LAW COMMISSION OF INDIA

EIGHTY - THIRD REPORT

ON

THE GUARDIANS AND WARDS ACT, 1890 AND CERTAIN PROVISIONS OF THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956.

April, 1980.

Dated the 26th April, 1980.

My dear Minister,

I am herewith forwarding the Eightythird Report of the Law Commission containing proposals for amendment of the Guardians and Wards Act, 1890, and Section 6 of the Hindu Minority and Guardianship Act, 1956.

2. The Guardians and Wards Act, 1890, was enacted 90 years back. At the time of its enactment women had scarcely any rights; for them there was only social and legal degradation, material insecurity and other manifestation of dominance and false superiority of men. The Act while providing the appointment of the guardian kept in view the welfare of the minor but laid emphasis on the superiority of the father or male member in the matter of appointment of guardians of minors and their custody.

3. In the social conditions that exist today, it is very necessary that parents must regard as their foremost responsibility to bring up their children as healthy, happy, and useful individuals of an all-round standard of education and as active builders of society. The purpose, therefore, of the law of the guardianship should be to ensure this development of the child and to safeguard its interests. This can be done only if, in the appointment of the guardian of a minor, the welfare of the minor is made the first and paramount consideration, and no other consideration, such as the superiority of the mother or father is taken into account. In appointing a guardian the Court must also see which of the claimants is best suited by his or her educational competence and influence, and by his own example to provide the requisite care in upbringing the child. The Commission, therefore, feels that it is necessary to overhaul and revise the existing Guardians and Wards Act, 1890, so as to embody the idea of the welfare of the minor being the first and paramount consideration in the appointment of a guardian and in other related matters. Even as it is the working of the Act has revealed a number of defects and deficiencies which hamper the administration of the Act. Some of the legal provisions of the Act require elaboration and clarification, while others require tightening up.

4. The Hindu Minority and Guardianship Act, 1956 recognising the advancement in the status of women in all spheres gave them the right to be appointed as guardians. It also made the welfare of the minor the paramount consideration in the appointment of a guardian. Further while postponing the mother as a natural guardian to the father, it laid down at the same time that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Section 6 of the Hindu Minority and Guardianship Act, 1956 requires to be altered so as to allow the mother the custody of a minor till it completes the age of 12 years. It is necessary to allow the mother to have the custody of a child till it attains the age of 12 years in order to prevent the father from using the child as a pawn for securing complete submission of his wife, where the husband on the instigation of parents or sister or on his own has adopted the 'pawn' method when the wife insists on the husband having his own establishment which he can well afford or when a wife has not served well the mother-in-law or when the wife has not brought a handsome dowry.

5. The amendments suggested by the Commission seek to embody in the Guardians and Wards Act, 1890, and Section 6 of the Hindu Minority and Guardianship Act, 1956, all the ideas narrated earlier.

6. We are grateful to Shri P. M. Bakshi, Member Secretary, of the help and assistance given to us in the preparation of this Report. We are also grateful for the assistance given to us by Shri V. V. Vaze, Additional Secretary of the Commission.

With regards,

Yours sincerely,
(Sd.) P. V. DIXIT

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CHAPTER 1

INTRODUCTORY

Genesis and scope.

1.1. This Report is concerned with the Guardians and Wards Act, 1890.[1] The sociological importance of such legislation and its relevance to the welfare of children hardly need elaboration. Further, a number of provisions of the Act have led to controversies in their interpretation and require clarification in the interests of uniformity of law. The Commission has, therefore, as a part of its function of revision of Central Acts of general importance, considered it desirable to take it up for revision suo moto. It is also[2] proposed in this Report to deal with certain analogous provisions of the Hindu Minority and Guardianship Act, in which reform appears to be needed.

Need for revision of the Act.

1.2. Although the Act was passed about a hundred years ago, no comprehensive revision of its provisions seems to have been undertaken since it was passed. The Legislature, when it considered the law[3] relating to maintenance and guardianship applicable to Hindus had occasion to deal with some matters germane to the law of guardianship, but there was no opportunity for considering reform of the Act of 1890. Some of the provisions of the Act are in need of reform in the light of present day conditions. A number of important questions arising from conflict of judicial decisions or from certain deficiencies in the present expression of the law have also necessitated a review of the law. Clarity, always desirable in legislation, is especially necessary in this field. As has been said,[4] "The lives of the young are at stake.....".

The child in society.

1.3. It is unnecessary to underscore the social significance of legislation dealing with children. It was Sophocles who said that children are the anchors that hold a mother to life. This puts beautifully the elementary proposition that the bond between the mother and a child of tender years is one that should be regarded as sacrosanct. Unfortunately, some of the provisions of the Act do not reflect this attitude to the fullest degree. These provisions will therefore occupy our serious attention.

Crisis in family life.

1.4. It is common-place that family life, when it is running a smooth silent course, presents no serious legal problems. Small ripples that create transient tensions, pass the parents by. But a major crisis in the family that causes emotional conflict, sooner or later creates a rift which, in modern times, often reaches the Courts. The Act with which we are concerned purports to deal with such a crisis, in so far as the crisis may affect the lives of minor children. How far the Act deals with the matter adequately by providing a sound legal framework will be an important consideration in making our recommendations.

Problems presented by children.

1.5. Children usually present two problems to a system of law. They must be prevented from squandering away the property through inexperience; and if either or both of their parents die or if the parents disagree in matters concerning the children, provision must be made for their proper upbringing and for the management of their property.

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1 Briefly, "the Act".

2 Chapter 6, *infra*, para 6.50.

3 Hindu Minority and Guardianship Act, 1956.

4 F.A.R. Bennion, "First consideration" (1976) 126 New L.J. 1237.

Welfare.

1.6. As the welfare of the child is the paramount consideration, such welfare would prevail over parental rights. Parental rights would enter into a consideration, as one of the factors in considering the welfare of the child, but not as a dominating factor, where they would conflict with the welfare of the child. As Scrutton L.J. said[1] in his picturesque language, "proceedings for obtaining custody are being used 'not for the body, but for the soul of the infant'."

Shelley's Guardianship.

1.7. This is the modern approach, though this position has been reached after some struggle. For example, in England the two children of the poet Shelley from Harriet were left in the care of a guardian other than himself[2] by an order of the Court—though not without some difficulty. To Shelley and his friends, the decision appeared an example of the "tyranny of priests and laws",[3] impelling him to leave England permanently. But the Court had to pronounce the decision because Shelley's moral and atheistic ideas were considered a serious disqualification for exercising the rights of the father.

Various competing considerations

1.8. It would be pertinent to observe that a number of competing considerations[4] has been mentioned by the Legislature or the judiciary in determining questions of guardianship or custody or both. In the first place, there is the criterion of personal law and the "right" of the father or (in some cases) of the mother thereunder. In the second place, there is the question of the fitness (or unfitness) of the person who is proposed to be appointed a guardian or to whom custody of the child is proposed to be given. In the third place, there is the question of consulting the wishes of the minor. Last, but not the least, is the consideration of the welfare of the child—or, to put it in a different phraseology —"the best interests of the child". One or the other of these criteria has, in the course of history, come into prominence and the other has shaded into comparative insignificance.

Thus, the law relating to custody is still evolving. As Lord Upjohn observed,[5] the rules here "have developed, are developing and must, and no doubt will, continue to develop by reflecting and adopting the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment and methods of bringing up children".

This is not to say that the concept of "welfare of the child" is totally new. It is sometimes stated that in the historically famous dispute decided by King Solomon, the matter was decided by way of rough and ready justice, or in a crude manner. This, however, is not strictly accurate. The approach of the King was based on a shrewd psychological judgment, which itself (rightly) assumed that the love of the mother would transcend any desire to assert "her right". A question of fact (maternity), otherwise difficult to decide, was decided on the basis of instinct.

Cardozo's views as to "best interests theory".

1.9. As to the criterion to be adopted in such matters, Cardozo, siting as a judge in the New York Court of Appeals,[6] made the following observations pertinent to the "best interests" theory:—

"The Chancellor, in exercising his jurisdiction, does not proceed upon the theory that the petitioner, whether father or mother, has a cause of

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1 *Re Carroll*, (1931) 1 K.B. 317, 331.

2 *Shelley* v. *Westbrook*, (1817) Jac. 260 and *Shelley* v. *Westbrook*, (1821) *Jac.* 266 followed in *Thomas* v. *Roberts*, (1850) 3 De G. & S. 758.

3 Chambers Encyclopaedia, Vol. 12, page 471.

4 See further para 6.37, *infra* (section 17).

5 J. v. C., (1970) A.C. 668, 722H-723A.

6 *Finlay* V. *Finlay*, (1925) 148 N.E. 624, 626 (N.Y.).

> action against the other, or indeed against anyone. He (the Chancellor) acts as *parens patriae* to do what is best for the interest of the child. He is not adjudicting a controversy between adversary parties, to compose their private differences. He is not determining rights as between a parent and a child, or as between one parent and another.....Equity does not concern itself with such disputes in their relationship to the disputants. Its concern is for the child."

The concept of "welfare of the child" does find a mention in the Act of 1890. However, it is like a thread that is visible at some places, but gets blurred elsewhere by being entangled with others.[1] It needs now to be painted in glowing colours.

Clash of interests between parent and child.

1.10. The possible opposition of interests between parents and child is now regarded as almost commonplace in domestic relations law and juvenile law. It is illustrated by proceedings for paternity and child support, parental neglect and abuse, brought against the parents for the welfare of the child. In fact, a separate counsel for the child has been regarded as necessary [2-3] in some countries.[4]

Role of Judge.

1.11. These aspects impose a particularly heavy burden on the Judge. Any Judge with experience of dealing, at first instance, with cases concerned with the care and custody of children must be well aware of the necessity to treat the matter with the utmost discretion and tact. Where there is a serious dispute between the parties involved, it may on occasions be inevitable that an assessment has to be made of the character of one or more of them from the point of view of suitability to have care of, or access to, a child. But such an assessment can rarely be made satisfactorily by anyone who has not heard all relevant evidence and, in particular, has not had the opportunity of observing the parties in the witness box. The assessment should always be expressed in moderate language, lest the dispute should be exacerbated and there should be impairment of the prospects of securing that all concerned contribute as much as may be within their power towards promoting the welfare of the child.[5]

A Judge usually can decide with self-confidence the legal and factual issues in litigation over who should have the custody of a child. Where he needs help, however, is in evaluating which of the available alternatives will best satisfy the psychological needs of the child. Attempt to provide guidelines, based on psychoanalytic theory, to govern the Judges decision in all types of child placement cases would be futile. The attempt would be seductive, but impossible; because the amalgams of factors to be appraised in custody contests are too complex.

