

## **GUARDIANSHIP UNDER HINDU LAW**

- Two main legislations regarding Guardianship and Custody
  1. The Hindu Minority and Guardianship Act, 1956
  2. The Guardianship and Wards Act, 1890
- The Hindu Minority and Guardianship Act, 1956 is a Hindu Personal law and The Guardianship and Wards Act, 1890 is a secular law which applies to all irrespective of their religion or caste But both these laws are still complimentary to each other and court applies the provisions of both these laws in a harmonious way.

### **Hindu Minority and Guardianship Act, 1956**

#### **Definitions**

- **Minor:** According to **Section 4(a)**, it is defined as a **minor** means who has not completed the age of 18 years.
- **Guardian:** A guardian is defined under **Section 4 (b)** of the Hindu Minority and Guardianship Act, 1956. “**Guardian**” means a person having the care of the person of a “minor” or of his property or of both his person and property, and includes-
  - i. A **natural guardian**,
  - ii. A guardian appointed by the will of the minor’s father or mother, (**Testamentary Guardian**)
  - iii. A guardian appointed or declared by a **court**, and
  - iv. A person empowered to act as such by or under any enactment relating to any court of words;

## Section 6: Natural Guardian of Hindu minor

- If a legitimate minor child then the natural guardianship is with father and after him the mother
- But if the child is less than **5 year** old than the custody of the child is generally with the mother
- If the minor child is illegitimate then the guardianship is with mother and after her the father
- In case of a minor married girl- her husband (if husband is also minor then mother/father or girl)
- **Githa Hariharan vs RBI 1999** held that the word 'after' in section 6(a) cannot be interpreted to be 'after the Life of Father'. The word 'after' has the meaning 'in the absence of'. If the father is absent or is wholly indifferent to the affairs of a minor then mother will become natural guardian of the minor.
- **Disqualification from natural guardianship**
  - (a) If he has ceased to be a Hindu, or
  - (b) If he has completely and finally renounced the world by becoming a hermit (vanaprasha/sanyasi)

## Section 7: Natural guardianship of adopted son

- In case of adopted minor child also the adoptive father is the natural guardian and after him the mother

## Section 8: Powers of Natural Guardian

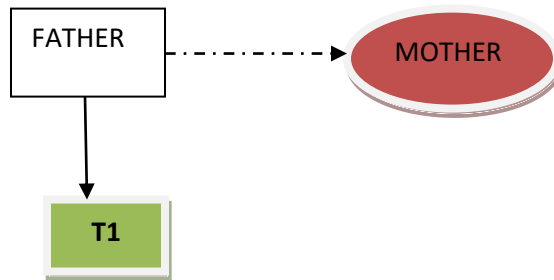
- To do all acts which are necessary or reasonable and proper for the benefit of the minor or for the benefit of the minor's estate but cannot bind the minor under a contract.
- The natural guardian shall not, without the previous permission of the court,—
- Guardian cannot transfer/ mortgage / charge / sale / gift / exchange any immovable property in name of the minor. The court will grant such permission only if there is a necessity or there is an evident advantage to the minor.

- Lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.
- Any disposal of immovable property by a natural guardian, in contravention is voidable at the instance of the minor or any person claiming under him.
- **Ram Krishan Gupta v. Nootan Agarwal (2007)**  
The mother as guardian of property of minor sons applied for sale of vacant plots belonging to minor sons. In fact she wanted to sell these plots and with the sale proceeds buy built flats in an established residential colony where most of her relatives also had flats. While the lower court denied permission on appeal the court held that the sale of vacant land to buy flats in the name of the son in a residential colony where most of their relatives also had flats. Would be in their interest and hence permission was granted.

