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Minority and Guardianship under Hindu Law in India

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ABSTRACT

This article is focuses on the guardianship of Hindu minor in India. Minor means a person who has not attain the age of 18 years as well person who is physically and intellectually imperfect and immature and need someone's protection. And guardianship means a whom who can give such protection and livelihood to the minor. We know the number of the offences relating to child increasing day by day by lack of guardianship of the children because of some children thrown by their parents and in orphans not to adopt children etc². A guardianship of the Hindu minor is vested in the sovereign of a parent's patria and was exercised by the court. The law of guardianship was developed in the British time. It comes t the existence that father is the natural guardian of the minor and after death of the father, mother is considered as natural guardian of the children and no one else can be considered as natural guardian of the minor. The concept of guardian has changed from time to time and for parliament was passed the Hindu minority and guardianship act, 1956. Hindu minority and guardianship act, 1956 as sec.2, 4, 6, 7, 11, 13 etc.

Keywords: Guardianship, Minor child, Hindu law, Father, Mother.

I. INTRODUCTION

In the ancient time, a child is not considered capable of taking care of himself/herself body or property because of minority child is even not able to understand what is right and what is wrong. So, he may requires the help of the some other person for taking care of himself/herself. Where a minor is a person who has not completed his eighteen years of age and guardianship is considered as a person who gives protection to the minor child for the welfare of child, the law makers had made specific laws which allow some relation and support to the lives of minor. In the modern laws the Hindu minority and guardianship act, 1956 have been enacted by parliament for the protection and custody of minor the father is considered as natural guardian of the minor and after his death the mother will be considered as the guardian of minor child

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² Guardianship of minor is considered as livelihood and custody in the society but from time to time it converted into burden by the guardians.

During the Hindu dharmashastras because of the concept of joint Hindu family where a child without parents is taken care by the head of joint family. That time no specific law were regarding the guardianship but from time to time it becomes burden for the people. So Hindu law of guardianship of minor has been codified and reformed Hindu minority act, 1956.

II. MEANING OF “MINOR” AND “GUARDIAN”

(A) Guardianship

Guardianship is generally means a person who gives protection to the minor child. For the welfare of child, the law makers had made specific laws which allow some relation and support to the lives of minor.

According to section 4 (a) of Hindu minority and guardianship act, 1956

“guardian” means a person having care of minor or his property or both, This includes:

- i. Natural guardian
- ii. A guardian appointed by will of natural guardian (testamentary guardian)
- iii. A guardian appointed or declared by court
- iv. Person empowered to act as such by order of court.

A person who is taking care of minor without any authority of law, can also be considered as guardian as de facto guardian. This guardian include self appointed guardian and guardian by affinity.

(B) Minor

Minor generally means a person below the age of 18 years. According to section 4 (b) of Hindu minority and guardianship act 1956 “Minor” means a person who has not completed the age of 18 years and a person who is physically and intellectually imperfect and immature and hence needs someone’s protection.

III. OBJECTIVES OF GUARDIANSHIP OF MINOR

The purpose of Hindu minority and guardianship act, 1956 as follows:

1. To protection of minor.
2. To give better livelihood of guardian.
3. To protect rights of minor.
4. To live letter right.
5. To provide custody to the minor.

IV. TYPES OF GUARDIANSHIP FOR MINOR

There are 3 kinds of guardianship which is mainly discussed as :-

1. Natural guardian
2. Testamentary guardian
3. A guardian appointed by court

(A) Natural Guardian

According to section.4(c) of the act, the natural guardian is considered as father and mother of minor and for a minor husband, her husband is considered as natural guardian. And

According to section.6 of the act , there are further three types of natural guardianship as:

1. Father - A father is considered as the natural guardian of the boy and unmarried daughter, the father is considered as the first and the mother is considered as next guardian of the minor. This act said that only the age of 5 years the mother is considered as natural guardian of the child.

2. Mother – The mother is considered as the first guardian of the illegitimate child, even father is alive or in existence.

3. Husband – Husband is considered as the natural guardian of his wife.

But under sec.6, no person will be considered as natural guardian of the minori:

1. He/she ceases to be a Hindu.
2. IF he/she has completely renounced the world that they are becoming an ascetic or hermit.

Under section.6 the term “Father” and “Mother” do not include step-father and step-mother.

