
GUARDIANSHIP

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1. Hindu Minority and Guardianship Act, 1956

1.1. Meaning of Guardianship

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 that is below the age of Eighteen years who 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.

In 1956 as a part of Hindu Code Bills, the Hindu Minority and Guardianship Act along with Hindu Marriage Act, Hindu Succession Act and Hindu Adoption and Maintenance Act were established under the leadership of Jawaharlal Nehru in order to modernize prevalent scenario of Hindu legal tradition. The Hindu Minority and Guardianship Act was established to empower the Guardians and Wards Act of 1890 and provide better right and protection to children instead of acting as a replacement of already prevalent act.

This act was passed with a motive of defining rights, obligations, relationships between adults and minors. Not only Hindus are covered under this act but also Lingayat, Virashiva, Brahmo followers, Parthana Samaj followers, Arya Samaj followers, Buddhist, Sikhs and Jains. In other words, Muslims, Christians, Parsis and Jewish are not covered under this act.

Minority of a particular person is defined according to the age of that person. Attainment age for being a major varies according to religion and time, for instance, in old Hindu law age of 15 or 16 years was the age of majority but now it has been increased to 18 years, for Muslims, age of puberty is considered as the age of majority.

Both legitimate and illegitimate minors who have at least one parent that meets the stipulations outlined above fall under the jurisdiction of this Act. Irrespective of personal laws followed by individual communities a common act majority is known as Indian Majority Act, 1875 applies to all communities.

Under this act attainment of age of majority is 18 years but if a person is under the care of guardian attainment of age of majority increases to 21 years. The Guardians and Wards Act, 1890 applies to everyone irrespective of their caste, creed or community unlike Hindu Minority and guardianship act which applies to Hindus and religion considered as Hindus only.

1.2. Jurisprudence Aspect and Evolution

Be it noted that the Hindu Minority and Guardianship Act of 1956 has been engrafted on the statute book by way of an amendment and codification of certain parts of the law relating to minority and guardianship among Hindus. It is not out of place to mention also that Hindu

law being one of the oldest known system of jurisprudence has shown no signs of decrepitude and it has its values and importance even today.

But the lawmakers, however, thought it prudent to codify certain parts of the law in order to give a fruitful meaning and statutory sanction to the prevailing concept of law having due regard to the social and economic changes in the society. It is on this perspective however certain aspects of the law as it stood prior to the codification ought to be noted.

Incidentally, the law relating to minority and guardianship amongst Hindus is to be found not only in the old Hindu law as laid down by the smritis, shrutis and the commentaries as recognised by the Courts of law but also statutes applicable amongst others to Hindus, to wit, Guardian and Wards Act of 1890 and Indian Majority Act of 1875.

Be it further noted that the Act of 1956 does not as a matter of fact in any way run counter to the earlier statutes in the subject but they are supplemental to each other as reflected in Section 2 of the Act of 1956 itself which provides that the Act shall be in addition to and not in derogation of the Acts as noticed above.

Before proceeding further, however, on the provisions of the Act in its true perspective, it is convenient to note that lately, the Indian Courts following the rule of equality as administered in England have refused to give effect to the inflexible application of the paternal right of minor children. In equity, a discretionary power has been exercised to control the father's or guardian's legal rights of custody, where the exercise of such right cannot but be termed to be capricious or whimsical in nature or would materially interfere with the happiness and the welfare of the child.

The statute therefore on a plain reading with literal meaning being ascribed to the words used, depicts that the mother's right to act as a natural guardian stands suspended during the lifetime of the father and it is only in the event of death of the father, the mother obtains such a right to act as a natural guardian of a Hindu minor. It is this interpretation which has been ascribed to be having a gender bias and thus opposed to the constitutional provision.

It has been contended that the classification is based on marital status depriving a mother's guardianship of a child during the lifetime of the father which also cannot but be stated to be a prohibited marker under Article 15 of the Constitution. The whole tenor of the Act of 1956 is to protect the welfare of the child and as such interpretation ought to be in consonance with the legislative intent in engrafting the statute on the Statute Book and not de hors the same and it is on this perspective that the word 'after' appearing in section 6A shall have to be interpreted.