Legislative trends in family law and in regard to children.

1.12. Students of family law are well aware of certain interesting developments in that sphere of law. Recognition of the peculiar nature of proceedings involving disputes concerning the family,[6] and the emergence of a new set of values with reference to the equality of status[7] of women along with increasing emphasis on the rights of the child, have led to certain important developments in family

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[1] See para 6.40, *infra*.

[2] *Cf. Matter of Gault*, (1963) 387 U.S. 1, 27, 34-42.

[3] Nanette Dembitz, "The Good of the Child v. The Rights of the Parent" (1961) Vol. 86, Pol. Science Quarterly, 389, 395.

[4] See also para 1.15, *infra*.

[5] *B. v. W.*, (August 17, 1979, Part 31), 1 W.L.R. at 1053.

[6] Para 1.11, *supra*.

[7] Para 1.18, *infra*.

law. So far as the subject of guardianship and custody of children is concerned, the trend of legislative and judicial attitudes in recent times may be briefly adverted to.

Legislative trends.

1.13. In the first place, there has been an increasing emphasis on giving the mother, the right to apply for custody. In England, this trend took the shape of legislation passed in 1829, 1873 and 1925, giving increasing recognition to the mother's right and culminating in the statutory provision now to be found in the Act of 1973,[1] which specifically provides that "in relation to the custody or upbringing of a minor and in relation to the administration of any property belonging to or held in trust for a minor (or the application of income of any such property, *a mother shall have the same rights and authority* as the law allows to a father, and the rights and authority of mother and father shall be equal and exercisable by either without the other. If they disagree, either may apply to a court for its discretion".

This is certainly a far cry from the nineteenth century attitude when Courts were persuaded only with some difficulty to decline to enforce the father's claim to custody.

The second trend, which was a logical consequence of the increasing powers which the Courts had come to acquire,—was the evolution of a *principle* upon which to adjudicate such disputes. Here we have the principle of the child's welfare which, in the course of time, was held to override considerations such as the father's "right". Thus, equality was created between the two parents and the welfare of the child was placed in the forefront.

Thirdly, with increasing complexity in family relations, it has become necessary in certain countries to give persons and bodies outside the family unit powers to intervene in the interests of the children. In the competition between parents and non-parents, again,[2] the welfare of the child is the first and paramount consideration.

Fourthly, we come across legislation vesting in local authorities certain functions in relation to the care of children. Such authorities may be ordered by the Court to care for, or supervise, a child whose home circumstances, upbringing, education or behaviour have been found unsatisfactory. Such provisions, while appearing to be qualifications and restrictions on the rights of the parent, really act as a useful inducement for the observance of parental responsibilities.

Criminal law.

1.14. While these topics belong to the field of civil law, the criminal law has also kept pace with the times in order to protect children from a wide variety of evils—such as, employment in hazardous occupations, purchase of dangerous substances, sexual exploitation and so on. More direct are the provisions designed to protect children from various forms of neglect or ill-treatment at the hands of their parents.

Developments in procedure—Experts to assist the Court.

1.15. These developments in the substantive sphere have been matched by the evolution of certain procedural devices which are mainly intended to ensure that the guiding principle that the welfare of the child is paramount, is properly applied and adequately implemented in practice. To some such belief may be attributed the movement for the appointment of experts to assist the Court in assessing the welfare of the child and the movement for appointing a child advocate.[3]

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[1]Section 1(1), Guardianship Act, 1973. See further Chapter 6, *infra* and Appendix 3.

[2]*Cf. J. v. C.*, (1969) 1 All E.R. 788 (House of Lords).

[3]See also para 1.10, *supra*.

In England, for example, all courts have power to call for an independent report on matters relevant to the welfare of the child. This service is provided in the High Court and the divorce court by the welfare officer, who is generally the principal probation officer for the area. Although the service is utilised mostly in proceedings ancillary to divorce, it is not so confined.

Independent legal representative.

1.16. As to the seperate representation of children, there is vast and expanding scholarly material in the United States calling for the appointment of a child advocate or counsel for the child in contested cases.[1-3] Separate legal representation of children has been suggested[4] on the ground that the earlier the attorney is appointed in a contested custody case where a real dispute is apparent, the more effectively can the principles be put into practice.

Recently, in England, in regard to certain "care proceedings",[5] the Court has been given a power to appoint a person to represent the interests of a child.[6]

Steady trend.

1.17. Thus, over a period of years there can be discerned a steady trend which reflects the view of successive generations, as to what the public interest demands in this particular field of law. Development of legislation in this field in India ought to proceed upon a parallel, rather than on a diverging, course.

Equality of sexes.

1.18. Finally, it may be mentioned that the need for equality of treatment as between the sexes nas been stressed not only by international bodies concerned with the status of women[7] but also in India.[8]

U.N. Declaration.

1.19. The U.N. Declaration on Rights of the Child enunciates this principle:[9]

> "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security: a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to "extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable."

Position in elsewhere and on the continent.

1.20. Recent legislation in England also emphasis in positive terms the equal positions of each parent.[10] In France,[11] the former "paternal power" (puissance paternelle) has been replaced by the new "parental authority" (authorite parentale).

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[1]Goldstein and others, "Beyond the best interests of the child" (1973), page 66.

[2]Note "Lawyering for the child" (1978 May) 87 Yale Law Journal 1126.

[3]Statutory references collected in Note "Lawyering for the child" (1978 May) 87 Yale Law Journal 1126 footnote 8 (19 jurisdictions using the term "attorney or counsel for the child" and 5 jurisdictions using the term "guardian ad litem").

[4]Note "Lawyering for the child" (1978 May) 87 Yale Law Journal 1126.

[5]Section 64 Children Act 1975 inserting section 32A in the Children and Young Persons Act 1964.

[6]See also Alec Samuels "Children's Advocate" (1977), N.L.J. 133.

[7]U.N. Commission on Status of Women, 20th Session (1967).

[8]Committee on Status of Women (India) Report (1974), pages 126-128 paragraphs 4.143 and 4.144.

[9]U.N. Declaration of Rights of the Child, Principle 6.

[10]Guardianship of Minors Act 1971 and Guardianship Act, 1973.

[11]Law of 4th June, 1970 (France) as briefly summarised in Alexandre, "Women in France" (1972) 20 American Journal of Comparative Law 647, 651.

The modern approach is also illustrated by the position as it prevails in Sweden.[1] The parents are joint guardians of the children of the marriage, and, on the death of the one parent the other becomes the sole guardian. During separation or after divorce, the parent with custody is the sole guradian. Of illegitimate children, the mother is the sole guardian unless she is unsuited to act on behalf of the child. Until the twentieth birthday, a child remains in the custody of the parent or the guardian. During the cohabitation of the parents, parental custody is joint. In the event of separation or divorce, the Court determines which parent shall be the custodian. In practice, the mother is often preferred when the child is of tender age, while there is a preference of the father in the case of teenage sons.

Treatment by society of its children.

1.21. In England, the philosophy underlying the Children Act, 1975 was thus summarised by David Own M.P.[2]

> "A nation's children represent a nation's future. How society treats its own children is a good reflection of the overall health and stability of that society."

Relevance of survey.

1.22. Opinions differ as to the efficacy of the various legislative and other measures. But this brief survey is relevant to show that the legal relationship between parents and children cannot be quite like that between adults, because here we are concerned with the upbringing of someone who is too young to bring himself up and too young to force others to do it for him.

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[1]Wallin, "Women in Sweden" (1972) 20 American Journal of Comparative Law, 622, 626.
[2]David Owen M.P.

CHAPTER 2

BRIEF HISTORY

Introduction.

2.1. The historical evolution of the law in India may be briefly dealt with.[1] Before the Act of 1890, while the law relating to age of majority was codified,[2] there was no all-India Act dealing with the guardianship of minors. The matter, in so far as the law was codified, was governed by certain Acts or Regulations in force in certain local areas and there were also in operation certain uncodified rules of personal law dealing with guardianship.

Statutory law.

2.2. Briefly speaking, the statutory law before 1890 on the subject of guardianship (apart from legislation relating to Courts of Wards), consisted of Acts separately in force in the three Presidencies, certain Regulations in force in the Presidency of Madras, one fragmentary legislation (Act 9 of 1861) amending the law relating to minors and the European British Minors Act (13 of 1874) which provided for the guardianship of European British minors.

Uncodified law

2.3. The general law of guardianship, however, remained unaffected, in so far as the legislation referred to above did not, except as regards European British subjects, purport to deal with natural guardians, their rights and duties. These matters were left to be dealt with by uncodified rules in the sphere of personal law. So also was the subject of testamentary guardianship, as regards Hindus and Muslims.

Origin of Act of 1890.

2.4. Of the Acts in force before 1890, one—the Bombay Minors Act, 1864—had caused serious difficulties in practice. This was the immediate factor that induced the Government of the day to take up the question of enacting suitable legislation on the subject of guardianship. However, it was felt that there was need for an all-India law on the subject.[3]

2.5. It was in this background that the draft Bill was drafted, circulated for comments, revised and introduced and further processed. Details of the relevant discussions will be found in an Appendix.

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[1]For a detailed historical discussion, see Appendix 2.

[2]The Indian Majority Act, 1873.

[3]See Appendix 2 (Historical discussion).

[4] Appendix 2.

CHAPTER 3

PRESENT LAW AND SCHEME OF THE ACT OF 1890

Scope.

3.1. We propose to deal in this Chapter in brief with the present law on the subject of guardianship in India as contained in the Act of 1890 and certain allied Acts.

Minority.

3.2. Guardianship, as envisaged by the Act, is a concept integrally linked with the legal concept of "minority". At the outset, therefore, the position as to minority may be briefly adverted to. The principal enactment on the subject is the Indian Majority Act, 1875.

In Indian law, in the main, three periods of guardianship of minors with reference to the age of the minor fall to be considered. In the first place, a minor is a person under the specified age in regard to matters falling within personal law. This age varies, but in the case of Hindus (under the uncodified law), it was 15 years or 16 years (according to the school by which the minor was governed). According to Muslim law, minority extends upto the age of 15 years.

For Hindus, by statute,[1] it is now 18 years.

