

**The first state:** Foolishness or absence of mind accompanies man since his puberty, by reaching the age of puberty while being fool or absent-minded and remains at this state. At this state, guardianship over his property continues for the one who was guarding him during his childhood, and this lasts until his foolishness or absence of mind ends. There is no need to a new interdiction, and guardianship of his guardianship during his childhood does not end due to absence of discretion, which is considered a provision for giving his property to him. It lasts until his foolishness or absence of mind ends. This is the opinion of majority of scholars. (1)

Abu Hanifah (2) sees that guardianship ends when the fool or the absent-minded reaches twenty five years, whether he becomes discrete or not, for he sees that the fool does not fall under interdiction.

Abu Yusuf said: Guardianship over the young ends when he reaches the age of puberty, and he needs to be interdicted again by the judge. That is because scholars disagreed on interdiction over the fool and the absent-minded, and so there

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(1) 'Al-Mohadhab' (1/331)

(2) 'Showing the Facts' (5/195)

is need to discretion of the judge to see which is better: interdiction or not. And the rule should only be for the judge (1), for he is the only one who can prove interdiction over them. The opinion of the majority of scholars is more preponderant, for continuation of interdiction over them is for their origin; for their origin is indiscretion, and this is not removed from upon them except with certainty.

**The second state:** Foolishness or absence of mind occurs after puberty and discretion. At this state, scholars may Allah show mercy on them disagreed on the time when guardianship over them begins, for disagreeing on interdiction over them.

The majority of scholars said: Guardianship over the fool and the absent-minded begins when the ruler proves interdiction over them. And the interdiction does not end as long as foolishness and absence of mind are still existent. This is the opinion of Al-Malikyah (2), Al-Hanabelah, Abu Yusuf and the authentic opinion of Al-Shaf'i.

The reason for this opinion: Scholars disagreed on interdiction over the fool and the absent-minded, and judge of the ruler ends this disagreement. That is because this judge is of benefit and harm; for saving and protecting their properties are a benefit for them, and preventing them from disposing in their properties is harm for them as this degrades them and humiliate their dignity. And so this matter needs to discretion

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(1) 'Al-Mabsot' (24/163)

(2) 'Mughni Al-Mohtaj' (2/171), 'Showing Facts' (5/195) and 'Al-Mughni' for Ibn Qudamah (4/519)

of the ruler to balance between them, and choose what benefits more. In addition, deception in dealings may not be for foolishness, but to attract people's attention and to gain fame. Thus discretion and consideration are needed.

On the other side, some scholars said: Interdiction over the fool and the absent minded is proves as soon as foolishness or absence of mind exists, and there is no need to judge of the ruler. This is the opinion of Muhammad bin Al-Hasan and a saying of Al-Shaf'i.

The reason for this opinion: The reason behind proving interdiction over them is foolishness or absence of mind, and they are already existent. And so the rule depends on its reason; whether it is proved or negated. They are like the madman and the insane; interdiction is proved over them as soon as madness and insanity are proved on them, without need to judge of the ruler.

Those of this opinion (1) disagreed on guardian of the fool and the absent-minded: It was said that their guardian is the same of their childhood; such as the person who reaches puberty while being fool. It was also said that their guardian is the judge, for the previous guardianship of the father and so on has been ended, and it does not return.

**The preponderant opinion:**

It is the opinion of the majority of scholars who provide judge of the ruler to prove interdiction over the person who became fool or absent-minded after puberty and discretion.

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(1) 'Paradise of the Seekers of Knowledge' (4/182) and 'Al-Mohadhab' (1/331)

That is because Ali may Allah be pleased with him went to 'Uthman bin Affan may Allah be pleased with him and asked him to prove interdiction over Abdullah bin Ja'far when he sold something. (1) Accordingly, if interdiction on the one who became fool or absent-minded after puberty and discretion is permissible without judge of the ruler, Ali would not seek judge of 'Uthman to interdict on him. Interdiction over the person who has become fool or absent-minded after puberty and discretion, needs discretion and consideration to prove or negate it. And judging that foolishness and absence of mind are like madness and insanity is not acceptable for there is difference between them. Madness and insanity are clear for all people, and so there is no need to discretion to prove them. But foolishness needs to discretion to prove it, for people disagree on proving it.

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(1) A good tradition: It was narrated by Al-Shaf'i in 'Al-Um' (3/220) and in 'Al-Musnad' (2/160), Al-Khateeb in 'The History' (14/242) and Al-Baihaqi in 'Al-Kubra' (6/61). All of them narrated it through the transmitted chain of Jacob bin Ibrahim, on the authority of Hisham bin 'Irwah, on the authority of his father who said: Abdullah bin Ja'far bought something, and Ali may Allah be pleased with him said to him: "I would go to 'Uthman, and interdict over you…"

**(b) The virgin woman who reached the age of puberty before marriage** (1)

Scholars may Allah show mercy on them disagreed on proving guardianship over property of the female who reaches the age of responsibility before marriage, for they disagreed on continuation of interdiction over her: Majority of scholars, including the three Imams Abu Hanifah, Al-Shaf'i and Ahmed in his well-known narration (2), see that when the female reaches the age of puberty and discretion, interdiction over her ends. And no one has guardianship over her. And so she can dispose of her property as the discrete male does, whether the female is virgin or has married before.

Malik (3), his companions and Ahmed in another narration (4) see that the mature, virgin female remains under guardianship of her father, his trustee or the judge until she marries and her husband consumes the marriage. And her actions are rejected before the marriage. And interdiction over her ends, for Al-Malikyah, if the following provisions are found in her:

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(1) Second part of the second division: Those whom scholars disagreed on interdicting them of legal capacity

(2) 'Paradise of the Seekers of Knowledge' (4/182) and 'Al-Moghni' for Ibn Qudamah (4/517)

(3) 'At-Tag and Al-Iklil' in the footnote of 'Mwaheb Al-Jalil' (5/69) and 'The Great Explanation' for Ad-Dardir (3/268)

(4) 'Al-Moghni' for Ibn Qudamah (4/517)

**The first:** That is to be mature.

**The second:** That is to dispose of her property in a good way.

**The third:** That is two or more just people witness for her good disposition.

**The fourth:** That is her husband consumes the marriage, and she remains with him for some time. It was said that this period is one year. It was also said that it is to be two years. Others said that it is to be six years. And others said that it is to be seven years. That is for a woman whose father is alive. As for the orphan woman, who is under guardianship of trustee of her father or representative of the judge, interdiction over her except when five provisions are achieved: The previous four provisions, and **the fifth** is that the trustee or the representative of the judge end the interdiction from upon her. And if they did not end the interdiction, her actions would be rejected even if she became spinster. (1)

And if her husband does not consume the marriage, she remains under interdiction until she becomes spinster. It was disagreed about the limited time of becoming spinster. It was said that it is to reach forty years. It was also said that it is from fifty to sixty years, when her menstruation ends. This is for the woman whose father is her guardian. As for the woman whose guardian is the trustee or representative of the judge, interdiction over her does not end until her guardian ends it; even if this occurs after becoming spinster. (2)

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(1) Footnote of Al-Dosoky (3/268)

(2) 'Magnificent of the Great' (5/67)

**Evidences of the two groups are as follows:**

Majority of scholars based on evidences from the Book, the Sunnah and deduction that the female is not put under interdiction after reaching the age of puberty and discretion:

**(a) The Book:**

1- Allah the Al-Mighty said: "Make trial of orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them." (1)

The reason behind taking this verse as a proof: Allah commanded guardians of the orphans to give their properties to them, provided that they (the orphans) reach the age of puberty and the guardians notice their sound judgment. The verse did not differentiate between male and female. And so providing that the woman remains under guardianship until marriage is an addition to what Allah has provided; and this is null and void.

2- Allah the Al-Mighty said: "And if you divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (is due to them), unless they remit it or (the man's half) is remitted by him in whose hands is the marriage tie." (2)

The reason behind taking this verse as a proof: Remission of the woman for her right in the dower, before consummation of the marriage is considered. This refers that her disposition is

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(1) Chapter of the Women: (6)

(2) Chapter of the Heifer: (237)

acceptable, and there is no interdiction over her.

**(b) The Sunnah:**

1- Jabir may Allah be pleased with him reported: I observed prayer with the Messenger of Allah peace be upon him on the 'Id day… The Prophet preached to the women and admonished them, and asked them to give alms, for most of them are the fuel for Hell. A woman having a dark spot on the cheek stood up and said: "Why is it so, Messenger of Allah?" He said: "For you grumble often and show ingratitude to your spouse." And then they began to give alms out of their ornaments such as their earrings and rings which they threw on to the cloth of Bilal. (Agreed upon) (1)

The reason behind taking this Hadith as a proof: The Messenger of Allah peace be upon him commanded all women to give alms; and among them were the virgin and the previously married woman. And what witnesses for that is Hadith of Um 'Atyyah may Allah be pleased with her, who said: " The Messenger of Allah peace be upon him commanded us to bring out on 'Id-ul-Fitr and 'Id-ul-Adha young women, menstruating women and screened away ladies." (Narrated by the Group) (2)

The Messenger of Allah peace be upon him did not differentiate between them in this matter; he accepted alms

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(1) Al-Bukhari (918, 935), Muslim (885), Ahmed in 'Al-Musnad' (3/318), and Al-Nesai (1575).

(2) Al-Bukhari (318), Muslim (890), Ahmed in 'Al-Musnad' (5/84), Abu Dawood (1/676), At-Tirmidhi (539), Al-Nesai (390), and Ibn Majah (1308).

from all of them. And if it were not that disposition of the virgin is acceptable, he would not generalize the command.

(c) The Deduction:

For the female is an orphan who has reached the age of puberty, and whose dispositions are sound and discrete, then her property is to be given to her like the male. (1)

**The proof of Malik and of those who say like him:**

1- Female differs from the male, for she is screened and does not observe matters due to virginity. Thus she remains under interdiction until marriage, for then she can understand all affairs. But the male is not like her. He disposes in matters and meets people since from his growth to his puberty; and so he is put under trial and his mind complete. Accordingly he becomes discrete. (2)

2- It is permissible for the father to make her marriage contract without her permission. And so interdiction over her is still existed, like the young girl.

3- Some of Al-Hanabelah took the following tradition as a proof: It was reported that Shuraih said: "'Umar bin Al-Khattab may Allah be pleased with him asked me not to allow any slave-woman to be given a gift, until she stays in the house of her husband for one year or until she gives a birth to a boy." (Narrated by Saeed in his 'Sunan') (1) None among the Prophet's

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(1) 'Al-Mughni' for Ibn Qudamah (4/517)

(2) 'Interpretation of Al-Qurtoby' (5/38) and 'Rules of the Qur'an' for Ibn Al-Araby (1/321)

companions contradicted this tradition. (2)

**Discussion of the majority of scholars to these evidences:**

1- Regarding their saying that woman before marriage is screened and does not observe matters due to virginity, and that she will understand all affairs by marriage, it is replied upon this saying with what Al-Qurtoby said in his 'Interpretation' (3): "Sexual relationship (after marriage) does not increase woman's discretion, if she already knows all her affairs and does not waste her money."

2- Equaling between interdiction over woman's property and forcing her on marriage is not correct. The woman is screened and cannot mix with men, and so she cannot choose who is appropriate to her in marriage. But regarding the money, she can buy and sell before marriage. Also this comparison is null and void, for it is not agreed upon the thing they are comparing with as many scholars see that the father cannot force his daughter on marriage, taking this Hadith as a proof: Abu Hurairah reported that the Messenger of Allah peace be upon him said: "A matron should not be given in marriage except after consulting her; and a virgin should not be given in marriage except after her permission." The people asked: "O

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(1) An authentic tradition: Ibn Hazm said: This tradition was reported through the transmitted chain of Saeed bin Mansoor, on the authority Hasheem, on the authority of Isma'il bin Abi Khalid, on the authority of Al-Sha'bi who reported that Shuraih said … It was narrated by Ibn Abu Shaibah (6/411) and Wakee' in 'News of Judges' (2/191-192)

(2) 'Al-Mughni' for Ibn Qudamah (4/517)

(3) 'Interpretation of Al-Qurtoby' (5/38)

Allah's Messenger! How can we know her permission?" He said: "Her silence (indicates her permission)." (Narrated by the Group) (1)

3- And regarding the tradition of 'Umar – if it is authentic – it is not known that it was spread among the Prophet's companions. Also evidences of the Book, Sunnah and deduction are not left for it. Thus most scholars, including Imam Malik, did not report this tradition. And supposing that it is authentic, it is special to preventing the gift, and it is not necessary that she is prevented from disposing in her property and in her other affairs. (2)

In addition, there is no evidence upon the limitation they said about the time in which interdiction over woman ends after marriage with one, five, six or seven years. It is just an opinion. Thus they disagreed on determining it.

Ibn Al-Araby said after mentioning the limitation they set: "There is no evidence upon any of this. And limiting the years for the woman whose guardian is her father is hard, and limiting it for the orphan is harder. And continuation of interdiction over the woman until her discretion appears and the trustee or the ruler ends it is what appears of the Qura'n. (3)

**The preponderant opinion:**

According to what was mentioned above of evidences and

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(1) Al-Bukhari (4843), Muslim (1419), Ahmed in 'Al-Musnad' (2/434), Abu Dawood (2092), At-Tirmidhi (1107), Al-Nesai (3265), and Ibn Majah (1871)

(2) 'Al-Mughni' for Ibn Qudamah (4/517)

(3) 'Rules of the Qura'n' for Ibn Al-Araby (1/321)

discussions, it appears that opinion of the majority of scholars is more preponderant for their strong evidences. And Al-Malikyah has no evidence, on which we can depend, but it is just an opinion. And so it cannot be accepted because it contradicts with evidences of the majority of scholars.

In addition, when Al-Malikyah provided marriage of the female, they did not end the interdiction over her completely. She gets out of an entire interdiction to a partial interdiction. They (Al-Malikyah) judged that, after marriage, a woman can behave without compensation in what is more of third of the property. (1) Interdiction before marriage was for her fortune, but after marriage it is for her husband, by preventing her from donating with what is more than third of her property. But there is no guardianship over her; she can behave in Indemnity contracts; such as selling, buying, leasing, loaning, and so on. She can dispose in her money as she wishes, except donating with what is more than third of her property. However, interdiction over woman after marriage is not the subject of our research; for the research is about those who are under guardianship.

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(1) 'Nail Al-Awtar' (6/22)

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| **Second Chapter**  **Trusteeship over those who are interdicted of Legal Capacity** |

**This chapter includes three parts:**

**First part:**

It shows definition of trusteeship over those who are interdicted of legal capacity, its rule, evidences on its legality, the rule of accepting it and how it is done.

**Second Part:**

It shows who can be chosen as the trustee, definition of the trustee, provisions that should be provided in him and when the provisions are considerable.

**Third Part:**

It talks about multi-trustees. It covers three subjects:

The first subject: It shows how they can act.

The second subject: It shows how they protect the property when disagreeing.

The third subject: It shows the rule when efficiency of one of them becomes disturbed, or when one of them was not present, or when one of them dies or when eligibility of one of them is removed due to madness and so on.

**First Part**

**Definition of Trusteeship over those who are interdicted of legal capacity, its Rule, Evidences on its Legality, the Rule of accepting it and how it is done**

**Definition of Trusteeship:**

**\_Its linguistic meaning:** It is to give authority to somebody else to behave in your property or anything belongs to you.

**\_Its conventional meaning:** It is to prove disposition, delaying until death. (1)

**Difference between bequeath and trusteeship:**

It is noticeable that both bequest and trusteeship have the same linguistic meaning.

But regarding the conventional meaning: Bequeath refers to donation which is to be done after death, and trusteeship is to authorize another man to guard on what he leaves after his death. (2)

Some scholars see that Bequeath includes both meaning: Donation that should be carried out after death, and authorization of somebody else to represent him after his death.

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(1) 'Qailoby' (3/177)

(2) 'Mughni Al-Mohtaj' (3/39)

Mansoor Al-Bahoty (1) said: Bequeath is a command to behave in one's affairs after his death. And bequeath with money is the donation which should be given after death. The first definition means that the trustee becomes representative of the person after his death. And the second definition means that the trustee owns the money that the person specifies it for donation after his death.

Ibn 'Arafah Al-Maliki (2) said: Trusteeship is a contract which obligates that third of property of the contractor is to be given as donation, or that there will be a representative for him after his death.

This definition includes both kinds, for the word 'or' means that any of these two states is acceptable. And so it includes the two definitions mentioned above.

**Rule of trusteeship over those interdicted of legal capacity, and evidences on its legality:**

It is unanimously agreed that it is supererogatory to appoint a trustee to care for affairs of the young, the madman and the fool. (3) This was tradition of the antecedents. But it is not acceptable according to the juristic deduction, for power and guardianship of the guardian ends by death. But there is evidence upon permitting it. Al-Baihaqi narrated through a

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(1) 'Discovering of the Mask' (4/335)

(2) 'Faculties of the Great' (6/364)

(3) 'Mughni Al-Mohtaj' (3/73)

good transmitted chain that Ibn Masood made a bequest, saying: "My bequest is to Allah, to Al-Zubair and his son Abdullah." (1)

Hisham bin 'Irwah reported that Abdullah bin Masood, Al-Miqdad bin Al-Aswad, Abdelrahman bin Aouf and Moti' bin Al-Aswad made a bequest to Al-Zubair. (Narrated by At-Tabrany) (2)

Ibn Qudamah said in 'Al-Mughni' [3] (4) that when Abu 'Ubaidah crossed Al-Forat River, he made a bequest to 'Umar. Also Ibn 'Umar was trustee to a man. And no one disagreed with this.

Some scholars see that it is dutiful to make a bequest appointing a trustee (after your death). Al-Hattab reported in 'Faculties of the Great' [5] that Mondher bin Saeed said in book 'The Bequests': "Making a bequest is dutiful. And the wisdom behind legalizing it is to be kind towards those interdicted of

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(1) Al-Baihaqi in 'Al-Kubra' (6/282): Abu Al-Husain told us that Abdullah reported, on the authority of Ibrahim bin Al-Mondher, on the authority of Waki' bin Al-Jarrah, on the authority of Abu 'Amees, on the authority of Amer bin Abdullah bin Al-Zubair who said: "Abdullah bin Masood made a bequest …" This tradition was also narrated by Ibn Abu Shaibah (7/294). Ibn Al-Molaqin and Al-Hafez said: "This tradition was narrated by Al-Baihaqi through a good transmitted chain." And the tradition mentioned after it strengthens it.

(2) Ibn Abi Shaibah (7/305): Abu Osama told us that Hisham said that Abdullah bin Masood … It was also narrated by At-Tabrany in 'Al-Kabeer' (246), and by Al-Baihaqi in 'Al-Kubra' (6/282)

[3] 'Al-Mughni' (6/576)

(4) See book of Ibn Abu Shaibah (7/305)

[5] 'Faculties of the Great' (6/364)

legal capacity and to save their properties." Muhammad Al-Shirbiny reported in 'Mughni Al-Mohtaj' (1) that Al-Azra'i said: "It is dutiful upon fathers to appoint trustees on their children if they do not have a grandfather eligible to guardianship. And the father should choose a trustworthy trustee. He must save his children's property, for after his death a deceiving man or judge may take his money.

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(1) 'Mughni Al-Mohtaj' (3/74)

**The rule of accepting trusteeship:**

Scholars may Allah show mercy on them disagreed on the rule of accepting trusteeship in two sayings:

**The first:** Accepting it is a Prophetic Sunnah (1) for the honest and strong man, for generality of Allah's saying, "Help you one another in righteousness and piety." (2) And also Allah's saying, "Verily, Allah commands justice and the doing of good." (3)

In addition, the Prophet peace be upon him urged upon maintaining orphans, showing that the maintainer of the orphan will be in Paradise close to rank of the Prophet peace be upon him. The Messenger of Allah peace be upon him said: "I and the one who looks after an orphan will be like this in Paradise," showing his middle and index fingers and separating them. (Narrated by Al-Bukhari and Abu Dawood) (4)

Also the Prophet's companions may Allah be pleased with them were doing so; they were making bequest for each other and were accepting them; such as what was mentioned before when showing evidences upon legality of trusteeship.

Trusteeship is authorization and honesty, and so it looks like deposit and representation during life.