It is now settled law that a narrow pedantic interpretation running counter to the constitutional mandate ought always to be avoided unless of course, the same makes a violent departure from the Legislative intent in the event of which a wider debate may be had having due reference to the contextual facts.

1.3. Kinds of Guardianship

According to Section 4 of HMG Act, 1956 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:

- Natural guardian;
- Guardian appointed by the will of a natural guardian (testamentary guardian);
- A guardian appointed or declared by court;
- A person empowered to act as such by the order of Court of Wards.

This list of 4 types of guardians is 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.

Natural Guardian

Under 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:

- i. Father
- ii. Mother
- iii. Husband

Thus the natural guardian can only be father, mother and husband and according to it:

“In 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. The guardian of illegitimate boy or illegitimate unmarried girl shall be firstly the mother and later the father. The guardian of married girl is her husband.”

The guardianship can be terminated in the following situations:

- i. When such guardian is no more Hindu.
- ii. When he has renounced the world.

In case of **E.M. Nadar v. Shri Haran, 1992**, it was held by the court that the father is guardian of minor even if living separately.

In case of **Vijaylakshmi v. Police Inspector, 1991**, it was held that when father converts to be non-Hindu then mother shall be natural guardian.

In case of **Chandra v. Prem Nath, 1969**, it was held that the guardian below the age of 5 years is mother.

But in several decision, it has been considered that if the father is unable and do not have sufficient fund then the natural guardian shall be mother as described by the court in the following cases:

- I. **R. Venkat Subaiya v. M. Kamamma, 1992**
- II. **Smt. Geeta Hariharan v. Reserve Bank of India, 1999**

The power of Natural Guardian:

The power of Natural Guardian can be kept under two heading:-

- i. Right regarding the body of Minor
- ii. Right regarding the property of Minor.

Keeping in the view of the importance of above lines the body of minor under Section 8 (i) that the natural guardian can perform all the function regarding care of the minor which are in his benefits.

The Power of Natural Guardian Property of Minor – Section 8 of HMGA 1956 describes the powers of a natural guardian as follows:

- A guardian can do any act, subject to provisions of this section, that are necessary or are reasonable and proper for the benefit of the minor or the benefit of the minor's estate. But the guardian, in no case, shall bind the minor by a personal covenant.
- The guardian cannot, without prior permission from the court,
 - Mortgage, charge, or transfer the immovable property of the minor by way of sale, gift, exchange, or otherwise.
 - Lease the immovable property for a term more than 5 years or where the lease ends one year after the minor attains majority.
- Any sale of immovable property in violation of the above two points, is voidable at the insistence of the minor.
- The court shall not give permission for sale of immovable property unless it is necessary or clearly in the benefit of the minor.

These powers also include the following:

- right in education
- right to determine religion
- right to custody
- right to control movement
- right to chastisement

In the case of **Manik Chandra v. Ram Chandra AIR 1981 SC** has held that the meaning of “necessity” and “advantage” of a minor are quite wide and the courts have the power to widen their scope as per the case facts before giving the permission. As per section 12, no guardian can be appointed for the undivided interest in the joint property of the minor. However, the court may appoint a guardian for the complete joint family if required. Minor cannot the guardian of another minor: As described in Section 10 of the Act that no

minor cannot be guardian of another minor. In the case of **Ibrahim v. Ibrahim, 1916**, it was held the minor can be the guardian of his wife but cannot be guardian of her property.

Testamentary Guardian (Sec 9)

A person who becomes a guardian due to the will of a natural guardian is called a testamentary guardian. Section 9 defines a testamentary guardian and his powers.

- For a legitimate boy or a girl, the father, who is a natural guardian, may appoint any person to act as the guardian of the child after the death of the father. However, if the mother is alive, she will automatically become the natural guardian and after her death, if she has not named any guardian, the person appointed by the father will become the guardian.
- A widow mother who is a natural guardian, or a mother who is a natural guardian because the father is not eligible to be a natural guardian, is entitled to appoint a person to act as a guardian after her death.
- For an illegitimate child, the power of appointing a testamentary guardian lies only with the mother.

