

Under entitled to act  
as the natural  
guardian



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Under old Hindu Law a testamentary guardian appointed by father could function even though when the mother was alive. But according to Section 9, even though the father has appointed a guardian if the mother is alive, she would be his guardian, and she also can appoint under her will a guardian of her own choice. But if the mother does not appoint any guardian, the appointment of the guardian under "father's will" will come into operation.

Such a testamentary guardian becomes functional only after the death of natural guardians, as a will comes into effect only on the death of its executor. Section 9 of the Act runs as follows: "(1) A Hindu father entitled to act as a natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in Section 12) or in respect of both, (2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive, if the mother dies without appointing by will, any person as guardian. (3) A Hindu widow, entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor illegitimate children by reason of the fact that the father has become disentitled to act as such, may by will appoint a guardian for any of them in respect of minor's person or in respect of minor's property (other than the undivided interest referred to in sub-section (2) or in respect of both. (4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children, may by will, appoint a guardian for any of them in respect of the minor's persons or in respect of the minor's property or in respect of both. (5) The guardian so appointed by will has the power to act

as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the powers of a natural guardian under this Act to such extent and subject to such restrictions, if any as are specified in this Act and in the will. (6) The right of guardian so appointed by will shall, where the minor is a girl, cease on her marriage."

### **Who can Appoint Testamentary Guardian?**

Thus according to the above section the following persons can exercise the right to appoint a testamentary guardian in respect of minor's person or property or both: (1) Father, natural or adoptive (2) Mother, natural or adoptive (3) The widowed mother, natural or adoptive.

#### **Father:**

A Hindu father, who is entitled to act as a natural guardian and has not become disqualified to act as such, may by will appoint a guardian in respect of minor's person or his property or both, but not of undivided interest of the minor in the joint-family property. The undivided interest of minor in a joint Hindu family remains in the hands of Karta. Hence no testamentary guardian can be appointed in respect of that. The father cannot supersede the power of the mother to act as a natural guardian by appointing a testamentary guardian in case he predeceases her but if the mother died without appointing any guardian, the appointment made by the father shall revive. Thus where the father dies during the life time of his wife (minor's mother) after appointing a guardian by will, the appointment will not become effective and the mother by virtue of the provisions in Section 6 of the Act will become the natural guardian of the minor.

But where the widowed wife, i. e., minor's mother dies without appointing any person as guardian by will of the minor, the appointment made by the father will revive.

**Widowed Mother:**

A Hindu widowed mother entitled to act as the natural guardian of her legitimate children may by will appoint a guardian for any of them in respect of the minor's person or separate property or both. Any appointment made by her husband will be of no effect on the face of the appointment made by the widow. Where the child is illegitimate, the mother being a natural guardian can appoint a guardian by will even during the life time of her husband. In such case the father has no right to appoint any person as guardian. A Hindu mother entitled to act as the natural guardian of minor legitimate children could appoint a guardian by will during the life time of her husband provided he has ceased to be a Hindu or has become a sanyasi by renouncing the world.

Similarly where the mother entitled to act as a natural guardian of her illegitimate children, may appoint a guardian by will either with respect of minor's person or property or both. In such cases the presence of her husband is no bar nor is it necessary that he is disqualified to act as such because the father is not competent to act as a natural guardian of the minor children during the lifetime of their mother, who alone could exercise the right of appointing a guardian by will. There is nothing in the act which limits the choice of natural guardian to appoint any person as the guardian under a validly executed will. But the person so appointed must be one who

is not suffering from any disqualifications like minority, renunciation of the world or being a non-Hindu or insanity.

**Powers of Testamentary Guardian:**

The testamentary guardian becomes entitled to act as the guardian of the minor after the death of the natural guardian. He can exercise all the rights and powers of a natural guardian to such extent and subject to such restrictions as are specified in the Act and in the will. Thus the powers of testamentary guardian and the natural guardian are the same except that the power of a testamentary guardian to deal with property belonging to the minor is also subject to the restrictions imposed by the will. Since the powers of the testamentary guardian are similar as that of natural guardian, it is relevant to know that Section 8 of the Hindu Minority and Guardianship Act, 1956 deals with the powers of the natural guardian.

Section 8 lays down that the natural guardian has every power to do any act subject to the provisions of the law if necessary or found to be beneficial to the estate of the minor. However, it should be noted that a natural guardian has no power to sell, make a gift or exchange any property of the minor without the permission of the Court. In the same way natural guardian can't lease the property of the minor for more than five years or more than one year beyond the date on which the minor attains majority.

**Removal of a Testamentary Guardian:**

Section 39 of the Guardian and Wards Act lays down certain grounds on which a testamentary guardian could be removed. It may be noted here that the above section has not been abrogated by the present Act of 1956 hence

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it stands a good law even today. Thus a testamentary guardian could be removed on the following grounds as mentioned in Section 39 in the Guardian and Wards Act:— 1) Abuse of his trust. 2) Continuous failure to perform the duties. 3) Incapacity to perform the duty.

4) Ill-treatment or neglect to take proper care of his ward. 5) Continuous disregard to any of the provisions of the Act. 6) Conviction in case of an offence relating to lapses in the character. 7) Keeping an adverse interest.

8) Ceasing to reside within the local limits of the jurisdiction of the court, and 9) Insolvency or bankruptcy. In addition to the above, the Hindu Minority and Guardianship Act, 1956 mentions the following grounds: (i) If he ceases to be Hindu, or (ii) Has completely and finally renounced the world by becoming a hermit or an ascetic.

#### **Guardians Declared or Appointed By the Court:**

Where the court is satisfied that it is for the welfare of a minor that a guardian should be appointed with respect to his person or property or both, it may pass an order to that effect under the Guardian and Wards Act, 1890. In appointing or declaring a person as the guardian of a minor, his welfare shall be the paramount consideration.

This has been specifically provided in Section 13 of the Hindu Minority and Guardianship Act, 1956, which runs as under: “ Section 13(1)—In appointing or declaring any person as a guardians of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

**Who can apply for the appointment as guardian?**

The court can consider the appointment of a guardian on the application of

(1) The person desiring to be appointed or claiming to be the guardian of the minor; or (2) Any relative or friend of the minor; or (3) The Collector of the district or other local area in which (a) The minor ordinarily resides; (b) The minor holds property; or (4) If the minor belongs to a class, then the Collector, having authority with respect to that class. The powers of the guardian, thus appointed by the court and the limitations on his power are the same as that of a natural or testamentary guardian.