**The second:** Accepting it is disapproved, for it includes danger.

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(1) 'Mughni Al-Mohtaj' (3/77) and 'Discovering of the Mask' (4/393)

(2) Chapter of the Table: (2)

(3) Chapter of the Bees: (90)

(4) Al-Bukhari (4998), Ahmed in 'Al-Musnad' (5/333), Abu Dawood (5150), At-Tirmidhi (1918), on the authority of Sahl bin Sa'd may Allah be pleased with him.

Ibn 'Abdeen said in 'Guiding the Confused' (1): Abu Yusuf said: "Accepting trusteeship for the first time is a mistake, for the second time is treachery and for the third time is theft." Al-Hasan said: "The trustee could not be just, even if he was 'Umar bin Al-Khattab." Abu Muti' said: "I never saw, during the period of my judgment which lasted for twenty years, any man acting justly in property of his nephew."

Others said: "Beware of these four things: Authorization, guardianship, trusteeship and endowment."

Ar-Rabi' reported that Al-Shaf'i said: "No one accepts trusteeship except a fool or thief." (2)

Ibn Qudamah said in 'Al-Mughni' (3): Deduction of Ahmed about leaving trusteeship is worthier, for the risk it includes. There is a Hadith reported refers to this meaning. It was reported that the Prophet peace be upon him said to Abu Dharr: "I see you weak, and I like for you what I like for myself. Do not be a leader of two (persons), and do not be a guardian of an orphan." (Narrated by Muslim) (4)

**The preponderant opinion:**

It is preponderant– and Allah knows best – that accepting trusteeship is a Prophetic Sunnah, for the person who realizes

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(1) 'Footnote of Ibn 'Abdeen' (5/685)

(2) 'Mughni Al-Mohtaj' (3/77)

(3) 'Al-Mughni' (6/577)

(4) Transmission of this Hadith was mentioned before.

honesty and strength in himself, for generality of verses and for the great reward for the one who maintains an orphan as the Prophet peace be upon him showed.

Mansoor Al-Bahoty said in 'Discovering the Mask' (1): Al-Harithy replied on those who said that leaving trusteeship is worthier, saying: "Trusteeship may be either dutiful or recommended. And giving priority to leaving it leads to suspending it … Accepting it may be dutiful for property exposed to waste for absence of the judge or so on; and this prevents corruption and brings benefit.

Prohibition of the Prophet peace be upon him to Abu Dharr not to accept guardianship over the orphan was for his weakness, such as what was shown in the Hadith.

**How trusteeship is done?**

Trusteeship is done with offer of testator and acceptance of trustee.

**What is offer? And what are its examples?**

Offer of the testator is every word he utters refers to what is meant. For example: I authorized you to look after my children's affairs, or I give you guardianship over their affairs, or I make you my representative, or I make you at my position, and so on. But the word must include 'after my death', except when saying you are trustee over them for it is clear.

**What is acceptance?**

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(1) 'Discovering the Mask' (4/394)

Acceptance is every saying or action refers to approval. If the trustee disposes in property of the testator with selling or buying, this is considered acceptance for majority of scholars. As acceptance is done with clear word, it can also be with action. In a narration for Al-Shaf'i: (1) "Action does not replace saying," but the more authentic narration for them is that it replaces saying; such as authorization.

**Time of accepting trusteeship:**

It is unanimously agreed that it is authentic to accept trusteeship after death of the testator. But they disagreed on authenticity of accepting it during life in two sayings:

**The first:** Majority of scholars see that accepting trusteeship during life is authentic such as accepting it after death. The reason behind this is that trusteeship is a permission of disposition; and so it can be accepted directly after making the contract like authorization. In addition, the testator appoints one of his friends or honest people to be his representative (after death), so accepting it during his life is authentic. If acceptance is not authentic during life, the testator's purpose of trusteeship may be lost, for the trustee may not accept it. This is the opinion of Al-Hanafiah, Al-Malikiyah and Al-Hanabelah (2), and in a narration of Al-Shaf'i.

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(1) 'Qalioby and 'Umairah' (3/179), 'Al-Tag and Al-Iklil' in the footnote of 'Faculties of the Great' (6/403) and 'Showing Facts' (6/206)

(2) 'Al-Mughni' (6/574), 'Masterpiece of Religious Scholars' (4/306) and 'Al-Tag and Al-Iklil' in the footnote of 'Faculties of the Great' (6/402)

**The second:** Accepting trusteeship during life in not authentic, for the time of disposition has not come yet. This is the more authentic narration for Al-Shaf'i. (1)

**The preponderant opinion:**

It appears – and Allah knows best – that accepting trusteeship during life is more preponderant, for there is difference between bequest of disposition and bequest of money. Bequest of money is ownership after death, and so it is not authentic to accept it before death. And bequest of disposition is permission for trustee with disposition, and so he can accept it after making the bequest; such as authorizing him to make an action after some time, he can accept it immediately. In addition benefit of trusteeship returns to the testator. On the other side, bequest of money returns to the bequeathed.

**Can the trustee turn back trusteeship during life of the testator?**

I have mentioned before that scholars disagree on authenticity of accepting trusteeship during life in two sayings:

**The first saying:** It is not authentic to accept it during life of the testator. Accordingly, the trustee cannot turn trusteeship back during life of the testator, for this is not its time. And so if the trustee refused it during life and then accepted it after death, the acceptation is correct, for this is the time of disposition. And if the trustee does not accept it after death, then trusteeship becomes incorrect. (1) =

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(1) 'Explanation of Al-Jalal' in the footnote of 'Qalioby and 'Umairah' (3/179)

**The second saying:** It is authentic to accept trusteeship during life of the testator. Accordingly, if the trustee accepted it during life of the testator and with his knowledge, and then turned it back with his knowledge during his life too, the turning back is correct. That is because the testator cannot obligate the trustee to accept it, and he can appoint somebody else. And if the trustee turned it back without knowledge of the testator, the turning back is not correct for Al-Hanafiah (2), for this would harm the testator as he would not appoint another man for depending on him. And others see that (3) turning it back without knowledge of the testator is correct.

**Can the trustee turn back trusteeship after death of the testator?**

If the trustee accepted trusteeship during life of the testator then he (the testator) died, or accepted it after death of the testator, he cannot turn it back after that. This is the opinion of Al-Hanafiah (4) and Al-Malikiyah (5) in their famous narration.

**The reason behind this for Al-Hanafiah:** If the trustee accepted trusteeship during life of the testator, and then turned it back

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= (1) 'Mughni Al-Mohtaj' (3/77), 'Explanation of Al-Jalal according to the Approach' in the footnote of 'Qalioby and 'Umairah' (3/179)

(2) 'The Footnote of Ibn 'Abdeen' (5/688)

(3) 'Al-Mughni and the Great Explanation' (6/574) and 'The Footnote of Al-Dosoky' (4/405)

(4) 'Showing the Facts' (6/206)

(5) 'Faculties of the Great' (6/404)

after his death, this would harm the dead, for his acceptation during his life prevented the testator from giving it to another person; and so it is not acceptable to turn it back. (1) And if he accepted it after death of the testator, then it would be obliged on him for bearing the least of two harms; harm of the dead as he cannot appoint another trustee, and harm of the trustee as he cannot perform its duties. While it is not possible to remove these two harms, then it is dutiful to bear the least of them; obliging the trustee to commit to trusteeship to remove the larger harm; the harm of the dead. That is because nothing can compensate harm of the dead, while harm of the trustee is compensated with the reward. (2)

Al-Shaf'i and Al-Hanabelah said (3): The trustee can turn back trusteeship, whether he accepted it during life of the testator or after his death, for he disposes with permission; and so he can oust himself like the authorized deputy.

**The preponderant opinion:**

It appears – and Allah knows best – that trustee can turn back trusteeship during life of the testator and after his death. But this is suspended on judgment of the ruler. That is because obligating trusteeship on him makes him be coerced, and Allah the Al-Mighty said: "No ground (of complaint) can there be against good-doers." (4)

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(1) 'Showing the Facts' (6/206)

(2) 'Footnote of Al-Shalaby' on 'Showing the Facts' (6/206)

(3) 'Al-Mughni' (6/574) and 'Explanation of Al-Jalal on the Approach' (3/180)

(4) Chapter of Repentance: (91)

In addition, if the trustee turned it back, there would be no benefit from obligating it on him. Al-Athram and Hanbal reported that the trustee can oust himself when finding a ruler, for the ruler saves property of those interdicted of legal capacity. But if there were no ruler, then the trustee could not oust himself as this would lead to wasting rights of the Muslim. Also the trustee cannot oust himself if it is hard for the rule to judge for him, or if it is expected that the ruler would appoint non-eligible trustee, or if the ruler is unjust, as Al-Harithy said. (1)

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(1) 'Discovering the Mask' (4/397)

**Second Part**

**Who can be chosen as the Trustee, Definition of the Trustee, Provisions that should be provided in him and when the Provisions are Considerable?**

**Who can be chosen as the trustee? And what provisions should be provided in him?**

Trusteeship is acceptable from ever free, responsible and discrete man, who has guardianship on those under trusteeship. (1) And so it is not acceptable from a slave, madman, young boy and fool, for they do not even have guardianship on themselves. And so it is worthier that they cannot have guardianship over others. A brother cannot appoint a trustee over his brother who is interdicted of legal capacity, and the uncle cannot appoint a trustee over his nephew who is interdicted of legal capacity. Also representative of the judge cannot appoint a trustee on others. The father cannot also appoint a trustee over his responsible, discrete son or over the son who became fool after puberty. That is because all of these people do not have guardianship on them at the time of appointing a trustee.

Scholars disagreed about grandfather; whether he can appoint a trustee over his grandson or not. And this disagreement is for their disagreement on proving guardianship for him. Al-Shaf'iah and Al-Hanafiah (1) = prove guardianship for

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(1) 'Mughni Al-Mohtaj' (3/75)

him, and so they approve him to appoint a trustee on his grandson. Al-Malikiyah and Al-Hanabelah (2) do not prove guardianship for him, and so they do not approve him to appoint a trustee for him grandson, for he has no guardianship over him.

They also disagreed about the mother; whether she can appoint a trustee over her children or not. Also disagreement is for their disagreement on proving guardianship for her. Abu Saeed Al-Istakhri from Al-Shaf'iah approved her to appoint a trustee over her children, for her guardianship over them is proved.

On the other side, majority of scholars see that the mother cannot appoint a trustee over property of her children. Disagreement on proving guardianship of grandfather and mother was mentioned before in the first chapter when talking about guardian of the young. Al-Malikiyah permitted trusteeship of the mother with three provisions:

**The first:** That is property that she appoints a trustee over it be little; such as sixty Dinars.

**The second:** That is her children have no guardianship, of father, or a trustee, or representative of the judge. For her bequest is not acceptable while such people are existed.

The third: That is property she appoints trustee on it belongs to her, but if it does not belong to her, then she cannot appoint a

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= (1)'Explanation of Al-Jalal on the Approach' at the footnote of 'Qalioby' (4/179) and 'Magnificent of the Creatures' (5/155)

(2) 'Al-Tag and Al-Iklil' in the footnote of 'Faculties of the Great' (6/389)

trustee over it. (1)

**Can the trustee give trusteeship to another man?**

If a man made a bequest (of disposition) to another man; he may either permit him to appoint another trustee such as saying: "I permit you to appoint a trustee over my children, or to whom you give trusteeship, I give it to him or he is my trustee; or give him trusteeship without permitting or preventing him from appointing another trustee.

If the testator permitted him, then trusteeship would be correct. In this state the trustee can appoint another trustee, for the testator accepted his dispositions and dispositions of those who he chooses. This is the opinion of most scholars, including Al-Hanafiah, Al-Malikiyah and Al-Hanabelah (2), and Al-Shaf'iah in their preponderant saying. In another narration for Al-Shaf'iah: The trustee cannot give trusteeship to another person. And in a third narration: He cannot give trusteeship to another person, except if the testator appointed for him whom he can give it to him.

**The preponderant opinion:**

The trustee can give trusteeship to another person if the testator permits him to do so; such as the authorized deputy: if he is given authorization, he can appoint another representative. And if the testator made it general; did not give

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(1) 'The Great Explanation' for Al-Dardir in the margin of 'The Footnote of Al-Dosoky' (4/402)

(2) 'Al-Mughni' for Ibn Qudamah (6/574), 'Showing the Facts' (6/209) and 'Footnote of Al-Dosoky' (4/402)

him permission and did not prevent him, many scholars said that he can give trusteeship to another person. This is the saying of Malik, Abu Hanifah and Ahmed in a narration. The reason behind this for Al-Hanafiah is that the trustee behaves according to a guardianship transmitted to him, so he can give trusteeship to others like the grandfather. And so trustee of the father is introduced over grandfather, for the fixed guardianship has moved to the trustee.

Al-Shaf'i, Ishaq and Ahmed in his famous narration: It is not acceptable for the trustee to give trusteeship to another man in the general case, for the dead has authorized him disposition not to authorize trusteeship to others. He does not own this right; such as the authorized deputy. He cannot authorize anyone to do what he is authorized with. Both of them dispose according to a guardianship given to them, and so they cannot give it to others. Trustee is not like the father, for the father guards without appointment. And so they do not have the same rule.

**Those who permitted replied on those who prevented, saying:**

We do not take for granted that the testator did not accept disposition of the second trustee. He may have showed his acceptation by any way. For when the testator gave trusteeship to the trustee, knowing that he (the trustee) would not live forever, this shows that he accepts giving trusteeship to another man; especially when supposing that the trustee may die before fulfilling the purpose of taking care of properties of his young children before their puberty. The testator hopes that his property would not be wasted. And this is considered permission for the trustee to give trusteeship to another through indication. The trustee is not like the authorized deputy in this case, for the authorizer is alive; he can reach his purpose by himself. And so there is nothing here indicates to his acceptation for his deputy to appoint another person. (1) Also the authorized deputy is ousted by death of the authorizer, and by becoming mad.

**The preponderant opinion:**

It appears – and Allah knows best – that it is not permissible for the trustee to give trusteeship to another in case of generality. That is because appointing guardian over the underage children is for the ruler or for what represents him among judges, in case that there is no guardian for them. And so properties of the underage children would not be wasted. It is dutiful upon the ruler to take care of their affairs or appoint any one he wills to take care of them.

**Who is the trustee? And what are his provisions?**

**\_Its linguistic meaning:** It was reported in the tongue of the Arab (2) that trustee is the person who gives trusteeship and the person to whom trusteeship is given.

**\_Its meaning for the religious scholars:** He is the person to whom trusteeship is given, who is authorized with disposition after death (of the testator).

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(1) 'Showing Facts' (6/209-210)

(2) 'Tongue of the Arab' (20/273)

**Provisions of the trustee:**

The following provisions should be provided in the trustee:

**The first provision:** That is to be responsible, meaning to be mature and mindful. And so it is unanimously agreed that it is not permissible to give trusteeship to a madman or a young boy, for they are of no eligibility. And so they cannot have guardianship over themselves or over others.

As for the discrete boy: Most scholars (1) say that he cannot be appointed as a trustee, for he is still under guardianship like young boy and madman. Al-Qadi from Al-Hanabelah said: Juristic deduction of the group is that giving trusteeship to him is acceptable, for Ahmed said that he can be appointed as an authorized deputy. But he should be of more than ten years. The first saying is more preponderant, for trusteeship is guardianship, and the young boy is not eligible to guardianship.

**The second provision:** That is to be Muslim, if the person under trusteeship is Muslim. That is because trusteeship is guardianship, and there is no guardianship for the disbeliever over the Muslim for Allah's saying, "And never will Allah grant to the unbelievers a way (to triumph) over the believers." (2) In addition, the disbeliever is not trusted over Muslim as Allah said: "In a Believer, they respect not the ties either of kinship or of covenant." Also the disbeliever is an enemy as Allah said: "O you who believe! Take not into your intimacy those outside

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(1) 'Al-Mughni' and 'The Great Explanation' (6/570)

(2) Chapter of the Women: (141)

(3) Chapter of Repentance: (10)

your religion: They will not fail to corrupt you. They only desire your ruin: Rank hatred has already appeared from their mouths: What their hearts conceal is far worse." (1)

**The third provision:** That is to be just. It is not permissible that the trustee be immoral. That is because trusteeship is guardianship and trust, and the immoral man has no honesty.

Al-Kharqi from Al-Hanabelah said: It is permissible to make trusteeship to an immoral man, but with appointing an honest man with him. (2)

Al-Sarkhasi (3) from Al-Hanafiah said: It is permissible to make trusteeship to an immoral man, but the judge should abrogate it.

But the preponderant opinion is that it is not permissible to make trusteeship to the immoral, for he is not eligible to guardianship and honesty.

**The fourth provision:** That is to beware of the way of disposing in property under trusteeship. It is not permissible to appoint a foolish, old or absent-minded and so on as a trustee, for there is no benefit in making trusteeship to any of them. (4)

**The fifth provision:** That is to be free. But there is disagreement on this provision. Al-Shaf'i (5) and Abu Yusuf see

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(1) Chapter of the Family of 'Imran: (118)

(2) 'Al-Mughni' (6/571)

(3) 'Footnote of Al-Shalaby' in 'Showing of Facts' (6/207)

(4) 'Mughni Al-Mohtaj' (3/74)

(5) 'Explanation of Al-Jalal' in the footnote of 'Qalioby and 'Umairah (3/177) and in =

that it is not authentic to make trusteeship to a slave, even if his master permitted this and even if he was a slave to the testator. That is because the slave has no guardianship over himself, and so it is more appropriate not to have guardianship over others.

In addition, the slave cannot dispose in property of his son, and so he cannot be a trustee. That is because trusteeship needs free time, and he does not have it, for he is busy with affairs of his master. And if the trustee was a slave to the testator, this would give the slave guardianship over his master and this opposes the legal.

Abu Hanifah (1) said: It is permissible for the person to make trusteeship to his slave if his heirs are young. That is because the slave is an addressee who is eligible to dispose (in property), and so it is authentic to appoint him as trustee.

Al-Malikiyah and Al-Hanabelah (2) said: It is permissible to make trusteeship to the slave, whether he was slave to the testator or to another one. But it is provided that his master would give him permission. That is because he is eligible to take care of money, for the saying of the Messenger of Allah peace be upon him: "A servant is guardian of his master's property and responsible for his ward." (Agreed upon) (3)

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= 'Showing the Facts' (6/207)

(1) 'Showing the Facts' (6/207)

(2) 'Al-Tag and Al-Iklil' in the footnote of 'Faculties of the Great' (6/389) and 'Discovering the Mask' (4/394)

(3) This Hadith was reported by Ibn 'Umar may Allah be pleased with them: It was narrated by Al-Bukhari (853), Muslim (1829), Ahmed (2/5), Abu Dawood (2928) and =

As a servant is eligible to guardianship, then it is dutiful to prove making trusteeship to him. In addition, he is of justice and is represented as deputy in life, so he is eligible to trusteeship.

They (Al-Malikiyah and Al-Hanabelah) replied on the saying of Al-Shaf'i that the servant does not guard over property of his son, saying: This does not negate making trusteeship to him, for the woman cannot guard over her son but she can be trustee over him. And regarding that dispositions of the servant depend on permission of his master, this does not prove negating trusteeship for him; such as the patient: He cannot dispose in more than third of his money during his illness, and disposing in the rest is based on permission of the heirs. (1)

**The sixth provision:** That is to be insightful, as Al-Shaf'iah (2) said. That is because the blind cannot observe selling and buying, and so affairs of others cannot be authorized to him. But majority of scholars said that it is permissible to make trusteeship to the blind, for he is able to sell and buy. And supposing that he cannot observe selling and buying, he can authorize anyone to observe what he cannot do. In addition, he (the blind) can be a witness, and is guardian over his children, and so it is authentic to make trusteeship to him like the insightful. And this is the preponderant opinion.

**The seventh provision:** That is to be talking. It is not

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= At-Tirmidhi (1705)

(1) 'Discovering the Mask' (4/394)

(2) 'Explanation of Al-Jalal according to the Approach' in the footnote of 'Qalioby and 'Umairah' (3/178)

permissible to make trusteeship to a dumb even if his gestures are understandable. This is the opinion of some of Al-Shaf'iah. (1) But the more authentic saying is that it is acceptable to make trusteeship to the dumb when his gestures are understandable.

**The eighth provision:** That is to be male. Ibn Qudamah reported this in 'Al-Mughni' (2), on the authority of 'Atta'. That is because it is not permissible for the woman to be judge, and so she cannot be a trustee.

