

CHAPTER VIII

GUARDIANSHIP

THE LAW relating to guardianship of children is to be found in the Guardians and Wards Act, 1890 and the different personal laws (including their statutory modifications) applicable to various religious communities of India. These are examined in this chapter.

I THE GUARDIANS AND WARDS ACT, 1890

The Guardians and Wards Act, 1890 was enacted with a view to amending and consolidating the rather scanty legislative provisions in the field existing before its enactment. This law was passed in addition to the provisions of various personal laws relating to guardianship of children, and not in place of them. It, therefore, exists side by side with the provisions of the personal laws. The Act itself makes it clear that it leaves the rules of personal law unaffected,¹ (though all applications for the appointment or declaration of a guardian are to be made under its provisions). The Act, thus, comes into operation when an application to appoint a guardian of a child has been made under it, and it prevails over the personal law in case of conflict with the latter.²

The Act of 1890 contemplates two kinds of guardians: (i) guardian of person; and (ii) guardian of property. Both positions may be combined in the same person. A guardian may be appointed under the Act in

1. Guardians and Wards Act, 1890, s. 6.
2. *Rafiq v. Bashiran*, A.I.R. 1963 Raj. 239; *Asha Wadhwa v. Prithi Raj Wadhwa*, (1973) 75 P.L.R.D. 313; *Surjit Singh v. Nazir Singh*, (1970) 71 P.L.R. 87. See also *infra* for relationship between this Act and the Hindu Minority and Guardianship Act, 1956.

respect of any person who is a "minor" under the Indian Majority Act, 1875, namely a person below the age of 18 years, and below the age of 21 years if under the superintendence of the Court of Wards.³

The Act states that where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the court may pass an order accordingly.⁴ Thus, the court can either "appoint" a guardian or "declare" that a person is a guardian of a particular child. The court may also remove a guardian whether appointed by the court earlier or acting under a will or otherwise.⁵ An order appointing or declaring a guardian can be made only on the application of the claimant of guardianship, a relative or friend of the minor, the district collector or a special collector.⁶ The application for the order has to state all the relevant details specified in the Act,⁷ including religion of the minor.⁸ A procedure is prescribed by the Act for the admission of the application including its publicity.⁹ Before making a final order the court can make interim and interlocutory orders.¹⁰ The court in appointing a guardian will keep in view the welfare of the child, consistently with the law to which he is subject.¹¹ It may appoint one or more guardians in accordance with the personal law applicable; and if the ward has many properties different persons may be appointed for different properties. The Act thus gives weightage in favour of the personal law of the child provided it is in the interest of the child and such a guardian is not unfit to be appointed. The paramount consideration is that of the welfare of the child.¹²

The Act further provides that "welfare" of the minor is to be determined with reference to the following:

- (a) age of the child;
- (b) sex of the child;
- (c) his or her religion;
- (d) character and capacity of the proposed guardian;
- (e) his nearness in relation to the child;
- (f) wishes of the deceased parents of the child;

3. Indian Majority Act, 1875, s. 3.

4. Guardians and Wards Act, 1890, s. 7.

5. S. 7 (2).

6. S. 8.

7. S. 10.

8. S. 10 (a).

9. Ss. 11-13.

10. S. 12.

11. S. 17.

12. See for instance, *V. V. Narasaiah v. C.P. Raju*, A.I.R. 1971 A.P. 134; *Lalta Prasad v. Ganga Sahai*, A.I.R. 1973 Raj. 93.

- (g) existing or previous relations of the proposed guardian with the child or his property;
- (h) child's own preference if he is old enough to give it.

Interest of the child, it will be seen, includes his "religion", and this is a factor which cannot be ignored.

The court cannot appoint a guardian of the following persons:¹³

- (a) a married girl, even if minor, whose husband is not unfit to act as her guardian;
- (b) a child whose father is alive and is not (in the opinion of the court) unfit to act as guardian;
- (c) a person whose property is under superintendence of the Court of Wards;
- (d) a person for whom a testamentary guardian is already acting.

Even in the case of section 19(b) and also 19(a) the paramount consideration will be the welfare of the child, and the father may be ignored in the interest of the child. This position is certain in the case of the Hindus, particularly in view of section 13 of the Hindu Minority and Guardianship Act, 1956,¹⁴ and the position seems to be the same in the case of the Muslims.¹⁵

The Act allows appointment of a minor as the guardian of his wife, children and in the case of a joint Hindu family of any child of another minor in the family.¹⁶ However, such cases will be rare.

The Act places the guardian and the ward in a fiduciary relationship and the former must not make any profit out of his office.¹⁷ Though the Act stresses the fiduciary relation between the guardian and the ward,¹⁸ yet it allows the court to sanction an allowance for the guardian for "his care and pains in the execution of his duties."¹⁹

Guardians are charged by the Act with the custody, support, health and education of the ward and with such other duties as the personal law

13. *Supra* note 4, s. 19.

