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**GUARDIANSHIP UNDER HINDU LAW**- Neelakshi<sup>1</sup> & Ayush Dutt Tripathi<sup>2</sup>**Abstract-**

This paper deals with the law of guardianship under Hindu law. It also deals with the application of the act its types. The paper has in general discussed about what are the rights and powers of a guardian. Other than the laws, this paper further discuss about what does the welfare of a child in a wider sense mean. Further the paper focuses on what are the criticism and what should be done to overcome the flaws.

**Keywords-** Minority and Guardianship Act, Minor, Hindu, Mother, Father, Welfare and Adoption.

**Introduction-**

*“Custody and Guardianship by the parent of his child does not arise under the Constitution, laws or treaties of the United States and is not dependent on them”.*<sup>3</sup>

India is a country that has various individual laws: every local area has its very own laws. The Hindus, the dominant part, have their different family law: so, have the Muslims which are the greatest minority community. More modest minority community, the Christians, Parsis, and the Jews, whose number, with regards to the complete populace of India, isn't extremely large but has their own different family laws. Any individual who is Hindu by religion in any of its structures and advancements is a Hindu. Over the span of 5,000 years of presence, Hindu religion has gone through numerous stages. Every now and then enlargements, groundbreaking thoughts and contemplations and practices have appeared, here and there entirely inverse to one another. The noteworthy component of Hindu religion has been that it has had the option to ingest and acclimatize all considerations, thoughts, dissensions, practices and callings in its overlay and has held its essential solidarity.

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There has been a whirlwind of action on the individual law front in our country in the new past. A revision looking to add 'lost' breakdown of marriage as a ground for separation to the Hindu Marriage Act, 1955<sup>4</sup> and the Special Marriage Act, 1954<sup>5</sup> is in the wings.<sup>6</sup> There are likewise arrangements on sharing marital property and deferring the legal cooling time frame before a lawful disintegration of marriage. Without a doubt, individual law change is a need given that the greater part of our laws is out of date. When we talk about the law of guardianship, it was developed during the regime of British era. It was set up that father is the natural guardian of the minor and after his demise mother is the natural guardian and none other can be the natural guardian of the minor. It was acknowledged that the preeminent guardianship of the minor youngsters was vested in the state as “*parens patriae*”<sup>7</sup> and was exercised by the courts. The Hindu law of guardianship of minor child children has been codified and reformed by the Hindu Minority and Guardianship Act, 1956.

### **Application of the Act-**

In *Narayan laxman Gilankar vs. U.K. Kaushik*<sup>8</sup>, it was said that looking to the prelude of this demonstration one may immediately take note of that the Act alters and systematizes certain pieces of the law identifying with minority and guardianship among Hindus. It doesn't imply to cover the entire scope of the subject. The Hindu Minority and Guardianship Act, 1956 is the third bit of the Hindu code Bill which was passed and which got the President's assent on 25th August, 1956. This demonstration reaches out to the entire of the India with the exception of the territory of Jammu and Kashmir.<sup>9</sup> It has been reached out to Dadra and Nagar and Pondicherry.<sup>10</sup>

Looking into the old writings and the Hindu law that was regulated during the British time frame one may say that the law of Guardianship depends on the inadequacy of the minors, crazy people and imbeciles to look to their inclinations and to oversee them. Similarly, the individual who supply necessities to the minor needs to seek the bequest of minor for repayment under the

<sup>4</sup> Section 10- Grounds of Judicial Separation, Hindu Marriage Act, 1955.

<sup>5</sup> Section 23- Judicial Separation, Special Marriage Act, 1954.

<sup>6</sup> <https://www.thehindu.com/opinion/op-ed/child-custody-law-in-india-a-litigant-perspective/article4371934.ece>

<sup>7</sup> A doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf. The **parens patriae** doctrine has its roots in English Common Law.

<sup>8</sup> *Narayan Laxman Gilankar v. U.K. Kaushik*, (1994) 1 HLR 492 (Bom.)

<sup>9</sup> On 5<sup>th</sup> August 2019, the Government of India revoked the special status, or limited autonomy, granted under Article 370 of the Indian Constitution to Jammu and Kashmir. Therefore, this act now extends to whole of India.

<sup>10</sup> Section 1- The Hindu Minority and Guardianship Act, 1956.

Contract Act.<sup>11</sup> Subsequently, the Hindu law, as held in Suryaprakasham case<sup>12</sup>, has molded and conditioned the limit of Guardian's capacity. But, A.B. Rastogi J., in Om Prakash v. Child Welfare Bond<sup>13</sup> observed that "children are most vulnerable group in the population and in need of the greatest social care. The State has the duty of according proper care and protection to children at all the times, and it is on their physical and mental well-being that the future of the nation depends".