Other scholars said that it is permissible to make trusteeship to the woman. Ibn Al-Mondher reported that scholars unanimously agreed on this (3). That is because the woman can be a witness, and so she resembles man. And what witnesses for this saying is that 'Umar bin Al-Khattab may Allah be pleased with him made trusteeship to his daughter Hafsa may Allah be pleased with her. Also trusteeship cannot be judged like judiciary, for perfect creation and deduction are considerable in judiciary, not as trusteeship.

When these provisions are considerable?

Scholars may Allah show mercy on them disagreed on the time when provisions of the trustee be considerable, in three sayings:

**The first:** The provisions are considerable at the time of death (of the testator), not at the time of making trusteeship, nor

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(1) 'Mughni Al-Mohtaj' (3/75)

(2) 'Al-Mughni' (6/570)

(3) 'Mughni Al-Mohtaj' (3/75)

during the time between them like making a bequest for him. That is because disposition depends on the death, and so provisions are considerable during this time. This is like justice of the witnesses; this provision is only considerable at the time of delivering (the witness) or judge. This is the most authentic saying for Al-Shaf'iah. (1)

According to this saying, if these provisions were not provided in the trustee at the time of making trusteeship to him, and then they were found after death (of the testator), then trusteeship to him is valid. For example: Making trusteeship to a young boy, and then he reached the age of puberty after death; or being unbeliever, and then he entered Islam before death.

**The second:** These provisions are considerable when making trusteeship and after death; they are not considerable at the time between them (2). That is because these provisions are for a contract; so they should be provided at its time like other contracts. Also the time of the contract is the time of acceptance, and the time of death is the time of disposition; so they are considered during them.

**The third:** These provisions are considerable since the time of making trusteeship till death (3), for each time may be the time of disposition if the testator died. Thus provisions are considerable during any of this time.

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(1) 'Mughni Al-Mohtaj' (3/74)

(2) 'Al-Mughni' (6/571)

(3) 'Al-Mohadhab' for Al-Shirazy (1/463)

The preponderant opinion – and Allah knows best – is that these provisions should be considerable at the time of making trusteeship and after death, for they are provisions of authenticity of the contract so they are considerable at the time of its existence like other contracts. (1)

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(1) 'Al-Mughni' (6/571)

**Third Part**

**Multi-Trustees**

**This part includes three subjects:**

**The first subject:**

It shows how they can act.

**The second subject:**

It shows how they protect the property when disagreeing.

**The third subject:**

It shows the rule when efficiency of one of them becomes disturbed, or when one of them was not present, or when one of them dies, or when eligibility of one of them is removed due to madness and so on.

**First subject**

**Disposition of the Multi-trustees**

When a person makes trusteeship to more than one person, then this matter can be one of the following three states:

**First state:** That is the testator stipulates that the trustees should gather when disposing. In this state, it is dutiful on them to gather. And disposition of any of them without permission of the other(s) is null and void, for the dead did not accept disposition of any of them separately. (1)

**Second state:** That is the testator stipulates that the trustees can dispose separately; such as saying, 'I have made trusteeship to both of you, and both of you have the authority of disposition'. In this state, it is permissible for any of them to dispose separately, without waiting for permission of the other(s), for both of them are behaving according to stipulation of the testator, and do not exceed this stipulation.

**Third state:** That is the testator makes trusteeship to the trustees absolutely; such as saying, 'I have made trusteeship to both of you, or to so and so and so and so', or to made trusteeship to everyone of them with a separate contract.

In this state, scholars may Allah show mercy on them disagreed in two sayings, whether it is permissible for one of

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(1) 'Qalioby and 'Umairah' (3/179), 'Al-Mughni' for Ibn Qudamah (6/575), and 'Footnote of Al-Dosoky' (4/403)

them to dispose separately or not:

**The first saying:** It is not permissible for any of them to dispose separately, except in some exceptions that will be shown afterwards. This is the opinion of majority of scholars (1) including the four Imams.

The reason behind this saying: Trusteeship is proved for each of them with authorization, and so the description of authorization should be considered; which is participation in disposition. That is because participation is beneficial, for opinion of one person is not like opinion of two persons. Also the testator did not accept opinion of one person. And so disposition of one of them separately opposes stipulation of the testator, for each of the two trustees is considered half of the reason and the rule is not proved by half reason. Accordingly, disposition of one trustee is null and void. (2)

**The second saying:** It is permissible for each of them to dispose separately. This is the opinion of Abu Yusuf.

The reason behind this saying: Trusteeship is like guardianship; it is an inseparable legal description. And so it is proved for each of them like guardianship of marriage for the two brothers. That is because trusteeship is succession, and succession is transferred to both of them at the same way that was proved for the testator, which is perfection. In addition, the testator's choice of each of them permits specialization of pity for each of them. And so this state is attached to

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(1) 'Al-Mohadhab' (1/463) and 'Faculties of the Great' (6/396)

(2) 'Showing the Facts' for Al-Zai'ali (6/208)

exceptional states in which each trustee can dispose separately. (1)

**Discussion of scholars to the saying of Abu Yusuf:**

They said that making trusteeship to two trustees or more differs from guardianship of marriage from two sides:

**The first:** The reason behind guardianship (of marriage) is kinship, and so it can be carried out by any of the guardians perfectly. But the reason behind trusteeship is not kinship.

**The second:** Guardianship in marriage is a dutiful right upon the guardian for the woman. This is not his right. And so if she asked him to make her marry from an appropriate man to her, he has to answer her demand. As for trusteeship, the right is for the trustee; and he can choose to dispose or not. Accordingly, if one of the guardians disposed without permission of the other(s), he has accomplished a right for the other (guardian); and this is permissible. And if one of the trustees disposed without permission of the other(s), he has taken the right of the other (trustee); and this is not permissible. And regarding exceptional states, disposition of one of the trustees separately is permissible for necessity; for necessity is always exceptional.

**What is permissible for each trustee to do separately?**

It is permissible for each trustee to dispose in matters in which delay causes harm; such as buying a shroud for the dead, preparing him (for burial), accepting the gift, selling what is

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(1) 'The Printed Guardianship' with completion of 'Fath Al-Qadeer' (8/493)

supposed to be damaged, collecting lost moneys, and buying food and clothes for young children, in case that the other trustee is absent.

It is also permissible for one of the trustees to dispose separately in returning properties to their due people; such as deposit, loan and what was bought corrupted. Disposing separately is also permissible in paying a debt or executing a stated bequest; for executing it is a means of aid and there is no need to opinions in doing this.

It is also permissible to dispose separately in lawsuit for the dead. This is the opinion of Al-Hanafiah for it is hard for the trustees to gather in it.

Al-Malikiyah said: It is not permissible for the trustee to make a lawsuit, except when the other trustee is present. But if the other trustee authorized him to do so or was absent, this would be permissible. And when the absent trustee returns, he can introduce his proof if he feared that the first trustee did not introduce a strong proof. Most scholars see that it is permissible to dispose separately in saving money; for it is considered a means of aid and so there is no need to opinions here. (1)

We will talk in the second subject about saving money when the two trustees disagree; who will save the money with him?

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(1) 'Mughni Al-Mohtaj' (3/77), 'Showing the Facts' for Al-Zai'ali (6/209), and 'Faculties of the Great' and 'Al-Tag and Al-Iklil' in their footnote (6/396)

**Second Subject**

**The Way of Saving Money when the Trustees disagree**

Scholars give three sayings about disagreement of the trustees about who of them would keep the money with him:

**First saying:** They divide it among them, whether the testator stipulated that they should gather separately or collectively, or whether he left it general. That is because each of them is a trustee of the dead; and so none of them is worthier to keep it. This is the opinion of Al-Hanafiah and Al-Shaf'iah. (1)

**Second saying:** If the disagree, the ruler should look into this matter leaving the money with the most just of them. And if they are equal in justice, he should leave it with the most adequate.

They disagree on what each of the trustees guarantees: it was said that each of the trustees guarantees the whole property. It was also said that each trustee guarantees what his companion keeps. This is the opinion of Al-Malikiyah. (2)

**Third saying:** They should not divide money. It should be saved in a place under their guardianship. And if this is hard, it should be sealed and given to trustee of the judge. The reason behind this reason is that the testator did not make trusteeship to any

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(1) 'Mughni Al-Mohtaj' (3/78), 'Guidance' with completion of 'Fath Al-Qadeer' (8/494), and 'Al-Mughni' for Ibn Qudamah (6/576)

(2) 'Footnote of Al-Dosoky' on 'The Great Explanation' (4/404) and 'Faculties of the Great' and 'Al-Tag and Al-Iklil' in its margin (6/398).

of them individually, to keep and dispose in his property. Also participation in disposition includes participation in saving, for this was the will of the testator. A trustee cannot separate in keeping as he cannot separate in disposition. But if the testator recommended that one of the trustees disposes alone, then there are two cases for separation in keeping money:

The first is what was mentioned above in the third saying.

The second is that they divide it among them. This is the opinion of Al-Hanabelah. (1)

It appears and Allah knows best that the first saying is the most preponderant, for each of them is trustee of the dead and he accepted that any of them can save the money. And he made them participate in disposition to reach a perfect opinion, for opinion of two persons is more perfect than opinion of one person. Also participation in disposition does not necessitate participation in keeping money, for in keeping money there is no need to opinion like disposition. In addition, participation in saving money may be more proper, for part of it may be destroyed and so the other part will be saved. And this is a benefit for the young.

And regarding their saying that the dead did not authorize any of them to keep money, we reply that if he did not authorize keeping money to any of them, he would not make a bequest for him, for who is not trusted to keep money is not trusted to dispose.

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(1) 'Al-Mughni' for Ibn Qudamah (6/576) and 'Discovery of the Mask' (4/396)

**Third Subject**

**The Rule when one of the Trustees became Weak,**

**Or became Absent, or Died, or became Ineligible**

**The rule when one of the trustees became weak or absent:**

If one of the two trustees became weak or absent, and the testator did not allow any of them to dispose separately, then the ruler should appoint a trustworthy man to participate with him in disposition. Trusteeship of the weak is not removed, for he still has perfect eligibility of honesty and guardianship. (1)

And if the testator allowed any of the two trustees to dispose separately, then the ruler should not appoint a trustworthy man to dispose with them, for the other trustee is enough. But if the other trustee is unable to dispose separately due to much work, then he can appoint another trustee with him.

**The rule when one of the trustees died or became in eligible:**

If one of the two trustees dies or became ineligible due to madness or immorality, this matter is of two states:

**The first state:** That is each of them can dispose separately. In this state, the other trustee is adequate. It is not permissible for the ruler to appoint a trustee with him, for the second trustee can dispose separately according to bequest (of the dead). And

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(1) 'Al-Mughni' with 'The Great Explanation' (6/576) and 'Discovery of the Mask' (4/396)

so there is no need to another one. And if the two trustees died together, or became ineligible, then the ruler can appoint another trustee, for the dead accepted disposition of one person.

**The second state:** That is the dead stipulated that both trustees should dispose collectively, or made the bequest general. In this case, if one of the two trustees died or became mad or immoral, the ruler appoints a trustee instead of him. This is the saying of most scholars. It is not permissible for the ruler to allow the other trustee to dispose separately, for the dead did not accept his disposition separately.

**It was said:** The ruler can allow the other trustee to dispose separately, for in this state he gets this right from bequest of the dead and discretion of the ruler. But the preponderant opinion is the first saying, for the testator did not accept disposition of one of the two trustees separately. And so it is dutiful to appoint another trustee with him, for bequest is preceded over discretion of the ruler. And if both of them died or became ineligible, the ruler should appoint two trustees instead of them as some scholars said.

**It was said:** If both of them died or became ineligible, the ruler can appoint only one trustee. That is because when the two trustees are not existed, the matter is referred to the ruler as if there is no bequest. And when there is no bequest, the ruler can appoint only one. (1)

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(1) 'Al-Mughni' and 'The Great Explanation' (6/575), 'Mughni Al-Mohtaj' (3/77), 'Qailoby' (3/179), 'The Great Explanation' for Al-Dardir where 'Footnote of Al-Dosoky' (4/403), and 'The Printed Guidance' (8/496)

The preponderant opinion and Allah knows best that the ruler can appoint only one trustee, for guardianship of the testator was cut. And so the rule is left for discretion of the ruler. Whereas the testator did not accept one trustee, this does not mean that the ruler should not accept one trustee. The testator did not accept disposition of one of the two trustees whom he appointed, but in this case these two trustees are not existed.

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| **Third Chapter**  **Dispositions of Guardians and Trustees, their Rights**  **and what determine Removing them** |

**This chapter consists of four parts:**

**First Part:**

It talks about dispositions of the guardians and trustees, and what they should do.

**Second Part:**

It shows some duties related to money of those who are interdicted of legal capacity, whether these duties are for Allah or humans.

**Third Part:**

It shows rights of the guardians and trustees for their work.

**The fourth part:**

It talks about removing the guardians and trustees, holding them accountable and what lead to removing them.

**First Part**

**Dispositions of the Guardians and Trustees**

**And what they should do**

It is recommended for the guardian, whether he is father, grandfather – according to those who see that grandfather can be guardian –, trustee, ruler, or representative of the ruler to dispose and invest in property of those under guardianship, in order that he would attain profits that would suffice his needs and needs of those upon whom he should spend. Accordingly, the guardian gets capital of property and returns it to its owner after removing interdiction from over him. This is the saying of scholars.

Ibn Qudamah said in 'Al-Mughni' (1): "We know none disapproved this except Al-Hasan. He may have intended to avoid risking with property."

But this is discretion of Al-Hasan, and it opposes a religious text; and so it is not considerable. Allah Glory be to Him said: "They ask you concerning orphans. Say: "The best thing to do is what is for their good." (2) And it is a good for them to dispose in their property in a way that would bring benefit to them.

Allah the Al-Mighty also said: "Come not nigh to the orphan's property except to improve it, until he attains the age

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(1) 'Al-Mughni' (4/293)

(2) Chapter of the Heifer: (220)

of full strength." (1) In this verse, Allah prohibits getting close to property of the orphan except in a way that benefits them.

And regarding the Sunnah: At-Tabrany in 'Al-Awsat' narrated that Anas bin Malik reported that the Messenger of Allah peace be upon him said: "Trade in property of the orphans, in order that Zakat would not finish it." Al-Haithamy said (2): My master and Sheikh told me that transmitted chain of this Hadith is authentic. (3) He means Al-Hafez Zain Al-Deen Al-'Iraqi by his Sheikh.

And regarding the meaning: Trading in property brings much benefit to those under guardianship so that their expenditure would be from profits. This is like what those who are not under guardianship do. (4)

**How the guardian and trustee dispose in property of those under interdiction?**

The guardian should exert his efforts and sincerity in saving property of those under his guardianship. He should keep it away from reasons that lead to damage and destruction. He should dispose according to what would bring benefit. For example, he should buy only what he thinks that it would bring profits, and sell what he sees that there is benefit in selling it. He should be cautious when selling and buying. He should only trade in safe matters; he should not buy what damages quickly

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(1) Chapter of the Night Journey: (34)

(2) 'Majma3 Al-Zawa'id' (3/67), (1/7)

(3) Transmission of this Hadith will be mentioned afterwards

(4) 'Al-Mughni' (4/293)

even if there is profit in it (1); he should not use money in matters fall between profit and loss (2); and he should be bias to anyone such as buying with what is more than price of the identical object or selling with what is less than it.

And if the guardian or trustee took his caution in disposition, without negligence, his disposition would be obliged on those under his guardianship; they cannot cancel it after removing interdiction from upon them, and there would be no compensation on him for any object damaged when disposing. Accordingly, we can divide dispositions of guardians and trustees into three divisions:

**The first division:** Harmful dispositions: For example, what the guardian pays from property of those under guardianship without any return; such as charity, gift, bequest (3), emancipation, selling with a price less than that of identical object, buying with an expensive price, giving loans as a means of generosity, reward or kindness (4), or divorcing wife of the person under his guardianship (5). All of these dispositions are null and void, for they bring absolute harm, and the Prophet peace be upon him forbade harm, saying: "There should be neither harming nor reciprocating harm." (Narrated by Ahmed, Ibn Majah, At-Tabrany and Al-Darqutney from Hadith of Ibn

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(1) 'Mughni Al-Mohtaj' (3/175)

(2) 'Discovering of the Mask' (3/449)

(3) 'Wonderful Arts' (5/153)

(4) 'Discovering the Mask' (3/450)

(5) 'Wonderful Arts' (5/153)

Abbas) (1)

It was also narrated by Al-Hakem in 'Al-Mustadrak' from Hadith of Abu Saeed, and said: Transmitted chain of this Hadith is authentic.

**The second division:** Useful dispositions: There is no need to think about executing them; such as accepting the gift, charity and bequest.

**The third division:** Disposition that fall between benefit and harm: Such dispositions require perfect consideration and caution. They are permissible when the guardian or trustee seeks to attain benefit from it. It is permissible for the guardian to dispose in property of the person under his guardianship by cash or deferred payment when there is benefit in it.

The guardian can give loans, when there is a considerable reason for this; such as fearing on property from being stolen or sinking, or when intending to travel, or to transfer the money to another country by loaning it to a person in this country and then gets it from him to save money from danger and save charge of transferring it.

The guardian can also deposit it if he does not find anyone to loan it to him. But loan is worthier, for it is guaranteed not like the deposit. And he should bring witnesses to witness on loaning it. He should only loan it to a trustworthy person, and take mortgage if this is possible. And if he deposits it, he should

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(1) An Authentic Hadith: It was reported by 'Ikremah from Ibn Abbas may Allah be pleased with them, about the Prophet peace be upon him. Jabir Al-Ja'fari, Samak and Dawood bin Husain narrated it about 'Ikremah.

provide that the depositor be honest. (1)

In addition, the guardian can buy a real estate and rent it, if renting it suffices expenditures and if he is sure that it is safe from being destroyed or taking by force by the ruler. Such disposition is worthier than trade, because it faces less danger. (2) He can also build houses and stores if this is habit of the country and brings benefit more than buying it. The guardian can borrow when there is need; such as needing clothes or expenditure for those under guardianship.

He can also deposit the estate as mortgage when necessity. And he should not sell it if there is benefit from behind this, or when fearing that it would be destroyed, or when the person under his guardianship is in need to expenditure, clothes, payment of debt and there is no other property except this, or for any other reason that brings benefit. (3)

The above-mentioned matters are not the only dispositions that the guardian can execute, and are not the only ones that bring benefit. There are other permissible dispositions that benefit those under guardianship.

Benefit cannot also be restricted in a certain disposition, for this differs according to time, place and people. It can appear in a kind of trade other than another one, such as trading in lands and real estate; it brings benefit nowadays

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(1) 'Al-Mohadhab' (1/329) and 'Al-Mughni' for Ibn Qudamah (4/295)

(2) 'Mughni Al-Mohtaj' (3/174)

(3) 'Al-Mughni' for Ibn Qudamah (4/294)

more than other trades. In addition, the guardian may have ability and skillfulness in some dispositions more than others; and so he disposes in property according to what he experienced.

This means that the guardian should seek to attain benefit for those under his guardianship as possible, and realize the heavy responsibility put on his shoulder, and know that Allah sees all what he does and will reward him according to his deeds; good for good and evil for evil. Allah the Al-Mighty said: "Allah knows the man who means mischief from the man who means good." (1) He also said: "Those who unjustly eat up the property of orphans, eat up a Fire into their own bodies: They will soon be enduring a Blazing Fire!" (2)

**Difference between guardians and trustees in dispositions:**

Guardians and trustees are alike in permitting them to dispose according to benefits, as long as provisions of guardianship are provided in them which were mentioned before in the second chapter. But they differ in some matters:

**1-** If the guardian is the father, he can buy with or sell from property of his son under interdiction for himself as long as there is no deception in such dispositions. The same is for the grandfather according to those who see that the grandfather can be guardian. (3) = That is because there would be no accusation between, for it is a nature for the father to feel pity

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(1) Chapter of the Heifer: (220)

(2) Chapter of the Women: (10)

towards his son and preferring interest of his son upon his own interest. But scholars disagreed on other guardians; such as the trustee, ruler and his representative: can they sell to those under their guardianship and buy from them? Malik (1), Abu Hanifah and Abu Yusuf permitted this if it brings benefit to those under guardianship. But they disagree about what achieves benefit. It was said that it is to decrease the price to the half in selling, and to buy with increasing price to one and half. It was also said that it is to attain two Dirhams from the ten in case of selling and buying. (2)

As for Al-Shaf'i and Ahmed: This is not permissible, for those mentioned guardians are not like the father in pity and negating accusation. Any of them can take the benefit for himself.

