Review Document

THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956

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ENACTMENT OF THE ACT

The Hindu Minority and Guardianship came into force on 25th August, 1956. This Act extends to the whole of India and applies to all Hindus domiciled in the territories to which this Act extends as well as outside the territories to which this Act extends. The enactment of this Act was meant to enhance the Guardians and Wards Act, 1890 but not serve as its replacement.

OBJECTIVE BEHIND THE ENACTMENT OF THE ACT

The object of the Act is to amend and codify certain parts of the law relating to minority and guardianship among the Hindus. This Act specifically defines the guardianship relation between adults and minors.

APPLICATION OF THE ACT

Section 3 of the Act states that this Act applies to any person who is a Hindu by religion. It also includes a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj. This Act also applies to any person who is a Buddhist, Jain or Sikh by religion.

NON – APPLICABILITY OF THE ACT

This Act does not apply to the following persons:

1. Muslims, Christians, Parsis, or Jews unless the law otherwise permits them to be governed by the Hindu law or by any custom or usage as a part of that law.
2. Members of any Scheduled Tribes defined under Article 366(25) of the Constitution of India, unless the Central Government has directed by notifying in the Official Gazette.
3. Any Renoncants of the Union Territory of Pondicherry.

WHO ARE HINDUS, BUDDHISTS, JAINS, OR SIKH?

The persons who are Hindus, Buddhists, Jains, or Sikhs by religion, are as follows:

1. Any legitimate or illegitimate child, whose both parents are Hindus, Buddhists, Jains or Sikhs by religion.

2. Any legitimate or illegitimate child, whose at least one parent is a Hindu, Buddhists, Jains or Sikhs by religion.
3. Any person who has converted or re-converted themselves into the Hindu, Buddhist, Jain or Sikh religion.

IMPORTANT DEFINITIONS UNDER THE ACT

1. **Minor –** Section 4(a) of the Act defines "minor" as any person who has not completed the age of eighteen years (18 years).
2. **Guardian –** Section 4(b) of the Act defines "guardian" as any person who takes care of the minor or his property or both his person or property. Following are the types of guardian:
    - **Natural Guardian –** The father is the natural guardian of the minor and in absence of the father, the mother is the natural guardian of the minor. No other person can be called as the natural guardian of the minor.
    - **Testamentary Guardian –** It means any guardian who is appointed by the will of the minor's father or mother.
    - Any guardian who is appointed or declared by a court.
    - Any person who is empowered to act as a guardian under any enactment in relation to any Court of wards.

Apart from the above four categories of guardian specifically referred to, the old Hindu Law had the *de facto* and the *ad hoc* guardians as well. These have no place under the Act now.

WHO IS A NATURAL GUARDIAN OF A MINOR?

According to Section 6 of the Act, the natural guardians of a Hindu minor's person as well as his property, excluding the minor's undivided interest in joint family property are as follows:

- **In case of a boy or unmarried girl –** The father is the natural guardian of the boy or unmarried girl. In the absence of the father, the mother is the natural guardian of such child. If such minor has not completed the age of five years (5 years), the custody of the minor shall ordinarily vest upon the mother.

- **In the case of an illegitimate boy or an illegitimate unmarried girl –** The mother shall be the natural guardian of an illegitimate boy or an illegitimate unmarried girl. And after the mother, the father is the natural guardian of such child.
- **In case of a married girl –** The husband is the natural girl of a married girl.

CONSTITUTIONAL VALIDITY OF THE CONCEPT OF NATURAL GUARDIAN

A natural guardian is outlined as someone, by virtue of his natural relationship with the minor assumes the duty of taking care of the person and also the property of the minor. Section 6 of the Hindu Minority and Guardianship Act, 1956 is looked upon as a convoluted and an unconstitutional provision with regards to natural guardianship. Recently the Supreme Court has issued notice to the Centre seeking its response to a public interest litigation challenging Section 6 of the Act. The provision has been challenged as being violative of the principle of "Equality before Law" enshrined under Article 14 of the Constitution of India, as it discriminates women in the matters of natural guardianship.

Section 6 states that among Hindus, the father is the natural guardian of the minor and his property, and after him, is the mother. The statute on a plain reading with literal meaning of the word "after" depicts that the mother's right to act as a natural guardian remained suspended during the lifetime of the father and it is only in the event of the death of the father or when he was disqualified from guardianship be virtue of having converted and thereby ceased to be Hindu, or if he had finally and completely renounced the world, the mother shall obtain such a right to act as a natural guardian of the Hindu minor. This interpretation is completely gender biased thus against constitutional provisions. Both the parents being equal partner in parenthood, need to have equal say in the matters of their child's welfare. By giving the mother a preferential right to custody of the minor, the law acknowledges her as a caretaker of the child but not as a decision maker. Law entitles women to custody, but in matters of guardianship, father is the precedent. A mother's control over her child in axiomatic. Thus, the concept of guardianship needs to be made gender neutral.

