

HINDU MINORITY AND GUARDIANSHIP

The Hindu Minority and Guardianship Act were established in the year 1956 as part of the Hindu Code Bills. This act extends to the whole of India except the State of Jammu & Kashmir and applies to Hindus domiciled in our country. This act was launched to enhance the rules under Guardians and Wards Act, 1890. Hindu Minority and Guardianship act was introduced to modernise the Hindu legal tradition and to codify certain parts of the laws relating to minority and guardianship among Hindus. This act serves explicitly to define guardianship relationships between minors and adults, as well as between the people of all ages and their respective property.

In the Hindu Dharamshastras, not much has been said about the guardianship. This was due to the concept of joint families where a child without parents is taken care of by the head of the joint family. Thus no specific laws were required regarding the guardianship. In modern times the concept of guardianship has changed from the paternal power to the idea of protection and the Hindu Minority and Guardianship Act, 1956 codifies the laws regarding minority and guardianship with the welfare of the child at the core.

Under the Hindu Minority and Guardianship Act, 1956 a person who is a minor i.e. below the age of Eighteen years is incapable of taking care of himself or of handling his affairs and thus requires help, support and protection. Then, under such a situation a guardian has been appointed for the care of his body and his property.

HISTORICAL BACKGROUND OF GUARDIANSHIP

The traditional mindset of the Guardianship revolves around the patriarchal society, the father was considered the sole guardian of the person and property of the child. The authority of the father in every aspect of the child's life, including his/her conduct, education, religion and maintenance, was considered absolute and even the courts refused to interfere with the same. Mothers did not have any authority over children, since mothers did not have independent legal status; their identities being forged with that of their husbands upon marriage. As divorce became possible and mothers began to have independent legal existence and residence, their claim, if not right, to have custody of the children began to be recognized by the courts.

In Hindu law the broad principle is recognized from the Regime of the kingship where it was said that king is the supreme guardian [parens patrie] of all the minors present in the state¹. No other sage except Narada who has mentioned parents i.e. mother and father as the guardians. It seems to be that law of guardianship haven't developed due to the reason that in the earlier time the joint family concept is very much in notion and minors of the family are in the guardianship of the Karta of the family then after went to schools/asharams for studies they have their Gurus are the guardians of that time-period till then they get the education.

LEGAL FRAMEWORK OF THE GUARDIANSHIP IN INDIA

Guardianship and wards Act, 1890- The guardianship and wards act, 1890 was a secular act which is answerable to the major issues of the guardianship and custody and it provide provisions irrespective of the religion, it is applicable to all the citizens of India. The Act is a complete Code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issues under every religion⁹ Even if the substantive law applied to a certain case is the personal law of the parties, the procedural law applicable is what is laid down in the Guardians and Wards Act, 1890.

Sec-9. Court having jurisdiction to entertain application.

- (1) if the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

If the application is with respect of the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in the place where he has property.

If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

GW Act, 1890 authorizes the court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the '**welfare of the minor**'. It provided as; -

Power of the Court to make orders as to guardianship¹² - Where the Court is satisfied that it is for the welfare of a minor that an order should be made- Appointing a guardian of his person or property or both, or declaring a person to be such a guardian the Court may make an order accordingly.

An order under this section shall imply the removal of any guardian who has not been

appointed by will or other instrument or appointed or declared by the Court.

Where a guardian has been appointed by will or other instrument or appointed or declare by the Court, an order under this section appointing or declaring another person to be guardian in his stand shall not be made until the powers of the guardian appointed or declare as aforesaid have ceased under the provision of this Act.

GUARDIANSHIP UNDER HINDU LAW

The Dharmashastras did not deal with the law of guardianship. During the British regime the law of guardianship was developed by the courts. It came to be established that the father is the natural guardian of the children and after his death, mother is the natural guardian of the children and none else can be the natural guardian of minor children. Testamentary guardians were also introduced in Hindu law: It was also accepted that the supreme guardianship of the minor children vested in the State as parens patrie and was exercised by the courts. The Hindu law of guardianship of minor children has been codified and reformed by the Hindu Minority and Guardianship Act, 1956.

Guardianship of the person: Minor

Children Under the Hindu Minority and Guardianship Act, 1956, S. 4(a), minor means a person who has not completed the age of eighteen years. A minor is considered to be a person who is physically and intellectually imperfect and immature and hence needs someone's protection. In the modern law of most countries the childhood is accorded protection in multifarious ways. Guardian is "a person having the care of the person of the minor or of his property or both person and property." It may be emphasized that in the modern law guardians exist essentially for the protection and care of the child and to look after its welfare. This is expressed by saying that welfare of the child is paramount consideration. Welfare includes both physical and moral well-being.