Powers

A testamentary guardian assumes all powers of a natural guardian subject to limitations described in this act and to the limitations contained in the will. A testamentary guardian is not liable personally for the expenses and he can ask the guardian of the property of the minor to meet the expenses through the property. The rights of the guardian appointed by will cease upon the marriage of the girl.

Guardianship by Affinity

In **Paras Nath v. State, 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 of the child is to be considered first before anything else.

De Facto Guardian

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. Some HC consider that alienation by de facto guardian is void while alienation by de jure guardian is voidable (**Ashwini Kr v. Fulkumari, Cal HC 1983**), while some HC have held that both are voidable (**Sriramulu' case 1949**). 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.

1.4. Rights and Obligations of Guardian

Custody of a minor is also subordinate to section 13, which declares the welfare of the child to be of paramount interest. Regarding a child, who is at the age of discretion, his wishes are also to be considered, though his wishes may be disregarded in his best interest.

That a mother is preferred to father for custody is not right. Better economic condition of the father than maternal grandfather is considered to be in favour of the father. In **Kumar v. Chethana AIR 2004**, SC has held that mother's remarriage is not a sufficient cause in itself to lose custody of a minor. It was further held that convenience of the parents is irrelevant.

To ensure the welfare of the child, the custody may even be given to the third person as was given to the mother and grandfather by SC in case of **Poonam v. Krishanlal AIR 1989**.

In the case of **Re Madhab Chandra Saha 1997**, a father was never active in the interest a minor and after a long time demanded the guardianship. His claim was rejected.

In the case of **Chakki v. Ayyapan 1989**, a mother who says she will keep living with friends and may beget children from others, was not considered appropriate for custody in the minor's interest.

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. Babooee Mukharjee 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.

In the case of **Vishambhar v. Laxminarayana, 2001**, SC has held that a sale of minor's immovable property without courts permission is voidable and not void ab-initio. It further held that Sec 60 of Limitations Act would be applicable when the minor repudiates the transaction.

In case, a minor repudiates an improper alienation made by the guardian, he is liable to return the consideration.

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.
- Have exclusive possession of minor's property.

1.5. 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.

Thus, under this doctrine, any guardian may be removed depending on the circumstances on per case basis and the court may appoint a guardian as per the best interests of the minor.

1.6. Critical analysis of Hindu Minority and Guardianship Act

According to section 7 of Hindu minority and guardianship act, the natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother. This provides natural guardianship in case of adoption only for son because of the traditional notion that adoption is meant for couples who do not have a son. Hindu Minority and Guardianship Act is, for now, silent on this issue. Over the time as the society has developed many legal measures are taken for empowerment of females as a

gender and sex ratio but this legal lacuna has not been fixed due to the deeply enrooted preference of son over a daughter.

1.7. Position of Unwed Mothers for Sole Guardianship

A glimpse of patriarchal society can be seen from our Hindu Minority and Guardianship Act where the first natural guardian of a child for both property and person is father and second is a mother. But as society is modernizing, its laws have to change accordingly so that people a change and develop, the apex court had understood this proposition very well. Consequently, in recent judgements supreme court allowed an unwed mother to apply for sole guardianship of minor children.

In case of **Ms. Githa Hariharan & Anr vs Reserve Bank Of India & Anr (AIR 1999, 2 SCC 228)**, an educated and employed mother wants to make her five-year-old child nominee for her investments but asked for the paperwork in which she was either required to provide the name of the father or guardianship certificate. The district court rejected her claim because under section 11 of the Guardians and Wards Act, 1890 she needs to disclose the information of the father of that child which she was not willing to do.