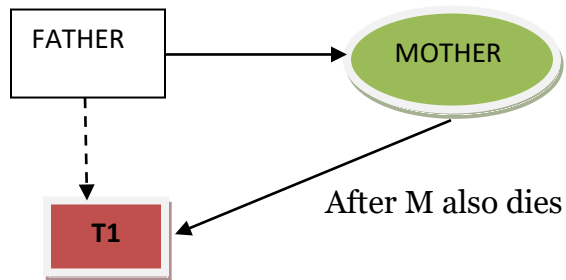
### **Testamentary guardian and their powers (section 9)**

- A testamentary guardian has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act
- According to the Hindu Minority and Guardianship Act, 1956 testamentary power of choosing a guardian has been provided on both, father and mother. If the father chooses a testamentary guardian but the mother rejects him, then the chosen guardian of the father will be inefficient and the mother will be the natural guardian thereafter. If the mother chooses a testamentary guardian, her chosen guardian will become the testamentary guardian and father's appointment will be void. If the mother does not want to choose any guardian then father's appointee will become the guardian
- **Court Appointed Guardian:** If there are no natural guardians or testamentary guardian then court will appoint the guardian.

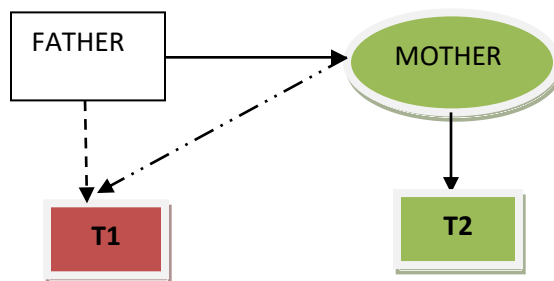
M dies before F



F dies before M and M has no appointed TG



F dies before M and M has appointed TG



## **Other Provisions of Hindu Guardianship and Minority Act, 1956**

**Section 10- A minor can be a guardian of another minor but cannot be guardian for another minor's property.**

- Example- if mother is 17 years old and the child is 1 years old, they both are minor but still one minor (mother) will be guardian of another minor (her child) but she will not be guardian of the minors property

**Section 11: De facto guardian** cannot deal with minors property after the commencement of this Act, no person shall be entitled to dispose of or deal with the property of a Hindu minor merely on the ground of his or her being the de facto guardian of the minor

A de facto guardian is a person who takes continuous interest in the welfare of the minor's person or in the management and administration of his property without any authority of law.

**Section 12: Guardian not to be appointed for minor's undivided interest in joint property.** Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest.

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

**Section 13: Welfare of minor to be paramount consideration.**

1. In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.
2. No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindu's if the courts is of opinion that his or her guardianship will not be for the welfare of the minor.

- Supreme Court in **Mohini v. Veerendra Kumar, (1977) 3 SCC 513**, has held that the controlling consideration in deciding the custody of the child is the welfare of the minor and not the rights of the parents.
- Supreme Court in **Sumedha Nagpal v. State of Delhi**, held that father's right to custody of children is neither an absolute nor indefeasible one. Welfare of the child is of paramount importance.
- **Kirtik kumar Joshi v. Pradip Kumar Joshi (1992)**  
Custody of two minor children was sought by father as also by maternal uncle. Mother of the children died an unnatural death and the father was facing charge under section 498 A of the IPC Children were staying with the maternal uncle and they also expressed their court granted custody in favour of maternal uncle
- **Ram Nath v. Ravi Raj Dudega (2006)**  
A custody dispute between the father and the maternal grandparents .The mother of the minor had died under suspicious circumstance and the father was tried under s 304 of the Indian Penal Code 1860 and convicted by the trial court but acquitted by the applied court When the child's father was taken into custody the child was only four years old and ever since then he was being looked after very well by the maternal grandparents The child who was by now sixteen also preferred to live with maternal Grandparents. The Court held that interest of the child lies with grandparents and not the father.
- **Gaurav Nagpal Vs Sumedha Nagpal (2009)** Hindu Minority and Guardianship Act, 1956 and Custody of the minor child. In any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute for the time being in force.
- **Mausami Moitra Ganguli Vs Jayant Ganguli (2008)** In the above said case, Welfare of a child Hon'ble Supreme Court of India after discussing the case of **Rosy**

**Jacob Vs Jacob A. Chakramakkal, 1973 (1) SCC 840** has held that paramount consideration is the welfare of the child.

- **Jitender Arora v. Sukriti Arora 2017** A bench of Justices A.K. Sikri and R.K. Agrawal gave this ruling while entrusting custody of a 15-year-old girl to the father, ignoring the claims of the mother who chose to live in the United Kingdom. Court held that the welfare of minor child is the paramount consideration while granting custody of the child either to father or mother, separated after divorce.