LAW COMMISSION REPORT ON SECTION 6(a) OF THE ACT

According to the Report of the Law Commission, the present laws handling custody and guardianship of Hindu minor has been reviewed and therefore suggested legislative amendments to the Hindu Minority and Guardianship Act, 1956. These amendments are necessary so as to adjust with the new social considerations. The Report says that the modification in the provision is needed so as to fulfil the principle of equality enshrined under Article 14 of the Constitution of India. The Law Commission suggested that this superiority of father over the mother ought to be removed. Both father and mother should be considered as the natural guardian of the minor. The welfare of the minor shall be the paramount consideration in each circumstance. Therefore, the word "after" utilised in Section 6(a) of the Hindu Minority and Guardianship Act, 1956 has been interpreted in a broader sense.

In the case of Jijabai Vithalrao Gajre v. Pathankhan, where the father was alive, however had fallen out with the mother of the minor daughter and was living separately for several years, not taking any interest in the affairs of the minor, who was within the custody of the mother. The Supreme Court held that in peculiar circumstances where, though the father is alive, however doesn't take any interest in the affairs of the minor, the father should be treated as non-existent and the mother can be regarded as the natural guardian of the minor's person and property.

Reiterating the same stand, the Supreme Court in the case of Githa Hariharan v. Reserve Bank of India , ascertained that the mother can act as a natural guardian of a minor even when the father is alive. Section 6(a) that uses the word 'the father and, after him, the mother', on a casual reading, does give an impression that the mother can be considered to be the natural guardian of the minor only after the lifetime of the father. If the section is so understood the section has to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution of India. The Supreme Court further held that, the word 'after' need not necessarily mean 'after the lifetime'. In the context in which it appears in Section 6(a), it means 'in the absence of', the word 'absence' therein referring to the father's absence from the care of the minor's property or person for any reason, be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise. Such an interpretation will be the natural outcome of harmonious construction of Section 4 and Section 6 of the Hindu Minority and Guardianship Act,1956, without causing any violence to the language of Section 6(a).

WHO ISN'T A NATURAL GUARDIAN OF A MINOR?

The following persons aren't entitled to act as the natural guardian of a minor under the provisions of Section 6 of the Act:

a) If any person has converted his religion and has ceased to be a Hindu.
b) If any person has fully and eventually renounced the world by turning into a hermit (*vanaprastha)* or an ascetic (*yati or sanyasi).*
c) A step-father and a step-mother can not be considered as a natural guardian of a minor.

NATURAL GUARDIANSHIP OF ADOPTED SON

Section 7 states that the natural guardianship of an adopted minor son, passes on adoption, to the adoptive father and after him to the adoptive mother.

LAW COMMISSION REPORT ON SECTION 7 OF THE ACT

The Hindu Minority and Guardianship Act, 1956 came into force when the overall Hindu law as recognised by the courts didn't recognise the adoption of a daughter. Thus, at the time when the Act was passed, adoption of daughter was only allowed under custom but not under codified law. It had been also enacted before the Hindu Adoptions and Maintenance Act, 1956, which corrected the legal position of adoption of a daughter statutorily. This was because earlier it had been believed that adoption is supposed for couples who didn't have a son. Adoption of daughter was against the tradition notion of the society at the time when the law was enacted. Thus, the Report of the Law Commission recommended changes in Section 7 of the Act which deals with natural guardianship only of adopted son and not adopted daughter. The language of the Act is congruous and hence change is suggested in order that it deals with the natural guardianship of both adopted son and also as adopted daughter. Further the Commission recommended that the natural guardianship of the adopted child should be passed on adoption to both the adoptive parents, in reference to the recommendations made by Commission to Section 6(a) of the Act as mentioned above. The Hindu Minority and Guardianship Act, 1956, is silent on this issue now. Over the time because the society has developed, many legal measures are taken for the empowerment of girls

but this legal lacuna has not been fixed thanks to the deeply rooted preference of son over a daughter.