In Al-Araby (3) said that it is permissible for the guardian to buy from property of those under guardianship, for Allah Glory be to Him permitted guardians of the orphans to mix their property with that of the orphans, leaving the matter to their honesty. He said: "If you mix their affairs with yours, they are your brethren; but Allah knows the man who means mischief from the man who means good." (4)

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= (3) 'Discovering the Mask' (3/448), and 'Mughni Al-Mohtaj' (3/176)

(1) 'Rules of the Qur'an' for Ibn Al-Araby (1/155), and 'Wonderful Arts' (5/154)

(2) 'Similitudes and Peers' for Ibn Najeem (292)

(3) 'Rules of the Qur'an' for Ibn Al-Araby (1/156)

(4) Chapter of the Heifer: (220)

**2-** The father can sell the real estate of his son who is under his guardianship. He is not asked to bring evidence that shows necessity of selling and there is no need to a legal reason for selling it. And his disposition is valid. But if he was deceived in selling it, this would not be permissible. On the other side, the trustee has not the right to sell from property of those under his trusteeship, except for a necessity; such as spending on the person under interdiction or paying his debt as long as there is no other money to fulfill his need from it. It is also permissible if there is a clear benefit in selling it; such as selling it with a double price. But if there is no necessity or clear benefit from selling it, the trustee has no right to sell it. And the reason behind this is that the father feels pity towards his son and is not accused. In addition, if the father is of good opinion and management, with full pity, his will prove for him complete guardianship. It is enough that the disposition would not be of clear harm. As for the trustee, he is not of full pity. And if he is of good opinion and management, he should use them in saving and protecting. And the real estate is saved by itself; and so it is not permissible to sell it when there is no need or benefit from it. This is the opinion of Malik (1) and Abu Hanifah (2).

As for Al-Shaf'i (3), there is no difference between father and trustee regarding real estates. The father has not the right

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(1) 'The Great Explanation' for Al-Dardir in the margin of 'The Footnote of Al-Dosoky' (3/268)

(2) 'Similitudes and Peers' (P. 291)

(3) 'Explanation of Al-Jalal according to the Approach' in the footnote of 'Qalioby and 'Umairah' (2/305)

to sell it except for a need or clear benefit, like the trustee.

Imam Ahmed (1) permitted the guardian, whether he is father or trustee, to sell the real estate while there is benefit in selling it, without restricting selling with need or clear benefit. That is because the purpose of guardianship and trusteeship is to see what brings much goodness and benefit to those interdicted of legal capacity. And this authenticate disposition of any of them, without differentiating between guardian and trustee.

**3-** It is not permissible for anyone, other than the judge, to give loan from property of the young and the madman, except for necessity; such as fearing of fire or stealing, or when intending to travel. But this is permissible for the judge at all for his many works. (2)

In addition, the judge does not fear denial of the borrower that he has taken a loan. But this is not guaranteed for others.

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(1) 'Al-Mughni' for Ibn Qudamah (4/294)

(2) 'Mughni Al-Mohtaj' (2/175), and 'Wonderful Arts' (5/153)

**Second Part**

**Dutiful Acts in Property of those Interdicted**

**Of Legal Capacity**

Guardianship of the underage was legalized for their interest, for they are not able to attain their interests and manage their properties by themselves. And the guardian replaces them in saving, protecting and investing in their properties, so that they will find them after removing interdiction from upon them. Accordingly, it is not permissible for the guardian to spend anything from them except in a legal way.

And among the most important duties in their properties are the following:

**1- Expenditures:**

Whether these expenditures are spent on those under interdiction or those on whom they should spend; such as wives, slaves and close relatives. The guardian should spend on them justly, without excess or negligence. He should be moderate. Allah the Al-Mighty said, praising His Believing Slaves: "Those who, when they spend, are not extravagant and not niggardly, but hold a just (balance) between those (extremes)." (1) If he spent niggardly, he would be sinful; and if he spent excessively, he would guarantee it.

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(1) Chapter of the Criterion: (67)

And if the person under guardianship is orphan, it is permissible for the guardian to mix their food with his food and the food of his children, when this mixture achieves interest for the orphan. That is when mixture makes the orphan attain complete nourishment, for separating him may bring harm to him and his property. He may leave food when he is separated, feeling that he is discarded and humiliated. And bringing complete meal from his money would waste much money, and the rest food would be corrupted. And so Allah permitted guardians of the orphans to mix their affairs with them. He said: "They ask you about orphans. Say: "The best thing to do is what is for their good; if you mix their affairs with yours, they are your brethren."

Al-Baihaqi narrated in his 'Sunan', grading it as authentic: When Allah revealed His saying, "Do not come near an orphan’s property except to improve it" (2) and His saying, "Those who devour unjustly the property of orphans" (3), those who were in charge of an orphan went and separated their food and drink from his, and if any of the orphan’s food or drink was left over, they kept it for him until he ate it or it went bad. Finding that a burden, they mentioned the matter to God’s Messenger peace be upon him, and God most high sent down, "And they ask you about orphans. Say, to set things right for them is good, and if you intermix with them they are your brethren". They then mixed their food and their drink with theirs. (4) =

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(1) Chapter of the Heifer: (220)

(2) Chapter of the Cattle: (152)

(3) Chapter of the Women: (10)

Knowingly that expenditure is not only included in food, drink and clothes. It is dutiful on the guardian to buy for those under his guardianship all what they need like things with his peers, such as brushes and household tools and so on.

In addition, it is dutiful upon the guardian to treat them and buy what they need of medicines, and pay the wage for the doctor, if it is not available for him to be cured for free. That is because such matters are among necessities of life.

Moreover, it is dutiful on the guardian to buy what the young need for his education; such as books, pens and so on of tools required for his education. He should also buy the costs of his transportation if his house is away from the school. He should not neglect anything that would bring benefit to the one under interdiction, and should take care of him perfectly, and make him appear in suitable manner before his peers. This is the goodness which Allah commands with.

**2- Value of Damaged Objects:**

If the person interdicted of legal capacity damaged property of another man, he would guarantee it. And so the guardian should pay the value of what the interdicted person damaged from property of the interdicted person. But it is

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= (4) A good Hadith: This Hadith was narrated by Ahmed (1/325), Abu Dawood (2871), Al-Nesai (3669), Ibn Jarir (2/369 – 370), Al-Wahedi in 'Reasons behind Revelation of Verses of the Qur'an (P. 72), Al-Hakem (2/278), and Al-Baihaqi in 'Al-Kubra' (6/284). All of them narrated it through the transmitted chain of 'Atta', on the authority of Saeed bin Jubair, on the authority of Ibn Abbas may Allah be pleased with them.

Al-Haithamy graded the transmitted chain of this Hadith as good.

provided that damage by the young and the madman not to be by command of the owner. And any damage occurs by command of the owner to the young or madman, there would be nothing on them; such as giving property to a young as a deposit or loan, or selling it to him. In such case, no guarantee is on the young, for this damage occurred due to the owner.

And if the interdicted person aggrieved anyone, he would guarantee him, and the guardian would pay from property of the interdicted.

**3- Zakat**

Zakat is dutiful in property of the fool without any difference among scholars (1). It is given to him to distribute it on its dues. That is because it is an act of worshipping, and intention is a provision of its authenticity. And the fool understands this; he is responsible. But he should distribute it at the presence of the guardian or his representative, for he may give it to people other than its dues or damage it and claim that he has given it to its dues.

And regarding the young and madman, majority of scholars (2) said that Zakat is dutiful in their property. This is the saying of Malik, Al-Shaf'i and Ahmed. And their proof is generality of verses and Hadith which refer that Zakat is dutiful in property, without differentiating between young and old, mindful and mad.

And what refer that Zakat is dutiful in property of the

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(1) 'Mughni Al-Mohtaj' (2/172), and 'Showing the Facts' for Al-Zai'ali (5/197)

(2) 'Al-Mughni' for Ibn Qudamah (2/493)

young are the following:

1- At-Tabrany narrated in 'Al-Awsat' that Anas bin Malik may Allah be pleased with him reported that the Messenger of Allah peace be upon him said: "Trade in property of the orphans, in order that Zakat would not finish it."

Al-Haithamy (1) said in 'Magma3 Al-Zawa'id': My master and Sheikh told me that transmitted chain of this Hadith is authentic. He means Al-Hafez Zain Al-Deen Al-'Iraqi by his Sheikh. (2)

2- Amr bin Shu'aib reported on the authority of his father, on the authority of his grandfather: "One who becomes the guardian of an orphan, who owns property, must trade on his behalf and not leave it (saved and unused) until it is all eaten up by Zakat (which is paid yearly)." Al-Hafez said in 'Al-Talkhees' (3): This Hadith was narrated by At-Tirmidhi, Al-Darqutney and Al-Baihaqi. Its transmitted chain includes Al-Mathna bin Al-Sabah who was graded as a weak narrator. (4)

Al-Darqutney (5) said: This is the words of 'Umar.

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(1) 'Magma3 Al-Zawa'id' (3/67)

(2) This Hadith was graded as weak.

(3) 'Al-Talkhees Al-Habeer' (2/157)

(4) A weak Hadith: It was narrated by Amr bin Shu'aib, on the authority of his father, on the authority of his grandfather, about the Prophet peace be upon him.

(5) 'Umar bin Al-Khattab may Allah be pleased with him said: "Trade in property of the orphans in order that it would not be eaten up by Zakat." Saeed bin Al-Mosayeb, Amr bin Shu'aib, Makhool, Amr bin Dinar Al-Zuhari, Abu Awn, Mujahid, Tawoos, Abdelrahman bin Al-Sa'ib, and 'Ubaid bin 'Umair reported it about 'Umar, but none of them heard it from him.

3- Al-Shaf'i narrated that Yusuf bin Mahik reported that the Messenger of Allah peace be upon him said: "Trade in properties of the orphans so that Zakat would not finish it." This is an incompletely transmitted chain, for Yusuf bin Mahik is a follower; he did not see the Prophet peace be upon him. But the transmitted chain of this Hadith is authentic as Al-Nawawi said. (1) [2]

4- Abu 'Ubaid in 'The Properties' (3) and Al-Baihaqi in 'The Sunan' (4) reported that Zakat is proved in property of the young. They reported this about 'Umar (5), Ali (6), 'Aisha (7) and Jabir bin Abdullah (8) may Allah be pleased with them. None disagreed with them, as Al-Nawawi said in 'Al-Majmo3' (9) =,

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(1) Transmission of this Hadith was previously mentioned.

[2] 'Al-Majmo3' for Al-Nawawi (5/297)

(3) 'The Properties' for Abu 'Ubaid (P. 612)

(4) 'The Sunan' for Al-Baihaqi (4/107 – 108). It was also reported by Ibn Abu Shaibah in 'Al-Mosanif', Abdelrazeq (4/66) and 'The Properties' for Ibn Zangawaih (3/990)

(5) Al-Shaf'i in 'The Mother' (2/28), Abdelrazeq (6991) and Abu 'Ubaid in 'The Properties' (1302)

(6) Al-Shaf'i in 'The Mother' (2/30), Ibn Abu Shaibah (3/40), Abu 'Ubaid (1305 – 1306), Ibn Zangawaih (1810), Al-Darqutney (2/ 110 – 111 – 112), Al-Baihaqi in 'Al-Kubra' (4/ 107 – 108) and in 'Knowing the Sunan' (8017 – 8018 – 8019), and Ibn Hazm in 'Al-Mohalla' (5/208)

(7) Al-Shaf'i in 'The Mother' (2/28 – 29 – 30), Malik in 'Al-Mawt'i (1/2251), Ibn Abu Shaibah (4013,41), Abdelrazeq (6983,6984,6985), Abu 'Ubaid (1307), Ibn Zangawaih (1811,1812), Al-Baihaqi in 'Al-Kubra' (4/ 108) and in 'Knowing the Sunan' (8023,8024), and Ibn Hazm in 'Al-Mohalla' (5/207 - 208)

(8) Ibn Abu Shaibah (4013), Abdelrazeq (6981), Abu 'Ubaid (1310 – 1311), and Ibn Hazm in 'Al-Mohalla' (5/208) Al-Marzawi narrated that Abdullah said: Five among the Prophet's companions were giving Zakat from property of the orphans

except Ibn Abbas in a weak narration, which includes Ibn Lahi'ah (1), and Ibn Masood through a disconnected narration, Mujahid reported it about Ibn Abbas, and he did not realize him. In addition, Laith bin Abu Saleem reported it about Mujahid. Al-Baihaqi said: Scholars graded Laith bin Abu Saleem as weak. (2)

Abu Hanifah (3) said: Zakat is not dutiful in property of the young and the madman, except in plants and fruits. That is because Zakat is an absolute worship like prayer. And so it is not dutiful upon the young, for he does not have the ability to carry it out, and the intention, which is considered a provision of its authenticity, is not found. And it is not permissible for the guardian to perform it instead of him, for his guardianship of the young is obligatory. It is not by will of the young. And the

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(9) 'Al-Majmo3' (5/297) =

(1) This tradition was narrated by Ibn Zangawaih (1822) and Al-Darqutney (2/122), through the transmitted chain of Ibn Lahi'ah, on the authority of Abu Al-Aswad, on the authority of 'Ikremah that Ibn Abbas may Allah be pleased with them said: "Zakat is not dutiful in property of the orphan until prayer is obliged on him." This is a weak transmitted chain due to weakness of Ibn Lahi'ah. Also Al-Darqutney graded it as defective for the same reason.

(2) This tradition was narrated by Abu 'Ubaid (1315), Ibn Zangawaih (1821), Ibn Abu Shaibah (4113), Abdelrazeq (6997), At-Tabrany (9591), Al-Baihaqi in 'Al-Kubra' (4/108) and in 'Knowing the Sunan' (8027), and Muhammad bin Al-Hasan Al-Shaibany, through the transmitted chain of Laith, on the authority of Mujahid that Ibn Masood may Allah be pleased with him said: "Count Zakat from property of the orphan. And when he reaches the age of puberty and becomes discrete, tell him about it. And he is free; he can give the Zakat or not." The transmitted chain of this tradition is weak; for weakness of Laith and disconnection between Mujahid and Ibn Masood, and its text is eccentric; for leaving Zakat to will of the orphan.

(3) 'Wonderful Arts' (2/4)

act of obedience cannot be performed except by free will, and the young does not have this will. (1)

Abu Hanifah took the following Hadith as evidence upon that proves that Zakat is not dutiful on the young and the madman. The Messenger of Allah peace be upon him said: "The pen has been lifted from three: A sleeping person till he awakes, a child till he is a grown up, and an insane person till he is restored to reason or recovers his sense." This Hadith was narrated by Ahmed, Abu Dawood, Al-Nesai, Ibn Majah, Ibn Heban and Al-Hakem, from Hadith of 'Aisha. (2)

The reason behind taking this Hadith as a proof: lifting the Pen means that actions of such people are not recorded and they are not responsible. This proves that the young and the madman are not obligatory to give Zakat, for they are not responsible.

But what the majority of scholars said is more authentic, for the mentioned Hadith that Zakat is dutiful in property of the young, and for generality of verses and Hadith that show obligatory of Zakat. In addition, as Zakat is an act of worshipping which achieve reward for the one who gives it from his property, it is also a means to help the poor from property of the riches as a means of thanking Allah and purifying the property. It is a dutiful right in property, and so it shall be paid from it like other rights; such as spending on the wife and relatives.

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(1) 'Uncovering Secrets according to Fundamentals of Pride of Islam' (4/1361)

(2) Transmission of this Hadith was previously mentioned.

And judging Zakat according to prayer, as Abu Hanifah said, is not acceptable; for they differ in many rules.

Abu 'Ubaid (1) said: What I see is that legislations of Islam are not judged by one another. Each of them has its obligatory and supererogatory acts. They also differ from each other in many things. For example, Zakat can be paid before its due time, but prayer cannot be performed before its time.

And regarding the evidence of Abu Hanifah in Allah's Messenger's saying, "The Pen has been lifted from upon three men", this Hadith does not refer that Zakat is not dutiful in property of the young. This Hadith only means that sinfulness and accountability are lifted from upon them. We say that there is no sin on him, and Zakat is not dutiful on him. But it is dutiful in his property, and his guardian shall pay it with his intention instead of the young. It is like that indemnities for what the young damaged should be paid from his money, but there is no punishment on him. (2) And regarding the Fast-Breaking Zakat, it is dutiful on the young and the madman; their guardian shall pay it for them from their property. This is the saying of scholars (3), including the four Imams and Abu Yusuf. Muhammad bin Al-Hasan said: The Fast-Breaking Zakat is not dutiful on the young, for it is an act of worshipping and getting close to Allah. In addition, it was legalized for purifying the fasting person from obscenity, and the young is not in need

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(1) 'The Properties' for Abu 'Ubaid (P. 617)

(2) 'Al-Majmo3' for Al-Nawawi (5/298)

(3) 'Fundamentals of Al-Sarkhasi' (2/337 – 338), and 'Al-Mughni and The Great Explanation' (2/646)

to that purification for no sin is on him. But what the majority of scholars said is more preponderant, for it was proved that the Messenger of Allah peace be upon him made the Zakat of breaking the fast at the end of Ramadan obligatory on every Muslim, whether freeman or slave, male or female, young or old, and stipulated it as a Sa' of dates or a Sa' of barley. (1) And regarding that it was legalized to purify person from obscenity, this does not mean that it is not proved for the young; for this is mentioned as the majority. Also purification is not the only reason for its legislation. It was also legalized to feed poor (2) people and to fulfill their needs at this day. And so it is for purification from one side, and for richening the poor from another side. (3)

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(1) Al-Bukhari (1432), Muslim (984), Ahmed in 'Al-Musnad' (2/137), Abu Dawood (1611), At-Tirmidhi (676), Al-Nesai (2504), and Ibn Majah (1826), about Ibn 'Umar may Allah be pleased with them.

(2) 'The Chosen News with Nail Al-Awtar' (4/206)

(3) 'Fiqh Al-Zakat' for Al-Qardawy (2/926)

**Third Part**

**Rights of Guardians and Trustees**

**In Return to their Work**

**When the guardian is a father:** he can take what he needs from property of his son. And it is not dutiful on him to repay it. That is because expenditure of the father is dutiful on his son without any work; then it is worthier while working for him?! (1)

Grandfather has the same rule like the father, for those who see that he can be a guardian. The same rule is also for the mother if she is a trustee. (2)

**When the guardian is a ruler:** he cannot take from property of the one interdicted of legal capacity; for his ruling is not particularly for the interdicted person. In addition, the ruler gets a wage from property of Muslims, which keeps him in no need to that property. Also taking care of property of the interdicted person is included into his ruling. It was also said that the ruler is like the trustee as what will be explained. (3)

When the guardian is trustee of the dead: if he did not accept trusteeship, except after that the dead or the ruler made a wage for him, he would get this wage if this wage equals that of the same work or less than it. The one whom the judge appoints as a guardian has the same rule if the judge appointed

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(1) 'Al-Mughni' (4/295)

(2) 'Mughni Al-Mohtaj' (2/176)

(3) 'Al-Insaf' (5/241)

a wage for him and did not make a wage for him from the State Treasury of Muslims. (1)

And if the trustee accepted trusteeship without appointing a wage for him by the dead or the ruler, there is disagreement on this.

**Disagreement of scholars in case that no wage is appointed for the trustee:**

Scholars may Allah show mercy on them disagreed about those who accepted trusteeship without appointing a wage for them by the dead or the ruler: do they have a right in return to their work or not? There are seven sayings:

**The First Saying:** If the guardian is in need, he can take the least of the least of his wage or what suffices his need. It is not dutiful on him to return back what he took. This is the saying of most scholars, including Al-Shaf'i and Ahmed in their most authentic narration. This was also the saying of Al-Hasan, 'Ata', Ibrahim Al-Nakha'i and Ibn Al-Araby. (2)

Those scholars give evidences on their saying from the Book, the Sunnah and sayings of the Prophet's companions.