The law identifying with Guardianship and Minority is contained in the Guardianship and Wards Act, 1890 and Hindu Minority and Guardianship Act, 1956. The Provisions of this demonstration are supplemental to the Guardians and Wards Act. This is so in light of the fact that this demonstration of 1956 doesn't systematize the whole law of minority and guardianship material to Hindus. The demonstration anyway unites the arrangement as to who are qualified for be natural and testamentary guardians and present certain constraints on forces of such guardian with respect to the removal and the board of the property of a minor.

### **Guardianship of the Person-**

The section 4 of Hindu Minority and Guardianship Act, 1956 clearly defines the definition of minor under clause (a) and definition of guardian under clause (b), but at the same time when we talk about natural guardianship, Section 4 (c) says that whatever is mentioned in regards to guardian in Section 6 is the definition of "natural guardian". There are basically three types of guardianship which are 1) Natural Guardianship, 2) Testamentary Guardianship and 3) Guardians appointed by the court. Beside these, there are also two types of guardians, existing under Hindu law which is de facto Guardians, and guardians by affinity.

#### **1) Natural Guardianship-**

When we see Section 6 it says that natural guardian is one who becomes so by his natural relationship with the minor. A natural Guardian nurtures a child and if does not, in that matter, requires the support of court's order for the purpose.<sup>14</sup> The father and mother are the natural guardians of a minor. Between the father and the mother, the father has the priority to act as a guardian.<sup>15</sup> On the father's demise (and not previously) the mother ventures into that position. In

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<sup>11</sup> Section 68 – Indian Contract Act.

<sup>12</sup> Suryaprakasham v. Gangaraju, AIR 1956 AP 33.

<sup>13</sup> AIR 1980 Delhi 137, 17 (1980) DLT 368

<sup>14</sup> Dakshinamurthy, In re, (1969) 1 MLJ 345, See also Yeshoda v. Sindhura, (2002) 1 HLR 641

<sup>15</sup> D. Rajaiah v. Dhanapal, AIR 1986 Mad 99.

the event that anyway the father, by his will, names some other individual as the guardian of a minor the mother can't go about as minor's guardian. In *Narain vs. Sapurna*<sup>16</sup> it was held that during the father's lifetime if he refuses or disables himself on account of his conduct to act as such guardian, the mother does not become entitled or is not regarded as a natural guardian.<sup>17</sup> Also, in case *Rajalaxmi vs. Ramachandra*<sup>18</sup>, it was held that the mother's remarriage does not disentitle her to act as a natural guardian of her minor children and a mother is the natural guardian of her illegitimate child except in cases where father of a child is ascertained.<sup>19</sup>

In some of the cases constitutionality of Section 6 has also been also challenged like in *Githa Hariharan case*<sup>20</sup>. It was alleged that Section 6(a) violates Article 14<sup>21</sup> and 15<sup>22</sup> of the Constitution in as much as the mother of the minor is relegated to an inferior position on the ground of sex alone since her right as a natural guardian is made cognizable "after" the father in the said provision.<sup>23</sup> The court<sup>24</sup> observed that in Section 4(b) of the Hindu Minority and Guardianship Act, 1956 there is no such discrimination and the mother is the natural Guardian as provided in Section 6. The word "the father and after him the mother" does mean that mother is the guardian of the minor after the death of the father. The mother can be regarded as natural guardian in place of the father even in the condition where father is indifferent or careless or mentally or physically weak to take steps for the welfare of the child. The word "after" in that clause simply means "in the absence of" and the word "absent" means where father is alive but is mentally incapable or is indifferent to discharging his obligations. The obligations of natural guardian is to maintain their minor children by exercising few rights upon them which are- i) Right to custody, ii) Right to determine the religion of the children, ii) right to education, iv) right to control movement, and v) Right to reasonable chastisement. These rights are presented on the guardian in light of a legitimate concern for the minor children and hence every one of these rights is subject to the welfare of the children.

## 2) Testamentary Guardianship-

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<sup>16</sup> AIR 1968 Pat 318

<sup>17</sup> *Narain v. Sapurna*, AIR 1968 Pat 318, *Bhaktavatsalam v. Muthuram*, (1965) 78 Mad LW 573.

<sup>18</sup> AIR 1969 Mad 113.

<sup>19</sup> *Rajalaxmi s. Ramachandran*, AIR 1969 Mad 113.

<sup>20</sup> *Githa Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228: AIR 1999 SC 1149.