The Law Commission's Report stated that when the Parliament passed the Hindu Minority and Guardianship Act, 1956, adoption of daughter wasn't recognised under the Hindu Adoption and Maintenance Act, 1956. Though now the position of daughters has improved statutorily but the conflict between these two laws remained unsolved. So as to resolve the conflict, the Law Commission recommended amendment of Section 7 of the Hindu Minority and Guardianship Act, 1956.

POWERS OF A NATURAL GUARDIAN

The natural guardian is vested with several powers under Section 8 of the Hindu Minority and Guardianship Act, 1956:

1. The natural guardian of a Hindu minor, as per the provisions of Section 6(1) of the Act, has the power to do all necessary, reasonable or proper acts for the benefit of the minor. The power of realisation, protection or benefit of the minor's estate is vested on the natural guardian of the minor. But the guardian, under any circumstances, cannot bind the minor by a personal covenant entered into by him. The Madras High Court held in the case of ***Natesa Nattar v. Manicka Nattar***[1] that the creditor cannot in such cases enforce his claim against the minor personally but may enforce it against his property subject to the condition that this right of recourse of the creditor is not claimable where the creditor is not able to show that on a general taking of account between the minor's estate and the guardian, an amount would be due to the guardian from that estate.
2. The natural guardian, without the previous permission of the Court, shall not be entitled to:
    a) Mortgage, or charge, or transfer any a part of the immovable property of the minor by sale, gift, exchange or otherwise.

[1] (1938) 1 MLJ 181.

b) Lease any a part of such property of the minor for quite five years (5 years) or for quite one year (1 year) beyond the date on which the minor will attain the age of majority, i. e., eighteen years (18 years).

3. Disposal of any 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 an individual claiming under him.

   The Supreme Court in the case of ***Viswambhar and Ors. V. Laxminarayan***[2] , considered Section 8 of the Act and held as follows:

   "The question in such circumstances are whether the alienations void or voidable? In Section 8(2) of the Hindu Minority and Guardianship Act, 1956, it's laid down, that the natural guardian shall not, without previous permission of the court, transfer by sale any a portion of the immovable property of the minor. In Sub-section (3) of the said section, it's specified that any disposal of immovable property by a natural guardian, in contravention of Sub-section (2) is voidable at the instance of the minor or a person claiming under him. There's therefore, little scope for doubt that the alienations made by Laxmibai which are under challenge within the suit were voidable at the instance of the plaintiffs and therefore the plaintiffs were required to keep aside the alienations if they wanted to avoid the transfers and regain the properties from the purchasers".

4. No Court shall grant permission to the natural guardian to try any act which is mentioned in sub-section (2) unless there's any necessity for advantage to the minor.
5. This section provides for the appliance of permission being governed by the provisions of S. 29 and 31 of the Guardians and Wards Act, 1890, and especially:
   a) Proceedings in reference to the appliance shall be deemed to be the proceedings under Section 4-A of the Guardians and Wards Act, 1890.
   b) The Court shall observe the procedure and may exercise the powers laid out in sub-section (2), (3) and (4) of Section 31 of the Guardians and Wards Act, 1890.
   c) This section provides that an appeal lies against an order refusing permission to the natural guardian to try to do any act mentioned in sub-section (2) of this Act which

[2] (2001) 6 SCC 163.

such appeal lies to the court to which appeal normally lies from the opposite decisions of the court making the order. It might be noticed that no appeal is provided for against an order granting the appliance.

6. In this section, 'court' means the City Civil Court or a District Court or a Court empowered under Section 4-A of the Guardians and Wards Act, 1890 within the local limits of whose jurisdiction the immovable property of the minor or a part of any portion of the property is situated. The position that where the immovable property is situated within the jurisdiction of more than one court, the application for the permission to transfer the property can be made to any of those courts, does not apply to a guardian who has applied and failed to get the permission from one of the said courts to apply again for the permission to another such court on the same facts. If the circumstances have changed and furnish fresh jurisdiction for the transfer, there is nothing to prevent the guardian for applying for permission for the alienation to the same court or a different court having jurisdiction on the basis of new circumstances.

LANDMARK JUDGEMENTS WITH REGARD TO POWER OF NATURAL GUARDIAN

In ***Panni Lal v. Rajinder Singh***[3] , some property belonging to the respondents therein was sold once they were minors by their mother acting as a guardian under the registered sale deed. Upon attaining majority, the respondents sued the appellant for possession of land on the ground that the sale having been made without the permission of the court was void. The Supreme Court held:

The provisions of Section 8 are devised to completely protect the property of a minor, even from the depredations of his parents. Section 8 empowers only the natural guardian to alienate a minor's immovable property provided it's for the necessity or advantage of the minor or his estate and it further requires that such alienation shall be affected after the permission of the court has been obtained. It's difficult, therefore, to consider that the sale was voidable, not void, by reason of the facts that the mother of the minor respondents signed the sale deed and therefore the father attested it.