(B) Testamentary Guardianship

Testamentary guardianship generally means a guardianship by will. According to section.9 of Hindu minority and guardianship act, 1956. Testamentary guardianship is considered as such type of guardian which is authority by will only. It is compulsory for the guardianship as testamentary that testamentary guardian receive the guardianship adoption by express or implied will. A testamentary guardian has the right to decline the appointment but he received the adoption as guardianship he/she cannot denied to perform as a guardian without the permission of the court.

According to the act the testamentary power to choosing guardianship is with both father and mother. In case if father choose the testamentary guardian but mother reject him, then the choose guardian by the father is efficient and mother will be considered as natural guardian. But in case where testamentary guardian is choose by mother, her chooses guardian we be considered as testamentary and father choose guardian shall become void. Bur if mother does not want to choose any guardian then the guardian chooses by father become the guardian.

(C) Guardian Appointed By Court

In the times of Smritis, the jurisdiction of the child was with the king. King had power to choose guardian if the child as according to closest relation with the child and that priority is only given to the paternal side and ignore maternal side. Only for the security of child this tyoe of laws has been enacted.

Now the court having power to appoint guardian of the minor child under guardianship and ward act, 1890. The guardian who is appointed by court also known as certified guardianship. According to secton.13 of Hindu minority and guardianship act 1956 when the court is appointed guardian of the minor. The advantage if minor would be paramount and primary considerable. Therefore in ancient times king have responsibility to appoint guardian of th =e minor and in modern times court having same responsibility to appoint the guardian of the minor. If the court is satisfied that it is for the welfare of the minor child court may appoit guardian of such minor under guardianship and ward act, 1980. The welfare of the minor shall be the paramount consideration.

V. SOME OTHER TYPES OF GUARDIAN

(A) Guardianship by Affinity

The guardianship of affinity is considered as the guardianship of minor widow. Generally the husband is the guardian of widow but in cases where husband dead, the parents of the widow minor is considered her guardians. It is held by Allahabad High court in case of *Paras Nath v. State* - that father in law is the rightful guardian of the minor widow but Madras High court not accepted such view and held that paramount consideration and benefit and welfare of the child be considered first before anything else under sec.13 and father in law is appointed as guardian is only a second consideration.

(B) De Facto-Guardianship

This guardianship is related to the minor's property .in early times king is considered as the guardian of the minor's property until he attains the age of majority and after attaining majority property is handed over to him. But today natural guardians would be considered as guardian of minor's property as they will take care of the minor. This statement is also used in testamentary and certified guardianship. According to section.11 of the act of 1956 , De Facto-guardian is not allowed dispose and deal with the property of minor and the guardian doses not have right to take away any debt. In other words de facto-guardian is not a legal guardian of the minor's property and he no authority in law to act as such but only himself has assumed as guardian minor's property as he takes care of such property.

VI. LEGISLATIVE PROVISIONS FOR THE GUARDIANSHIP OF MINOR

(A) Hindu Minority and Guardianship Act, 1956

Some important provisions of the act can be discussed as:

Section 4. Definition

- a). "MINOR" means a person who has not completed his 18 years of age.
- b). "GUARDIAN" means a person having care of the person of the of a minor or of his property or of both person or property and also include-
 - (i) a natural guardian
 - (ii) a guardian appointed by the will of natural guardian,
 - (iii) a guardian appointed by court
 - (iv) a person empowered as to act as such by or under enactment relating to any court of wards.

Section 6. Natural guardian of Hindu Minor

The natural guardians of a Hindu minor child in respect of the minor's person as well as in minor's property excluding his / her undivided interest in joint family property are :-

- (a) in the case of a boy or an unmarried girl the father and after father the mother having custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother.
- (b) in the case of an illegitimate boy or an illegitimate unmarried girl the mother, and after her the father is considered as guardian.
- (c) in the case of a married girl her husband is considered as natural guardian.

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section if

- (a) if he has ceased to be a Hindu or
- (b) if he has completely and finally renounced the world by becoming a hermit or an ascetic.

Explanation-In this section, the expressions "father" and "mother" do not include a step-father and Step-mother.

Section 9. Testamentary guardian and their power

- (1) A Hindu father entitled to act as the natural guardian of his minor legitimate children, by his will appoint a guardian for any of them in respect of the minor's person or property (other than the undivided interest referred to in section 12 or in respect of both)
- (2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing by will any person as guardian.
- (3) A Hindu widow having right to act as the natural guardian of her minor legitimate child by reason of the fact that the father has become disentitled to act as such and may by will

appoint as a guardian for any of them in respect of the minor's person or in respect of the minor's property other than the undivided interest or respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will appointed as a guardian for any of them in respect of the minor's person or minor's property or in respect of both

(5) The guardian so appointed by will of parents 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 to such extent and subject to such restrictions if any, as are specified in this Act and in the will.