In the second place, a person is a minor in matters governed by the Indian Majority Act[2] till he attains the age of 18 years. That Act does not extend to the capacity of any person to act in certain specified matters,—mainly, marriage, dower, divorce and adoption and matters governed by the religion or religious rites and usages of any class of persons.

In the third place, in the case of a person who has a guardian appointed by the Court or who is under the superintendence of the Court of Wards, minority extends upto the age of 21 years.[3]

The statutory minimum age of marriage is now 21 years for males and 18 years for females.[4] However, marriage in contravention of the prescribed age is not void for the purposes of civil law, though it may attract criminal liability.

Litigation.

3.3. Guardianship of a minor for the purpose of litigation is dealt with in the Code of Civil Procedure.[5]

Testamentary guardianship.

3.4. Testamentary guardianship is regulated by certain statutory provisions[6-7] and (as regards Muslims) by the Muslim law.

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[1]Section 4(a), Hindu Minority and Guardianship Act, 1956.
[2]The Indian Majority Act, 1875.
[3]The Indian Majority Act, 1875.
[4]Child Marriage Restraint Act, 1929 as amended.
[5]O. 32, Code of Civil Procedure, 1908.
[6](a) Section 9, Hindu Minority and Guardianship Act, 1956.
(b) Section 60, Indian Succession Act, 1925.
[7]See para 345, *infra*.

3.5. The statutory law of guardianship in India is to be found principally— but not exclusively—in the Guardians and Wards Act, 1890 (18 of 1890) and in the Hindu Minority and Guardianship Act, 1956 (32 of 1956). Besides these, the Chartered High Courts[1] have special jurisdiction conferred on them by their respective Charters or Letters Patent. Courts of Wards—principally concerned with Revenue paying estates—are governed by State Acts wherever such legislation still exists. Testamentary guardians can be appointed under the Succession Act[2] or under the Hindu Minority and Guardianship Act.[3-4] Statutory provisions.

3.6. The Act of 1890 does not deal with the entire law relating to guardianship. It does not, for example, contain provisions as to who are to be the natural guardians of minors. The Act, in the first place, deals with the jurisdiction of Courts in regard to guardianship, such as— Act not exhaustive.

(i) appointment and declaration of guardians,

(ii) removal of guardians,

(iii) control of guardians by the Court, and

(iv) orders as to custody.

Secondly, it deals with the duties and liabilities of guardians of all classes.

3.7. The Act is divided into four chapters. The first chapter (sections 1 to 4A) deals with certain preliminary matters, such as title, extent and commencement, savings, definitions and power to confer jurisdiction on subordinate judicial officers and to transfer proceedings to such officers. Scheme of the Act of 1890.

Chapter 2 (sections 5 to 19) deals with the appointment and declaration of guardians. A pretty large number of questions has arisen with reference to certain provisions contained in this Chapter, particularly, sections 7, 17 and 19. Section 5 which dealt with guardianship by will or other instrument in the case of European British subjects, has been repealed.[5] The power to appoint a guardian in other cases is saved by section 6, which now applies to all persons. Section 7 is the operative provision in this Chapter, dealing as it does with the power of the Court to appoint the guardian of the person or property or both. Sections 8 to 16 mostly deal with procedural or other minor matters, but section 17 is of great importance. It is concerned with the matters to be considered by the Court in appointing a guardian. Section 18 provides that a Collector, if appointed or declared a guardian, is so appointed by virtue of his office. Section 19 prohibits the appointment of a guardian in certain cases. Although negative in form, this section has given rise to a number of problems in interpretation and to the question of the interrelationship between section 17 and section 19. We shall deal with this question at the appropriate place.

3.8. Chapter 3 (sections 20 to 42), which is the longest Chapter in the Act, is concerned with the duties, rights and liabilities of guardians. The first four sections (sections 20 to 23) deal with matters of a general character, such as the fiduciary relationship of guardian to his ward, the capacity of minors to act as guardians, the remuneration of guardians, and control of the Collector when he is appointed as the guardian. Guardianship of the person is dealt with in sections 24 to 26, of which the most important is section 25 dealing with restoration of

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[1](a) *In re Dattatraya*, I.L.R. 58 Bom. 519.

(b) *Mahadeo Krishna*, A.I.R. 1937 Bom. 1932.

[2]Section 60, Indian Succession Act, 1925.

[3]Section 9, Hindu Minority and Guardianship Act, 1956.

[4]See para 3.4, *supra*.

[5]Section 5 followed the European British Minors Act (13 of 1874).

the custody of the ward to the guardian. This is the section most frequently resorted to in practice, and as may be expected, case law on this section is prolific.

Guardianship of the property is the subject matter of sections 27 to 37.

With sections 38 to 42, the Act again reverts to matters of a general character, namely, survivorship amongst joint guardians, removal of a guardian, discharge of a guardian, cessation of the authority of a guardian, and appointment of a successor to a guardian who is dead, discharged or removed.

These operative provisions of the Act are supplemented by Chapter 4 (sections 43 to 51), which are primarily concerned with matters in the nature of enforcement, appeal, costs, rules and other topics of a miscellaneous or residuary character.

Sections considered.

3.9. After these general observations, we proceed to consider the Act section by section.

CHAPTER 4

PRELIMINARY PROVISIONS: SECTIONS 1 TO 4

Scope of Chapter.

4.1. Sections 1 to 3 deal with certain preliminary matters and do not, in general raise any serious controversies. The changes required are minor.

Section 2.

4.2. Section 2 has been repealed.

Section 3.

4.3. Section 3 saves the jurisdiction of Courts of Wards and High Courts. Court of Wards are now regulated mostly by provincial or State legislation, wherever such legislation still exists. The need for saving the jurisdiction of High Courts arose from the fact that the letters patent or charter of certain High Courts confers special jurisdiction on those High Courts in regard to guardianship. This jurisdiction is not exercisable by other High Courts. We shall have occasion to deal with this jurisdiction in detail, at the appropriate place.[1] It may incidentally be mentioned that the jurisdiction of High Courts has been specifically saved by a provision of the Hindu Minority and Guardianship Act also.[2]

Section 3—Instances of High Court's jurisdiction.

4.4. Some instances of the power of the High Court which is saved by section 3 may be mentioned—

(a) special power to appoint a guardian for an infant or his "estate"—which includes a minor's interest in undivided property;[3]

(b) power to appoint a guardian even where there is no property, if a proper case in made out for such an appointment;[4] and

(c) power to appoint a guardian for an infant residing abroad[5] (in view of sections 41-42 of the Supreme Court Charter).

Section 4—To be re-arranged.

4.5. Section 4 contains definitions of certain expressions, namely, 'minor', 'guardian', 'ward', 'district', 'the court', 'Collector', and 'prescribed'.

Following current legislative practice, the definition should be re-arranged in the alphabetical order. We recommend accordingly.

Section 4(1) 'Minor'.

4.6. The definition of 'minor' in section 4(1) adopts by reference that in the Indian Majority Act, 1875. However, that Act is confined to persons domiciled in India. As regards persons not so domiciled, the matter would presumably be governed by rules of private international law as applied in India.

In this connection, we may refer to the position as to capacity to contract. The Indian Contract Act[6] provides as follows:—

"Every person is competent to contract, who is of the age of majority *according to the law to which he is subject* and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

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[1]See discussion relating to section 7, *infra* (para 5.12).

[2]Section 12, proviso, Hindu Minority and Guardianship Act, 1956.

[3](a) *In re Lovejoy*, A.I.R. 1944 Cal. 433.

(b) *In re Vasudevan*, A.I.R. 1949 Mad. 260.

[4]*In re Jagannath Ramji*, (1893) I.L.R. 19 Bom. 96, 98 (Starling J.).

[5]*In re the Estate of H.G. Meakin*, I.L.R. 21 Bom. 137 (minor residing in England). Contrast *Jairam Luxmon*, I.L.R. 16 Bom. 634.

[6]Section 11, Indian Contract Act, 1872.

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The words "law to which he is subject" leave the field open for applying a rule of foreign law, if our court so decides as a matter of private international law. In other words, the age of majority would be determined by resort to that system of law which the Indian rules of private international law recognise as relevant in the particular field of law in regard to which the controversy arises. The matter is (as regards some fields of law) regulated by statute,[1] but in other fields not so regulated. It is unnecessary to go into this vexed question. For example, contractual capacity in regard to persons not domiciled in India is governed by the law of domicile according to one view,[2] but by *lex loci contractus* according to another view.[3]

Section 4(2)—Whether justistic person can be 'guardian'.

4.7. Comments in somewhat greater detail are needed in section 4(2), which defines "guardian" as *a person* having the care of the persons of a minor or of his property or of both his person and property. The question has arisen whether one *other than a natural person* can be appointed as a guardian. The Calcutta view on the subject is that a charitable society cannot be appointed as a guardian.[4] According to this view, the definition of "person" in section 3(42) of the General Clauses Act, 1897 becomes inapplicable in view of certain provisions of the Act of 1890—such as, sections 43 and 45.

The Calcutta case has been dissented from by one Court.[5]

We are of the view that the Court should have a power to appoint a juristic person as a guardian subject to certain safeguards. The point is proposed to be considered further[6] in a subsequent Chapter.

Section 4(2) applicable to all guardians.

4.8. It is now fairly well settled[7] that the definition of "guardian" is applicable to guardians of all classes—natural testamentary and certificated, though, of course, the definition does not include a guardian for marriage (wherever such guardianship continues under personal law), or a guardian *ad litem*. This much is clear from the present wording of the definition, since it is requisite in the definition that a person, in order to be a "guardian", must have the "care" of the person or proporty of the minor. The emphasis placed on "care" seems to have been derived from the original. Anglo-Saxon word "weardian" (to watch or to guard).

De facto guardian.

4.9. Text book writers, when dealing generally with personal law, discuss the "de facto guardian". In regard to the Act of 1890, much of the controversy that has arisen relates to persons who, *by legal right*, claim guardianship or custody of a minor.[8] It is, however, necessary to consider the position as to *de facto* guardians as applicable to Hindus after the Act of 1956.

Section 4 of Act of 1956 and its inter-relationship with Act of 1890.

4.10. In the Act of 1956, section 4(b) defines a guardian as under:

"4. In this Act,—

(b) 'guardian' means a person having care of the person of a minor or of his property or of both his person and property, and includes—

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[1]E.g. as to negotiable instruments, see Law Commission of India, 11th Report (Negotiable Instruments), paragraphs 27 and 29.