[3] (1993) 4 SCC 38.

In ***Ram Krishna Gupta v. Nootan Agarwal***[4] , permission to sell property of minors was sought by the guardian, who was really mother of the minors. The application was made under Section 8 and 13 of the Hindu Minority and Guardianship Act, 1956, and Section 28 and 31 of Guardians and Wards Act, 1890. Mother of the minors decided to sell vacant plots to enable her to buy readymade constructed flat in established residential colony. The Court in support of mother said that the decision to buy readymade, constructed apartment in place of two unguarded plots was a wise decision. It absolutely was found to be in the interest of minors. Close relatives were also residing within the vicinity of the flats to be purchased. Granting of permission to buy the flat wasn't improper.

Thus, the guardian may act when it's necessary or reasonable and proper for the advantage of the minor or his estate. The guardian can enter into contracts, compromise, acknowledge, debt, enter into a family arrangement and refer disputes to arbitration.

WHO IS A TESTAMENTARY GUARDIAN?

Testamentary guardian is a guardian who is appointed by way of will. Testamentary guardian is appointed to make sure that the minor will have a guardian even after the death of the natural guardian. A testamentary guardian may be required to supervise the minor's person as well as property in the absence of the natural guardian. A testamentary guardian cannot act as a guardian al long as the natural guardian of the minor is alive.

WHO MAY APPOINT A TESTAMENTARY GUARDIAN?

Following persons can appoint a testamentary guardian:

- A Hindu father, either natural guardian or adoptive father of the minor.
- A Hindu mother, either natural guardian or adoptive mother of the minor.
- A Hindu widowed mother, either natural guardian or adoptive mother of the minor.

POWER OF A TESTAMENTARY GUARDIAN

The power of a testamentary guardian is vested under Section 9 of the Hindu Minority and Guardianship Act, 1956:

[4] AIR 2007 NOC 649 (All): (2007) I All LJ 772.

1. Section 9(1) states that a Hindu father, who is the natural guardian of his minor legitimate children, has the power to appoint or entitle by will, any person to act as a guardian of the minor's person or property or both. A testamentary guardian cannot manage the minor's undivided interest in joint family property unless the High Court so appoints.
2. Section 9(2) states that the guardian appointed by the will of the father will cease to exist after his death, if the mother has appointed any other person as the guardian of the minor in her will.

   For example – Ram is the father (natural guardian) of the minor. Rekha is the mother (natural guardian) of the minor. Ram appoints Hari (testamentary guardian), by will, to act as the guardian of his minor child after his death. Ram dies but Rekha is still alive. Rekha is now the natural guardian of her minor child. Rekha appoints Prakash (testamentary guardian), by will, to act as a guardian of her minor's person and property. Rekha dies after few days. Prakash is now the testamentary guardian of Ram and Rekha's minor child.

   Ram's will shall have no effect because Rekha mentioned Prakash to act as the guardian of their minor child after her death in her will. If Rekha had not made any will after Ram's death, then Ram's will would have been taken into consideration and Hari would have to act as a guardian of the minor child.
3. Section 9(3) states that both a Hindu widowed mother and Hindu mother of her minor legitimate children has the authority to appoint by will, a person to act as a guardian of her minor's person or property. Provided the father is legally disentitled to act as a natural guardian of the legitimate minor child.
4. Section 9(4) states that a Hindu mother of her minor illegitimate children can appoint by will, any person to act as the guardian of her illegitimate minor's person or property or both.
5. Section 9(5) states that the testamentary guardian, so appointed by the will of the natural guardian of the minor, is entitled to exercise all the powers of

a natural guardian mentioned in Section 8 of this Act, after the death of the father or mother of the minor. The power of the testamentary guardian will be subject to any restrictions as mentioned in the Act or the will of the natural guardian of the minor.

6. Section 9(6) states that the right of the testamentary guardian of a minor girl will end after her marriage as the husband of the minor girl will be the natural guardian after her marriage as mentioned in Section 6(c) of this Act.

WHO CANNOT ACT AS A TESTAMENTARY GUARDIAN?