(6) The right of the guardian may appointed by will where a child is a girl, cease on her marriage.

Section 12. Guardian not to be appointed from minor's undivided interest in joint property

In case where minor has undivided share in the property in the joint Hindu family and such property is under the management of the adult member of the family, no guardian shall be appointed for such property of the minor in respect of such minor's interest. But it does not mean that court not having jurisdiction to appoint guardian in interest of minor.

Section 13. Welfare of minor to be paramount consideration

(1) In this where guardian is appointed by the court, the welfare of the is the Paramount consideration.

(2) No person shall be entitled to be appointed as a guardian by the provision of this act or by any other law relating to the guardianship of Hindu minor, if court is of opinion that his or her guardian will not be for welfare of minor.

(B) Guardianship and Ward Act, 1890

The Hindu minority and guardianship act was passed by the parliament for the protection of growing as well a minor child. This act talks about security and safety of children instead of go through substitution of the law relating to the minor. This act covers all Hindus, supporters of Lingayat, Virashiva, Brahma, Prarthana, Samaj, Arya Samaj, Buddhists, Sikhs, Jains. This act was came into force on 1st July, 1890. According to the act of 1890

“MINOR” means a person who under the provisions of Hindu majority act, 1875 is to be deemed not to attain his majority.

“GUARDIAN” means a person having the care of the person of a minor or his property or both his person and property.

“WARD” means a minor for whose person or property or both there is a guardian.

(C) Juvenile Justice Act, 2000

Children are the assets of Nation and considered as gifts of God. In such act juvenile is a person who has not completed his 18 years of age, this act protection to the child and proper care like guardianship, healthy environment. Its aim is to protect the laws relating to child and gives care, protect and treatment to the needy children which also include adoption of child which means guardianship provide to the child.

(D) Code of Criminal Procedure

Section 125 of Cr.p.c provides the protection to the minor and includes the definition of minor as minor is a person who, under Hindu majority act, 1875 is deemed not to have attained his majority. And the parents of minor child is considered as the natural guardians of child. And in case of married minor girl his husband is deemed to be a guardian of such child.

VII. JUDICIAL APPROACH/INTERPRETATION**1. Essakkayal nadder v. Sreedharan babu**

In this case the mother of minor was died but child alive and the father was not living with the minor child who is alive. The child was not declared to be Hindu as well as not fit. These facts do not authorize that any other person adopts the child and becomes the natural guardian and transfer the property of child to anyone. Court held this guardianship was illegal and such persons do not have right on minors property.

2. Jayabhai v. Pathakhan

In this case the mother and father got separated and can not live together and the minor daughter stayed under the guardianship of mother. Hence considered and held mother as the natural guardian of such minor daughter.

3. Smt. Beti Bai v. Jagdish Singh and others

In this case Aparbal Singh was the father of the plaintiff who is died. He has two wives because during his lifetime his first wife was died and then he do second marriage and in this case such second wife is respondent in this case and the child born from second wife is also died. And after that after the death of plaintiff Aparbal Singh, his second wife who is respondent captured all the property then son of first wife filled a complaint. It was held by the court that according to section 4, 6, 8, 11 of the Hindu minority and guardianship act, 1956 son of first wife has right over the property of his father and enjoy such property. Court further held that respondent only having right over one third of the share of property.

4. Paras Nath v. State

In this case father in law of the widow took her from her mother and re-marriage her without her consent with the improper man. The court held father-in-law liable and guilty for the

displacing of girl without her consent. Later Allahabad high court said that that father in law is the rightful guardian of the minor widow and had not guilty of any offence but Madras High court not accepted such view and held that paramount consideration and benefit and welfare of the child be considered first before anything else under sec.13 and father in law is appointed as guardian is only a second consideration.

VIII. CONCLUSION

Hence, the guardianship of the child takes place by many aspects and means which creates relationship of child and guardian, it creates the subject matter of personal law and for a minor, it is compulsory to protect him/her and also his/her property. Special thanks to the lawmakers who enacted such types of law who property the minors interest and well as provide guardian to a minor. Therefore the guardian is very necessary for a minor to protect himself physically or mentally and secure from by danger. In the matter of future of the child the welfare and the interest of the child is very important. Priority must given to the vasrius religious and personal laws but a secular and uniform law is the need of hour.