<sup>21</sup> Article 14- Equality before law, Constitution of India, 1950.

<sup>22</sup> Article 15- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, Constitution of India, 1950

<sup>23</sup> Writ Petition No. 1016/1991.

<sup>24</sup> Bench – Per Anand, CJ. And Srinivasan J.

Before the passing of Hindu Minority and Guardianship Act, 1956, a Hindu father couldn't choose a guardian of his minor child and consequently reject even the mother from guardianship. If there should arise an occurrence of demise of the father, the mother didn't have the ability to name a testamentary guardianship. A testamentary guardian can be appointed by a will. The position is now changed as under Section 9, of the Hindu Minority and Guardianship Act, 1956. Now, power of choosing a testamentary guardian has been provided to both mother and father. On the off chance that the father picks a testamentary guardian yet the mother rejects him, the picked guardian of the dad will be wasteful and the mother will be natural guardian from there on. At the same time, if the mother picks a testamentary guardian, her chosen guardian will turn into the testamentary guardian and father's arrangement would be void.<sup>25</sup> Likewise, it is obligatory for the testamentary guardian to get the guardianship appropriation which might be communicated or inferred. A testamentary guardian has the privilege to decay the arrangement, yet once he/she gets the guardianship then he/she cannot decline to perform or leave without the authorization of the court.

The testamentary guardian has every one of the forces and rights and commitments of the characteristic guardian so exceptionally far as they are not restricted by the will, however his commitments to give maintenance isn't personal and just exists just to the degree that there are properties of minor. For example, under the old earlier law if he was justified by circumstances, a testamentary guardian could sell or mortgage a considerable portion of the minor's immovable property whereas now such a transaction would require the court's permission before entering into it.<sup>26</sup>

### **3) Guardians appointed by the Court-**

Under Guardians and Wards Act, 1890, the court is empowered to appoint guardian to minor children. The High Court likewise have intrinsic locale to choose guardianship yet this force is practiced sparingly. In cases like, *Babu Ram vs. Keshavachand*<sup>27</sup> and *Bimla vs. Subhash*<sup>28</sup>, it was held that under the Guardianship and Wards Act, 1890, the jurisdiction is conferred on the District Court.<sup>29</sup> The court may appoint or declare any person as the guardian whenever it considers it necessary in the welfare of the child.<sup>30</sup> Similarly, in *Mohini vs. Virendra*<sup>31</sup>, the

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<sup>25</sup> Family Law- Paras Diwan, pg. 260.

<sup>26</sup> Hindu Law- B.M. Gandhi, pg. 504.

<sup>27</sup> AIR 1978 P & H 124.

<sup>28</sup> 1992 Pat 96.

<sup>29</sup> Section 17- Guardian and Wards Act, 1890

<sup>30</sup> Babu Ram v. Keshavchand, AIR 1978 P & H 124.

<sup>31</sup> AIR 1977 SC 1359

court said that in appointing or declaring a person as the Guardian of a minor or in the welfare of the minor shall be permanent consideration.<sup>32</sup> Also, in one of the cases it was held that in matters related with the custody of a minor child, welfare and interest of a child is more important than convenience or pressure of the parents.<sup>33</sup>

### **Guardianship of Minor's Property-**

The natural guardian of a child is the only guardian of the minor's property but not in the case of minor's undivided interest in the joint family property. In respect of alienations of minor's immovable property, it is voidable without the permission of the court at the option of the minor.<sup>34</sup> In *Amrith v. Sornam*<sup>35</sup>, it was held that a transferee of the minor can also avoid an improper alienation made by the guardian. Also, where the guardian acquires property for the benefit of the minor, no permission of court is necessary.<sup>36</sup>

Recently, Supreme Court in one of the cases has elucidated the law of alienation. The issue that fell into consideration was "Whether a transferee from a minor after he attained majority, can file a suit to set aside the alienation made by the minor's guardian or the said right is one to be exercised only by the minor?"<sup>37</sup> Considering the facts of the case, Supreme Court bench was of the view that it was necessary for the person claiming through minor to bring an action within a period of three years from the date of death of the minor to get sale deed executed by the defendant.<sup>38</sup>

### **Guardian by Affinity-**

Before 1956, the guardian of minor widow was called as guardian by affinity. Mayne said that "the husband's relation, if there existed any, within the degree of sapinda<sup>39</sup>, are the guardians of a minor widow in preference to her father and his relations."<sup>40</sup> In *Paras Ram vs. State*, the concept of Guardianship by affinity was brought to an end. The question which was raised before the court was that "whether the nearest sapinda of the husband automatically becomes a guardian of the minor widow on the death of her husband or whether he is preferentially

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<sup>32</sup> <https://indiankanoon.org/doc/1576164/>

<sup>33</sup> *Kumar v. Chetna*, AIR 2001 SC 2179

<sup>34</sup> *Inruppakuty v. Cherukutty*, AIR 1972 Ker 71.