[2](a) *Kashiba* v. *Sripat*, I.L.R. 19 Bom. 697 (Law of domicile).

(b) *Rohilkhand and Kumaun Bank Ltd.* v. *Row*, (1885) I.L.R. 7 All. 490.

[3](a) *T.N.S. Firm* v. *Mohammad Hussain*, A.I.R. 1933 Mad. 756.

(b) *Baindail* v. *Baindail*, (1946) 1 All E.R. 342, 346.

[4](a) *Smt. Ashalata* v. *Society for Protection of Children in India*, A.I.R. 1930 Cal. 397.

(b) *M.C. Sweoney* v. *Arbithnot*, A.I.R. 1931 Cal. 563.

[5]*Lakshman Singh* v. *State*, A.I.R. 1955 V.P. 3, 4, para 5 (Jagat Narayan J.C.) (Registered society).

[6]See discussion relating to section 18A, *infra*.

[7]*Ratan* v. *Bishan*, A.I.R. 1978 Bom. 190 (Chapter 6).

[8]Para 7.14, *infra*

"(i) a natural guardian;

(ii) a guardian appointed by the will of the minor's father or mother;

(iii) a guardian appointed or declared by a court; and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards:

It will be noticed that the Act of 1956 does not specifically *include* a *de facto* guardian in section 4(b) quoted above, though the words "having the care" seem to cover *de facto* guardians. A controversy has arisen as to whether, as regards Hindus, the definition in *section 4(2) of the Act of 1890*[1] would cover *de facto* guardians. The Bombay High Court has answered the question in the affirmative.[2] The Kerala High Court[3] however, takes a different view.

The concept *De facto* guardian.

4.11. The position obviously needs clarification. The concept of "de facto guardian" has been discussed at length in a judgment of the Federal Court where Kania C. J. observed:[4]

> "There can only be a *de facto* manager, although the expression *'de facto* guardian' has been used in text books and some judgments of Courts. If that description is adopted (and I consider it to be the correct description of a person generally managing the estate of a minor without having any legal title to do so) the powers of a natural guardian are not brought into consideration in defining the position of such a manager."

Cencept of *de facto* guardian recognised in various branches of law.

4.12. The concept of de facto guardian[5] is not peculiar to Hindus. It is familiar to Muslim law as administered in India,[5] though the powers of *de facto* guardians as regards the disposition of property of Muslim minors are narrower than those that were recognised by Hindu law before the Act of 1956. In fact, the concept is born out of necessity, and necessity knows no boundaries of race or religion.

Nor is the concept confined to civil law. For example, the Explanation to section 361 of the Indian Penal Code also gives a wide meaning to "lawful guardian", and runs as follows:[6]

> "The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person....."

This shows that the concept of a person acting *de facto* is not new. The above definition, it may be noted, is inclusive.

Recommendation to amend section 4(2) to add *de facto* guardian.

4.13. In this position, and on a consideration of all aspects of the problem, we recommend that the law should be clarified by adding, below section 4(2) of the Act of 1890, a suitable Explanation which would make it clear that a *de facto* guardian is included within the definition of "guardian".

We do not propose to define a "de facto" guardian. In a Bombay case[7] Crump J. said:—

> "I must admit that I am not precisely enamoured of the term 'de facto guardian', because it appears to me to be debatable in the extreme, and incapable of exact definition. "I take it to mean, *so far as it can be defined*, a person who, being neither a legal guardian nor a guardian appointed by

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[1] Para 4.7, *Supra.*

[2] *Ratan v. Bishan* A.I.R. 1978 Bom. 190 (P.S. Shah J.)

[3] *Ramchandra* v. *Annapurni Ammal*, A.I.R. 1964 Ker. 269.

[4] *Sriramulu* v. *Pundarikakshayya*, A.I.R. 1949 F.C. 218, 221, para 13.

[5] *Musa Miya* v. *Kadar Bux*, (1928) 55 I.A. 171, 179 (P.C.).

[6] Section 361, Indian Penal Code.

[7] *Harilal* v. *Govardhan*, (1927) I.L.R. 51 Bom. 1040, 1047.

court, takes it upon himself to assume the management of the property of the minor as though he were a guardian. But if that be the real meaning of the term, I agree with the learned Chief Justice that it implies some continuity of conduct, some management of the property beyond the isolated act of sale which comes into question in this suit."

The same idea can be expressed more briefly by stating that a *de facto* guardian" means a person who, as a matter of fact, has custody and care of the person of a minor or of his property.

Element of "care" in other statutory provisions.

4.14. Reverting to the present definition of "guardian", it would be interest to note that the same element of "care" as is emphasised in the Act of 1890 is also emphasised in the Medical Termination of Pregnancy[1] Act, which defines a guardian as meaning "a person having *the care* of the person of a minor or a lunatic" and (though in somewhat wider phraseology in the Children Act,[2] which provides that "guardian" in relation to a child, includes "any person who.....has for the time being the *actual charge of, or control over, that child*".

Under the Vaccination Act,[3] section 2(3), "guardian" includes any person who has accepted or assumed the care or custody of any child.

Under section 2 of the Children (Pledging of Labour) Act, 1933, "guardian" includes any person having legal custody of or control over a child.

Definition in other Acts.

4.15. We need not multiply precedents, but we may mention that the following Central Acts contain (or contained) definitions of the expression "guardian":—

(a) European British Minors Act (13 of 1874) (repealed).

(b) Vaccination Act (13 of 1880, section 2(3).[4]

(c) Children (Pledging of Labour Act (32 of 1933), section 2.[5]

(d) Section 9, Explanation (ia), Hindu Adoptions and Maintenance Act, 1956 (inserted by Act 45 of 1962), which reads—

> "(ia) 'guardian' means a person having the care of the person of a child or of both his person and property and includes—(a) a guardian appointed by the will of the child's father o: mother, and (b) a guardian appointed or declared by a court;"

(e) Hindu Minority and Guardianship Act (32 of 1956), section 4.[5]

(f) Children Act (60 of 1960), section 2.[6]

(g) Medical Termination of Pregnancy Act (34 of 1971), section 2.[6]

English definition.

4.16. In one of the statutory definitions in England, "guardian", in relation to any child or young person, has been defined as meaning the person having the legal right to the guardianship of the person of that child or young person.[7] In another statutory definition in England, ' guardian" has been defined as including anybody who has for the time being charge of or control over a person.[8]

Effect of the expression "*having* the care".

4.17. An important question arises from the expression "having the care" used in the definition. Does it mean that if a person, though legally vested with guardianship, never actually had the care of a minor, he cannot take proceedings under the Act? This question becomes of practical importance with reference to section 25, and will be considered thereunder.[9]

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[1]Section 2(a), Medical Termination of Pregnancy Act (34 of 1971).
[2]Section 2(k), Children Act (60 of 1960).
[3]Section 2(3), Vaccination Act, 1880.
[4]Para 4.14, *supra*.
[5]Para 4.14, *supra*.
[6]Para 4.10, *supra*.
[7]Section 106(4) Education Act 1944 (Eng.)
[8]Section 126 Magistrate's Courts Act 1952 (Eng.)
[9]See discussion relating to section 25 (para 7.14, *infra*).

CHAPTER 5

EMPLOYMENT OF SUBORDINATE JUDICIAL OFFICERS: SECTION 4A

Section 4A.

5.1. While jurisdiction under the Act is in the first instance vested in the District Judge, section 4A(1) empowers the High Court to confer such jurisdiction on "any officer exercising original civil jurisdiction subordinate to a District Court". The object of the provision is to reduce the load on the District Judge. The section was inserted in pursuance of a recommendation of the Civil Justice Committee.[1]

Amendment recommended in section 4A.

5.2. The section seems to require modification in one respect. The exercise of jurisdiction under the Act—particularly, in adjudicating questions of custody—requires mature judgment and often involves the balancing of delicate considerations. It is therefore desirable that the powers should be vested only in senior judicial officers. As the nomenclature of the subordinate judiciary varies from State to State, it is not possible to make a provision confining it to judicial officers *of a particular designation*, but it would be appropriate if the jurisdiction is confined to judicial officers who exercise unlimited original civil jurisdiction. Such unlimited jurisdiction is in all States exercised only by senior judicial officers. Accordingly, we recommend that in section 4A, in sub-section (1), for the words "exercising original civil jurisdiction", the words exercising *unlimited* original civil jurisdiction" should be substituted.

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[1]Statement of Objects and Reasons, Gazette of India (1926), Part V, pages 11-12.

CHAPTER 6

APPOINTMENT AND DECLARATION OF GUARDIANSHIP: SECTIONS 5 TO 19.

I. Introductory

Scope.

6.1. The appointment and declaration of guardians is a subject spread over fifteen sections (sections 5-19). Of these, at least three sections—sections 7, 17 and 19—have raised important questions of principle or detail.

Section 5—Powers of parents to appoint in case of European British subjects (Repealed).

6.2. The first section in this group, though repealed, is of interest. It read as follows:—

> "5. (1) Where a minor is an European British subject, a guardian or guardians of his person or property, or both, may be appointed by will or other instrument to take effect on the death of the person appointing,—
>
> (a) by the father of the minor or,
>
> (b) if the father is dead or incapable of acting, by the mother.
>
> (2) Where guardians have been appointed under sub-section (1) by both parents, they shall act jointly."

We are quoting this section as an interesting example of the legislative attitude as to the equality of the parents of both sexes in regard to a certain class of persons.

Section 6.

6.3 Section 6 provides that in the case of a minor nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both which is valid by the law to which the minor is subject. The "power to appoint" which is saved by the section would, *inter alia*, include the power to appoint a guardian by will.[1] This power has been recognised by the Legislature[2] and the Courts in India on more than one occasion.[3]

II. Appointment and declaration of guardian

Section 7(1)—Criteria for exercise of the power.

6.4. Section 7(1) empowers the Court to make an order as to guardianship, and may be described as the pivotal section in the entire Act. The power is to be exercised only for the welfare of the minor; for this reason, the introductory words of the section have been described as the key note of the Act.[4] The Court must be "satisfied" that the order should be made for the welfare of the minor. Its satisfaction must be based on some material, and must not be illusory. In making an appointment of a guardian under the section, the Court

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[1]Cf. (a) Section 9, Hindu Minority and Guardianship Act, 1956.
(b) Section 60, Indian Succession Act, 1956.