In ***Smt. Vinod Kumari v. Smt. Draupadi Devi***[5], Hindu female appeared before the Court to ask for the guardianship of two of her sons. One son was born out of her marriage with her deceased husband and another son was born out of her another marriage with her present husband. The Court held her to be the step-mother of her previous son who was born out of her marriage with her deceased husband. The Court further said that a step-mother can never be a testamentary guardian of a minor and the grandmother was appointed as the testamentary guardian in this case.

INCAPACITY OF MINOR TO BE A GUARDIAN OF PROPERTY

Section 10 of the Hindu Minority and Guardianship Act, 1956 says that a minor is incompetent to act as guardian of the property of any other minor.

DE FACTO GUARDIAN CANNOT MANAGE MINOR'S PROPERTY

A minor child when he has no legal guardian, some closer relation takes the responsibility of the person and property of the minor and on his application to the court as guardian, if the court appoints him, he becomes the court guardian.

However, such person, if he does not make application to the court, but still manages the person and property of the minor, he is referred to as de facto guardian. De facto guardian of a minor, is neither a lawful parent nor a testamentary guardian and nor a guardian appointed by the court, but he's an individual, who himself, has appropriated the management of the affairs of the minor, as if he were a natural guardian. Section 11 of the Hindu Minority and Guardianship Act, 1956, does

[5] Judgement decided on 07th July 2010.

not entitle any person to dispose of, or deal with the property of a Hindu minor merely on the ground of being the de facto guardian of the minor. He has no lawful authority of the minor's person or his property.

GUARDIAN NOT TO BE APPOINTED FOR MINOR'S UNDIVIDE INTEREST IN JOINT FAMILY PROPERY

It is pertinent to note here that under the Hindu Minority and Guardianship Act, 1956, no guardian for a minor's undivided interest in the joint family property is to be appointed. The provisions of the Act do not apply in respect of a minor's undivided coparcenary property. But the powers of the High Court to appoint a guardian in respect of such interest has not been restricted. Section 12 of the Act says that where a minor has an undivided interest in the joint family property and an adult member of the family manages such property, no guardian shall be appointed for the minor's undivided interest in the joint family property. But if the High Court finds it necessary to appoint any person as a guardian in respect of such interest, the provision of this section shall not affect the jurisdiction of the High Court.

WELFARE OF MINOR TO BE PARAMOUNT CONSIDERATION

- Section 13(1) of the Act states that the welfare of the minor shall be the paramount consideration in the appointment or declaration of any person as guardian of a Hindu minor by a Court.
- Section 13(2) of the Act states that no provisions of this Act or of any law in relation to guardianship in marriage among Hindus, shall entitle a person to act as a guardian. If the Court opines that such guardianship is not for the well being of the minor, the guardianship of such person shall cease to exist.

In determining the question as to who should be given the custody of a minor child, the Court held in ***Gaurav Nagpal v. Sumedha Nagpal***[6], that the paramount consideration is the welfare of the child and not rights of the parents under a statute in force. The court looks not only at the issue on legalistic basis, but also with human angles. The word "welfare" has to be construed liberally in the widest sense, and there is nothing which stands in the way of court exercising its *parens patriae*

[6] (2009) 1 SCC 42.

jurisdiction arising in such cases. The court also emphasised the need for saving marriage as the children are the ones who bear the burns of dissolution of marriage.

CONCLUSION

Thus, the Hindu Minority and Guardianship Act, 1956, was enacted to ensure that every minor, legitimate or illegitimate, married or unmarried has a guardian, be it natural, or testamentary or declared by Court. This Act was drafted to specify the guardianship relation between an adult and a minor. We live in a patriarchal society and that can be clearly seen by reading the laws of this Act. Several provisions in this Act has made the role of mother secondary. Mothers have an undeniable and consequential role in the child's upbringing. She can't be treated as a secondary guardian and the father should not always be treated as a primary guardian. Both the parents have equal role in the birth of a child so both of them must be given equal right of guardianship of their child. Though the judiciary has struck down this provision on several cases, yet this continues to exist. Now is the time we declare it unconstitutional and remove those provisions statutorily.

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About the Author

I am Randita Paul from Surendranath Law College, University of Calcutta. I had got a marvellous opportunity for one-month internship under LegalEagle Law Forum. This internship was very enriching for me. I had gathered a lot of experience. An internship like this was very challenging. Reviewing the Bare Acts is tough as well as knowledgeable. I had to go through the Bare Act thoroughly and review the same. This internship was a supplement to my academic education. It allowed me to work with experts in the organisation. An internship like this has bridged the gap between my academic knowledge and practical field. I have gained an outstanding experience that will help me in my future for the real world.