POWER OVER MINOR'S PROPERTY

In general, a guardian may do all acts that are in the interest of the minor. A third party may deal safely with the guardian in this respect. However, this excludes fraudulent, speculative, and unnecessary deals. Before this act, a natural and testamentary guardian had the power to alienate the minor's property if it is necessary as determined by SC in Hanuman Prasad v. BabooeeMukharjee 1856. However, this rule has been restricted through sec 8, which mandates courts permission before alienating the minor's interest in the minor's property. Also, a guardian does not have any right over the joint family interest of a minor.

LIABILITIES OF A GUARDIAN

since the legal position of a guardian is fiduciary, he is personally liable for breach of trust

- He is not entitled to any compensation unless explicitly specified in a will.
- A guardian cannot take possession of minor's properties adversely.
- Must manage the affairs prudently.
- Liable to render all accounts.

If the minor, after attaining majority, discharges the guardian or reaches a settlement of account, the guardian's liability comes to an end.

RIGHTS OF A GUARDIAN:

A guardian has a right to:-

- * Represent the minor in litigations.
- *Get compensation for legal expenses from minor's property.
- *Sue the minor after he attains majority to recover expenses.
- *Refer matters to arbitration if it is in the best interest of the minor.

REMOVAL OF A GUARDIAN

Court has the power to remove any guardian in accordance to section 13.

- *Ceases to be a Hindu.
- *Becomes hermit or ascetic.
- *Court can remove if it finds that it is not in the best interest of the child.

Welfare of the minor is of paramount importance (Sec 13)

- While appointing or declaring a guardian for a minor, the court shall take into account the welfare of the minor.
- No person shall have the right to guardianship by virtue of the provisions of this act or any law relating to the guardianship in marriage if the court believes that it is not in the interest of the minor.

Statutory provisions:

Section 1(2) provides that this Act's jurisdiction extends to all Hindus domiciled in and out of the motherland.

Section 2 of the Act clarified that it has not enacted to derogate the Guardians and Wards Act of 1890, whereas it is an extension of the same.

As per **Section 3**, this Act applicable to the wholesome Hindu community no matter whether the minor is a legitimate or illegitimate child of a Hindu parent. Withal, any person who converts or reconverts to the Hindu religion is also within the ambit of the Act's definition.

Section 6 elucidates the concept of the natural guardians (inclusive of both body and property) and excludes step-mother and step-father from its definition. It recognizes the biological father as a natural guardian for the legitimate child and after him, the biological mother; whereas, it admits the biological mother as a natural guardian for the illegitimate child, and after her, it passes to the biological father. If the child of both categories is under the age of 5, then the mother would be the natural guardian.

If the minor girl is married, her husband is authorized to be a natural guardian under this Act.

Guardians may be of the following types :

1. Natural guardians,
2. Testamentary guardians, and
3. Guardians appointed or declared by the court.

There are two other types of guardians, existing under Hindu law,

1. de facto guardians, and
2. guardians by affinity.

NATURAL GUARDIANS

In Hindu law only three persons are recognized as natural guardians father, mother and husband, Father. "Father is the natural guardian of his minor legitimate children, sons and daughters." Section 19 of the Guardians and Wards Act, 1890, lays down that a father cannot be deprived of the natural guardianship of his minor children unless he has been found unfit. The effect of this provision has been considerably whittled down by judicial decisions and by Section 13 of the Hindu Minority and Guardianship Act which lays down that welfare of the minor is of paramount consideration and father's right of guardianship is subordinate to

the welfare of the child.

The Act does not recognize the principle of joint guardians. The position of adopted children is at par with natural-born children. The mother is the natural guardian of the minor illegitimate children even if the father is alive. However, she is the natural guardian of her minor legitimate children only if the father is dead or otherwise is incapable of acting as guardian

Section 6 of Act provides that the natural guardian consists of the three types of person:-

1. Father: A father is the natural guardian in a case of a boy or unmarried girl, firstly the father and later mother is the guardian of a minor. Provided that upto age of five year mother is generally the natural guardian of a child. In *Essakkayaladder v. Sreedharan Babu*, the mother of the minor was dead, but the father was not residing with his children, he is still alive, has not ceased to be a Hindu or renounced the world and has not been declared unfit. This does not authorize any other person to assume the role of natural guardian and alienate the minor's property.

2. Mother: The mother is the guardian of the minor illegitimate boy and an illegitimate unmarried girl, even if the father is alive and after her, the father. If the mother ceases to be a Hindu, her right of natural guardianship remains the same. The position also remains the same in case of an adopted child and not a natural born child. In a case *Jajabhai v. Pathankhan*, where a mother and father had fallen out and were living separately and the minor daughter was under the care and protection of her mother, the mother could be considered as the natural guardian of minor girl. In *Gita Hariharan v. Reserve Bank of India*, the Supreme Court has held that under certain circumstances, even when the father is alive mother can act as a natural guardian. The term 'after' used in Section 6(a) has been interpreted as 'in absence of' instead 'after the life-time'.