[2]E.g. (a) Bengal Regulation 5 of 1799.
(b) Sections 18 and 19, Madras Regulation 5 of 1804.
(c) Section 8, Bombay Minors Act (20 of 1864).

[3](a) *Pirthee Lal* v. *Doorga Lal*, (1867) 7 W.R.C.R. 74, 75.
(b) *Alimodeed Moallen* v. *Syfoora Bibee* (18/66) 16 W.R.M.R. 125.
(c) *Alikhan v. Panibai* (1894) I.L.R. 19 Bom. 832.

[4]*Sarat* v. *Girindra*, (1911) 15 Cal. Weekly Notes 457, 459, 460.

will, of course, have to bear in mind the fact that the effect of an appointment would be to extend the period of minority.[1]

Power to declare or appoint guardian—Certificated guardians.

6.5. The power of the Court under sub-section (1) of section 7 is either to appoint a guardian or to declare a person to be a guardian. Such guardians are, in common parlance, called "certificated guardians". The power to declare a person as a guardian possesses some utility—as, for example, in cases where a guardian has been appointed under a testamentary instrument and the Court, by a declaration, gives effect to the appointment.

Sub-section (2) of section 7 sets out the consequences of the appointment or declaration of a guardian by the Court. Without a formal order of removal, such an order implies the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court. The object is to avoid conflict of authority between two or more guardians.[2] The powers of the certificated guardians are exclusive.

Sub-section (3) of section 7 requires the Court to ensure that an order under this section shall not be made where a guardian has been appointed by will or other instrument or appointed or declared by the Court, until the powers of such guardian have ceased.

Questions to be considered with reference to section 7.

6.6. We now proceed to deal with certain important points concerning section 7. Broadly, these questions pertain to the following topics:—

(a) *the persons* who can be appointed as guardians;[3]

(b) *the property* in respect of which a guardian may be appointed;[4] and

(c) *the nature* of the order can be passed.[5]

Section 7 and guardian residing outside India.

6.7. Commentaries on the Act discuss at some length the question whether a person residing out of India can be appointed as a guardian. The general consensus at present seems to be that the matter is in the discretion of the Court and a very rigid rule prohibiting the appointment of such a person would not be recognised. Although many of the judicial decisions in this context relate to an application for custody under section 25, the principle would presumably be the same in relation to the wider jurisdiction to appoint a guardian under section 7. In this position, we do not consider it necessary to recommend any amendment on the subject. As to the appointment of institutions, the point will be considered later.[7]

Section 7 and the word 'property'

6.8. Coming to the points concerned with *property* for which a guardian can be appointed, the expression "property" in section 7 has created a certain amount of controversy with reference to the question whether the hereditary trusteeship of a religious institution is "property" within the meaning of the section.

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[1]Section 4(1), read with section 3 of the Indian Majority Act, 1875.

[2]*Arguman* v. *Duraising*, A.I.R. 1914 Mad. 648, 649.

[3]Para 6.7, *infra*.

[4]Para 6.8 to 6.17, *infra*.

[5]Para 6.18, *infra*.

[6]*P. Williams* v. *P.C. Martin*, A.I.R. 1970 Mad. 427.

[7]Para 6.56, *infra*.

Conflict of decisions as to hereditary trusteeship.

6.9. The Madras[1] and the Patna[2] decisions take a restricted view of the matter.

This view, however, has been dissented from in Andhra Pradesh in a Full Bench decision,[3] which holds that the word "property" in section 7 is comprehensive enough to take in all types of proprietary rights. The term "property" is used in a generic sense. It has a wide connotation and is not restricted to a kind of property in which the minor has a beneficial enjoyment. The section, according to the Andhra Pradesh view, contemplates the appointment of guardians to minors in regard to all types of property. The hereditary trusteeship of a religious institution therefore constitutes "property" within the ambit of the section, according to the Andhra Pradesh view, and a Court is competent to appoint a guardian to a minor in respect of trust properties of which the minor happens to be a trustee. The Andhra Pradesh judgment points out that the principle that the office of hereditary trusteeship follows the line of succession has been embedded in Hindu law and judicially recognised. A reasonable interpretation has to be given to section 7, so as to harmonise it with the concepts of Hindu law.

Recommendation to insert an Explanation below section 7.

6.10. In our opinion, it is desirable to adopt the wider view by legislative amendment. It is necessary that the expression "property", at least in an Act vitally affecting personal law, should be given an interpretation that will be in harmony with the concepts of personal law. Accordingly, we recommend that an Explanation should be inserted below section 7, somewhat in these terms:

> "Explanation.—The expression 'property' includes the hereditary trusteeship of a religious institution."

Section 7 and interest in undivided property.

6.11. The next question—also relating to the scope of the expression "property" in section 7—concerns the interest of a minor in undivided property of a Hindu coparcenary.[4] Such an appointment is now restricted to Chartered High Courts.

Jurisdiction of High Courts.

6.12. The Chartered High Courts have an independent power to appoint a guardian—the power derived from the Charter of the Supreme Court[5] (sections 41 and 42), which gave that Court the powers of the Court of Chancery; especially, the power "to appoint guardians and keepers for infants and their estates". Section 9 of the High Courts Act, 1861 continued this power of the Supreme Court to the High Court. Sections 3 and 6 of the Act of 1890 preserved the pre-existing powers of High Courts.[6]

Earlier law.

6.13. Position under earlier legislation may be dealt with. In Soobane Singh v. Juggeshur Koer,[7] the High Court of Calcutta observed:—

> "It is not clear ..... that under Act XXXV of 1858 (the Bengal Minors Act) a manager under no circumstances could be appointed if a lunatic be a member of a joint Hindu family under the Mitakshara law possessed of no separate property."

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[1](a) *Alagappa* v. *Mangulhai*, I.L.R. 40 Mad. 672.
(b) *Venkatachalapathi* v. *Thirugnana*, 33 M.L.J. 297;
(c) *Varadachuriar* v. *Raja Ramkrishnan*, A.I.R. 1923 Mad. 497.

[2]*Kitty* v. *Bahuria*, A.I.R. 1933 Pat. 527.

[3]*K. Sastrulu* v. *M. Venkataswara Rao*, A.I.R. 1959 A.P. 232 (F.B.).

[4]Section 12, Hindu Minority and Guardianship Act, 1956.

[5]See para 6.12, *supra*.

[6]See—
(a) *Raja of Vizanagaram* v. *Secretary of State*, A.I.R. 1937 Mad. 51.
(b) *Sham Kuar* v. *Mohanunda*, (1892) I.L.R. 19 Cal. 301.

[7]*Soobane Singh* v. *Juggeshur Koer*, 13 C.L.R. 86 (Cal.). See *Sham Kuar* v. *Mohanunda*, (1892) I.L.R. 19 Cal. 301, 307.

In *Bhoopendra Narain Roy* v. *Greesh Narain Roy*,[1] Pointfex, J., said, with reference to this Act (the Bengal Minors Act 35 of 1858):—

> "It appears to us that there may be cases where it is essentially necessary that a guardian should be appointed for a member of a Mitakshara family as much as for any other family."

Under the Bombay Minors Act of 1864 (20 of 1864), which was similar in its provisions to Act 40 of 1858, the Bombay High Court had held, apparently on the authority of the Privy Council case of *Durgapersad* v. *Keshopersad Singh*,[2] that a certificate of administration may be granted for the share of a minor who was a member of an undivided Hindu family;[3] and the Allahabad High Court[4] held that under Act 40 of 1858 a certificate may be granted in the lifetime of the father.

6.15. So much as regards the earlier law and the present position. It is now time to consider the question whether this jurisdiction should be extended to other Courts. Power of other Courts.

6.16. In this context we have taken note of the following observations made in a Bombay case[5] a few years ago:— Bombay case.

> "In my opinion earlier decisions of this Court establish clearly that the Court has jurisdiction in a case of this sort to make the order asked for. That jurisdiction was established definitely by a decision of a Full Bench in 25 Bom. 353[6] in which it was held that under its general jurisdiction, and apart from the Guardians and Wards Act, the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property. The applicant in that case also sought sanction of the Court for a sale of the family property in which the minor "was interested and that sanction was given. That decision confirmed a practice which had been adopted in previous cases: 16 Bom. 634[7] and 17 Bom. 96[8] and such practice has since been followed in this Court and by the Calcutta High Court in 50 Cal. 141[9] and 59 Cal. 570.[10]
>
> "However, in the year 1932, Kania, J. in 34 Bom. L.R. 1156[11] stated his view that although the Court had jurisdiction in a case of this sort to make the order, the Court ought not to exercise that jurisdiction except in very special circumstances. The learned Judge pointed out correctly that the manager of a joint Hindu family has power to sell or mortgage for legal necessity or for the benefit of the estate, and that the burden is upon the purchaser or mortgagee to prove that the sale or mortgage fulfils those conditions. and the learned Judge took the view that the purchaser or mortgagee had no right "to cast that *obligation on the Court*. I do not find

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[1] *Bhoopendra Narain Roy* v. *Greesh Narain Roy*, (1878) I.L.R. 6 Cal, 539.

[2] *Durgapersad v. Keshopersad Singh*, (1881) I.L.R. 8 Cal. 656; L.R. 9 I.A. 27 (P.C.).

[3] *Babaji* v. *Sheshgiri*, I.L.R. 6 Bom. 593.

[4] *Dhiraj Koer* v. *Adjoodhya Bux Singh*, 3 M.W.P. (All.), 91, cited in *Sham Kuer* v. *Mohammda*, (1892) I.L.R. 19 Cal. 301, 303.

[5] *In re Mahadeo Krishna Rupji*, A.I.R. 1937 Bom. 98, 99 (per Beaumont C.J.).

[6] *In re Manilal Hurgovan*, (1901) *I.L.R.* 25 Bom. 353; 3 Bom. L.R. 411 (F.B.).

[7] *Jairam Laxmon*, (1892) I.L.R. 16 Bom. 634.

[8] *Re Jagannath Ramji*, (1895) I.L.R. 19 Bom. 96.

[9] *In re Hari Narain Das*, A.I.R. 1923 Cal. 409; I.L.R. 50 Cal. 141.

[10] *In re Bijaykumar Singh Buder*, A.I.R. 1932 Cal. 502; I.L.R. 59 Cal. 570.

