Paper-7 Module-4

Women's Right to Guardianship and Custody

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(B) Description of Module

Items	Description of Module
Subject Name	**Women's Studies**
Paper Name	**Women and the Law**
Module Name/ Title	**Women's right to Guardianship and Custody**
Module ID	**Paper-7 Module-4**
Pre-requisites	The student should be aware of the responsibilities of Guardianship

Objectives	To make the students aware of the different aspects of taking on the guardianship of a child and of what it entails
Keywords	Guardian, minority, ward, custodian and welfare of the child

Women's right to Guardianship and Custody

Introduction

Guardianship and custody are twin concepts, generally used interchangeably and presumed to be synonymous in the popular sense. But, legally speaking, both are different concepts but interrelated in the sphere of parental care and control over children. Guardianship is the legal right over the person and property of the minor during his/her minority whereas custody refers to physical possession of the child and taking care of the child's interests by way of serving the needs of the child for proper growth. Guardianship generally refers to a permanent or a long run right and custodianship refers to relatively a short term personal care. A guardian is legally competent to deal with the property of the minor whereas the custodian does not enjoy that right. This right has always a corresponding legal accountability also. In spite of these differences, guardianship and custodianship are in the nature of a sacred trust. As long as parents are living together, the issues of guardianship and custodianship do not conflict with each other. But in case of the separation of parents, the issues surface warranting legal and judicial interventions. In such cases guardianship may vest with one person and custody with another. The legal issues - who is a guardian of a minor and who is entitled to have custody of a minor and what is the status of woman in the matters of guardianship and custodianship form the subject matter of the present topic.

Legislations on matters relating to Guardianship and Custody

The Majority Act, 1875 defined a minor as a person who has not completed the age of 18 years. But where a guardian is appointed for the minor by a court or where the property of the minor is under the supervision of the Court of Wards, the age of majority is on the completion of 21 years. This difference in the age of a person being a minor and a person

even after having becoming a "major" having someone else supervise the property used to cause much confusion and legal debate. However, fortunately, this distinction has been done away with by enacting the Indian Majority (Amendment) Act, 1999 which provides that the age of majority for everybody is 18, uniformly applicable to all. It is a gender neutral definition. The Guardians and Wards Act, 1890 (hereinafter referred as GWA) is a secular law dealing with the powers and duties of guardians towards their wards and prescribes the procedure for appointment and removal of guardians for the person and property of minor wards in the absence of natural guardians. It governs all Indians irrespective of religious affiliation and therefore supercedes individual customs and convention dictated by religion and society.

The Hindu Minority and Guardianship Act, 1956 (hereinafter referred as HMGA) is a religious specific law applicable to Hindus only. It is in addition to and complementary to the GWA, 1890 and as far as Hindus are concerned both are to be read together. The HMGA deals with certain aspects of guardianship and the rest is to be looked into GWA.

Women's right to Guardianship and custody under Hindu law

According to HMGA, 1956, a guardian can be of three categories, namely natural guardian, testamentary guardian and court appointed guardian. In case of a boy or an unmarried girl, the father is the first natural guardian and after him, the mother. Since the woman gives birth and is the natural nurturer and care-giver of the child, particularly in the first few years of its life, therefore in all cases the custody is generally with the mother, till the child attains five years of age. The expressions 'Father' and 'Mother' do not include step-father and step –mother, but include adoptive father and adoptive mother. For an illegitimate boy or illegitimate unmarried girl, mother is the first natural guardian and after her, the putative father. In case of a married minor girl, parents lose their guardianship and her husband becomes the natural guardian. In such a case, however, this is a contested site since it is illegal for a minor girl to be married in the first place itself.

It is quite explicit that in case of legitimate children, law accords primary position to father and secondary position to mother to act as their natural guardians. However, the custodianship is acknowledged to be the prerogative of the mother generally due to the emotional bondage that generally exists between a mother with her child.

The issue of legality of guardianship of mother of her daughter during the life time of father came before the Supreme court in *Jijabai Vithalarao Gajre* v. *Pathankhan* [(1970) 2 SCC 717] in which the court observed that "It is no doubt true that the father was alive but had fallen out with the mother and he was not taking any interest in the affairs of the minor for 20 long years and it was as good as if he was non-existent so far as the minor

was concerned. In the peculiar circumstances, the mother could be considered as the natural guardian."