When this case was transferred to the high court, they gave the reasoning for upholding this judgement that even if the mother is unmarried, father of that child could have an interest in the child. But the supreme court bench headed by Justice Vikramjit Sen overturn this judgement by laying down two fundamental rules; first interests of the child are supreme and in the pursuance of that a mother can be considered as guardian; second on the ground of privacy woman has a fundamental right to conceal the father's identity.

The ruling of this case had at least given a ray of hope to women who have fought for the equal rights in guardianship, which will ease out their daily life from school admission and bank account opening forms to investment papers, official documentation insists on the father's name. Gita Hariharan case where she appealed to the supreme court when she was not able to make an investment for her son as his guardian because of the fact that it requires stipulation that father's information should be mentioned. In this case, the couple was separated and the mother was the guardian of the child.

The court of law held that both parents will be treated on equal footing for the purpose of guardianship and the word 'after' in Hindu minority and guardianship act should not render the mother's position secondary. But the father's information is still required by many private and public institutions.

This new ruling had benefitted the society in two ways, firstly protection of rights of a child born out of wedlock and secondly provided a legal status to single mother especially for the children of sex workers. This judgement will at least do some good and safeguard the rights of unwed mothers or illegitimate child which Guardianship act had mentioned but society had still not accepted.

Implications of the ruling:

- After this ruling mother of the child got equal rights in case of guardianship.

- Interpretation of the word ‘*after*’ has been changed from ‘*after the death of husband*’ to ‘*in the absence of husband*’ so now the secondary position of the mother is changed to equal.
- This ruling will be beneficial to some extent for child born out of wedlock or progenies of commercial sex workers.
- This landmark judgement will also encourage adoption by single, independent women in India.

2. Guardianship Under Muslim Law

2.1. Meaning

Guardianship of a minor person means the overall supervision of the minor’s temperament. It means that the care and welfare of the kid together with the liability to take care of it. It is more than mere custody of the kid upon a particular age. Let us learn more about Guardianship under Muslim Law.

The term ‘guardian’ is defined in the Guardians and Wards Act as a person having the care of the person of a minor or of his property, or of both his person and his property.

According to Section three of the Indian Majority Act, 1875, someone domiciled in the Republic of India who is below the age of eighteen years, is a minor.

A minor is assumed to have no capacity to protect his or her own interests. Law thus, requires that some adult person must safeguard the minor’s person or property and do everything on his or her behalf because such a minor is legally incompetent.

A person who is authorized underneath the law to guard the person or property of a minor is called a guardian. Under Muslim law, guardians are needed for the aim of a wedding, for protecting the minor’s person and for protecting the minor’s property.

Guardianship under Muslim law, is called HIZANAT. They are sometimes taken to mean the same thing. But underneath Muslim law, these two aspects of the guardianship are different and are governed by the different laws.

The guardianship of a child means that overall oversight of the kid throughout its minority. Father or his executor or in his absence, the paternal grandfather, being the natural guardian, is in charge of the minor’s person. On the opposite hand, ‘custody of the child’ simply means a physical possession (custody) of the child upon a certain age.

Although the mother is not the natural guardian of the child under Muslim law, she has a right to the custody of the child, until the child attains a specific age. But the father or the paternal grandfather encompasses control over the minor throughout the complete interval of the minority.

2.2. Kinds of guardianship under Muslim law

Muslim law makes a distinction between guardian of the person, guardian of the property and guardian for purposes of marriage in case of minors.

2.2.1. Guardianship in Marriage (Jabar)

It is one of the essentials of a valid marriage that the parties are competent to enter into marriage which means they must have attained the age of puberty. This general rule admits one exception- where the marriages is solemnised on behalf of minor by the guardian.

Under the Muslim law the father has the power to give his children of both sexes in marriage without their consent to enter into marriage but it is before the Shariri stage.

The rule of Muslim law is that when a remote guardian allowed marriage, when the nearer one is present, the validity of the marriage is dependent upon the latter's ratification and consent. A marriage by a remoter guardian when the nearer guardian is present and has given his consent is not only irregular but void.

