

# GUARDIANSHIP UNDER HINDU LAW

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## ABSTRACT :

The Hindu law vests the guardianship of the minor in the sovereign a *parens patriae*<sup>2</sup>, and was exercised by the courts. 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. The concept of guardianship has changed from paternal power to the idea of protection in modern times and the Hindu Minority and Guardianship Act, 1956 codifies the laws regarding minority and guardianship with the welfare of the child at the core.

**KEYWORDS:** Guardianship, Minor child, Hindu law, Father and Mother.

## INTRODUCTION

There were no specific laws required regarding the guardianship, during the Hindu Dharamshastras, 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. The Hindu law of guardianship of minor children has been codified and reformed by the Hindu Minority and Guardianship Act, 1956. The subject may be discussed under the following heads :

- (i) Guardianship of person of minors,
- (ii) Guardianship of the property of minors, and
- (iii) De facto guardians, and
- (iv) Guardians by affinity.

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<sup>2</sup>Manu, VIII 27; IX, 146,190,191; Gaut X, 48; Vishnu III,65; Vas XVI 7 ;F MacN 25; 1 Stra HL 1;2 Stra. HL 72-75. See also Budh Karan Chaukhani v. Thakur Prasad Shah ILR (1942) 1 Cal 19, 39-40, where some of the original texts are cited.

## GUARDIAN: MEANING

If a person donates property to a minor and appoints a guardian to look after the property he would not be a guardian within the meaning of the Act<sup>3</sup>.

According to Section 4 of Hindu Minority and Guardianship Act, 1956<sup>4</sup> "Guardian" means a person having the care of a person of a minor or of his property or of both the person and his property. This includes:

- i. natural guardian
- ii. a guardian appointed by the will of a natural guardian (testamentary guardian)
- iii. a guardian appointed or declared by court, and
- iv. a person empowered to act as such by the order of Court of Wards.

The above mentioned types of guardians are not exhaustive. A person who is taking care of a minor without authority of law, can also be a guardian under the above definition and is called a de facto guardian. De facto guardians include self-appointed guardians and guardians by affinity, such as guardians for a minor widow. However, a person does not have right to sell or deal with minor's property if he is merely a de-facto guardian as per section 11. 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.

## 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.

<sup>3</sup>Rajalakshmi v. Ramachandran, AIR 1967 Mad 113: (1966) 1 MLJ 420.

<sup>4</sup>Hindu Minority and Guardianship Act, 1956, bare Act.

## Natural Guardians

Section 4 (c) of the Hindu Minority and Guardianship Act, 1956 the expression natural guardian refers to the father and after him the mother of the Minor. The natural guardian of wife is her husband. 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<sup>5</sup>. In *Essakkayal nadder 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<sup>6</sup>.
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<sup>7</sup>. 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*<sup>8</sup>, 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*<sup>9</sup>, 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.

## Testamentary Guardians

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. Acceptance may be express or implied. A testamentary guardian may refuse to accept

<sup>5</sup>Section 6(a), The Hindu Minority and Guardianship Act, 1956(3 of 1956).

<sup>6</sup> AIR 1992 Ker 200.

<sup>7</sup>Section 6(b), The Hindu Minority and Guardianship Act, 1956

<sup>8</sup> AIR 1971 SC 315; (1970) 2 SCC 717.

<sup>9</sup> AIR 1999 SC 1149.

the appointment or may disclaim it, but once he accepts, he cannot refuse to act or resign except with the permission of the court. 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.

### **Guardians Appointed by the Court**

Where the court is satisfied that it is for the Welfare of minor that an order should be made appointing a Guardian of his person or property or both, the court may make an order under the Guardians and Wards Act, 1890 appointing a guardian. In appointing or declaring a person as the Guardian of a minor Welfare of the minor shall be the Paramount consideration<sup>10</sup>. The Hindu Minority and Guardianship Act is supplementary to and not in derogation to Guardians and Wards Act.

The guardian appointed by the court is known as certificated guardian. 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. In the ultimate analysis his powers are co-extensive with the powers of the sovereign and he may do all those things (though with the permission of the court) which the sovereign has power to do. A certificated guardian from the date of his appointment is under the supervision, guidance and control of the court.

### **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<sup>11</sup>." In *Paras Nath v. State*<sup>12</sup>, Allahabad HC 1960, held that the father-in-law is the rightful guardian of a minor widow. However, this view has not been adopted by Nagpur HC. Madras HC also did not hold this view and held that the welfare

<sup>10</sup>Mohini v. Virendra, AIR 1977 SC 1359: 1977(3) SCC 513

<sup>11</sup>Paras Diwan, Family Law 294(8th ed.)

<sup>12</sup>AIR 1960 All 479.

of the child is to be considered first before anything else. Under Section 13, Hindu Minority and Guardianship Act, in the appointment of 'any person as guardian, the welfare of the child is paramount consideration. The fact that under Hindu law father-in-law has preferential right to be appointed as guardian is only a matter of secondary consideration.

### **De Facto Guardian**

Section 11 of the Hindu Minority and Guardianship Act, 1956 deals with De Facto Guardian. Section 11 of the said act prohibits a de facto Guardian to deal with minors 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. In other words, a de facto guardian is a person who is not a legal guardian, who has no authority in law to act as such but nonetheless he himself has assumed, the management of the property of the child as though he were a guardian. 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 recognized in Hindu law as early as 1856. The Privy Council in Hanuman Prasad Singh and Ors v. Bhaguati Prasad Singh and Ors<sup>13</sup>, 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.

Section 11 says that a de facto guardian is not entitled to dispose or deal with the property of the minor merely on the ground of his being the de facto guardian. There is controversy regarding the status of a de facto guardian. It is now well settled that de facto guardian does not have the right to assume debt, or to gift a minor's property, or to make reference to arbitration.

### **CONCLUSION:**

In a matter where the future of the child is of concern, the importance must be of the best interest of the child. Priority must not be given to the various religious or personal laws but a secular law and uniform law is the need of the hour. Since adoption is legal affiliation of a child, it forms the subject matter of personal law.

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<sup>13</sup>(1897) ILR 19 All 357.