[11] *In re Dattatraya Govind*, A.I.R. 1932 Bom. 537; I.L.R. 56 Bom. 519.

myself able to agree *with that reasoning.* The attitude of a purchaser or a mortgagee is that unless he can get a good title, he is not going to enter into a contract of purchase or mortgagee. He does not seek to cast any burden upon the Court; he merely says that he is not going on with the transaction unless he gets a good title. Now, it is very difficult in many cases for a purchaser or a mortgagee to satisfy himself as to the existence of legal necessity, or benefit of the estate. It is very difficult for him to check the truth of the story told to him which is alleged to give rise to such necessity or benefit, and not only has he to do that, but he has to preserve evidence which will be available when the transaction may be attacked in years to come by a minor son of the manager. Experience in appeals from the mofussil has satisfied me that this burden which is cast on purchasers and mortgagees is a very heavy and often an unreasonable one. A sale or mortgage is often impeached some twenty years after the date of the transaction, and it is set aside because the purchaser or mortgagee, or those claiming through him, cannot, at that distance "of time, when material witnesses are no longer available, discharge the burden of satisfying the Court of the existence of legal necessity or benefit to the estate. I am not at all surprised, therefore, that legal practitioners in Bombay decline to advise their clients to enter into a transaction with the manager of a joint Hindu family unless they get an order of the Court, binding minor members, and it seems to me that as the Court has jurisdiction to make an order sanctioning the transaction, it ought in a proper case to do so. *Whether a similar power ought not to be vested in mofussil courts is a matter which might well engage the attention of the legislature.*[1] The petition in this case suggests that the money can be obtained on mortgage on much better terms if an order of the Court is obtained, than would be the case if an order is not obtained. Therefore the making of the order may well be for the benefit of the minors, and if the requisite facts are proved, in my opinion, the Judge should not hesitate to make the order. But undoubtedly a Judge has to exercise great care in seeing that the case is a proper one. "As Kania, J. points out, the evidence of the manager himself is generally interested, and it may not always be easy to check; but if the Court is not satisfied that the transaction is really for the benefit of the minor, it ought to refuse its assent."

No change recommended as to minor's interest in undivided property.

6.17. No doubt, having regard to the object of guardianship proceedings, namely, to protect the child, there is something to be said in favour of a specific power to appoint a guardian of the interest of a minor in undivided property. However, it appears to us that the extension of the jurisdiction to all Courts may be fraught with certain risks. Appointment of a guardian for an interest in joint family property requires the delicate weighing of several factors. Preservation of the power of the High Court is regarded as beneficial for all concerned —the minor as well as the other sharers, as was observed in one of the Bombay cases.[2] But we are not inclined to confer a similar jurisdiction on other Courts, who may not be able to bring to bear the mature judgment and delicate balancing of conflicting considerations which may be needed in such cases.

Section 7 and conditional orders.

6.18. This disposes of the points concerning the "property" covered by section 7. As to the nature of the order to be passed under section 7, there seems to be some controversy on the question whether a conditional order for guardianship can passed. According to the Madras view,[3] a conditional order to the effect that "upon petitioner furnishing security he is appointed guardian of

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[1]Note the suggestion for law reform.

[2]*Jairam Luxmon*, (1892) I.L.R. 16 Bom. 634, 636.

[3]*In re Nattia Vanketesa Perumal*, A.I.R. 1927 Mad. 36(F.B.).

minor's property" is bad from the very beginning, but according to the Bombay view,[1] this is permissible, and this also appears to be the Lahore view.[2]

6.19. In the Madras case,[3] where conditional orders were described as "suspensory" orders, the following observations were made:— Observations in Madras case.

> "The mischief of these suspensory orders, apart altogether from the question as to whether they are legal or invalid, is that the matter goes before the Judge who makes these suspensory orders and then the papers go into the office "where it is nobody's business to see what is being done about it. The order is not complied with, and then somebody finds out that the minor, whom it was desired to protect, has attained his majority, and the Court is powerless because the guardian has failed to carry out its directions and the Court has kept no control over the matter by reason of the nature of the order so as to summon the guardian and ask him: 'Why have you not furnished the security?'."

6.20. In the Bombay case[4] on the subject, on the other hand, the matter was thus dealt with— Bombay view.

> "In all matters connected with the welfare of minors the predominant motive of the Court is to pursue a course of action which will be for the minor's benefit, and the consideration of the appointment of the guardian of a minor's property is no exception to this rule. There are three alternatives as to security in relation to such appointments: (1) To make the appointment without requiring the giving of any security; (2) To require the prospective guardian to enter upon security before coming to "the Court for his appointment; (3) To make a condition that upon security being given the appointment shall operate.
>
> "I cannot think that the first course is for the benefit of the minor, and it would be wholly contrary to the practice of this country and to R. 5 of the Civil Manual mentioned above. The second course is hedged around with difficulties, in that security would either have to be given conditionally upon the Court making the appointment, alternatively it would have to be actually given, with the consequential unnecessary expense of its vacation, should the Court for some reason decide against making a particular appointment. The third course is the most practical and convenient one, namely, to make the appointment upon security being given. If security be given, a question may arise in some future case as to whether the appointment relates back to the date when the original order was made, but that does not arise here, nor do we decide it. There being nothing wrong or invalid in my judgment in this form of order, the effect of it is, in my opinion not open to serious doubt; the Receiver has no right to take possession of the minor's movable property until security has been furnished; were it otherwise, the whole object of the Court giving directions for security might be defeated. It follows, in my judgment, that if security be never given, the order never becomes operative, so far as the appointment of the prospective guardian is concerned. In my opinion, such an order cannot be 'cancelled' by the Judge who made it. If it is desired to get rid of an order if security be not given, the order can take the form of requiring security to be given on or before a specified date, so that if the time runs out the order automatically lapses. That prevents the difficulty envisaged by the learned Chief Justice Sir Murray Coutts Trotter in 49 Mad. 809 and would be in accordance with

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[1] *Jay Singh* v. *Pratap Singh*, A.I.R. 1945 Bom. 243, 245, 247 (reviews cases).

[2] *Sham Das* v. *Umer Din*, A.I.R. 1930 Lah. 497 (F.B.).

[3] *In re Natha Venkatesa Perumal*, A.I.R. 1927 Mad. 36, 37.

[4] *Jay Singh* v. *Pratab Singh*, A.I.R. 1945 Bom. 243, 246, 247.

R. 7 of the Civil Manual which appears to be honoured at present only in its breach."

Need for amendment as to conditional orders.

6.21. It appears to us that practical considerations justify the adoption of the wider view in the matter of power to issue conditional orders. Accordingly, we recommend that a suitable provision in this regard should be made by amending section 7.

In an appropriate case, the Court should have power to make an appointment conditional on the performance of a condition by the guardian within a specified period. It should also be provided that the order shall not be operative until the condition is satisfied.

We recommend that insertion of the following new sub-section in section 7, to achieve this object:—

"(4) *In an appropriate case, the Court may make an appointment of a guardian conditional on the performance by the guardian of a specified condition within a specified period and where such an order is passed, the order shall not be operative unless the condition is performed by the guardian within the period initially specified by the Court or subsequently extended by the Court.*"

III. Application and steps to be taken thereon

Section 8.

6.22. This takes us to section 8, which provides that an order shall not be made under section 7, except on the application of the persons entitled to apply for an order, as enumerated in the section. These are, in brief, the person desirous of being or claiming to be the guardian, any relative or friend of the minor, the Collector of the district or the Collector having authority with respect to the class to which the minor belongs.

The expression "relative or friend" in section 8(b) really means a person who, being a relative or friend, has a beneficial interest in the minor.[1]

Recommendation to add clause (bb).

6.23. The section does not, however, give the minor himself a *right to apply to the Court.* The general view[2] is that without an application under section 8 the Court cannot proceed in the matter. It may be noted that in England, a minor possessing property, if his parents are dead and if there is no testamentary guardian, may, after attaining the age of 14 years (male) or 12 years (female), himself "elect" a guardian.[3]

Section 8 (bb) to be inserted.

6.24. Though we need not, in India, go to that length, yet it would be useful if the minor is at least given a right to apply for the appointment of a guardian, since it is not inconceivable that the minor may be seriously prejudiced if no third person takes an interest in his welfare.

Recommendation.

6.25. On this reasoning, we recommend that the following clause should be inserted in section 8:—

"(*bb*) *the minor, if, being a male, he has attained the age of fourteen years or, being a female, she has attained the age of twelve years.*"

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[1] *Thangapandian* v. *K.B. Naicker*, A.I.R. 1965 Mad. 368.

[2] (a) *Sakina* v. *Mohomed*, A.I.R. 1928 Lah. 456.

(b) *Jaiwanti* v. *Gajadhar*, (1921) I.L.R. 38 Cal. 783, 785.

[3] Halsbury, 4th Ed. Vol. 24, page 224, footnote 5, citing *Ex parte Edwards* (1747) 3 A. & E. 519, and *Re Brown's Will*, (1881) 18 Ch. D. 61, 72, 76 (C.A.) and other cases.

6.26. Section 9 reads—

Section 9—Court having jurisdiction to entertain application.

"9. (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the "application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction."

The "ordinary place of residence" of a minor is a pure question of fact. Notions of constructive or legal residence do not enter into the picture at all. There is no presumption that the residence of the guardian is the residence of the minor, although usually that may happen to be the case.[1]

The matter being one of fact, the case law on the expression "ordinarilly resides", though abundant, does not appear to necessitate any change in the section.

6.27. Section 10 deals with the form of application for guardianship and needs no change. Section 10.

6.28. Section 11 deals with the procedure on admission of an application for guardianship, and does not need any change. Section 11.

6.29. Section 12 reads—

Section 2—Power to make interlocutory order for production of minor and interim protection of person and property.

"12. (1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in this section shall authorise—

(a) the Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of parents, if any, or

(b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property."

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[1](a) *Choudhury* v. *Choudhury*, (1974-75) 79 C.W.N. 784 (reviews cases).

(b) *Harihar* v. *Suresh*, A.I.R. 1978 A.P. 12, 18, para 6.

Section 12—Interim orders in cases under section 25—Recommendation.

6.30. Where the proceeding is not for the *appointment or declaration of a guardian*, but for custody under section 25, there is some uncertainty on the question whether the interim orders for the protection of minor and interim order for protection of person and property described in section 12 can be legally made. Section 12, by its terms, is confined to the pendency of "guardianship" proceeding, according to one view[1] but according to another view,[2] it is not so confined. One of the High Courts[3] has, in order to advance the cause of justice, found out a *via media* by resorting to the inherent juridiction of the Court.