Persons Entitled

The following is the list of the persons who can act as a guardian in the marriage of minor in following order:

- i. Father.
- ii. Father's father, how high so ever.
- iii. Full brother and other male relations on father's side.
- iv. Mother.
- v. Maternal relations within prohibited degree.
- vi. Kaazi or the Court.

Under Shia Law only the father and failing him the father's father how high so ever.

Testamentary Guardian for Marriage

Under Muslim law testamentary guardian for marriage are not recognised. A father has no power to appoint any person as guardian for marriage by his will.

2.2.2. Guardianship of Body of the Minor (Hizanat)

Mother

Mother under Hanafi school, mother is Guardian of her minor till he attains age of 7 years and of her daughter till she reaches puberty. Under Shia school, mother is guardian of her son till he attains the age of 2 years and of her daughter till she attains the age of 7 years.

An illegitimate child is left in the charge of mother till the age of 7 years but legally belongs to neither of his parents.

In the absence of mother, under Hanafi school, custody belongs to:

- i. Mother's mother
- ii. Father's mother
- iii. Full sister
- iv. Uterine sister
- v. Consanguine sister
- vi. Full sister's daughter
- vii. Uterine sister's daughter
- viii. Consanguine sister's daughter
- ix. Maternal aunt
- x. Paternal aunt

However, the right of *hizanat* of the mother and other female relations is lost if she leads an immoral life or, neglects to take proper care of the child or, marries a person not related to the child within prohibited degrees or, if during the subsistence of marriage, she goes and resides at a distance from the father's place.

In **Rahima Khatoon v. Saburjanessa**, the court held that the mother loses the guardianship of the minor daughter if she remarries with a person not related to the child within prohibited degrees. In this case, the court granted the certificate of guardianship to the child's paternal grandmother.

In default of mother and other female relations, hizanat belongs to:

- i. Father
- ii. Nearest paternal grandfather
- iii. Full brother
- iv. Consanguine brother
- v. Full brother's son
- vi. Consanguine brother's son
- vii. Full brother of the father
- viii. Consanguine brother of the father
- ix. Son of father's full brother
- x. Son of father's consanguine brother

Father

Father is the de-facto guardian of son over the age of 7 years under Hanafi school and 2 years under Shia school and unmarried daughter over the age of 7 under Shia school and who has attained puberty under Hanafi school.

The court will interfere with the father's guardianship of his children only if he is unfit in character and conduct or is unfit as regards external circumstances or waives his right or enters into an agreement to the contrary or is out of jurisdiction of the court or intends to go abroad.

Illegitimate Child: The mother of an illegitimate daughter is entitled to its custody.

Termination of Hizanat

1. **General disqualifications:** minor and non-muslim
2. **Disqualifications affecting females:** immoral, has married a stranger, resides at large distance from father, neglects the child.
3. **Disqualifications affecting males:** no male entitled custody of female child who is not within prohibited degree.
4. **Disqualifications affecting parents:** The court will interfere with the father's guardianship of his children only if he is unfit in character and conduct or is unfit as regards external circumstances or waives his right or enters into an agreement to the contrary or is out of jurisdiction of the court or intends to go abroad.
The mother does not lose her right to the custody of the children by divorce by the father of the children.
5. **Disqualifications affecting husband:** if the wife has not attained puberty, mother has greater right over her.

2.2.3. Guardianship of Property (Walayat-i-mal)

If a minor owns movable or immovable property, a guardian is necessary to manage it. The guardianship of the property of minor may be classified as follows:

- i. Legal or natural guardian (De-jure Guardianship)
- ii. Guardian appointed by court
- iii. De facto Guardian

2.2.3.1. Legal or Natural Guardian (De-jure Guardianship)

Legal or natural guardian order of persons entitled to guardianship of the property of a minor:

- i. Father
- ii. Executor appointed by father's will
- iii. Father's father
- iv. Executor appointed by the will of father's father

The mother, brother, the uncle etc are not entitled to be the legal guardian of the property of the minor.