3. Husband: Husband is the guardian of his minor wife.

In *Gita Hariharan v. Reserve Bank of India* and *Vandana Shiva v. Jayanta Bandhopadhaya*, the Supreme Court has held that under certain circumstances, even when the father is alive mother can act as a natural guardian. The term 'after' used in Section 6(a) has been interpreted as 'in absence of' instead 'after the life-time'. -

Rights of guardian of person. -The natural guardian has the following rights in respect of minor children:

- (a) Right to custody, .
- (b) Right to determine the religion of children,

- (c) Right to education,
- (d) Right to control movement, and
- (e) Right to reasonable chastisement

These rights are conferred on the guardians in the interest of the minor children and therefore of each- of these rights is subject to the welfare of the minor children. The natural guardians have also the obligation to maintain their minor children.

TESTAMENTARY GUARDIANS

When, during the British period, testamentary powers were conferred on Hindus, the testamentary guardians also came into existence. It was father's prerogative to appoint testamentary guardians. By appointing a testamentary guardian the father could exclude the mother from her natural guardianship of the children after his death. Under the Hindu Minority and Guardianship Act, 1956, testamentary power of appointing a guardian has now been conferred on both parents.' The father may appoint a testamentary guardian but if mother survives him, his testamentary appointment will be ineffective and the mother will be the natural guardian. If mother appoints testamentary guardian, her appointee will become the testamentary guardian and father's appointment will continue to be ineffective. If mother does not appoint, father's appointee will become the guardian. It seems that a Hindu father cannot appoint a guardian. of his minor illegitimate children even when he is entitled to act as their natural. guardian, as S. 9(1) confers testamentary power on him in respect of legitimate children. In respect of illegitimate children, Section 9(4) confers such power on the mother alone.

Under Section 9, Hindu Minority and Guardianship Act, testamentary guardian can be appointed only by a will. The guardian of a minor girl will cease to be the guardian of her person on her marriage, and the guardianship cannot revive even if she becomes a widow while a minor. It is necessary for the testamentary guardian to accept 'the guardianship.

Powers

According to **Section 9 (5)**, a **Testamentary guardian has** indistinguishable power just as Natural Guardian and can exercise all the powers that were vested in the Natural Guardian subject to restrictions of Act and the Will. The powers are the same except that power of TG to deal with property is also subject to restrictions imposed by the Will. Since the powers of the TG are similar to that of NG, it is relevant to know Section 8 of the Act. He has the power to alienate the minor's property only for the minor's benefit. But, he has to seek the permission of the Court before doing so.

GUARDIANS APPOINTED BY THE COURT

The courts are empowered to appoint guardians under the Guardians and Wards Act, 1890. The High Courts also have inherent jurisdiction to appoint guardians but this power is exercised sparingly. The Hindu Minority and Guardianship Act is supplementary to and not in derogation to Guardians and Wards Act.

Under the Guardians and Wards Act, 1890, the jurisdiction is conferred on the District Court: The District Court may appoint or declare any person as the guardian whenever it considers it necessary in the welfare of the child.' In appointing „a" guardian, the court takes into consideration various factors, including the age, sex, wishes of the parents and the personal law of the child. The welfare of the children is of paramount consideration.

The District Court has the power to appoint or declare a guardian in respect of the person as well as separate property of the minor. The chartered High Courts have inherent jurisdiction to appoint guardians of the- person as well as the property of minor children. This power extends to the undivided interest of a coparcener.

The guardian appointed by the court is known as certificated guardian. Powers of Certificated guardians. Powers of certificated guardians are controlled by the Guardians and Wards Act, 1890. There are a very few acts which he can perform without the prior permission of the court.

There are two other types of guardians, existing under Hindu law,

1. de facto guardians, and
2. guardians by affinity.

DE FACTO GUARDIAN

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. Hindu jurisprudence has all along recognized the principle that if liability is incurred by one on behalf of another in a case where it is justified, then the person, on whose behalf the liability is incurred or, at least, his property, is liable, notwithstanding the fact that no

authorization was made for incurring the liability.'

De facto guardianship is a concept where past acts result in present status. The term literally means 'from that which has been done.'

the de facto guardian was recognised in hindu law as early as 1856. The privy council in Hanuman Pradipati said that 'under hindu law, the right of a bona fide incumbrancer, who has taken a de facto guardian a charge of land, created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not affected by the want of union of the de facto with the de jure title

The term 'de facto guardian' as such is not mentioned in any of the texts, but his existence has never been denied in hindu law. In *Sriramulu, Kanta*[3]. Said that hindu law tried to find a solution out of two difficult situations : one, when a hindu child has no legal guardian, there would be no one who would handle and manage his estate in law and thus without a guardian the child would not receive any income for his property and secondly, a person having no title could not be permitted to intermeddle with the child's estate so as to cause loss to him. The hindu law found a solution to this problem by according legal status to de facto guardians.