In our opinion, it is desirable to make an express provision, in section 12, recognising such a power (that is, a power of the nature provided for in section 12), in regard to proceedings under section 25.

We recommend accordingly.

Section 13.

6.31. Section 13 provides that on the day fixed for the hearing of the application or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of, or in opposition to, the application.

The section does not, of course, rule out the taking of evidence by the Court. In this connection it is to be noted that the Law Commission has, in its Report on the Code of Civil Procedure, emphasised[4] the need for an enquiry by the Court in matters concerning the family. The amended Civil Procedure Code[5] provides that in suits or proceedings relating to matters concerning the family, "it shall be the duty of the Court to enquire, so far as it reasonably can, into the facts alleged by the plaintiff and into facts alleged by the defendant".

Consultation with child welfare experts.

6.32. The Act does not, at present, contain provisions empowering the Court to consult Child Welfare Officers before appointing a guardian. But such a provision[6] has been made in the Code of Civil Procedure.

Section 14—Recommendation to revise sub-section (3).

6.33. Section 14 deals with simultaneous proceedings in different courts. It may be noted that the section applies also to an application for appointment of guardian of the property of a minor.[7]

Sub-section (3) of the section, dealing with the case where the Courts are not subordinate to the same High Court, provides that the Court shall report the case to and be guided by such orders as they may receive from their respective State Governments. The conferment of this power on the *State Government* is not in harmony with the independence of the judiciary and, in fact, later legislative practice in India indicates a different approach[8] in regard to analogous situations. It would be more appropriate if the power is given to the High Court within the local limits of whose jurisdiction the court in which the earlier proceedings were taken is situated. We, therefore, recommend that section 14(3) should be revised as under:—

"(3) In any other case in which proceedings are stayed under sub-section (1), the Courts shall report the case to the High Court, and the High

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[1]*Inder Singh* v. *Kartar*, A.I.R. 1929 Lah. 487, 488.

[2](1957) M.P. Cases 202; (1957) Jabalpur Law Journal, 336, relying on *Nazir Begum* v. *Gulam Quadir*, A.I.R. 1936 Lah. 313.

[3]Ruxmaniben v. *Narmada*, A.I.R. 1962 Guj. 227, 228, paragraphs 5, 6 (Bhagwati J.).

[4]Law Commission of India, 54th Report, Chapter 32A.

[5]Order 32A, Rule 5(4), Code of Civil Procedure, 1908.

[6]Compare Order 32A, Code of Civil Procedure, 1908.

[7]*P. Pullama* v. *M. Venkatasubbaiah*, A.I.R. 1963 A.P. 93

[8]See section 23(3), Code of Civil Procedure, 1908.

Court *within the local limits of whose jurisdiction the Court in which the proceedings were first taken is situate shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.*"

IV. Separate guardians

6.34. Section 15 deals with the appointment or declaration of separate guardians. Sub-section (1) authorises the appointment of two or more guardians if permitted by the personal law, while sub-section (4) itself empowers the Court to appoint or declare separate guardians of person and property. Sub-section (5) further empowers the Court, if the minor has several properties, to appoint a separate guardian for any one or more of the properties. Section 15.

6.35. In this context, it is of interest to note that it has been held[1] that there is nothing in the Hindu law which prevents the Court from appointing more persons than one as guardians of the person of a minor. On this principle, in a Calcutta case,[2] the Court appointed a joint guardian in order to ensure that the undertaking taken from one guardian (mother) to bring up the children in the Hindu faith was properly carried out.[3] Section 15—Joint guardians.

It is not clear whether any provision of the Act of 1890 expressly provides now for joint guardians. However, joint guardians may conceivably come into existence under an appointment made under a will.

In a recent English case,[4] it was laid down that where there were two unimpeachable parents who could be reasonably contemplated as capable of co-operating sensibly with each other over the children whom they both love, it would be in the interests of the children that a joint custody order be made.

We have no change to recommend in section 15.

6.35. Section 16 deals with the appointment or declaration of a guardian for the children that a joint custody order be made property beyond the jurisdiction of the Court. In such a case the Court having jurisdiction in the place where the property is situated shall, on production of a certified copy of the order, accept the person appointed as duly appointed and give effect to the order. Section 16.

The section needs no change.

V. Consideration to be taken into account in appointing a guardian under section 17 and under the Act of 1956 and the English law.

6.37. We now come to a section of the Act which is perhaps the most important provision in the Act—section 17. The section deals with the matters to be considered by the Court in appointing a guardian. Section 17—Matters to be considered by the Court in appointing a guardian.

The subject matter has assumed greater importance because of the modern debate as to the relative importance[5] to be attributed to each of the various factors that come up for consideration—the welfare of the minor, his or her personal law and rights of the guardian thereunder and the fitness of the parent or other person claiming to be the guardian. Certain aspects of the matter are dealt with in section 19 also.

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[1] *Chironji* v. *Punam Chand*, 48 Indian Cases 75 (Nag.).

[2] *Dwijapada* v. *Baileau*, 20 Calcutta Weekly Notes 608, 620.

[3] *Konthalathammal* v. *Rangaswami Pillai*, A.I.R. 1924 Mad. 327.

[4] *Jussa* v. *Jussa*, (1972) 2 All E.R. 600, 603-604, 695, following W (JC), (1963) 3 All E.R. 459

[5] Para 1.8, *supra*.

It should also be noted that legislation passed in 1956 and applicable to Hindus on the subject of guardianship has a provision indicating a slightly different approach in this context.[1] Even that legislation, as viewed in the light of current notions, seems to be inadequate in certain respects.[2]

Need for harmony.

6.38. In order that the Indian legal system—in regard to statutory rules relating to the criteria for guardianship—may reflect an approach which is sound on the merits, adequate in its coverage and integrated and harmonious in its structure, it is necessary that the matter may be examined in some depth. Accordingly, in the present discussion, while concentrating on section 17 of the Act of 1890, we shall also have occasion to consider section 19 of the same Act and analogous provisions of the Act of 1956.

We first quote section 17 of the Act of 1890.

Section 17–Matters to be considered by the Court in appointing guardian.

"17. (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

* * * *

(5) The Court shall not appoint or declare any person to be a guardian against his will."

Section 19 of the Act of 1890 is as follows:—

"19. Nothing in this chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—

(a) Of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) Of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) Of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

Under section 6 of the Hindu Minority and Guardianship Act of 1956, the father is the natural guardian of a minor, but section 13 of that Act expressly provides that while appointing or declaring any person as guardian by a Court, the welfare of the minor shall be the paramount consideration.

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[1]Section 13, Hindu Minority and Guardianship Act, 1956 (para 6.42, *infra*).

[2]Para 6.50, *infra* (section 6).

Section 13 is quoted below:[1]

"*Welfare of minor to be paramount consideration.*

13. (1) In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, of the Court is of opinion that his or her guardianship will not be for the welfare of the minor."

Some difficulty is[2] no cannot, caused by section 2 of the Act of 1956, which provides that the provisions of the Act shall be "in addition to those of" the Act of 1890. The General view, however, is that the provision of section 19 of the Act of 1890 and those of section 6 of the Act of 1956 should be construed together.[3]

Questions for consideration.

6.39. This is an outline of the statutory provisions that will fall for consideration in the course of our inquiry into the need for reform of the law relating to adjudications on guardianship in the context of section 17.

The questions that we propose to consider in connection with section 17 and allied statutory provisions mentioned above may now be mentioned—

(1) *appointment of guardian* — the relative importance to be attributed to the concept of "welfare of the minor" and other considerations mentioned in the various provisions;[4]

(2) *welfare of the minor* — elaboration of this expression, as employed in the two Acts, so as to reflect the modern concept of the welfare of the child;[5]

(3) *procedure* — vesting of a power in the Court to call for reports from the guardian or person vested with custody.[6]

(4) *custody* — the age upto which the custody of the minor should remain with the mother, in so far as the matter is regulated by a specific statutory provision.[7]

Effect of section 17 and 19 taken together.

6.40. As to the first question posed above,[8] it is proper to note the combined effect of sections 17 and 19 of the Act of 1890.[9] *Consistent with the law to which the minor is subject* (section 17), the welfare of the minor should be taken into account in appointing a guardian (section 17). However, according to the *text* of the Act, — section 19(a) and 19(b) — the preferential right of the husband or father cannot be ignored unless, the opinion of the Court, the husband or father is *unfit to be the guardian.*

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[1]Section 13, Hindu Minority and Guardianship Act, 1956.

[2]*Cf. Ratan* v. *Bishan*, A.I.R. 1978 Bom. 190.

[3]*Lalta Prasad* v. *Ganga Sahali*, A.I.R. 1973 Raj. 95.

[4]Paragraphs 6.40 and 6.48, *infra*.

[5]Paragraphs 6.41 to 6.48, *infra*.

[6]Para 6.50, *infra*.

[7]Para 6.49, *infra*.

[8]Para 6.39, *supra*.

[9]Para 6.38, *supra*.

It should be noted that Courts have taken a liberal view in the matter. For example, the Supreme Court in a recent case,[1] keeping in view the welfare of a male child of eleven years, declared the mother as his guardian. In this case, there was nothing *against the father* to disentitle him to be a guardian, but the Court felt that the "child's welfare is financially and affectionately safe in the hands of the mother". There are other judicial decisions following the same approach and thus advancing the cause of justice. In this position, it is appropriate that the text of the law should be amended by ensuring that the consideration of the welfare of the minor shall be paramount.

Such an amendment will settle the position for all times to come, eliminating the possibility of any arguments[2] being taken to the effect that the father must be appoint if he is not "unfit".[2]

English law.

6.41. In this context, we may refer to the English law on the subject of guardianship and custody of "minors" — an expression now used in place of the earlier expression "infants".[3] The principal legislative measure on the subject is the Guardianship of Minors Act, 1971 supplemented by the Guardianship Act, 1973. Besides these Acts, elaborate legislation relating to children has been passed in recent times, particularly the Children's Act, 1975.

The principle on which questions relating to custody, upbringing etc. of minors are to be decided, is thus laid down in the English Act of 1971,[4] applicable to judicial proceedings:—

> "1. *Where in any proceedings before any court*[5] (whether or not a Court as defined in section 15 of this Act)—
>
> (a) the custody or upbringing of a minor; or
>
> (b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof,
>
> is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether, from any other point of view, the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, "administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

The Act of 1973[6] provides for the equality of parental rights in these terms:—

> "1.—(1) In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of income of any such property, a mother shall have the same rights and authority as the law allows a to father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other."