**The Book:**

Allah the Al-Mighty said: "If the guardian is rich, he should take no wages; but if he is poor, let him have for himself what is just and reasonable." (3) =

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(1) 'Footnote of Ibn 'Abdeen' (5/698) and 'Discovering the Mask' (3/455)

(2) 'Mughni Al-Mohtaj' (2/176), 'Al-Insaf' (5/339), and 'Rules of the Qur'an' for Ibn Al-Araby (1/326)

The reason behind taking this verse as a proof: Allah has permitted the poor to eat from property of those under his guardianship, without providing that he should return this back when having money. This refers that the guardian can eat, when necessity, without returning anything after being rich.

**The Sunnah:**

Amr bin Shu'aib narrated, on the authority of his father, on the authority of his grandfather: A man came to the Prophet peace be upon him and said: "I am poor with no possessions and I have an orphan to care for." He replied: "Eat from your orphan’s property, provided you are not extravagant, or take anything before you need it, or store up any of it." (Narrated by the five Imams, except At-Tirmidhi) (1)

**The Traditions:**

'Aisha may Allah be pleased with her said about Allah's saying, "If the guardian is rich, he should take no wages; but if he is poor, let him have for himself what is just and reasonable" (2): This Verse was revealed about guardian of the orphan. If the

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= (3) Chapter of the Women: (6)

(1) A good Hadith: Ahmed (2/186), Abu Dawood (2872), Al-Nesai (3668), Ibn Majah (2718), Ibn Al-Jarood (952), An-Nahas in 'An-Nasikh' (P. 91), Al-Baihaqi in 'Al-Kubra' (6/284), Al-Baghawi in 'The Sunnah' (2205) and in 'The Interpretation' (1/ 395 – 396), Ibn Abu Hatem in 'Interpretation of Ibn Kathir' (1/454), Abu Ya'li in his Musnad and Al-Harith Ibn Osama in his Musnad. All of them narrated it through the transmitted chain of Amr bin Shu'aib, from his father, from his grandfather. Al-Hafez said that the transmitted chain of this Hadith is strong. There is two Hadith witness for this Hadith, which were reported by Ibn Abbas and Jabir about the Prophet peace be upon him.

(2) Chapter of the Women: (6)

guardian is poor, he can eat from property of the orphan justly in return to his work. In another word: "It was revealed in connection with the custodian of the property of an orphan, who is in charge of her and looks after her; In case he is poor, he is allowed to eat out of that." (1) (Narrated by Al-Bukhari and Muslim)

It was reported that a Bedouin came to Ibn Abbas may Allah be pleased with him and said: "I guard over orphans. They have camels and so am I, and give from my camels to poor people. Then what can I take from milks of those of the orphans?" Thereupon Ibn Abbas said: "If you take care of these camels; searching for the lost and seek their needs, then drink from their milks without harming their born and without exaggeration." (2) (Narrated by Malik in Al-Mawta' about Yahia bin Saeed)

**Discussion about taking this verse as a proof:**

It was said that permission in Allah's saying, "but if he is poor, let him have for himself what is just and reasonable", is abrogated. They differ about what abrogates it. (3) Zaid bin Aslam said that what abrogates it is Allah's saying, "Those who unjustly eat up the property of orphans, eat up a Fire into their own bodies: They will soon be enduring a Blazing Fire!" (4) =

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(1) Al-Bukhari (2098) and Muslim (3019)

(2) An authentic tradition: It was narrated by Malik, Saeed bin Mansoor, Sufyan Al-Thawry, Al-Nahas, Abdelrazeq, Ibn Jarir, Al-Baghawi, Al-Baihaqi, and Al-Tha'labi. All of them narrated it through the transmitted chain of Yahia bin Saeed, from Al-Qasem bin Muhammad, about Ibn Abbas may Allah be pleased with them.

(3) 'Interpretation of Al-Qurtoby' (5/42)

And Mujahid said that what abrogates it is Allah's saying, "Eat not up your property among yourselves in vanities, except it be a trade amongst you, by mutual consent." (1) And this is not a trade.

It was also said that Allah's saying, "let him have for himself what is just and reasonable", means that if the orphan is poor, his guardian should spend on him according to his (the orphan's) state, poor or rich, and nothing is for the guardian.

It was also said that the verse means that the trustee eats from his own property in a just and reasonable way, in order not to be in need to property of the orphan. The rich should abstain from taking from the orphan's property for his richness, and the poor should spend in a tightened way in order not to be in need to property of the orphan under his guardianship.

Al-Nahas said: This is the best interpretation reported for the verse; for properties of people are banned, and nothing should be taken from them except for a strong reason. Abu Bakr Al-Gasas mentioned this interpretation in his interpretation for verses of the rules. (2)

**The reply on this discussion:**

Regarding their saying that this verse is abrogated, it is null and void; for abrogation is only considered in case that the verse are contradicted and there is no contradiction between

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= (4) Chapter of the Women: (10)

(1) Chapter of the Women: (29)

(2) 'Interpretation of Al-Qurtoby' (5/43)

this verse and Allah's saying, "eat not up your property among yourselves in vanities". That is because prohibition here is for eating it in vanities; meaning without right. And eating in the verse that we take as evidence is a right for guarding over it.

And Allah's saying, "Those who eat properties of the orphans unjustly", forbids eating up from it in an unjust way. And there is no injustice in eating from it in a just and reasonable manner; for this is in return to work. Injustice lies in extravagance, and we do not accept it.

And regarding their saying that address is for the orphan, Ibn Al-Araby (1) replied on this saying that this is not acceptable from two sides:

**The first:** Address cannot be for the orphan, for he is not responsible and is not commanded with anything.

**The second:** Whether the orphan is rich or poor, he eats in a just and reasonable way. And so this saying is void.

And regarding their saying that address is for the guardian in his own property, it is so far from context of the verses. Allah commanded guardians of the orphans to make trial of them (to experience their discretion), and then commanded them to give them their properties, and then prohibited them to eat from properties of the orphans in an extravagant way in order that they would find them when growing up, and then prohibited rich guardians to eat from them, and prohibited poor guardians to eat in a just and reasonable way.

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(1) 'Rules of the Qur'an' for Ibn Al-Araby (1/325)

In addition, if the address was for the guardian in his own property, there would be no need in mentioning abstaining from taking from others. Also end of the verse shows that it refers to properties of the orphans; for Allah commanded guardians to bring witnesses when giving properties to their owners. And so making properties be for orphans, and address be for guardians makes the verse be attached completely to the verse before it and the verse after it. And making the address be for the orphans or the properties be for the guardians makes the verse be dissociated. There would be connection between its parts. And the Word of Allah Glory be to Him is completely away from this.

**The Second Saying:**

It is permissible for the trustee to make use of property of those under his trusteeship, and to eat from their properties other than real estate; such as drinking milk, riding on animals, using slaves and eating dates. This is the saying of Malik, and it was reported about Ibn Abbas, Abu Al-'Aliyah and Al-Sha'bi.

**Evidence on this saying:**

Eating and making use of such things is a habitual and permitted matter among people. And regarding real estates, it is not habitual to eat from them. (1)

**Discussion of this evidence:**

Generality of the verse refers that it is permissible to eat from anything of property, without differentiating between

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(1) 'Rules of the Qur'an' for Ibn Al-Araby (1/325)

kind and another kind. Also Hadith of Amr bin Shu'aib does not differentiate between kinds of property. In addition, the tradition reported about 'Aisha permits eating from property without appointing a certain kind. And he who sees that permission here is for some kinds of property has to bring evidences from the Book, the Sunnah, or consensus of Muslims.

**The Third Saying:**

It is permissible for the guardian or the trustee to eat from property of those under his guardianship, when he is in need. But this eating is a loan. Accordingly he has to return it back when he can. This is the saying of 'Umar bin Al-Khattab may Allah be pleased with him, Ibn Abbas may Allah be pleased with them, 'Ubaidah Al-Salamany, Mujahid, Saeed bin Jubair, Abu Al-'Aliyah, Al-Awza'i (1), and Ibn Jarir At-Tabari (2). Abu Bakr Al-Gasas (3) reported that At-Tahawy said that this is the opinion of Abu Hanifah may Allah show mercy on him.

**Evidences on this saying:**

1- Allah the Al-Mighty said: "When you release their property to them, take witnesses in their presence."

'Ubaidah Al-Salamany said: This verse is evidence that it is dutiful upon the one who eats from property to repay it. And so it means that when you eat or take a loan, take witnesses. This is the interpretation of 'Umar bin Al-Khattab, Saeed bin Jubair,

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(1) 'Interpretation of Al-Qurtoby' (5/45)

(2) 'Interpretation of Ibn Jarir' (4/260)

(3) 'Rules of the Qur'an' for Al-Gasas (2/360)

Abu Al-'Aliyah and Abu 'Ubaidah Al-Salamany. (1)

2- Allah the Al-Mighty said: "But if he is poor, let him have for himself what is just and reasonable."

The reason behind taking this verse as a proof: The just and reasonable way is to eat according to his need, and then to repay it; such as the one who is in a great need to money for severe hunger. (2) And what supports this is what was reported that 'Umar may Allah be pleased with him said: "I placed myself from Allah's Property (i.e. property belongs to all Muslims) like place of the guardian from property of the orphan. If I am rich, I abstain from it; and if I am poor, I eat from it in a just and reasonable way and then repay it when I can." (3)

3- It is fundamental that others' property is banned, and it is here permitted to eat from it when necessity; and so it shall be repaid; such as what the person do when loaning from a strange man. (4)

**Discussion of these evidences:**

Regarding Allah's saying, "when you release their property to them, take witnesses in their presence " (5), does not mean, 'when you repay what you ate and loaned'; for Allah has shown

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(1) 'Interpretation of Al-Qurtoby' (5/45)

(2) 'Rules of the Qur'an' for Ibn Al-Araby (1/325)

(3) An authentic tradition: It was narrated by Ibn Jarir, Ibn Sa'd, Al-Tha'labi, Ibn Abu Al-Dunia, Al-Blazri, Ibn Abu Shaibah, and Al-Baihaqi. All of them narrated it through the transmitted chain of Ishaq, on the authority of Haritha bin Madrab about 'Umar.

(4) 'Interpretation of Ibn Kathir' (1/454)

(5) Chapter of the Women: (6)

before it provisions of giving properties of orphans to them, providing their puberty and discretion. He has also prohibited guardians from eating from their property in an extravagant way. Then he has permitted the poor to eat in a just and reasonable way at all. Restricting eating with being in a just and reasonable way is not like prohibiting extravagance. In addition, interpreting Allah's saying, "when you relay their property to them", with, 'when you take a loan', does not appear from context of the verses.

And regarding Allah's saying, "he should eat in a just and reasonable way", it does not mean to eat when necessity and then repay it; for clear words of the verse refers that it is permissible for the guardian to eat without returning it. And obliging repaying what he ate is only proved by evidence, and there is no evidence on this.

And regarding the saying of 'Umar, supposing that it is authentic, does not necessitate repaying what the guardian ate. This is just piety from 'Umar. And the Ummah unanimously agreed that – as Al-Qurtoby (1) said: "The Imam who guards over Muslims is not obliged to repay what he ate in a just and reasonable way; for Allah has appointed for him a portion from Allah's property. The saying of 'Umar is not a proof.

**The Fourth Saying:**

It is not permissible for the trustee to eat except when he is in a great need that permits for him to eat the dead animal and pig. And he should repay what he ate when he can. This is

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(1) 'Interpretation of Al-Qurtoby' (5/42)

the saying of Al-Sha'bi. (1)

**Evidence on this saying:**

It is fundamental that others' property is banned. And so it is not permissible for him to eat from it, except in case of great need.

**Reply on this evidence:**

Regarding their saying, "it is fundamental that others' property is banned", we agree with this. But Allah has permitted eating from it in His saying: "He should eat in a just and reasonable manner." In addition, others' property is banned when it is taken unjustly and with no right. And eating of the guardian here is in return to his work. And so it is not an aggression against others.

And regarding their saying that this eating is only permitted for the guardian, whom it is permissible for him to eat the dead animal and pig for his need, and then he should repay in when he can; Al-Nahas said that their saying has no meaning. For when he is in this great need, he can take what fulfill his needs from property of the orphan and others. There is no interest in restricting eating with reaching the ultimate case of necessity. [2]

**The Fifth Saying:**

It is permissible for the trustee to eat when travelling for matters related to property, according to his need. He should

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(1) 'Interpretation of Ibn Jarir' (4/256)

[2] 'Interpretation of Al-Qurtoby' (5/43)

not buy anything. And this is not permissible for him when residing. Al-Qurtoby reported this saying about Abu Hanifah and his two companions. [1]

**The reason behind this saying:**

When the trustee travelled for property, he would be stopped from earning money, and would free himself to work for property to bring benefits from it. And so he can take what he needs, without buying anything. But when he is residing, he is not cut off working to earn his own money. He can work for himself besides working on repairing property of the orphan.

**Reply on this reason:**

Allah the Al-Mighty permitted the poor guardian to eat at all, in a just and reasonable manner, whether this is when travelling or residing. And so judging that permission is when travelling not residing is a restriction with no evidence.

**The Sixth Saying:**

It is not permissible for the trustee to eat in return to his work, even if he is poor. This is the authentic saying of Al-Hanafiah.

Abu Bakr Al-Gasas said in 'Rules of the Qur'an': "What we know from opinion of our companions is that the trustee cannot take from property of the orphan, not even as a loan, whether he is rich or poor. He cannot even give from it to others as a loan. [2] =

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[1] 'Interpretation of Al-Qurtoby' (5/43)

**Evidences on this saying:**

1- Allah the Al-Mighty said: "To orphans restore their property (when they reach their age), nor substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it up) with your own. For this is indeed a great sin." (1)

2- Allah the Al-Mighty said: "If then you find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up." (2)

3- Allah the Al-Mighty said: "And come not nigh to the orphan's property, except to improve it, until he attain the age of full strength." (3)

4- Allah the Al-Mighty said: "Eat not up your property among yourselves in vanities: But let there be amongst you traffic and trade by mutual good-will." (4)

**The reason behind taking these verses as proofs:**

The previous verses prohibited guardians of the orphans to eat from their properties, whether they are wealthy or poor. And anything they eat from it is considered a wrongdoing which Allah has forbidden.

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= [2] 'Rules of the Qur'an' for Al-Gasas (2/360)

(1) Chapter of the Women: (2)

(2) Chapter of the Women: (6)

(3) Chapter of the Cattle: (152)

(4) Chapter of the Women: (29)

**And from the meaning:**

The trustee accepted trusteeship without providing a wage in return to his work. And so he is like a manager; he cannot take a wage or even a loan as it is not permissible for the managers. [1]

**Discussion of these evidences:**

The verses you mentioned, which prohibited the guardian to eat from properties of the orphans, do not mean to prohibition at all. They only prohibit eating from them, if this eating is in an unjust way and with no right. And eating in a just and reasonable way is not injustice; it is like a wage in return to working on them, and the context before these verses refer to this. Allah prohibited guardians to eat from properties of the orphans in an extravagant way. He Glory be to Him said: "But consume it not wastefully, nor in haste against their growing up."

Then Allah permitted the poor guardian to eat from it in a just and reasonable way, as usual among people. He should not live in luxury with properties of the orphans, and should not exaggerate in enjoyment with foods, drinks and clothes, claiming that he is fulfilling his need.

**The Seventh Saying:**

It is permissible for the guardian to take from property of the orphan as a wage, even if he is wealthy. This is the saying of Ibn 'Uqail from Al-Hanabelah [2], and reported it about Ahmed.

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[1] 'Rules of the Qur'an' for Al-Gasas (2/364) [2] 'Al-Insaf' (5/339)

Also Am-Marody and Al-Shacy reported it about Al-Shaf'iah. [1]

**Evidences on this saying:**

Allah the Al-Mighty said: "And whoever amongst guardians is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable."

**The reason behind taking this verse as a proof:**

The command in His saying, "let him take no wages", is for recommendation, not for obligatory.

**Their evidence from juristic reasoning:**

They see that trustee on property of the orphan is like the one who collects moneys of Zakat who has a right in these moneys even if he is wealthy; however, he cannot take from Zakat for his richness. But it is permissible for him to take from Zakat for his work on collecting it.

**Discussion of their saying:**

Judging that the command in the verse is for recommendation makes the meaning be away from clear words, with no presumptive evidence.

Also judging the trustee like collector of Zakat is invalid, for the clear text prohibits the rich guardian to eat from property of the orphan. Allah said: "Whoever amongst guardians is rich, he should take no wages."

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[1] 'Paradise of the Seekers' (4/190)

**The preponderant saying:**

It appears – and Allah knows best – that the guardian has a right for working on reforming and investing in property of the orphan. Allah Glory be to Him permitted the poor guardian to eat from the orphan's property in a just and reasonable way, and did not forbid the rich guardian to eat from it. He just recommended him not to take so that his deed would be a means of getting close to Allah. Abu As-So'od said in his 'Interpretation': "The words of asking the rich not to take a wage and permitting the poor to eat justly and reasonably refer that the trustee has a right in the orphan's property for working upon it." [1]

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[1] 'Interpretation of Abu As-So'od' (1/650)

**Fourth Part**

**Removing and Accounting Guardians and Trustees**

**And what lead to this**

**Meaning of Removing:** That is to keep someone away.

**Its meaning for Religious Scholars:** That is to take guardianship from the guardian or trustee.

**The Reasons for Removal:**

There are reasons for removal which result from inappropriateness of the guardian and the trustee for guardianship. Among these reasons are:

**1- Immorality**

That is the guardian or trustee commits a forbidden act, which defames his uprightness; such as adultery, homosexuality, drinking wine, breaking fast during the day of Ramadan deliberately, delay in performing what Allah has obligated on him; such as delaying prayer until its time passes with no excuse, and so on [1]. Whenever the guardian or trustee commits any deed like these, he loses eligibility for guardianship and becomes not trusted on property of the young people.

Scholars may Allah show mercy on them disagree about removal of the guardian and trustee: Are they removed as soon

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[1] 'Qailoby and 'Umairah' (3/178)

as they commit an immoral deed, or it is the ruler who can remove them? They gave two sayings:

**The first saying:** The guardian or trustee is removed as soon as he commits an immoral deed, without need to removal of the ruler. This means that any disposition the guardian or trustee does after committing the immoral act is null and void. This is the saying of Al-Shaf'iah [1] and Al-Hanabelah.

**The second saying:** The guardian or the trustee is not removed after committing an immoral act. It is the ruler who can remove them. This is the saying of Al-Malikiyah [2] and Al-Hanabelah. According to this their dispositions before removal are valid.

It appears – and Allah knows best – that the guardian and trustee are not removed after committing an immoral deed directly. It is the ruler of his representative who can remove them. That is because the immoral person is of perfect eligibility of disposition. And so his disposition before removal is valid. He is removed from guardianship because it is feared on property from him as he becomes dishonesty. Removal is a caution for saving the property, not for disability on disposition.

**2- Disability on working**

If the guardian or trustee became completely disabled, the ruler would remove him and appoint another one; such as being afflicted with a disease makes his unable to work, or reaching the age of senility, or becoming fool or absent-minded

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[1] 'Explanation of Al-Jalal according to the Approach' in the footnote of 'Qalioby and 'Umairah' (3/178), and 'Discovering the Mask' (4/396)

[2] 'Faculties of the Great' (6/390), 'Showing the Facts' (6/207)

that makes him unable to dispose usefully [1], and so on.

**3- Treachery**

When treachery is proved on the guardian or trustee, the ruler should remove him and appoint another one instead of him; for complete honesty is a provision of guardianship, and the treacherous is not trusted on property.

Accordingly, when treachery is proved on guardian or trustee, he is removed from guardianship. That is like paying no attention to properties of those under his guardianship, or exposing them to danger, or committing harmful dispositions, and or wasting money. In this case, his guardianship is ended; for guardianship is for consideration. And there is no benefit in leaving such guardian or trustee who exposes property to damage and waste.

Ibn Najeem said in 'Similitudes and Peers' [2]: "Removing treacherous (guardian) is dutiful."

