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# **TYPES OF GUARDIANS AND THEIR RIGHTS UNDER HINDU MINORITY AND GUARDIANSHIP ACT, 1956 & GUARDIANS AND WARDS ACT, 1890**

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Jatin Rana, BA LLB, Law College Dehradun

## **ABSTRACT**

Minors are the one who are not capable to take decisions for their own welfare and maintenance of their property. Thus, guardians are important to act on their behalf for their welfare and protection of their property. This article deals with age of the majority in India and why it differs in different countries on the globe. It discusses briefly about the guardianship of major person in India. In case of minors, there are five types of guardians out of which two are not recognized in the present law of Hindu guardianship. The powers of each type of guardian differ from each other and the two which are not recognized in law are conferred no powers over the property of the minor. The court has the power to extend or restrict the powers of the guardians on the basis of the welfare of the minor and protection of his property. Even the guardians recognized under law cannot act independently over the minor's property. Their powers are bounded initially by the court. They cannot deal without the prior permission of the court. Court also cannot permit any guardian to deal with the property except it is for the benefit of the minor.

## INTRODUCTION

Different countries have different ages for majority. The reason behind it is that it all depends on upon the maturation of mind of the person. The person is said to be mature when he is mentally and physically well capable to take decisions for his own welfare and protection of his property. The mental growth of the people differs on the factors around them like technology, family participation, education, opportunities, etc.

In India, the legal age of the majority is 18 years.<sup>1</sup> According to Indian laws, the person of 18 years is considered to be mentally and physically able to take decisions for his welfare, protection of his property and to give his intelligent consent in different matters.

The person below the age of 18 years in India is legally minor and is not mentally mature. Thus, the person is appointed or declared to act on minor's behalf for his welfare and protection of his property. The person appointed or declared is called 'guardian'.

## GUARDIAN

According to Hindu Minority and Guardianship Act (hereinafter known as HGMA,1956) and Guardians and Wards Act (hereinafter known as GWA, 1890) is a person who takes care of the minor or his property or of the both. The court can appoint separate guardians for minor and his property or for both and also different guardians for different sites of the property.

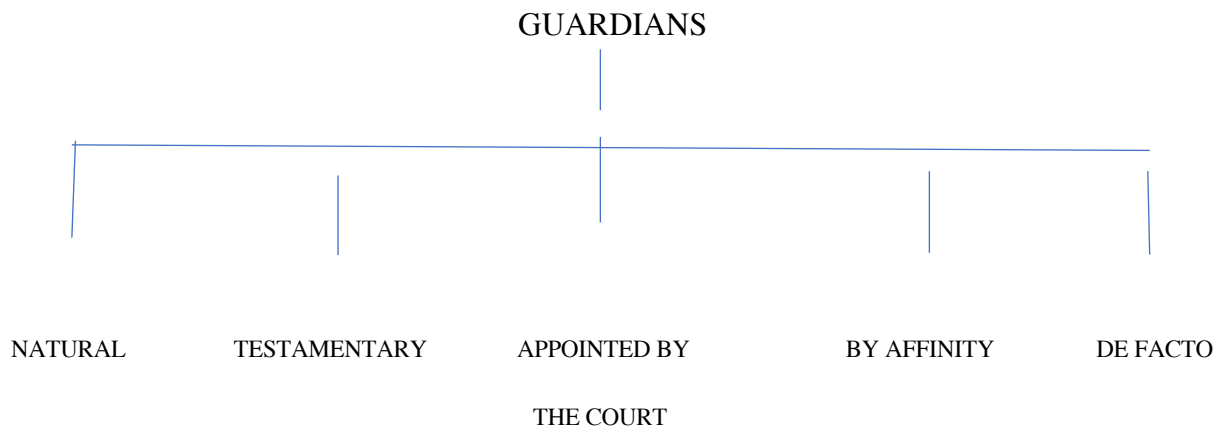
**A guardian can also be appointed for a major person.**<sup>2</sup> Court can appoint a guardian for the major person and his property separately or same for both. If the major is physically challenged but mentally well capable to take decisions for his own benefit then the guardian is appointed only for the maintenance of the person. If the major is both mentally and physically challenged then the guardian is appointed for the maintenance of the person and his property also.

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<sup>1</sup> Section 3 (1) THE MAJORITY ACT, 1875.

<sup>2</sup> Section (14) NATIONAL TRUST ACT, 1999.

## TYPES OF GUARDIANS AND THEIR POWERS



There are mainly five types of guardians.

**1. NATURAL GUARDIAN:** - A person who is by virtue the caretaker of the minor and his property and have direct blood relation with the minor (In case of girl, her natural guardian changes after her marriage which do not have direct blood relation with her.)

- In case of boy and unmarried girl, the natural guardian is father and after him the mother.<sup>3</sup>

Here mother after father does not mean after the lifetime of the father. Both father and mother are natural guardian of the minor but incase when father is unable to act as guardian due to any issue, mother becomes the primary natural guardian the minor.<sup>4</sup>

After the birth of the minor, mother act as the primary natural guardian till the age of 5 years of the minor because in this time period the minor’s most important need is mother to feed and nourish him.<sup>5</sup>

- In case of illegitimate child, mother is the natural guardian and after her the father.<sup>6</sup>
- In case of married girl, her husband is her natural guardian.<sup>7</sup>
- In case of adopted child, the father is the natural guardian and after him the mother.<sup>8</sup>

<sup>3</sup> Section 6 (a) HMGA, 1956.

<sup>4</sup> Githa Hariharan V. Reserve Bank of India, AIR 1999 SC 1149.

<sup>5</sup> Supra no. 4

<sup>6</sup> Section 6 (b) HMGA, 1956.