Powers

Section 11 of the Hindu Minority and Guardianship Act, 1956 prohibits a *de facto* guardian to deal with the minor's property. According to Section 11 of the Act, "no person shall be entitled to dispose of, or deal with, the property of Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor." Now it has been well settled that *de facto* guardian is not equipped with the right to assume debt, or to gift a minor's property, or to make any reference to arbitration.

GUARDIANSHIP BY AFFINITY

In pre-1956 Hindu law there existed a guardian called guardian by affinity. The guardian by affinity is the guardian of a minor widow. Mayne said that "the husband's relation, if there exists any, within the degree of sapinda, are the guardians of a minor widow in preference to her father and his relations." The judicial pronouncements have also been to the same effect. The guardianship by affinity was taken to its logical end by the High Court in *Paras Ram v. State*. In this case the father-in-law of a minor widow forcibly took away the widow from her mother's house and married her for money to an unsuitable person against her wishes. The question before the court was whether the father-in-law was guilty of removing the girl

forcibly. The Allahabad High Court held that he was not, since he was the lawful guardian of the widow.

POWERS OF THE GUARDIANS

Section 8(1) of the Hindu Minority and Guardianship Act, 1956 vests in the natural guardian the power to take all the actions that are necessary or reasonable and proper for the benefit of the minor or take any action to realise, benefit or protect minor's estate. A minor's estate means a minor's definite property and not his fluctuating indefinite interest in the joint Hindu family estate. Section 8 is in *parimateria* with sec 29 of the Guardianship and Wards Act, 1890.

POWERS OF NATURAL GUARDIAN.- Section 8

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,-

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor or

(b) 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.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular-

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof.

(b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and

(c) an appeal lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section, "Court" means the city civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

LIABILITIES OF THE GUARDIANS

1. The Guardian in carrying out the above mentioned powers can in no case bind the minor by a personal covenant. This means that though the guardian may impose a financial liability on the minor's estate yet cannot make him personally liable for the losses or the liabilities that arise later due to such contract.
2. Sub section 2 of Section 8 read with section 5 of the Hindu Minority and Guardianship act, 1956 supersedes the power vested in a natural minor to dispose of the immovable property of a Hindu minor. It is laid down explicitly that a natural guardian without the previous permission of the court-
 - Can not Mortgage, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor, or
 - Can not Lease any part of such property for a term more than that of five years or for a term more than that of one year after the date from the minor's majority.

It has been expressly mentioned in the Section that no court shall grant permission in aforementioned conditions unless it is proven that there is a case of necessity or an evident advantage of the minor. Section 31 of the Guardians and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the court. Only a civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890

within whose jurisdiction the property is situated or a part of the property is situated shall have the power to adjudicate upon the application. Where the property is being acquired by the guardian for the benefit of the minor, no permission of the court is necessary[4].

3. As per Sec 8(3) of the Hindu Minority and Guardianship Act, 1956, any disposal of the immovable property by a natural guardian contravening the conditions is voidable at the instance of the minor or any other person claiming under him. Where the property is sold by the guardian for the benefit of the minor even then can a minor challenge the transaction only after attaining the age of majority if it was done without the prior permission of the court[5].
4. The limitations are not only enforced on the natural guardians but also on the de facto guardians as per section 11 of the Hindu Minority and Guardianship Act, 1956. Strictly put, though a de facto guardian is nowhere defined in the law yet it is a person who hasn't been appointed by the court or through a testament or naturally but is a person who takes care of the guardian out of love and affection.
5. Section 12 of the Hindu Minority and Guardianship Act, 1956 has prohibited an appointment of a guardian for the minor who has undivided interest in the Hindu property which is being taken care of by an adult member of the family. Only the high court if it deems fit based on the facts of the case has the power to appoint a guardian for the same.
6. Sec 13 of the Act acts as a general principle of over every other provision mentioned in the act and states that all the decisions and all the appointments that are to be taken are to be done with the sole intention that is securing the welfare of the child.

RIGHTS OF A GUARDIAN

- Under Section 33 of the Hindu Minority and Guardianship Act the guardian of the ward in charge shall be entitled to such allowances for the care and pains in the execution of his duties.
- Under Section 13 of the Hindu Minority and Guardianship Act, a guardian must look after the health and education of the ward.
- Under Section 33A, the execution of the will by the guardian to his ward shall not take place without the guardian.
- Under Section 13, the property of the ward is to be handled carefully as a man of ordinary prudence would deal with.