**4- Enmity between trustee and the interdicted person**

When enmity falls between trustee and the person interdiction of legal capacity, the ruler should remove the trustee and appoint another one; for no enemy is trusted over affairs of his enemy. [3]

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[1] 'Al-Moqni3' (2/394)

[2] 'Similitudes and Peers' (P. 295)

[3] 'Faculties of the Great' (6/390), 'Footnote of Al-Dosoky' (4/403), and 'Qalioby and 'Umairah' (3/178)

**Who can remove the guardian and trustee?**

No one can remove guardian or trustee after death of the testator except the ruler or his representative judge. That is for generality of his ruling over the Ummah; for people have appointed him to achieve justice among them, to support the wronged over the wrongdoer, and to see what benefit people. The Messenger of Allah peace be upon him said: "All of you are guardians and are responsible for your subjects. The ruler is a guardian of his subjects." (Agreed upon) (1)

And so the ruler has the right to pay attention to affairs of orphans, madmen and foolish people who have no guardians. He also has the right to supervise on dispositions of guardians and trustees, abrogating any disposition that harms the underage people. And if any guardian or trustee became weak, the ruler would appoint another one with him to help him in increasing properties of those under guardianship so that they can find them when reaching the age of puberty and discretion. And if guardian was accused of treachery [2], the ruler would appoint a trustworthy person to supervise on his dispositions, and no disposition of the guardian is carried out except with permission of this trustworthy person.

Ibn Najeem [3] said that if the judge accused a trustee of treachery, he cannot remove him, but he should appoint another one with him. And Abu Yusuf said that he can remove him.

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(1) Transmission of this Hadith was previously mentioned.

[2] 'Qalioby and 'Umairah' (3/178) [3] 'Similitudes and Peers' (P. 295)

**Can the ruler or his representative remove the guardian or trustee without a considerable reason?**

It is not permissible for the ruler or his representative among judges to remove a guardian or trustee without a considerable reason. That is because guardianship of the father and grandfather is stronger than that of the ruler; it was proved to them for kinship and so they are of full pity more than the ruler. And so their guardianship is preceded over guardianship of the ruler for its strength. And guardianship of the ruler is only proved on a person when there is no guardian over this person from his relatives as the Prophet peace be upon him said: "Ruler is the guardian for those who have no guardian." (1)

And regarding trustee of the father or grandfather, it is not permissible for the ruler or his representative to remove him if he is just and sufficient. And if he removed him, he would be unjust and sinful. Scholars disagreed about validity of removing him.

Ibn Najeem said: [2] "Scholars disagreed about validity of removing him, and most of them see that this removal is valid, as Ibn Al-Shohna said. But it is dutiful to give Fatwa that it is not valid to remove him as was mentioned in 'Jami3 Al-Fsolain'."

The author of 'Al-Dur Al-Mokhtar' [3] reported the speech of 'Jami3 Al-Fsolain': "It is not permissible for the judge to remove trustee of the dead if he is just and sufficient. And if he

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(1) Transmission of this Hadith was previously mentioned.

[2] 'Similitudes and Peers' (P. 295)

[3] 'Al-Dur Al-Mokhtar' in the margin of 'The Footnote of Ibn 'Abdeen' (5/688)

removed him, it was said that the trustee would be removed. But I say that what is authentic for me that he would not be removed, for trustee feels pity towards those under his trusteeship more than the judge. This should be the Fatwa due to corruption of judges at this time." And this is the authentic by Allah's Will.

And regarding trustee appointed by the judge, he can remove him, even if this trustee is just, when seeing that there is interest in removing him; such as finding another trustee who is more efficient and has more ability on disposition. [1]

**Can the ruler or his representative account guardians and trustees?**

It is not permissible for the ruler or his representative to account guardians, whether he is father or grandfather. That is because the father is not accused, for his pity and sympathy towards his son. He will exert his effort to attain benefit for him; for both of them (the father and his son) are responsible for each other in expenditure and other affairs. And so he has pity more than the judge.

But this does not mean that the guardian can dispose as he wills, whether his disposition achieves interest or not. The judge can abrogate any inappropriate disposition, and he can also prevent the guardian from extravagance and wasting of the property of his son. And if the guardian does not keep away from such dispositions, he judge can remove him as what was mentioned when talking about the reasons for removing

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[1] 'Footnote of Ibn Abdeen' (5/688)

guardians.

And regarding trustees, if the judge suspected him, he can account him. Ibn Najeem [1] said: "It is dutiful on the judge to account his trustees about properties of the orphans which are under their trusteeship, in order that he would know the treacherous and substitute him.

The trustee is not obliged to accept accountability and explanation, except if he is known with dishonesty.

**Can the person interdicted of legal capacity account the guardian or trustee after ending of the interdiction?**

It is not permissible for the person interdicted of legal capacity account the guardian or trustee after ending of the interdiction, for they are entrusted. And if the young, after reaching puberty, disputed with the guardian or trustee regarding spending on him, the saying would be for the guardian or trustee, for they are entrusted and it would be hard for them to bring evidence. But if what the guardian or trustee claimed is more than the appropriate expenditure, the young is believed.

And if the young, after reaching puberty, claimed against his father or grandfather that sold some of his property, even one real estate, without any interest, they would be believed when giving an oath, for they are not accused due to their full pity.

And if the young claimed the same against the trustee or

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[1] 'Al-Bahr Ar-Ra'iq' (5/262)

representative of the judge, it is the young who would be believed; for they can be accused. It was said that the guardian is believed at all, whether he was father, grandfather, trustee or representative of the judge. Regarding others' saying that the trustee and representative are not believed, this is in property other than that of trade, for it is hard to bring witnesses on properties of trade.

Others interdicted of legal capacity have the same rule like that of the young, after ending of the interdiction. That is and Allah knows best!

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| **Fourth Chapter**  **Ending of Guardianship and giving the money back to its owners and the Rule of making others witness on this giving** |

**This chapter consists of three parts:**

**First Part:**

It talks about ending of guardianship.

**Second Part:**

It shows provisions of giving property back to those interdicted of legal capacity after removing interdiction from upon them. It includes three subjects:

**First subject:** Provisions of giving property back to its owners

**Second subject:** Puberty and its signs

**Third subject:** Definition of discretion and sayings of scholars about it

**Third part:**

The rule of bringing witnesses when returning property back to its owners, and is the guardian believed when claiming that he gave him the money without evidence?

**First Part**

**Ending of Guardianship**

Guardianship over property of those interdicted of legal capacity ends with one reason of the following:

**Firstly:** **Death of the guardian:** When the guardian dies, his guardianship over the person interdicted of legal capacity ends. That is because guardianship was legalized for consideration, and there is no consideration for man after his death. Guardianship is not inherited after death of the guardian; it is not like his properties and rights. That is because he did not earn guardianship, but it was proved for him due to kinship, whether he is father or grandfather, or due to authorization by the testator or the judge. And so it ends with death.

Accordingly, permission of the guardian, whether he is father, grandfather, trustee or representative of the judge, with disposition for the person under interdiction becomes null and void by death of the guardian. But if guardian is the judge, his permission does not become void by his death; for he is not disposing according to guardianship of himself, but with guardianship of the ruler, which is still existed.

**Secondly: Removal of eligibility of the guardian:** As soon as eligibility of the guardian is removed due to apostasy, madness, foolishness or so on, his guardianship over those interdicted of legal capacity finishes immediately.

The apostate is a disbeliever, and there is no guardianship for a disbeliever over a Muslim. Allah the Al-Mighty said: "And never will Allah grant to the unbelievers a way (to triumph) over the believers." [1] And the madman has no mind, and so he is under guardianship. Also the fool is not eligible for guardianship; for he himself is under guardianship. And so he cannot guard over others.

**Thirdly: Death of the person interdicted of legal capacity:** When the person under interdiction dies, guardianship over his property ends too; for at this time it is transferred to his heirs. And so he has no guardianship over it.

**Fourthly: Perfectness of the person interdicted of legal capacity:** When the young reaches the age of puberty and discretion, guardianship over him ends and he becomes a guardian over himself. Also guardianship over the madman ends when his mind returns to him. And guardianship over the fool person ends when discretion returns to him, and when the ruler ends interdiction from upon him if it is the ruler who judged with interdiction upon him. But if it is not the ruler who judged on him, then the guardian or trustee ends it if it is them who judged on them. And this will be explained, God willing, when talking about provisions of giving property back to its owners.

**Fifthly: Removal of the guardian or trustee:** Guardianship ends when the guardian or trustee is removed for a considerable reason. Accordingly, when guardianship ends, dispositions of the guardian or trustee become invalid.

**Sixthly: Trusteeship ends with retuning of guardianship to the father or grandfather:** Sheikh Mansoor Al-Bahoty [2]: "If the

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[1] Chapter of the Women: (141) [2] 'Discovering the Mask' (4/396)

guardian committed an immoral act, he would be removed from guardianship. And eligibility for guardianship does not return to him except with a new contract. Trustee appointed by the judge has the same rule. But if the father committed an immoral act, guardianship would return would return to him for his eligibility to it; his guardianship is for his fatherhood which is fixed. But guardianship of the trustee is for being appointed as a trustee, and this becomes void."

Sheikh 'Umairah [1] said: "If father or grandfather repented for (the immoral act he committed), guardianship would return to him. But others do not have the same rule.

**Seventhly: Trusteeship ends when its period ends:** If trusteeship is temporary; such as when the testator says to the trustee, 'I make trusteeship for you for two years', and this period has passed, his trusteeship ends. Also if trusteeship is suspended on a provision and this provision is achieved, then mission of the trustee ends. For example, saying of the testator, 'I make trusteeship for until Zaid comes', and so when Zaid comes, he becomes the trustee and trusteeship of the first trustee ends. [2]

**Eighthly: Trusteeship ends when the trustee is absent:** In this state, the person under trusteeship would not benefit from it.

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[1] 'Qailoby and 'Umairah' (3/178)

[2] 'Qalioby and 'Umairah' (3/179)

**Ninthly: Trusteeship ends when the trustee removes himself:** This is for those who permit the trustee to remove himself from trusteeship. It also ends when the ruler accepts his resignation; and this is for those who do not permit the trustee to remove himself from trusteeship.

**Second Part**

**Provisions of Giving Property back**

**To those under Guardianship**

This part includes three subjects:

**First Subject**

**Provisions of Returning Property**

It is dutiful that the following provisions should be achieved for those under guardianship before returning their property to them:

**First provision: Puberty:** Scholars unanimously agreed on this provision. It is not permissible for the guardian to give property to the young until he reaches the age of puberty. Allah the Al-Mighty said: "Make trial of orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them." [1]

This verse is clear in prohibiting giving property to the orphans until they reach the age of marriage. And each young has the same rule, for there is no difference between them. We will talk about puberty and its signs afterwards.

**Second provision: Mind:** There is no disagreement on this provision too. It is not permissible to give property to a madman for he has no mind, nor to an insane person due to shortage of his mind. That is because man is guided to saving property and useful dispositions with mind; and when it is not found or is incomplete, he is not guided to this. He may also waste property. And the Prophet peace be upon him prohibited wasting property. (2)

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[1] Chapter of the Women: (6)

(2) Transmission of this Hadith was previously mentioned.

**Third provision: Discretion:** There is disagreement on this provision:

Majority of scholars, including the three Imams Malik, Al-Shaf'i and Ahmed, Abu Yusuf and Muhammad bin Al-Hasan [1], see that discretion is a provision for giving property to its owners. And he who does not reach discretion, property is not to be given to him, even if he became an old man. It remains under guardianship. And so they see that the fool should be interdicted of legal capacity for he has no discretion regarding disposition in his property. On the other hand, Abu Hanifah sees that discretion is not a provision of giving property to its owners. He who reaches puberty, with no discretion, he is not given his property until he reaches twenty five years and then his property would be given to him, whether he is discrete at this age or not. That is because Abu Hanifah sees that the fool is not to be put under interdiction. [2]

Both of majority of scholars and Abu Hanifah gave evidences on their sayings, which we have mentioned most of them when talking about proving of guardianship over the fool. And we will mention them here briefly for the context requires this.

**Evidences of the majority of scholars:**

1- Allah the Al-Mighty said: "And give not unto the foolish your property, which Allah has made a means of support for you, but feed and close them therewith, and speak to them words of

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[1] 'Al-Mughni' with 'The Great Explanation' (4/511)

[2] 'Showing the Facts' for Al-Zai'ali (5/195)

kindness and justice." [1]

The reason behind taking this verse as a proof: Allah prohibited guardians of the foolish from giving their properties to them. And the reason for this prohibition is their foolishness and non discretion. And so this verse refers that it is not permissible for the guardian to give the property to them as long as they are foolish, whether they reached twenty five years or more, or not.

2- Allah the Al-Mighty said: "Make trial of orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them." [2]

The reason behind taking this verse as a proof: Allah has suspended the command of giving properties to the orphans on finding discretion in them. And as long as discretion is not found, it is not permissible to give them their properties; for the provision is not achieved.

3- And the reason behind prohibiting them from taking their property before reaching twenty five years is their foolishness, and foolishness is still existed. And prohibition remains as long as the reason remains.

**Discussion of Abu Hanifah for evidences of the scholars:**

1- Allah's saying, "and give not unto the foolish your property", does not refer to properties of the fools; it refers to properties of the addresses. They are prohibited to give them to fool children and women, as clear words of the verse show.

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[1] Chapter of the Women: (5) [2] Chapter of the Women: (6)

**Reply of scholars:**

Properties are for the fools not the addresses, and what supports that properties are for the fools is that this verse falls among verses of rules of the orphans. And so this verse would be connected to the verse before it and the verse after it. What also supports that properties are for the fools is that Allah made them a source for of their sustenance and clothes, and commanded the guardians to deal with them in a good manner.

2- Al-Hanafiah also said: Allah's saying, "Make trial of the orphans", suspends giving property to them on finding discretion in them.

**Reply of the scholars:**

Suspension on a provision does not the opposite when the provision is not achieved, as mentioned in decree of the Fundamentals.

3- Al-Hanafiah said: We do not consider at all that prohibiting the fools from taking their properties before the age of twenty five is for foolishness. It was a punishment and rebuking in order to abstain from their foolishness. And when they reached this age without leaving their foolishness, then hope for disciplining them would be lost, and there would be no benefit in preventing them from their properties.

**Reply of the scholars:**

The reason behind preventing them from their properties after puberty is foolishness. And so interdiction would be existed as long as foolishness is still existed; for this would save their properties. Prevention here is not a punishment.

**Evidences of Abu Hanifah on proving that discretion is not a provision for ending the interdiction, and that property is given to the fool after reaching twenty five years:**

1- Allah the Al-Mighty said: "But consume it not wastefully, nor in haste against their growing up." [1]

The reason behind taking this verse as a proof: Allah prohibited guardian over property of the orphan from wasting his money, fearing that when the orphan grows up, the guardian will have no guardianship over him anymore. And so this verse shows that guardianship is removed when growing up.

2- Allah the Al-Mighty said: "And give unto orphans their property." [2]

The orphans here refer to those reached the age of puberty. Allah called them 'Orphans'; for they were nearly close to orphanage, and to urge the guardians to give them their properties. Then Allah showed after that giving property to them is suspended on finding discretion in them, when reaching puberty. But after puberty (with a long time), giving property to them is dutiful at all; for Allah's saying, "And give unto orphans their property", is not suspended on a provision. [3]

The age of puberty is eighteen years, and we estimated the period of being close to it with seven years, taking into \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[1] Chapter of the Women: (6)

[2] Chapter of the Women: (2)

[3] 'Al-Mabsoot' for Al-Sarkhasy (24/161-162)

consideration the age of perception for the young as the Prophet peace be upon him indicated to it in his saying, "Command your children to perform prayer when they are seven years old, and beat them for (not offering) it when they are ten, and do not let (boys and girls) sleep together." (Narrated by Abu Dawood and Al-Hakem) (1)

3- Preventing the orphans from their property after reaching puberty immediately is for that the effect of youngness is still existed. And this effect does not remain after reaching twenty years old due to this long age between the two periods. And so this prevention does not remain. Abu Hanifah said: If a person reached puberty and discretion, and then became foolish, puberty is not prevented from him, property would not be taken from him; for effect of youngness is not existed. [2]

4- The reason behind preventing him from his property is discipline. And if he reached (twenty five), and he has not become discrete yet, there would be no hope from this discipline. And so there will be no benefit from preventing him from property. [3]

5- And after reaching twenty five years, he, for sure, gains discretion, either through experience or through trial.

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(1) The transmitted chain of this Hadith is good: It was narrated by Ahmed, Abu Dawood, Ibn Abu Shaibah, Al-Baghawi, Al-Darqutney, Abu Nu'aim, Al-Khateeb, Al-Hakem, Al-Baihaqi, Al-'Uqaily, Ibn Abu Al-Dunia, Al-Khra'ity, and Al-Bukhari. All of them narrated it through the transmitted chain of Siwar bin Abu Hamzah, on the authority of Amr bin Shu'aib, on the authority of his father, on the authority of his grandfather about the Prophet peace be upon him.

[2] 'The Printed Guidance' with completion of 'Fath Al-Qadeer' (1/317)

[3] 'Al-Mabsoot' (24/162)

**Discussion of scholars to evidences of Abu Hanifah:**

1- Allah's saying, "But consume it not wastefully, nor in haste against their growing up", prohibits guardians from eating property of the orphans in an extravagant way that makes them (the orphans) find no property when growing up. It is not a text for removing guardianship from upon every adult. In addition, this verse is general, and it is restricted with Allah's saying, "If you then find sound judgment in them, release their property to them." And the general is judged according to the restricted. And expressing with 'oldness' is for the majority, when the person becomes discrete. But if he did not become discrete, this rule would not be or him.

2- And regarding Allah's saying, "And give unto orphans their property", this verse is general. It is restricted with Allah's saying, "If you then find sound judgment in them, release their property to them." And the general is judged according to the restricted.

And regarding your differentiation between the age close to puberty and the age far from it, there is no evidence on this; for this restriction covers both what is close and what is far. And so nothing is given to the orphan until he becomes discrete.

As for your saying that the age of reaching puberty is eighteen years, it is not general. It is fifteen years for majority of scholars. And this will be mentioned when talking about signs of puberty. Also taking the Hadith as evidence is not suitable.

Also there is no evidence on your saying that five years is enough for changing the rules; the rule can change in less than this period. The guardian is commanded to command the young with prayer at the age of seven, and to beat him (if he does not offer it) at the age of ten.

And your saying that preventing the fool from property is for discipline is not acceptable. The prevention was to let (the guardian) to see and consider his affair in order not to leave it to him as he may destroy it.

As for your saying that he is for sure discrete at this age (twenty five), we say that if he became discrete, his property would be given to him, whether he reached this age or not.

**The preponderant opinion:** Evidences and discussions mentioned before show that the opinion of scholars is more preponderant. Accordingly, he who does not become discrete, his property would not be given to him, without determining a certain age.

**Fourth Provision: Rule of the ruler that the interdicted person is discrete:** There is disagreement on this provision. This provision is divided into two parts:

**The first:** The person who reached the age of puberty discrete

**The second:** The person who became fool after puberty and then became discrete

**Sayings of scholars about the person who reached the age of puberty discrete:**

**The first:** The majority of scholars said that a person who reaches the age of puberty discrete, interdiction is removed from upon him and his property is given to him, without permission of the ruler. [1]

**The second:** The person who reached the age of puberty discrete, interdiction is not removed from upon him and his property is not given to him, except with permission of the ruler. This is the saying of some of Al-Shaf'iah [2]. It was also reported by Ibn Qudamah about Malik. [3]

**Evidences of those who do not provide permission of the ruler:**

1- Allah the Al-Mighty said: "Make trial of orphans until they reach the age of marriage. If you then find sound judgment in them, release their property to them."

The reason behind taking this verse as a proof: Allah commanded guardians of the orphans to release properties to the orphans when finding sound judgment and discretion from them. He did not restrict it with permission of the ruler. And making permission of the ruler be a provision is an addition which preventing giving property to the orphans after finding discretion from them. And this opposes generality of the verse.

2- Interdiction over the orphan is proved without ruler of the ruler, and so it is removed without his permission to like interdiction over the madman.

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[1] 'Al-Tag and Al-Iklil' at the margin of Faculties f the Great' (5/64-65), and 'Al-Mughni' for Ibn Qudamah (4/510)

[2] 'Mughni Al-Mohtaj' (2/170) and 'Paradise of the Seekers' (4/182)

[3] 'Al-Mughni' for Ibn Qudamah (4/510)

**Evidences of those who provide permission of the ruler:**

Discretion is to be noticed through exertion and consideration. And so permission of the ruler is provided; such as removing interdiction from upon the fool. [1]

The reply on this saying: Interdiction over the young differs from interdiction over the fool. Interdiction on the young is proved without ruler of the ruler, and so his permission is not provided in removing it. It looks like interdiction on the madman. That is because the reason behind interdiction over both of them is the same, which is disability in disposition and saving property. And so if the reason for the interdiction ends, the interdiction ends too.