In the case of, **Ghulam Hussaini Qutubdin Maner v Abdul Rashid Abdul Razzaq Maner 2000**, Supreme Court of India has held that the mother of the minor cannot be appointed as his guardian to accept gift on his behalf during the lifetime of minor's father.

Powers

I. Power of Alienation of Immovable Property

A guardian is allowed to alienate minor's movable property, but can dispose of immovable property only under certain circumstances. Here, alienation includes selling and mortgaging.

The alienation of a minor's immovable property by the natural or legal and testamentary guardian is valid to a limited extent. According to the 'Durr-ulMukhtar', it is lawful for the executor to sell immovable property if there is an imminent danger of its being lost, or to sell it, if it can get double of its value, or for the maintenance of minors, or for the discharge of debts of the testator, or for the payment of legacies which cannot be paid otherwise, or where the income of the property does not exceed the cost of its upkeep, or when it is in the hands of a powerful misappropriator or usurper.

So, an immovable property of a minor may be disposed only under following circumstances:

- i. Where by sale, the guardian can get double the value of the property,
- ii. When the disposal is for the manifest advantage of the minor or lunatic,
- iii. When debts due from the testator have to be paid,
- iv. When there is no means for the legacies to be paid,
- v. When there is no other property for the maintenance of the minor or lunatic,
- vi. When the expenses of the property are more than its income,
- vii. When the property is in danger of being lost or destroyed, and
- viii. When the property is in the hands of a usurper and the guardian has reasonable belief that there is no chance of its recovery.

It is evident from the preceding lines that the guardian's power of disposing of the minor's property by sale is very limited. The minor's property can be sold only in exceptional circumstances when it is either absolutely necessary or is manifestly advantageous. Where a minor has several properties, there must be reasonable justification for selling a particular property. The only consideration in a sale should be the benefit of the minor.

Mortgage: The legal guardian's right to mortgage the minor's properties is the same as that for a sale. A guardian is not authorized to mortgage his ward's properties except in the interest of the minor or in the interest of the property itself.

Lease: The guardian's power to grant lease of the minor's property is also subject to condition that it must be for the advantage of the minor or is otherwise urgently required. The legal guardian is, therefore, authorized to lease out the property only if it is for the benefit of the ward.

II. *Power to Incur Debt*

A guardian can incur debts on behalf of the minor if there is some necessity and not otherwise." The guardian has the power to execute promissory note on behalf of the minor when incurring of debt is justified.

III. *Power to Enter into Contract*

The guardian has the power to enter into contract on behalf of the minor, if the contract is for minor's benefit and the minor is entitled to bring a suit for specific performance of contract also.

IV. Power to Carry on Business

According to the Hedaya, the guardian has power to carry on business or trade on behalf of the minor just like a person of ordinary prudence can do so in respect of his own business, provided the business or trade is not of speculative or hazardous nature. The guardian can also invest minor's property in partnership and may enter into partnership with others.

V. Power to surrender a right of pre-emption

The guardian has the power to assert a right of pre-emption on behalf of the minor or to refuse or accept an offer of a share in pursuance of such right, and the minor will be bound by such act, if it is done in good faith.

VI. Power to make Partition

The guardian has power to make partition of the share of minor only if there are shares of minors and adults. But if all the share-holders are minors then the guardian has no power of making partition and if makes, such partition is unlawful and invalid.

2.2.3.2. Guardian appointed by Court

In absence of legal guardian, the duty of appointing a guardian for the protection and preservation of minor's property fall in the Court.

While appointing a guardian the court takes into consideration the welfare of the minor.

Example: Court may appoint a mother, instead of paternal uncle as the guardian of the property of the minor.

Without the previous permission of the court, the guardian appointed by the court cannot:

- i. Charge the immovable property of the minor.
- ii. Mortgage.
- iii. Transfer by sale.
- iv. Exchange.
- v. Lease any part of the immovable property for a term exceeding five years or for any term extending not more than one year beyond the date when the ward will cease to be a minor.

A person who is neither a legal guardian nor a guardian appointed by the court but has voluntarily placed himself in charge of the body and property of the minor.