The issue of constitutional validity of provision of law (Section 6 (a) of HMGA, 1956 and a parallel provision Section 19(b) in GWA, 1986) relegating a secondary position to mother came before the Supreme court as violation of Articles 14 and 15 of the Constitution in *Githa Hariharan* v. *Reserve Bank of India* and in *Vandana Shiva* v. *Bandhopadhyaya* [(1992) 2 SCC 228] wherein the court delivered a common judgment. The court observed that " the word 'after' father, on a cursory reading does give an impression that the mother can be considered as a natural guardian only after the life time of the father… It is a well settled principle of interpretation that if on one construction a given statute will become unconstitutional and on another construction, it is constitutional, the court will prefer the latter on the ground that the parliament would not have intended to ignore the fundamental right which prohibits gender discrimination…The word 'after' need not necessarily mean 'after the lifetime' but it means 'in the absence of'. Where father is absent from the care of the minor or wholly indifferent to the minor's interests or the father is physically unable to take care because of his living away or due to his mental incapacity or the father consents for mother to act as guardian may be the various situations when mother will be considered as guardian even during the lifetime of father." The court said that the decision is only an expansion of the principle set out by the Bench in *Jijabai's* case. The apex court also gave direction to the RBI to formulate suitable methodology to the effect that mother to be recognized as equal guardian to fathers.

However, in spite of the ruling given by the apex court in the *Gita Hariharan* v. *Reserve Bank of India*, and the *Vandana Shiva* v. *Bandhopadhyaya* [(1992) 2 SCC 228] case, it still it is an issue that is debated and discussed as to whether the mother can be considered as a natural guardian in the absence of the various situations mentioned by the court in the case. Sections 6(a) of HMGA and 19(b) of GWA are to be amended suitably so as to accord equal guardianship to father and mother.

The mother is legally declared as custodian of her child, generally, till the age of five years and it is based on the legal presumption that welfare of a child below five years is most secure and assured in the lap of its mother which has no substitute. On the basis of this recognition the mother is enabled to seek custody of her child if she is deprived of it in case of any matrimonial litigation filed under the Hindu Marriage Act, 1955. Only under exceptional situations, the custody of children cannot be given to mother considering the welfare of the children. Financial vulnerability/disability is one of the factors often cited as the reason why a mother should not be given custody of her child. But thanks to the fact that more and more women are taking up jobs and becoming professionals and are being well paid and drawing decent salaries, frequently earning even more than their erstwhile husbands, this aspect is gradually becoming less of a

problem. Women, in growing numbers today, find themselves eminently capable of looking after their children financially.

The father or mother as natural guardian loses his or her status on conversion to another religion or on renunciation of the world. The natural guardian has the power to do all acts necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate. But he or she can not bind the minor by a personal covenant. The natural guardian cannot mortgage or sell or gift or exchange or charge or lease for more than five years or lease for a period exceeding more than one year beyond the date of minor achieving majority, the immovable property of the minor without the court's permission. Any such alienation is voidable at the option of the minor within three years on attaining majority. Where the minor choose to avoid the transaction, it is rendered *void ab initio*, as if it had never taken place.

Regarding the power of appointing a guardian under will, under classical Hindu law, only the father by his will could appoint a testamentary guardian. The testamentary guardian appointed by father became the guardian after the death of the father, even in the presence of the mother, and in that way the father was empowered to deprive the mother of her natural guardianship by making his own appointee. This particular provision of the classical Hindu law made possible great cruelty and injustice to women. Specially in the case of those marriages where the husband and wife did not enjoy good understanding or mutual love and respect for each other. It was a weapon in the hands of the Hindu male and he could use it to torment/punish/avenge/ his wife . The wife on the other hand could do nothing in the event of such a situation and had no other option but to bear the injustice meted out to her. Fortunately, these injustices/anomalies have been addressed and rectified under HMGA, 1956. Firstly, the mother can also appoint a guardian of her own choice under her will. Secondly, as long as she is alive, the testamentary guardian appointed by her husband will not become the guardian. Thus the husband cannot rob her of her right through his will. Thirdly, is she so wishes, she can in case of her death leave a will appointing any person to act as guardian. In such a case, her appointee will become the guardian and her husband's appointment will become ineffective.

In case of an illegitimate child, the mother can appoint a testamentary guardian. But the question 'whether such a person can become a a guardian in the presence of putative father' is not answered by the legislation. This needs legislative clarity because the law declares putative father as the natural guardian of the illegitimate child after the death of the mother. In the absence of such amendment, the question 'whether the mother of her illegitimate child can bar the putative father from becoming the natural guardian by her will?' becomes a subject of judicial interpretation. Gender parity requires removal of this lacuna existing against the putative father.