From the above-mentioned it appears that the saying which does not provide permission of the ruler in removing interdiction from over the person who reached puberty discrete is more preponderant.

**The second part: The Person who becomes fool after being discrete**

Disagreement about this part is based on disagreement about the way of interdicting over him:

Those who see that none can interdict over him except the ruler say that none can remove the interdiction from over him except the ruler too. This is the opinion of majority of scholars.

And those who see that interdiction over him is proved when noticing foolishness from him, they disagreed on the way

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[1] 'Al-Mughni' for Ibn Qudamah (4/510)

of removing interdiction from upon him; such as their disagreement about the person who reached puberty discrete as mentioned in the first part. This is the opinion of minority of scholars, including Muhammad bin Al-Hasan; a companion of Abu Hanifah and Abdelrahman bin Al-Qasem; a companion of Malik.

**The preponderant opinion:** Permission of the ruler is provided in removing interdiction and giving property; for this interdiction is proved by the ruler and so it should be removed by him.

**Fifth Provision: Marriage:** This provision is provided for the interdicted female. It is provided that the woman should marry, and her husband should consume the marriage and stay with her for some time before removing interdiction from upon her. It was disagreed about determining this period: It was said that it is to be one year, two years, five years, six years and seven years; the saying of Al-Malikiyah. [1]

The reason behind this: The woman before marriage does not have consideration; for she is screened and does not mix with people. And so she does not become discrete for she is of no experience in disposition. And so it is waited until she marries as she would, at this time, mix with people and realize the useful and the harmful. [2]

It was reported that Ahmed said: Property is not given to the woman until she marries and gives birth to a child or until

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[1] 'The Footnote of Al-Dosoky' (3/268)

[2] 'Interpretation of Al-Qurtoby' (5/29)

she stays a year at the house of her husband. [1]

**Opinion of the majority of scholars:** [2] Woman is like the man in giving property to her. When she reaches puberty and becomes discrete, interdiction is removed from upon her, whether she married or not.

**The preponderant opinion:** It is the opinion of the majority of scholars; for the woman is included in generality of Allah's saying, "Make trial of orphans until they reach marriage. If you then find sound judgment in them, release their property to them." [3] And the word orphans include both males and females.

**Sixth provision: Witness of two just people on her uprightness and good disposition:** This provision is special to the interdicted woman. This provision is the opinion of Al-Malikiyah. [4]

As for the majority of scholars who do not see that she is interdicted for being female, they do not differentiate between male and female in removing interdiction from upon them. They see that the guardian can give property to the woman after puberty and discretion, without need to a witness on her uprightness, but they approved witness on discretion for any interdicted person, male or female. [5]

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'Al-Moqni3' with its footnote (2/141)

[2] 'Al-Mughni' (4/517) and 'Paradise of the Seekers' (4/182)

[3] Chapter of the Women: (6)

[4] 'The Great Explanation' for Al-Dardir at the margin of 'Footnote of Al-Dosoky' (3/268) [5] 'Discovering the Mask' (3/443)

**The preponderant opinion:** It is – and Allah knows best – the opinion of the majority of scholars; for Allah the Al-Mighty provided puberty and discretion before giving property to the orphan; and providing a witness is addition to what Allah provided.

**Second subject**

**Puberty and its Signs and Disagreement about it**

I have mentioned before that puberty is a provision for removing interdiction and giving property to its owners. And we will mention her definition of puberty, its signs, the considered evidences and disagreements about them.

**Definition of puberty:**

**\_Its linguistic meaning:** Reaching.

**\_Its conventional meaning:** Ending of the period of youngness. [1]

**Signs of puberty:**

There are five signs of puberty; three among them are for men and women. They are ejaculation of the semen, appearance of dry hair of the pubes and age. And the other two are special to women. They are menstruation and pregnancy.

We will talk about each sign in detail:

**First sign: Ejaculation of semen:** It is the flowing liquid from which child is created. It comes out from male and female through either sexual intercourse or wet dream. And the time when it can get out is nine years old, without differentiating between male and female.

It was said that semen does not come out from male except at

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[1] 'Footnote of Ibn 'Abdeen' (6/153)

the age of nine and half.

It was also said that it comes out at the age of twelve at least. [1]

It is unanimously agreed that ejaculation of semen is a sign on puberty. And this sign is proved by the Book, the Sunnah and consensus of Muslims.

**The Book:**

Allah the Al-Mighty said: "O you who believe! Let those whom your rights hands possess, and the (children) among you who have not come of age ask your permission (before they come to your presence), on three occasions."

And on the following verse: "And when the children among you come of age, let them (also) ask for permission, as do those senior to them (in age)." [2]

The reason behind taking these two verses as a proof: Children before reaching the age of puberty are commanded to ask for permission at the three occasions of private parts. And after reaching the age, Allah commands them to ask permission at all times, like the free responsible. And so these verses refer that wet dream changes the rule; and this is evidence that this is a sign of puberty.

**The Sunnah:**

a. The Messenger of Allah peace be upon him said: "Pen has been lifted from three …. From the young until he reaches the

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[1] 'Mughni Al-Mohtaj' (2/167) and 'Showing the Facts' (5/203)

[2] Chapter of the Light: (58/59)

age of having wet dream." (Narrated by Abu Dawood and Al-Hakem) Al-Hakem said that this Hadith is authentic according to provisions of the two Sheikhs (Al-Bukhari and Muslim). (1)

b. The Messenger of Allah peace be upon him said: "Take a Dinar or value of a cloth like that Mu'afir from each person reaching the age of having wet dream." (Narrated by Abu Dawood and At-Tirmidhi, Al-Nesai and Al-Hakem, graded as good by At-Tirmidhi) Al-Hakem said that this Hadith is authentic according to provisions of the two Sheikhs (Al-Bukhari and Muslim), but they did not transmit it. (2)

The reason behind taking this Hadith as a proof: Taking a tax from the person who reached the age of having wet dream is evidence on his puberty; for Taxes are not taken from young boys.

**Consensus of Muslims:**

Scholars agreed that ejaculation of semen is a sign of puberty.

Al-Hafez bin Hajar said: "Scholars agreed that having wet dream, for men and women, makes acts or worshipping,

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(1) This Hadith was reported by Ali bin Abu Taleb as completely and incompletely transmitted chain, with different words. And Ibn Abbas, Al-Qasem bin Yazeed, Abu Al-Duha and Al-Hasan reported it from Ali bin Abu Taleb may Allah be pleased with him.

(2) Good: This Hadith was narrated by Abu Dawood, Al-Nesai, Ibn Khuzaimah, Al-Darqutney, and Al-Baihaqi. All of them narrated it through the transmitted chain of Abu Mu'awyah, on the authority of Al-A'mash, on the authority of Ibrahim, on the authority of Masrook, on the authority of Mu'adh about the Prophet peace be upon him.

punishments and other rules be obligatory." [1]

**Second sign: Appearance of dry hair of the pubes:** There is disagreement on this sign:

This refers to the rough hair, which is in need to be shaved from around sexual organs of man and woman. Small hairs are not considerable; for it appears at private parts of the young too. Scholars disagreed about appearance of this rough hair: Is it considered a sign of puberty or not? There are three sayings:

**The first saying:** It is considered a sign of puberty at all, whether for believer or disbeliever. This is the saying of Ahmed, Ishaq, Abu Thawr, Malik in the famous narration about him, and Al-Shaf'i in a narration. It was reported that Malik said this hair is considered as a sign of puberty, but not for the Allah's right. There is no sin on such person when leaving duties and committing forbidding acts. But the famous narration for Malik is generality. [2]

**The second saying:** It is not considered a sign of puberty at all. This is the saying of Al-Hanafiah and Malik in a narration. [3]

**The third saying:** It is considered a sign of puberty for the disbeliever, not for the believer. This is the saying of Al-Shaf'i in the famous narration. [4]

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[1] 'Fath Al-Bary' for Ibn Hajar (5/277)

[2] 'Al-Mughni' for Ibn Qudamah (4/513) and 'Footnote of Al-Dosoky' on 'The Great Explanation' (3/264)

[3] 'Footnote of Al-Shalabi' on 'Showing the Facts' (5/203)

[4] 'Mughni Al-Mohtaj' (2/167)

We will show evidences on each saying.

**Evidences of those who considered rough hair a sign of puberty at all:**

a. 'Atyah Al-Qurazi reported: "We were brought before the Prophet peace be upon him on the day of Quraizah. Those who had began to grow hair (on their private parts) were killed, while who had not, were set free. I was among those who had not begun to grow hair, so I was set free." (Narrated by the five Imams, graded as authentic by At-Tirmidhi) (1)

b. Al-Bukhari and Muslim narrated that Abu Saeed reported: "He (the Prophet) was raising garments of the adults. Those who have (rough) hairs among their private parts were killed; and those who do not have were left among the offspring."

The reason behind taking these Hadith as a proof: Killing those who have rough hair over private parts refer that they are like men (i.e. reached the age of puberty), leaving those who do not have this hair refers that they are still young. Accordingly, this refers that appearance of rough hair around private parts is a sign of puberty.

C. It was reported that a boy, who claimed that he committed adultery with a slave woman, was brought to 'Umar bin Al- Khattab may Allah be pleased with him. Thereupon he said:

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(1) Authentic: This Hadith was narrated by Ahmed, Abu Dawood, At-Tirmidhi, Al-Nesai, Ibn Majah, Al-Darmy, Ibn Al-Jarood, Abu 'Awanah, Al-Tahawy, Ibn Heban, Al-Hakem, Al-Hameedy, Abdelrazeq, Ibn Abu Shaibah, Ibn Ishaq, Ibn Sa'd, Abu 'Ubaid, Ibn Zangawaih, Al-Baihaqi, and Ibn Hazm. All of them narrated it through the transmitted chain of Abdelmalik bin 'Umair who said: I heard 'Atyah Al-Qurazi saying …

"Look at him", and they did not him having hair around his private parts; and so punishment was not applied on him.

The reason behind taking this tradition as a proof: 'Umar did not apply punishment on him when finding that rough hair around his private parts has not appeared yet. This proves that this hair is a sign of puberty.

**The Meaning:**

Appear is often accompanied with puberty, for both male and female. [1]

**Discussing these evidences by those who do not consider rough hair as a sign of puberty:**

They said about Hadith of 'Atyah and other Hadith like it: Killing them not for reaching puberty, but for getting rid of their evilness. In addition, killing them was a judge of Sa'd, and they accepted his judgment.

**Reply on this discussion:**

Regarding their saying that killing them was for getting rid of their evilness is not considerable. The Messenger of Allah peace be upon him was fighting people at far places like Tabuk while there were no evilness from them. He was killing them because they were disbelievers. The Messenger of Allah peace be upon him said: "I was commanded to fight people until they say that there is no god but Allah." (2)

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[1] 'Al-Mughni' for Ibn Qudamah (4/514)

(2) This Hadith was narrated by Al-Bukhari, Muslim, Ahmed, Abu Dawood, At-Tirmidhi, Al-Nesai and Ibn Majah, from Hadith of Abu Hurairah may.

As for their saying that killing them was a judge of Sa'd not for puberty, it is not considerable too. It was for their puberty; for if they were not at the age of puberty, they would not be killed before the Prophet peace be upon him who prohibited killing young boys. Ibn 'Umar reported: "A woman was found killed in one of these battles; so the Messenger of Allah peace be upon him forbade the killing of women and children." (Narrated by the group except Al-Nesai) [1] (2)

And it is impossible that judge of Sa'd disagrees with the command of the Prophet peace be upon him; not to kill women and children. He judged with killing their fighters and taking their offspring as captives; and so the Prophet peace be upon him supported his judge and said: "You have judged according to the Rule of Allah." (3)

**Evidences of those who do not consider rough hair a sign of puberty at all:**

They said that rough hair around private parts is like other hair around the whole body. It is like hair of the beard or moustache. In addition, the beard is worthier than hair around private parts to be a sign of puberty, without committing a forbidden act; for hair around private parts is known with touching or seeing and this is impermissible.

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[1] 'The Printed Chosen' with 'Nail Al-Awtar' (7/279)

(2) This Hadith was narrated by Al-Bukhari, Muslim, Ahmed, Abu Dawood, At-Tirmidhi, and Ibn Majah.

(3) This Hadith about the story of Sa'd was reported by Abu Saeed and others. And it was narrated by Al-Bukhari, Muslim, Ahmed and Al-Nesai.

**Discussion on this evidence:**

This juristic reasoning opposes a religious text and this is not permissible.

In addition, there is difference between hair of private parts and hair of the beard or moustache. Hair of the beard and moustache is only fond in men, but hair of private parts is found in both men and women. Also hair of the beard and moustache delays in appearance more than that of the private parts.

Moreover, hair of beard and moustache appears after wet dream, but hair of private parts almost appears with wet dream.

And regarding their saying that uncovering private parts is a forbidden act, it is said that it is not permissible to look at them except when necessity. Also uncovering their private parts (as reported in Hadith) refers that it is alone a sign of puberty; for if other hair can replace it, there would be no need to uncover their private parts.

Evidences of those who consider appearance of rough hair around private parts a sign of puberty for the disbeliever, not for Muslim:

It was said that Hadith reported about this matter were about Banu Quraizah, who were disbelievers. And so these Hadith became evidence on proving this sign for the disbelievers only. And as for a Muslim, his puberty may be known by his parents or Muslim relatives.

In addition, the Muslim benefits from appearance of this hair; and so he may make anything that makes this hair appear quickly in order that interdiction may be removed from over him. On the other hand, the disbeliever takes no benefit from appearance of this hair; it harms him for it may lead to killing him or taking taxes from him. And so he does not care to make it appear. [1]

**Discussion of this evidence:**

As for your saying that appearance of hair around private parts is a sign of puberty for disbelievers, not Muslim, we say that this appearance occurs for both disbelievers and believers. [2] It is a natural matter, and none is excluded from it. And so 'Umar may Allah be pleased with him considered it and abrogating punishment from upon the person who accused a slave woman with adultery, when finding that hair of his private parts has not appeared yet.

And regarding your saying that puberty of the Muslim can be known through his parents and relatives, we say that this does not mean that appearance of hair of private parts is not considered a sign of puberty for him; for this hair almost accompanies puberty; and so it is a sign for both Muslim and disbeliever with no difference.

And for your saying that Muslim benefits from puberty and so he can make anything that makes his hair grow quicker, we say that this is contradiction from you. You believe him when claiming puberty with wet dream, which is a hidden matter, and do not believe him when claiming puberty with appearance

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[1] 'Mughni Al-Mohtaj' (2/167)

[2] 'Al-Mughni' for Ibn Qudamah (4/514)

of hair, which is a clear matter.

**The preponderant opinion:**

It appears from the above-mentioned evidences – and Allah knows best – that the saying which consider appearance of hair around private parts is a sign of puberty at all, for believers and disbelievers, is the most preponderant. That is because it is based on authentic evidences, and the other sayings are just opinions with no evidences. And what strengthens that appearance of this hair is a sign of puberty is that it almost accompanies puberty, and it is for both male and female. Also it is a clear sign that can be seen by eyes, not like other signs which are just known by their owners like ejaculation of semen and menstruation.

**Third sign: The age:** There is disagreement on this sign:

Scholars consider that a certain age is a sign of puberty but they disagreed on determining it.

Most scholars said that puberty is considered at the age of fifteen. This is the saying of Al-Shaf'i, Ahmed, Al-Awza'i, 'Umar bin Abdelazeez, Abu Yusuf, Muhammad bin Al-Hasan [1], and Ibn Wahb from Al-Malikiyah. [2]

Others, including Al-Malikiyah [3] in their famous narration, said that puberty is considered at the age of eighteen. Abu Hanifah agreed with this group, but for the boy, not the girl. He considered that puberty of the girl be at the age of seventeen.

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[1] 'Al-Mughni' for Ibn Qudamah (4/514)

[2] 'Faculties of the Great' (5/59) [3] 'Faculties of the Great' and 'Showing Facts'

Abu Dawood Al-Zahiri said: "Man does not reach puberty with age as long as he has not had a wet dream, even if he reached forty years." [1]

Abu Dawood took the following Hadith as evidence on his saying: The Messenger of Allah peace be upon him said: "The Pen has been lifted from three: from the child until he has a wet dream, from the sleeper until he wakes up and from the insane until he regains his sanity." (Narrated by Abu Dawood and Al-Hakem who said that this Hadith is authentic according to provisions of the two Sheikhs) (2)

The reason behind taking this Hadith as a proof: This Hadith refers that responsibility and accountability from upon the young until he reaches puberty, and proving responsibility with other signs opposes the Hadith.

**Discussion of this Hadith:**

This Hadith does not prevent proving puberty without having wet dream, when there is another sign. And so appearance of hair around private parts has become a sign on it (wet dream). [3]

**Evidences of those who see that puberty is considerable at the age of fifteen:**

a. Ibn 'Umar reported: "I was brought before the Prophet peace be upon him on the Day of Uhud when I Was fourteen years

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[1] 'Interpretation of Al-Qurtoby' (5/35) and 'Al-Mughni' for Ibn Qudamah (4/514)

(2) Transmission of this Hadith was mentioned before.

[3] 'Al-Mughni' for Ibn Qudamah (4/515)

old, but he did not give me permission (to fight). I was afterwards brought to him on the Day of al-Khandaq (the Battle of Trench) when I was fifteen years of age, and he gave me permission (to fight)." (Narrated by the Group) (1)

In the narration of Al-Bukhari, it was added: Nafi' said: I came to 'Umar bin 'Abd al-'Aziz who was then Caliph, and narrated this tradition to him. He said: "Surely, this is the demarcation between a minor and a major." So he wrote to his governors that they should pay subsistence allowance to one who was fifteen years old, but should treat those of lesser age among children.

The reason behind taking this Hadith as a proof: The Messenger of Allah peace be upon him permitted Ibn 'Umar to fight at the age of fifteen, and did not permit him before this age; for he did not reach puberty yet. This refers that reaching the age of fifteen is a sign of puberty. [2]

b. Anas bin Malik may Allah be pleased reported that the Prophet peace be upon him said: "When the born child reaches fifteen years old, what is for him and what is against him should be written, and punishments should be applied on him." (Narrated by Al-Baihaqi through a weak transmitted chain)

The reason behind taking this Hadith as a proof: He who reaches fifteen years old is responsible; for he will be accountable on his sayings and deeds. And responsibility should be after puberty.

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(1) Transmission of this Hadith was mentioned before.

[2] 'Mughni Al-Mohtaj' (2/166)

c. And in fact the mind is the powerful and wet dream is its evidence. Wet dream does not usually delay after fifteen years old. And if it delayed, it would be for a disease.

**Discussion on these evidences by those who do not consider puberty with fifteen years:**

a. Hadith of Ibn 'Umar does not refer that fifteen years old is the age of puberty, for the Messenger o Allah peace be upon him did not mention (or ask) about his age. But this was thought of Ibn 'Umar. He permitted him (at the age of fifteen) for seeing that he has the ability to fight, and did not permit him before this time for seeing that he does not have the ability to fight. And ability on fight differs from one person to another, according to his strength and fitness. The age does not affect it. It may also be explained that the Prophet permitted him to fight for knowing that he had a wet dream [1]. Also potentials abrogate evidence.

b. And regarding Hadith, "when the born child reaches fifteen years old", its transmitted chain is weak and so no rule can be judged according to it.

c. And regarding your saying that wet dream is evidence of mind and it does not delay after fifteen years old, it is not considerable; for madmen have wet dreams while they are insane.

**Reply on this discussion:**

What you have mentioned of potentialities about Hadith of

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[1] 'Nail Al-Awtar' (5/281)

Ibn 'Umar is not acceptable, for the Hadith was also reported with this word: "I was brought before the Prophet peace be upon him on the day of Uhud; he did not give me permission (to fight), and did not consider me has having attained puberty." And this addition is authentic.

And Ibn 'Umar knows more than anyone else about which he reported especially this story is related to him.

And it appears that Ibn 'Umar did not say that according to his thought, without any (saying or deed) of the Prophet peace be upon him that refers to this.