14. *V.V. Narasaiah v. C. P. Raju, Lalta Prasad v. Ganga Sahai, supra* note 12.

15. See *Mistafa v. Rathima Shah*, (1970) 11 M.L.J. 354. Also *Rafiq v. Bashiran*, *supra* note 2.

16. S. 21.

17. S. 20.

18. *Ibid.*

19. S. 22.

applicable might impose.²⁰ In the case of a conflict between the personal law and the Guardians and Wards Act, the latter is to prevail as decided by the Rajasthan and Delhi High Courts.²¹ A guardian of property is bound under the Act to deal with it as carefully as a man of ordinary prudence would deal with his own property.²² The Act provides adequate safeguards against misuse of powers and position by the guardian of property.²³

No guardian appointed under the Act can act as the 'marriage-guardian' of a Muslim minor. The same was the position in regard to Hindu minors, but the principle is now irrelevant to Hindus since the very concept of 'marriage-guardianship' under Hindu law now stands abrogated (after the 1978 amendment of the Hindu Marriage Act, 1955).

II HINDU LAW

The law of guardianship and minority applicable to Hindus, Sikhs, Buddhists and Jains is now found in the Hindu Minority and Guardianship Act, 1956. The provisions of this Act are in addition to and not in derogation of the Guardians and Wards Act. The provisions of the Hindu Minority and Guardianship Act are to be read supplemental to the Guardians and Wards Act, and both are to be harmonised with each other, but in the case of a clear conflict between any of the provisions of the two statutes it seems the latter Act would prevail over the former.²⁴

Under the H.M.G.A., 1956, any Hindu who has not completed the 18th year of age is a minor.²⁵ According to this Act, the following persons in the following order are the natural guardians of the person and property of a Hindu minor:²⁶

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|--|---|
| (a) boys and unmarried girls by legitimate blood | (i) the father, after him
(ii) the mother. |
| (b) boys and unmarried girls by illegitimate relationship. | (i) the mother, after her
(ii) the father |
| (c) married girls | : the husband (even if minor himself) |

20. S. 24.

21. See *supra* note 2.

22. S. 27.

23. See ss. 28-37.

24. See *supra* note 2.

25. S. 4 (a).

26. S. 62.

Thus, legitimacy is a factor which decides the order of preference for guardianship between the parents. No non-Hindu can act as guardian of a Hindu minor.²⁷ Hermits and ascetics too are deprived of their guardianship rights.²⁸ Step-parents are not natural guardians of their step-children.²⁹ Conversion and *sanyas* are the only factors which may disqualify a living father from being the guardian of his children, and if any of these disqualifications exist, the mother will be the natural guardian, unless herself so disqualified. Remarriage is no disqualification for natural guardianship.³⁰ In the lifetime of a qualified father, the mother can act as guardian only if appointed so by the court, which is possible if the father is neglecting the child.³¹

Custody of a minor child of either sex up to the age of five years ordinarily belongs, under the Act, to the mother even where the father is the guardian.³²

Guardianship of a minor adopted son belongs, under the Act, to the adoptive father and if he is dead or disqualified to the adoptive mother (adoptive father's wife).³³ The Act is silent about the guardianship of an adopted daughter and takes no notice of the fact that a woman having no husband may adopt a child. These *lacunae* in the Act still exist while over 20 years have elapsed since its enactment.

The Act empowers natural guardians to do "all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minors estate".³⁴ No guardian can, however, bind a minor by a personal covenant.³⁵ In respect of property of the child, the guardian is allowed practically no power of disposition without the prior approval of the court.³⁶ The court may give such an approval in the light of the provisions of the Guardians and Wards Act, 1890.

The Act empowers a Hindu father or mother acting as the natural guardian of a child to appoint by will the next guardian.³⁷ When a

27. S. 6 (proviso) (a).

28. *Id.* (b).

29. S. 6, explanation.

30. See *B.R.L. Ram v. Shila Devi*, A.I.R. 1960 Punj. 304.

31. *Narain Singh v. Sapurna Kucr*, A.I.R. 1968 Pat. 318.

32. S. 6 (a).

33. S. 7.

34. S. 8 (1).

35. *Id.*, proviso.

36. S. 8 (2).

37. S. 9.

father makes such a will and dies survived by his wife (child's mother) the will does not operate and the mother, unless disqualified, acts as guardian.³⁸ The right to appoint the next guardian by will then belongs to her.³⁹ However, should she die without having made such a will, the father's will is revived.⁴⁰

A minor can act as guardian of another but not in regard to property,⁴¹ and this provision is in conflict with the corresponding provision of the Guardians and Wards Act, 1890 (noted above).