<sup>35</sup> AIR 1977 Mad 427 (FB)

<sup>36</sup> *Than Singh v. Barelala*, AIR 1974 MP 24

<sup>37</sup> *Murugan & Ors. v. Kesava Gounder(Dead) Thr. Lrs. And Ors.*, AIR 2019

<sup>38</sup> The decision was made keeping in view Article 60 of the Limitation Act, 1963.

<sup>39</sup> According to Hindu law, when two persons offer Pinda to the same ancestor, they are Sapindas to each other. Section 3(f) of Hindu Marriage Act, 1955 defines Sapinda Relationship

<sup>40</sup> Hindu law and usage, 11<sup>th</sup> ed. 288.

entitled as such? Madras and Nagpur bench came with the view that under Section 13<sup>41</sup> of Hindu Minority and Guardianship Act, the welfare of the child is the only concern. The fact that under Hindu law father-in-law has right to be appointed as guardian is the second thought. Therefore, it would be better if the guardianship of the minor widow, both of her person and property vests in the parents.

### **De-facto Guardianship-**

Before the passing of Hindu Minority and Guardianship Act, de facto guardian had the same powers of alienating the property of his ward as a natural guardian.<sup>42</sup> But after 1956, it was passed in the act that no person shall be entitled to dispose of or deal with the property of the Hindu minor, whether immovable or movable, merely on the ground of his or her being the de facto guardian of the minor.<sup>43</sup>

### **Welfare of the child to be paramount consideration-**

Section 13 of the Act reiterates a well – established principle in appointment of any person as the guardian of a Hindu minor, the welfare of minor will be paramount consideration.<sup>44</sup> In this section the word welfare is to be perceived in a wide sense. The word not just incorporates the material and actual prosperity of the minor, yet in addition each factor associated with the good and religious welfare, education and childhood of the minor.<sup>45</sup> In determining what will be for the welfare of the minor, the court could have respect to, inter alia, the ages, sex and religion of the minor, the character and limit of the guardian, his proximity of kinfolk to the minor, the desires if any of the minor's perished parent and the past and the current relations of the minor with the proposed guardian. Under the section the welfare of the child is sole concern. Guardianship is not a right but responsibility. Today the parental considerations are not considered to be sacred; they are not sacrosanct; it is the child's welfare that is sacrosanct.

### **Critical Analysis of this act-**

Section 7 of this demonstration says that the normal guardianship of the adopted minor child, after reception is of father and after that of mother. The road of this demonstration is restricted

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<sup>41</sup> Section 13- Welfare of minor to be paramount consideration, Hindu Minority and Guardianship Act, 1956.

<sup>42</sup> Hanuman Prasad v. Babooee, (1856) 6 MIA 393 ; Kasturi v. Sabinivas, AIR 1970 AP 440 (alienation voidable like that made by a legal guardian); Panchu v. Hrishikesh, AIR 1960 Cal 446 (alienation by a de facto guardian for legal necessity of minor cannot be impeached).

<sup>43</sup> Section 11, Hindu Minority and Guardianship Act, 1956.

<sup>44</sup> Sunil Kumar v. Sati Rani, AIR 1969 Cal 573

<sup>45</sup> Raj Kumar Mahant v. Indra Kumari, 1972 MPLJ 725.

to the adopting son with a basic presumption that appropriation is taken up by couples just when they can't conceive a son, which shows the basic defect stepped in male centric idea. Secondly Section 6 of the act which says that “*guardian of a married minor girl is her husband*”<sup>46</sup>. This is another impression of male centric culture where spouse is viewed as defender which will in general excuse the wife's independence and distinction. Unfortunately, male controlled society is so enrooted in all parts of society that law will in general reflect patriarchal belief systems.

### **Conclusion-**

Adoption of a child by any guardian is making a relationship of the child and the guardian, it makes the topic of individual law and for minor it is essential to property and things and consequently this demonstration is made which reveals to us the rights and powers of guardians. Simultaneously, the feline has some male centric ideas which should be corrected in light of a legitimate concern for sexual orientation correspondence. Despite the fact that numerous judgments have come in such manner as this demonstration was impression of standards of that time, consequently there should be more work in regards to something similar.

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<sup>46</sup> Section 6- Minority and Guardianship Act, 1956.