As for Hadith, "when the born child reaches", however it is reported through a weak transmitted chain, but when it is added to Hadith of Ibn 'Umar strengthens what Ibn 'Umar understood that the Prophet did not permit him to fight for seeing that he has not reached puberty yet.

**Evidences of those who say that puberty is considerable at the age of eighteen for the boy and at the age of seventeen for the girl:**

a. Allah the Al-Mighty said: "And come not nigh to property of the orphan, except to improve it." [1]

The reason behind taking this verse as a proof: The verse prohibited guardians from dealing in properties of the orphans except to improve it, until he reaches the age puberty and full strength. And the least period of this age is eighteen years as Ibn Abbas and Al-Qutiby said. And so the rule is judged

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[1] Chapter of the Cattle: (152)

according to this age. And as realization of females is quicker than that of males, we increase one year for puberty of the male. [1]

b. Also religion suspended rules and responsibility on having a wet dream. And so the rule be based on it, and it would not be negated except when being sure that it is not existed and feeling despair from its existence. And despair occurs after reaching this age; the age of eighteen.

**Discussion on those two evidences by those who see that puberty is considered at the age of fifteen:**

Regarding your saying that the least age of puberty and full strength is eighteen years is not acceptable at all; for scholars disagreed on the age of full strength.

Some scholars said that the age of puberty and full strength is when having wet dreams. This is the opinion of Zaid bin Aslam, Al-Sha'bi, Yahia bin Ya'mur, Rabi'ah and Malik bin Anas.

And as for your saying that religion suspended rules and responsibility on having wet dream, we say that as it suspended puberty on this, it also suspended it on other things like appearance of hair around private parts and menstruation.

And your saying that when a person reached eighteen years without having a wet dream, there would be despair from having it, it is not acceptable. That is because having wet dream

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[1] 'Footnote of Al-Shalabi' (5/203)

may delay after this for a disease. And your determination is not proved by a text or consensus.

**The preponderant opinion:**

From the above-mentioned evidences of each group and discussions on them, it appears that the saying which considers puberty with reaching fifteen years is more preponderant; for strength of its evidences.

In addition, wet dream, which it is agreed that it is a sign of puberty and with it acts of worshiping, punishments and other rules become obligatory, may occur before the age of fifteen. The female may have a wet dream at the age of nine, and the male may have it at the age of ten. As having wet dream may occur at this age, and according to it, the person becomes responsible; then making the age of fifteen another sign when the sign of having a wet dream does not occur. It is more preponderant than making it at the age of eighteen; for most people have wet dream at this age (the age of fifteen). And those who exceed it without having wet dream are rare, and so they take the rule of majority for no rule is based on the rare.

**Fourth sign: Menstruation:** This sign is special to women. The time of its appearance may be the age of nine. When the woman menstruates, she has become at the age of puberty. There are evidences from the Book, the Sunnah and consensus on proving that menstruation is a sign of puberty.

**The Book:**

Allah the Al-Mighty said: "Such of your women as have passed the age of monthly courses, for them the prescribed period, if you have any doubts, is three months, and for those who have no courses (it is the same)." [1] Allah also said: "Divorced women shall wait concerning themselves for three monthly periods." [2]

The reason behind taking these two verses as proof: The prescribed person for the woman who does not have a monthly menstruation and the woman who have passed its age is three months. And the prescribed period for the woman who has menstruation courses is three periods. This refers that menstruation changes the rule, and this is because it is a sign of puberty.

**The Sunnah:**

Abu Dawood narrated that 'Aisha may Allah be pleased with her reported: when Asmaa, the daughter of Abu Bakr, came in to visit God's messenger peace be upon him wearing thin clothes, he turned away from her and said: "When a woman is old enough to menstruate, Asmaa, it is not right that any part of her should be seen but this and this," pointing to his face and his hands. (3)

The reason behind taking this Hadith as a proof: The Messenger of Allah peace be upon him suspended obligatory of covering private parts for woman on having menstruation. This refers that the menstruated woman is responsible, and menstruation is a sign of puberty.

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[1] Chapter of the Divorce: (4)

[2] Chapter of the Heifer: (228)

(3) Transmitted chain of this Hadith is weak, and its text is denied. It was narrated by Abu Dawood (4104)

'Aisha also reported that the Messenger of Allah peace be upon him said: "The prayer of a woman, who has reached puberty, is not accepted unless she is wearing a veil." (1) (Narrated by Abu Dawood, At-Tirmidhi and Ibn Majah, Graded as good by At-Tirmidhi)

The reason behind taking this Hadith as a proof: It is a provision of validity of prayer for woman is wearing a veil after having menstruation. This refers that the menstruated woman is responsible, and menstruation is a sign of puberty.

**The Consensus:**

Scholars may Allah show mercy on them unanimously agreed that when the woman menstruate, she has become at the age puberty. This was reported by Al-Hafez bin Hajar in 'Fath Al-Bary', Ibn Qudamah in 'Al-Mughni' and Al-Qurtoby in his 'Interpretation'. [2]

**Fifth sign: Pregnancy:** It is a sign of puberty special to woman, for it is evidence on ejaculation as Allah makes it usual that the child is created from semen of the man and semen of the woman. Allah the Al-Mighty said: "Now let man but think from what he is created! \* He is created from water gushing forth. \* Proceeding from between the backbone and the ribs." [3]

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(1) Good: It was narrated by Ahmed, Abu Dawood, At-Tirmidhi, Ibn Majah, Ibn Abu Shaibah, Ibn Al-Jarood, Al-Baghawi, Ibn Khuzaimah, Ibn Heban, Al-Hakem, Al-Baihaqi and Ibn Abdelbar. All of them narrated it through the transmitted chain of Hamada, on the authority of Qatada, on the authority of Muhammad bin Sireen, on the authority of Safiah bint Al-Harith about 'Aisha may Allah b pleased with him.

[2] 'Fath Al-Bary' (5/276), 'Al-Mughni' (4/515) and 'Interpretation of Al-Qurtoby' (5/35) [3] Chapter of the Night Visitant (5,6,7)

Accordingly, when the woman becomes pregnant, it is judged that she has reached puberty, but this becomes sure when giving birth to a child. If the woman is married and gave birth, we judged that she reached puberty before giving birth with six months; for this is the least period for pregnancy. And if she is divorced and gave a birth from the husband, we judged that she reached puberty before divorce. [1] It is unanimously agreed that pregnancy is a sign of puberty.

**Are there other signs of puberty other than the above-mentioned?**

Some of Al-Malikiyah see [2] that among signs of puberty are appearance of (rough) hair underarm, rough voice and taking a thread, turning it with his neck and putting it between his teeth; of he made it around his head, he would be at the age puberty.

Some of Al-Hanafiah [3] said that having large breast is a sign of puberty, but most scholars disagreed with them. Most scholars see that there is no other sign of puberty except the previous five ones. And this is the valid saying, God willing.

**What is the rule if the young boy claimed reaching puberty?**

If the young boy claimed reaching puberty, he is believed. This is for ejaculation and menstruation when this occurs during their appropriate times; for this can only knew through

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[1] 'Mughni Al-Mohtaj' (2/167)

[2] 'Faculties of the Great' (5/59)

[3] 'Footnote of Al-Shalabi' on 'Showing the Facts' (5/203)

him (her). Al-Malikiyah also said that this rule is also for appearance of rough hair around private parts. Others also said that he is believed regarding his age when date of his birth is unknown. This is when he is not confused when talking and if he is not accused with lie.

**Third Subject**

**Meaning of Discretion, Its Time**

It was previously mentioned that among provisions of giving property back to its owners is finding sound judgment and discretion from them. And we will here talk about discretion, showing its time and whether male and female are alike in this matter? This subject includes two parts:

**The first part: Definition of Discretion:**

**\_Its linguistic meaning:** Keeping straight and firm on the Path of Right.

**\_Its conventional meaning:** It is disagreed about him on four sayings:

**The first saying:** It is to improve property; that is to keep your property from wastefulness and ill management; that is not to waste it in a forbidden matter and not to be deceived in dispositions and not to waste money in useless matters. This is the saying of most scholars, including Malik, Abu Hanifah and Ahmed. [1]

**The second saying:** It is to improve religion and property; that is to keep your property from wastefulness and to fix your religion; that is not to commit a forbidden act that abrogates justice; for the immoral person is not trusted on saving property as him immorality may lead him to waste his property.

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[1] 'Al-Mughni' (4/522), 'At-Tag and Al-Iklil' in the margin of 'Faculties of the Great', and 'Footnote of Ibn Abdeen' (5/145)

And so he would be deprived from disposing in his property, and also his witness and guardianship are not accepted, even if he never lied or wasted property.

This is the saying of Al-Hasan, Qatada, Saeed bin Jubair, Al-Shaf'i, and Ibn 'Uqail from Al-Hanabelah [1].

**The third saying:** It is to improve religion. This is the saying of Ibn Hazm Al-Zahiri. [2] And so the person who reaches puberty, having the ability to differentiate between belief and disbelief, his property is given to him for his discretion.

**The fourth saying:** It is the mind. This is the saying of Mujahid. [3]

**Discussion of the majority of scholars about these sayings:**

Regarding saying of Al-Shaf'iah that the immoral person is not trusted on keeping property, it is not acceptable. That is because the immoral person is not asked to keep other's property, but property here is his. Also this is a supposed saying and it differs from reality; for many immoral people keep property and improve it, fearing of losing their needs and lusts which are attained with property. And if the immoral person wastes his property by spending it in forbidden matters or buying useless matters, he becomes fool; and so he is put under interdiction.

And regarding that his witness is not acceptable, this does

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[1] 'Al-Mohadhab' (1/331)

[2] 'Al-Mohala' (9/183)

[3] 'Interpretation of At-Tabari' (4/253)

not prevent him from his property. And regarding that he is not eligible to property; this does not mean not to give him his property. He just cannot guard over property of others

As for saying of Ibn Hazm that discretion is to improve religion only for it appeared in the Qur'an and language with this meaning, it is replied that discretion is used according to each situation. You can use it in a situation with a meaning, which differs from another meaning in another situation.

And regarding saying of Mujahid that discretion is mind, it is replied that having mind does not mean being discrete. A person may be mindful and not discrete. Mind is a provision of discretion, not the discretion itself.

**The second part: Showing the time of Discretion and whether male and female differ in it?**

There is no a certain age of discretion; a young boy may be discrete while some people die without attaining discretion.

But the time when discretion is considerable for ending the interdiction and giving property to its owners is to be after puberty for Allah's saying: "Make trial of orphans until they reach marriage. If you then find sound judgment in them, release their property to them." The command of releasing their property to them is suspended on puberty and noticing their discretion.

And before puberty, dispositions of the young boy are considered fool, for his mind is not complete yet.

Male and female have this same rule for scholars, except Al-Malikiyah who said that a woman is not considered discrete except after marrying and after her husband consumes the marriage and after staying with him for a year at least as before marriage, it is not possible to try her for she is screened from people and does not experience different affairs of selling and buying.

**The preponderant opinion:**

Saying of the majority of scholars is more preponderant; for Allah the Al-Mighty commanded to make trial of orphans in general. He does not differentiate between male and female in the way of trying them. He also commanded to give property to the orphan, male and female, after reaching puberty and being discrete. And so providing consummation of marriage for the female is an addition over what Allah has legalized and this is null and void.

And it is replied on Al-Malikiyah that woman before marriage does not experience dealings, it is replied on this with the saying of Al-Qurtoby: "Consummation of marriage does not increase her discretion if she knows all her affairs, without wasting her property." [1]

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[1] 'Interpretation of Al-Qurtoby' (5/38)

**Third Part**

**Rule of Taking Witnesses on Giving Property to**

**The Interdicted after Removing Interdiction from upon them**

Scholars may Allah show mercy on them agreed that on legality of taking witnesses on giving property to the interdicted people after removing interdiction from upon them, for Allah's saying: "When you release their property to them, take witnesses in their presence: But All-Sufficient is Allah in taking account." [1] There are great benefits for this witnessing for both the guardian and the person under guardianship. As for the guardian, he frees himself, his honesty appears, keeps himself away from dispute, and be away from accusation. This also protects him from denial of the interdicted that he took his property and protects him from being asked to swear.

And as for the interdicted, they are protected from claims and disputes, and take their rights completely; for the trustee exerts his effort to give them their properties completely to gain trust of people in order not to be accused of treachery or negligence.

This shows that witnessing achieves benefits for both the guardian and the person under guardianship.

And so Allah has commanded with witnessing for its importance, but scholars disagreed about its rule in two sayings:

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[1] Chapter of the Women: (6)

**The first:** It is dutiful.

**The second:** It is recommended.

There are two reasons behind this disagreement:

**The first:** Is the guardian or trustee considered a trustworthy and so he s giving rules of trustworthy people, or not?

**The second:** Does the verse contains anything that directs the command of witnessing from being dutiful or not?

Those who see that witnessing is dutiful take clear words of this verse as a proof: "take witnesses in their presence"; for command is for dutifulness when there is nothing that keeps it away from dutifulness and nothing in the verse distract it from dutifulness. This is the famous narration for Al-Malikiyah and Al-Shaf'iah.

And those who see that witnessing is recommended say that the command in the verse is for direction not dutifulness. And what distracts witnessing from being dutiful is that the guardian is trustworthy, and witnessing is not dutiful on trustworthy. Also the end of the verse supports this: "But All-Sufficient is Allah in taking account." This is the saying of Al-Hanafiah and the famous narration for Al-Hanabelah.

Discussion of those who see that witnessing is dutiful on proofs of those who see that it is recommended:

As for your saying that the guardian is trustworthy and so he is not obliged to take witnesses, it is said that the guardian is no so for those under his guardianship, but he is trustworthy from the view of religion.

And regarding your saying that end of the verse supports recommendation, it is said that it supports dutifulness; for the All-Sufficient here means the Accountable as Allah prohibited guardians from eating properties of the orphans, saying: "but consume it not wastefully, nor in haste against their growing up", and prohibited exchanging it with other property, saying: "Do not substitute (your) worthless things for (their) good ones; and devour not their substance (by mixing it) with your own. For this is indeed a great sin." This supports that the guardian can be exposed to accusation, and it happened before that some guardians took unjustly and wasted property of the orphans; and so Allah threatened them. This shows that the saying of dutifulness is more preponderant.

**Consequences of this disagreement:**

Those who say that the command is for dutifulness say that the guardian would not be believed if he claimed that he released property to the orphans after removing interdiction from upon them; for they are only believed by witnessing, even if they swore.

And those who say that the command is for say that this recommendation say that this witnessing would save you from swearing.

**Disagreement of scholars about whether the guardian or trustee is believed if he claimed that he gave property to the interdicted without witnessing, or not:**

Scholars may Allah show mercy on them disagreed about this matter in three sayings:

**The first saying:** The guardian or the trustee is not believed. This is the famous narration for Al-Shaf'iah and Al-Malikiyah.

**The second saying:** The guardian or the trustee is believed. This is the opinion of Al-Hanafiah, Abdelmalik bin Al-Magshoon, Ibn Wahb from Al-Malikiyah and Al-Hanabelah.

**The third saying:** The guardian or the trustee is believed if he is working with no wage, but if he takes a wage, he is not believed.

**The preponderant opinion:**

It appears from the above mentioned sayings and evidences that if the guardian or trustee claimed that he gave property to the orphan after removing interdiction from upon him, without taking witnesses, he is not believed; for it is origin not to give it without witnesses, and also for generality of the saying of the Messenger of Allah peace be upon him: "Evidence is on the one who claims and swear is on the one who denies." (Narrated by Al-Baihaqi through an authentic transmitted chain)

And if the guardian is believed without witnesses, properties of the orphans may be lost. That is and Allah knows best!

**The Conclusion**

**Summary of Guardianship over Property**

It appears from the above-mentioned that system of guardianship over property is an integrated system. It provides perfect rights to those under guardianship, and protects them from wrong doings of guardians and trustees, and guarantees growth and saving to their properties.

This system can be summarized in the following rules:

**First rule:** Guardianship is only proved over those who are in need to it; such are those who are of no eligibility like the madman or the young before discretion, or those of imperfect eligibility like the discrete young boy, the fool and the absent-minded. And regarding the one of perfect eligibility, no guardianship is proved for anyone over him. He is free and can dispose in his property as he wills.

**Second rule:** Guardianship and trusteeship are proved for people of perfect eligibility. They are not proved for a young boy, a madman or a fool; for those are under guardianship and so they cannot guard others.

**Third rule:** Only just and honest person who can bring benefit for those under guardianship can guard over property. And so the immoral, dishonest and disabled shall be kept away from guardianship.

**Fourth rule:** It is not permissible for guardian or trustee to dispose except in what would bring benefit to those under guardianship. And so any disposition that harms them is null and void, for guardianship was legalized for bringing benefit and preventing harm.

**Fifth rule:** Guardian and trustee are not restricted to dispose in a certain way as long as it brings benefit. This is left for their honesty and discretion.

**Sixth rule:** guardian and trustee are protectors over property of those under guardianship; and so they do not guarantee any damaged object while there is no exaggeration or negligence.

**Seventh rule:** If efficiency of a guardian or a trustee became disordered, the judge would appoint another one to help him.

**Eighth rule:** If the judge accused a guardian or a trustee of treachery, he should appoint a trustworthy person with him to supervise over his dispositions.

**Ninth rule:** If treachery or disability of a guardian or a trustee is proved for the judge, he should remove him and take property from him.

**Tenth rule:** Guardianship of the judge over a young boy or a madman is only proved if there is no guardian from his kinship or trustee.

**Eleventh rule:** It is permissible for the ruler to supervise on dispositions of guardians and trustee to be sure of soundness of their disposition.

**Twelfth rule:** It is not permissible for the judge to remove father or grandfather from guardianship, or trustee of any of them, except if there is a reason for removing them. And if he removed any of them without a considerable reason, this would not be executed.

**Thirtieth rule:** If father or grandfather was removed from guardianship for losing eligibility, and then they became eligible again, guardianship would return to them without rule of the judge.

**Fourteenth rule:** It is permissible for the judge to hold trustees accountable, and he can ask them to swear if they are accused of treachery.

**Fifteenth rule:** Guardianship over property is a means that draws man close to Allah the Al-Mighty and brings unity among individuals of the Ummah. It is not a means to get money. And so every guardian or trustee should keep away from taking anything from property of underage and disabled people if he is wealthy, and to eat from it in a moderate manner if he is poor.

**Sixteenth rule:** It is not permissible for the guardian or the trustee to give property to its owner except if provisions of returning property to him, from maturity, mind and discretion, are provided in him. And if he gave it to its owner before this, he would be negligent. And so he would guarantee it if anything is damaged.

**Seventeenth rule:** If it appears from guardian or trustee that the person under his guardianship or trusteeship has perfect eligibility, he should soon give his property to him. It is not permissible for him to delay returning property to its owner without an excuse. And if he delayed it, he would be considered seized and would guarantee any damaged object of it.

**Eighteenth rule:** There is no need to permission of the ruler to return property back to its owner, except if interdiction (over the owner) was judged by this rule. In this case, it is dutiful on the guardian or the trustee to seek his permission.

From this brief presentation to the system of guardianship, it appears that Islam is a religion of worship and country, and that it is the eternal and valid religion for each time. That is because of flexibility and renewability of its teachings. It brings perfect rules which suit every time and every place. Islam also surrounded all men with what achieve good and righteousness to them. It combines between goodness and progress in life, and happiness and bliss in the Hereafter. Allah the Al-Mighty said in His Holy Book: "And We have sent down to you the Book explaining all things, a Guide, a Mercy, and Glad Tidings to Muslims." (1) He Glory be to Him also said: "This day have I perfected your religion for you, completed My favor upon you, and have chosen for you Islam as your religion." (2)

Abu Dharr may Allah be pleased with him reported: "The Messenger of Allah peace be upon him died, leaving no bird in the sky except after telling us about it." (3)

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(1) Chapter of the Bees: (89)

(2) Chapter of the Table: (3)

(3) An Authentic Hadith: This Hadith was narrated by Ahmed (5/153), At-Taialesy (479) and Abu Bakr bin Abu Shaibah.

Praises be to Allah firstly and lastly, and may Allah sending blessings and peace upon His slave and Messenger Muhammad peace be upon him, upon his family and companions.

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**Finished, Praises be to God!**

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