Women's right to Guardianship and custody under Muslim law

Under Muslim law, the custody of every child primarily belongs to its mother, while the guardianship of every legitimate child is ordinarily with the father. The mother as custodian is called *Hazina* and under Hanafi law, her custody of her female child comes to an end as soon as her daughter attains puberty. In the case of a male child her custody of her son comes to an end when he attains seven years of age. Thereafter, the custody shifts to the father and it becomes his right. However, there is a distinction between Hanifi Law and Shia Law. Under Shia law, the mother continues to be the custodian till seven years for female child and two years for a male child and thereafter the father becomes the custodian.

In case of the death or legal incapacity of the mother, under Hanafi law, the maternal grandmother or great grandmother, paternal grandmother or great grandmother, sister or her daughter, maternal aunt and paternal aunt will become the custodian of the child in the above said order. Under Shia law, father and after him paternal grandfather takes the custody of the child.

Regarding guardianship, Muslim law speaks of three types of guardians. These are namely, guardian of person (*Walayat-e-Nafs*), guardian of property (*Walayat-e-Mal*) and guardian of marriage (*Walayat-e-Nikah*) and the mother is not entitled to act as a guardian for any purpose. The father and in his absence, his male relatives will act as the guardian. Thus, as is evident, there is a great disparity in the position of a father and that of a mother. However, it is open to the father, as a guardian of property, to appoint by his will, the mother as a testamentary guardian or as an executor of his will and in such cases she can become the legal guardian of a minor's property.

In spite of these rules, the court in many cases appointed or declared a mother as a guardian of her children's property under the GWA, 1890, if the welfare of the children warrants so and in such cases the minority is till the child attains the age of 21.

Women's right to Guardianship and custody under other personal laws

Unlike Hindus and Muslims, Christians and Parsees do not have a separate personal law governing guardianship and minority. During the British period, with the exception of Hindus and Muslims, all other British Indian subjects including Christians and Parsees came to be governed by the rule of common law of the land in matters in which they did not have a specific personal law. Although codification was done of the law of marriage, matrimonial remedies and succession, the questions of guardianship and custody were not touched and they were not codified. Under the un-codified law, the father is the natural guardian for his legitimate minor children and after the event of his death, the mother takes the responsibility and becomes the guardian of her minor children.. For illegitimate children, the mother is the first natural guardian and in the event of her death or her absence for whatever reasons, the putative father becomes the next guardian. A

minor is considered to be a person who has not completed the age of 18 years as defined under the Indian Majority (Amendment) Act, 1999. The Guardianship and Wards Act, 1890, as general law, continues to govern the situation for the purpose of appointment, removal and declaration of guardians in case of absence of natural guardians. For Christians and for those who marry under Special Marriage Act, 1954, matrimonial remedies are provided under the Indian Divorce Act, 1869, later amended as the Divorce Act, 2010 in which Section 41 provides for the custody of children in case of battle for custody In such an eventuality, the court is expected to focus on the needs of the child-not just his material needs, but also keep in mind his emotional and mental requirements. Therefore, the court, while determining the entitlement of the parties, will place main focus on the welfare of the child as the primary consideration.

In case of matrimonial disputes, filed under the Parsi Marriage and Divorce Act, 1936, the issue of the custody of children becomes an ancillary relief and welfare of the children becomes the only consideration for the court in awarding custody.

Conclusion

From the foregoing discussion, it is to be noted that the status of women in the sphere of guardianship is generally relegated to a secondary position and in matters of custody, she is acknowledged as a primary custodian. As infants are in need of strong emotional bondage, love and care for all round development during the nascent years, all personal laws, whether codified or un-codified, place the mother in a high pedestal. On the other hand, as the matters related to property of the minor need a higher degree of skill and prudence, it is placed in the exclusive domain of the guardian declaring the father as the first natural guardian. This hierarchy within the family is, no doubt, to some extent tried to be balanced by the judiciary, through interpretation, with the scale of gender equality, leaving the burden of making it a law to the legislature. It is time to recognize both father and mother as equal guardians as done in the case of adoption through Personal Laws (Amendment) Act, 2010.

Suggested readings

Bare Acts

The Hindu Minority and Guardianship Act, 1956
The Guardian and Wards Act, 1890
The Indian Majority (Amendment) Act, 1999

Books

Mulla Hindu Law
Modern Hindu Law by R.C. Nagpal

Family Law Lectures by Kusum
Family Law in India by G.C.V. Subba Rao
Family Law by Paras Dewan