<sup>7</sup> Section 6 (c) HMGA, 1956.

<sup>8</sup> Section 7 HMGA, 1956.

## POWERS OF NATURAL GUARDIANS

Natural guardians have the power to do anything which is for the welfare of the minor but not for his own interest.<sup>9</sup> The welfare of the minor is kept at the supreme and guardians are supposed to act for the same.<sup>10</sup>

In case of immovable property of the minor, the natural guardians are restricted to mortgage and transfer any part of the property of the minor without the prior permission of the court.<sup>11</sup> Natural guardians cannot lease the property for more than 5 years or for the period extending more than 1 year beyond the date when minor attains the age of majority.<sup>12</sup>

- 2. TESTAMENTARY GUARDIANS:** - A person who is appointed by the will of either of the natural guardian of the minor is known as testamentary guardian. In case of father before his death appoints someone as a testamentary guardian, the title of guardianship passes to the appointed person if not opposed by the mother of the minor.<sup>13</sup>

If the minor is a girl, the right of the guardian ceases after the marriage of the girl as the guardianship passes to her husband.<sup>14</sup> No other person can appoint the guardian by their will when either of the natural guardian is alive and if done so, it will be void ab initio.<sup>15</sup>

## POWERS OF TESTAMENTARY GUARDIANS

Testamentary guardians have all rights which were conferred to the natural guardians if there are no restrictions in the will given by the natural guardians.<sup>16</sup> Testamentary guardians have no power to mortgage and transfer the immovable property of the minor without the prior permission of the court and no court can grant such permit except it is in the favor or welfare of the minor.<sup>17</sup>

The court can extend or restrict the power of the guardians if it is for the benefit of the minor and his property.<sup>18</sup>

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<sup>9</sup> Section 8 HMGA, 1956.

<sup>10</sup> Section 13 HMGA, 1956.

<sup>11</sup> Subhashappa P. Meti V. Maroti L. Sawarkar, AIR 2006 (NOC) 608 (Bom).

<sup>12</sup> Supra no. 7

<sup>13</sup> Section 9 (1) & (2) HMGA, 1956.

<sup>14</sup> Section 9 (6), HMGA, 1956.

<sup>15</sup> Sundaramurthy V. Shanmuganadar, AIR 1980 Mad 207.

<sup>16</sup> Section 9 (5) HMGA, 1956.

<sup>17</sup> Section 28 GWA, 1890.

<sup>18</sup> Section 32 GWA, 1890.

- 3. GUARDIAN APPOINTED BY THE COURT:** - Under section 7 of GWA 1890, court has the power to appoint guardian for the minor or his property or for the both. The court also has the power to remove the guardian for the welfare of the minor but cannot appoint another person until the first person's powers are ceased.<sup>19</sup> If minor has more than one property, court can appoint different guardians for different sites of property.<sup>20</sup>

#### **POWERS OF GUARDIAN APPOINTED BY THE COURT**

Guardian appointed by the court has power bounded by the limits as decided by the court from time to time. Guardian cannot mortgage or transfer the property without the prior permission of the court and court can only grant permission if it is for the welfare of the minor and protection of the property. The court can extend or limit the power of the guardian because the paramount consideration of the court is the welfare of the minor.<sup>21</sup> If the guardian transfers or mortgage any part of the property of the minor without the prior permission of the court, it will be voidable at the part of the minor when he attains the age of majority or any other major person on behalf of the minor.

- 4. GUARDIAN BY AFFINITY:** - Guardian by affinity is the guardian of a minor widow. These types of guardians are not recognized in HMGA,1956 or in any other present law. These types of guardians were recognized in Guardians and Wards Act, 1850. Under section 7 of GWA, 1890, court can remove any guardian who are not appointed or declared by the court.

In the case of *Paras Ram V. State of UP*<sup>22</sup>, father-in-law of the minor widow married her to person without her consent. The court held that the father-in-law of the minor widow is her guardian by affinity and was not found guilty of marrying her daughter-in-law to a person without her consent.

**Since, guardian by affinity is not recognized in present laws of guardianship, so no powers are conferred to these types of guardians.**

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<sup>19</sup> Section 7 GWA, 1890.

<sup>20</sup> Section 15 GWA, 1890.

<sup>21</sup> Supra no. 11

<sup>22</sup> AIR 1960 All 479,1960 CriLJ 1054

- 5. DE-FACTO GUARDIAN:** - Guardians which are neither appointed nor declared by the court nor by the will of the either of the natural guardian but take interest in the welfare of the minor and protection of the property.

**No powers are conferred to the De-Facto guardians under law.** They have no power to deal with the property and if they do so, it will be void.<sup>23</sup>

Deal done by the de-facto guardian will be void and the other party in the deal will be considered as the trespasser because he has no right over the property of the minor.<sup>24</sup> when minor attains the age of majority, he cannot ratify the deal because it was void not voidable.

## CONCLUSION

In the whole process of appointment or declaration of the guardian of the minor, court majorly considers the welfare of the minor and protection of his property. None of the guardian discussed above have absolute power to deal independently with the property of the minor. They have to take prior permission of the court to deal with the property of the minor.

While claiming for the guardianship, the applicant has to give evidence and confidence to the court that he will act for the welfare of the minor. For taking the title of guardian, neither the economic nor the mental concern are particularly considered by the court. All factors and balancing are considered before the court while appointing guardian for the well-being, welfare of the minor and protection of the property of the minor.

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<sup>23</sup> Section 11 HMGA, 1956.

<sup>24</sup> Essakkal Nadar V. Sreedharan, Babu AIR 1992 Ker 200.