Powers

The power and duties of a guardian appointed by court is governed by the provisions of the Guardians and Wards Act, 1890. *These are the following:*

- I. **Transfer of Immovable Property:** Under section 33 of this Act, the court has authority to define, restrict or extend the powers of a guardian from time to time. We have already discussed the power of natural or testamentary guardian regarding to transfer of minor's immovable property. But a guardian appointed by the court has no authority to deal with minor's property without prior sanction of the court. Such a guardian cannot sell, exchange, mortgage, or otherwise transfer the immovable property of the minor without a previous permission of the court. The court gives the permission for transfer of property only in cases of absolute necessity or where it is manifestly advantageous to the minor.
- II. **Lease:** A guardian appointed by court is empowered to lease out the minor's property for a period of five years, or for any term not extending more than one year beyond the date on which the minor attains majority. For a lease extending the above mentioned period, the guardians must take the previous permission of the court. However, transfer of an immovable property by a guardian appointed by court against any of the above rules, is not void, it is merely voidable at the option of the minor upon his attaining majority. Such transfer is voidable also at the option of any other person affected thereby.
- III. **Movable Property:** A guardian appointed by court is empowered to deal with the movable properties of the minor without any previous permission of the court. But the guardian must deal with minor's movables as carefully as a man of ordinary prudence would deal with his own property. Moreover, he may do all acts which are reasonable and proper of the realisation, protection or benefit of the property.

2.2.3.3. De-facto Guardian

A de-facto guardian is a person who is neither a legal guardian nor a testamentary guardian or statutory guardian, but has himself assumed the custody and care of a child. According to Tyabji a de-facto guardian means that an unauthorized person who, as a matter of fact, has custody of the person of a minor or his property. A de facto guardian could be a person having no authority for the guardianship however underneath the circumstances has taken the responsibility to act as the guardian of a minor.

The position of de-facto guardian is quite different from the legal guardian and the guardian appointed by the court. He has no power or authority to alienate the minor's property.

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A de-facto guardian is a mere custodian of the minor's person and property but has no right over either. He has only responsibilities towards the minor's person or property or both but no rights in respect thereof. They are usually the relatives of the minor but without rights to be the guardian under the Islamic law. He is an officious intermeddler (Fazooli) with the minor's property and has no status or position to alienate it without Court's permission. He has no

power or authority to alienate the minor's property. A sale by a de facto guardian of the minor's immovable property without Court's permission is void and not merely voidable. A de facto guardian is a person who is neither a guardian under Muslim personal law nor a guardian under the Guardians and Wards Act, 1890, but has assumed the powers and functions of a guardian. A de facto guardian, who may be a relative or a stranger, has no power to deal with the minor's property because a de facto guardian is no guardian in the eyes of law and is simply an unauthorized person who deals with the minor's properties.

2.3. Disqualification of a Guardian

A guardian whether de jure or de facto is removable by the court if necessary in the interest of the minor. A guardian appointed by the will can be removed on the following grounds:

- i. Abuse of his trust.
- ii. Continued failure to perform the duties of his trust.
- iii. Incapacity to perform the duties of trust.
- iv. Ill-treatment or neglect to take proper care.
- v. Continuous disregard of provisions of Guardians and Wards Act.
- vi. Having an adverse interest to the faithful performance of his duties.
- vii. Conviction for an offence.
- viii. Ceasing to reside within the local limits.
- ix. Insolvency or bankruptcy.

2.4. Difference between Sunni and Shia Guardianship

<i>S.No.</i>	Sunni	Shia
1.	Besides the father and true grandfather there are several relations who are guardians for marriage.	The only guardians for marriage are the father and true grandfather.
2.	Marriage by guardians other than father and grandfather may be repudiated after attaining majority.	Such marriage was wholly ineffective till it was expressly ratified.
3.	Mother is guardian of the person of her son up to the age of 7 and of her daughter up to puberty.	Mother is guardian of the person of the son up to the age of 2 and of her daughter up to the age of 7 years.

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