The Act of 1956 mentions that the "welfare of the minor" shall be the "paramount consideration" in the appointment or declaration of guardian by a court,⁴² and no person shall be entitled by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.⁴³ Thus, the claim of a natural guardian to be appointed as a guardian could be ignored in preference to another person if that is for the welfare of the child.⁴⁴ The list of marriage guardians is contained in section 6 of the Hindu Marriage Act, 1955.⁴⁵

III CHRISTIAN AND PARSI LAWS

Christians and Parsis of India have no separate laws relating to guardianship of children. The matrimonial enactments applicable to them contain references to minority and guardianship in regard to marriage and divorce only. Thus, the Christian Marriage Act, 1872 requires consent of the father for a minor's marriage⁴⁶ (the definition of "minor", it is notable now ^{46a} stands, changed). In the event of his not being alive, the minor's guardian (presumably appointed under the Guardians and Wards Act, 1890) is to be consulted. In the absence of a guardian the consent is to be given by the mother.⁴⁷

38. *Ibid.*

39. *Ibid.*

40. *Ibid.*

41. S. 10.

42. S. 13 (1).

43. S. 13 (2).

44. See, for instance, *Avinash Devi v. Dr. Khazan Singh*, A.I.R. 1960 Punj. 326; *Lalta Prasad v. Ganga Sahai, Narasaiah v. C.P. Raju*, *supra* note 12.

45. See *supra*, ch. VI.

46. S. 19.

46a. See s. 60 of the Act as modified by the Child Marriage Restraint (Amendment) Act, 1978.

47. S. 19.

The Parsi Marriage and Divorce Act, 1936 also requires for the marriage of a Parsi minor (*i. e.*, a person below the age of 21 years even now, as the 1978 law of marriage-age leaves this Act unaffected)⁴⁸ the consent of father or guardian.⁴⁹ It seems that unless a guardian is appointed under the Guardians and Wards Act, 1890, reference has to be made in each case to custom or uncodified religious law of the Parsis for determining a guardian.

There is no law among these communities comparable to the Hindu or Muslim laws relating to guardianship of the person and property of children. In such matters they are governed by the Guardians and Wards Act, 1890.

IV MUSLIM LAW

In the Muslim law, as applicable in India, minor persons between the age of 15 and 18 years can act freely independent of any guardian in matters of marriage, dower and divorce. This is so by virtue of the Indian Majority Act, 1875 which, while fixing the age of majority at 18 years, excludes these matters from its application. In other matters the Indian Majority Act applies.

In the Muslim law, the father alone is the natural guardian of a minor (both of person and property) male or female.⁵⁰ In the event of his not being alive, his executor is the guardian of the property of the orphan children.⁵¹ The mother and other female relatives have the right to custody of the child, and not to guardianship. Under the *Hanafi* law, guardianship of person passes on to other male (agnatic) relatives of the child, one after another, subject to the rule that if the child and the person whose turn it is to act as guardian are not within the prohibited degrees of marriage, he is superseded by the next person in order. Under the *Shia* law, in the absence of either parent, the surviving parent and in the absence of both parents, the grandfather is the child's guardian of person.⁵²

As regards illegitimate children, the Supreme Court has held that in Muslim law, the mother of an illegitimate child is entitled to the custody.⁵³ However, regarding the guardianship of illegitimate children the texts of the Muslim law make no express provision.

48. S. 3 (c).

49. *Ibid.*

50. Fyzee, *Outlines of Muhammadan Law* 198-199 (1974). Also see *Imambandi v. Mutsaddi*, (1918) 45 I.A. 73.

51. *Ibid.*

52. *Id.* at 198.

53. *Gohar Begum v. Suggi*, (1960) 1 S.C.R. 597.

In respect of guardianship of property, the right belongs first to the father of the child, and failing him, in order of priority it passes on to :

- (i) father's executor
- (ii) father's father
- (iii) father father's executor.⁵⁴

No other relation is recognised by the Muslim law as a guardian of a child's property.⁵⁵ Even though the mother has the right to custody of the children up to a certain age, she is not the guardian of property and cannot alienate the minor's property under any circumstance.⁵⁶

Under the Guardians and Wards Act, 1890, the court may appoint a guardian for the person of the minor or his property or both. Keeping in view the welfare of the minor, the court may appoint a person as guardian other than those prescribed by the Muslim personal law.⁵⁷

Like the personal laws of Hindus, Parsis and Christians, Muslim law too knows the concept of "marriage guardians", termed in Muslim law as *wali nikah*. In regard to marriage guardianship, no one can be appointed by the court. It is the substantive law itself that declares who, for the purpose of marriage, possesses the *patria potestas*; the court cannot appoint a *wali* for marriage although, in some cases, the *kazi* himself could act as a marriage guardian.⁵⁸ The order of priority among the marriage guardians is, (for all practical purposes) as follows :

- (i) father
- (ii) father's father
- (iii) brother
- (iv) mother.

A marriage with the consent of a remoter guardian in the presence of a nearer guardian qualified to act as such is void in the Muslim law.⁵⁹

54. *Supra* note 50 at 202.

55. *Ibid.*

56. The *Imambandi* case, *supra* note 50.

57. See *Mistafa v. Rathima Shah*, *supra* note 15.

58. *Supra* note 50 at 209.

59. *Ibid.*