Then there is the inherent jurisdiction of the High Court in regard to wardship.

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[1] *Smt. Mohini V. Virender Kumar*, A.I.R. 1977 S.C. 1359.

[2] *Cf. Snehlata* v. *Mahendra*, A.I.R. 1979 Raj. 29, 34, para 10 (Feb.-March).

[3] For detailed discussion of the English law and its evolution, see Appendix 3.

[4] Section 1, Guardianship of Minors Act, 1971.

[5] Emphasis added.

[6] Section 1(1), Guardianship Act, 1973.

Finally, the law relating to Habeas Corpus, in so far as it deals with the recovery of minors below the age of discretion, is also relevant[1]

Side by side with these legislative developments as to guardianship and custody, legislative measures for the welfare of children have come in quick succession. With the passage of the latest Act on the subject — Children Act, 1975 — this branch of the law has become a fairly complex one in England.

The object of legislation relating to children is to provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected and delinquent children and for the trial of the latter. Accordingly, the Children Acts initially made elaborate provisions for the establishment of a specialised machinery for dealing with such children.

However, the range and coverage of the legislation has now expanded. The Children Act, 1975 introduces certain provisions. One new concept concerns "custodianship". The Act provides a means whereby (as an alternative to adoption), relatives and others looking after children on a long-term basis can apply for, and obtain, the legal "custody" of the children. A "custodianship" order under the Act vests "legal custody" of the child in the applicant, who becomes known as the child's "custodian". A custodian appears to be in a similar position to a parent having custody of his child, but is not called his "guardian". "Custodianship" may be said to be a new form of guardianship, though giving less rights and powers than guardianship, and to be similar to, but not identical with, custody.

In England, Habeas Corpus has also long been used to gain the custody of infants. The writ is issued on the application of the party seeking custody and is directed against whoever has the control of the infant.[2] Though, in theory, it still rests on the idea of relieving an illegal restraint, the ordinary rules of family law apply in custody cases, and the matter is heard in the Family Division (previously, the Chancery Division). An application for custody is a proceeding which involves "not a question of liberty, but of nurture, control and education".[3]

Second question— Elaboration of "welfare of the child".

6.42. This disposes of the first question. As to the second question posed above[4] (welfare of the child), section 17(2) of the Act of 1890 states the matters to which the Court shall have regard in determining whether the appointment of a person as guardian would, or would not, be for the welfare of the minor. These matters are age, sex and religion of the minor and the existence of previous relations of the proposed guardian with the minor or his property. These are all matters personal to the minor. If the minor is old enough to form an intelligent preference, that preference may also be taken into account.

Act of 1956 and its relationship to the Act of 1890.

6.43. The Act of 1890 contains no separate provision as to preference to be given to any *particular* parent as to *custody*, although it does contain a provision[5] whereunder questions of *custody* may come up for adjudication.

In this context, the Hindu Minority and Guardianship Act, 1956, may be noted, since its provisions mark a departure in some respects. The Act is supplemental to the Act of 1890, and save as expressly provided in the Act of 1956,

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[1]see *infra*.

[2]Sharpe, Law of Habeas Corpus (1976), pages 168, 169.

[3]*Barnardo* v. *McHuge*, (1891) 1 Q.B. 194, 203 (Lord Esher M.R.).

[4]Para 6.39, *supra*.

[5]Section 25.

is not in derogation thereof.[1] Where, therefore, the Act of 1956 is silent, the Act of 1890 operates. There are, however, some matters on which the Act of 1956 is not silent and makes a specific provision. Sections 6 and 13 of the Act of 1956 are of particular relevance. Under section 6, the natural guardian of a Hindu minor is the father, and after him, the mother (The specific mention of the mother may be noted). The father's *guardianship* is subject to the provisio that the *custody* of a minor who has not completed the age of five years **shall** *ordinarily* be with the mother — a provision very material to the third question[2] formulated by us.

Section 13, it may be recalled,[3] provides that in the appointment of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the *paramount consideration*. Here, it must be noted that section 17(1) of the Guardians and Wards Act, 1890, while speaking of "the welfare of the minor", does not make the welfare of the minor the *paramount consideration* in the appointment of any person as guardian.

Effect of sections 6 and 13, Act of 1956.

6.44. *If section 6 and 13 of the Act of 1956*[4] are read together — as they must be — then it will be seen that neither the father nor the mother can, as of a right, claim to be appointed by the Court as the guardian of a Hindu minor, unless such appointment is for the welfare of the minor. The welfare of the minor is the *paramount consideration*. So, in regard to being granted the custody of a minor by the Court, the mother cannot, as of right, claim it merely because a minor is below the age of five years, nor can the father get the custody as of right solely on the ground that the minor has completed the age of five years. This is plain from the fact that section 6 provides only that the custody of a minor who has not completed the age of five years shall *ordinarily* be with the mother and section 13, which relaxes the rigour of section 19 of the Act of 1890 in the interest of the minor's welfare, also makes the welfare of the minor the *paramount consideration*. The approach adopted by the Act of 1956 is thus somewhat different from that adopted by the Act of 1890, which is tilted to some extent in favour of the father.

Modern sociological developments and their relevance.

6.45. This difference in approach is understandable. The Guardians and Wards Act, 1890 was enacted 90 years ago. At the time of its enactment women had *scarcely* any rights for them; there were only social and legal degradation, material insecurity and other manifestations of the dominance and false superiority of man. That is why the Act of 1890 lays an emphasis on the preferential claims of the father or male member in the matter of appointment of guardian of minors.[5] The Act of 1956 marks a distinct progress in this respect.

There is another matter in respect of which the Act of 1956 marks a progress. Recognising the advance in the status of women in all spheres and changed concepts as to child welfare, that Act has given women the right of guardianship (after the father) and also provided that the mother should ordinarily have the custody of the minor child till the age of five. More important is the provision of the Act which has made the welfare of the minor the *paramount consideration* in the appointment of guardian.[6] though it has kept intact the concept of "minor's welfare" as adumbrated in section 17 of the Act of 1890, without spelling it out for its own purposes.

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[1]Section 2, Act of 1956.

[2]Para 6.39, *supra*.

[3]For the text of section 13, see *supra*.

[4]Para 6.42, *supra*.

[5]Section 19.

[6]Section 13, Hindu Minority and Guardianship Act, 1956.

6.46. In so far as the Act of 1956 marks a progressive approach, it is welcome. But certain further comments would be in order. The social conditions existing today are altogether different from those that prevailed in 1890 or even in 1956. The goal of social justice envisages conditions conducive to freeing family relations from distortions and deformations associated with the exploitation of man and with the social and legal degradation of women and their material insecurity. Women have now a status of equality with men in all spheres of life. The social significance of the family is now being recognised. It should develop into a unit supporting and promoting those talents and human qualities which foster the development of the individual. Parents must regard it as their foremost responsibility to bring up their children as healthy, happy and useful individuals and of an all-round standard of education, so as to enable them to blossom as active builders of society and the guardian must ensure this development of the child and safeguard its interest. In appointing a guardian for a child, the Court must determine which of the claimants is, by his or her educational competence and influence and his or her own example, best suited to provide the requisite care in bringing up the child.

Present conditions different from those existing in 1890 or 1956.

6.47. Quite a part from the considerations of well being, welfare, education and development of the child which weigh in favour of allowing the mother a right to the custody of a child till he is at least twelve years of age,[1] it is necessary to give this right to the mother in order to prevent the father from using the child as a pawn for securing complete submission of his wife, who may be independent and spirited, to his none too laudable plans. Instances are common where the husband, either at the instigation of his parents or sisters or on own, has adopted "the pawn method", when the wife insists on the husband having his own establishment which he can well afford, or when the wife has not served well the mother-in-law or has not brought a handsome dowry. In such cases the husband sends away his wife to her parents' house, keeping the custody of their child with him. Such instances occur frequently in the early years of marriage,[2] when generally there is a minor child. It is not unreasonable to predict that with the liberalisation of marriage and divorce laws and the enactment of anti-dowry measures, "the child pawn" weapon would be too often used by the husbands who have failed to make their marriage a success and who are out to exploit the situation and pursue their object at any cost.

Need to prevent father from using child as pawn.

All these considerations are very material to the questions that we have formulated.[3].

6.48. In view of what we have stated above, we recommend that sub-section (1) of section 17 should be replaced by the following sub-sections:—

Recommendation for amending the Act of 1890, section 17.

"(1) *In the appointment or declaration of the guardian of a minor, the welfare of the minor shall be the paramount consideration.*

(1A) *Subject to the provisions of sub-section (1), the Court shall, in appointing or declaring the guardian of a minor, have due regard to the law to which the minor is subject:*

Provided that nothing in this sub-section shall affect the provisions of section 13 of the Hindu Minority and Guardianship Act, 1956"

Sub-section (2) of section 17 should be replaced by the following sub-sections:—

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character

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[1]See further para 6.50, *infra*.

[2]*Cf.* the facts in *Harihar Prasad* v. *Suresh*, A.I.R. 1978 A.P. 13.

[3]Para 6.39, *supra*

and capacity of the proposed guardian, *his educational competence and capacity for making the minor a healthy, happy and a useful individual of an all-round standard of education* and his nearness of kin to the minor and any existing or previous relations of the proposed guardian with the minor or its property

(2A) *The wishes, if any, of a deceased parent may also be taken into consideration, "but not so as to subordinate the factors mentioned in sub-section (2)"*

Insertion of new sub-section—Periodical reports

6.49. We have so far covered of the questions formulated by us in connection with section 17. The third question[1] concerns a matter of procedure. In our opinion, there should be a provision empowering the Court to call for periodical reports from the guardian appointed by the Court about the health, education and welfare of the minor. The period for submission of the reports may be fixed according to the circumstances of each case. To achieve this object, we recommend that two new sub-sections may be inserted in section 17 as follows[2]:—

"(6) *The Court may require the person appointed or declared to be the guardian under this section or the person to whom custody of the minor is entrusted under this Act to furnish to the Court, at such intervals as the Court may, in the circumstances of the case, deem fit, periodical reports regarding the health and education of the "minor and such other matters relating to his welfare as the Court may specify."*

"(7) *The Court, on receipt of the reports under sub-section (6), shall consider them as soon as possible and may issue such directions to the guardian or other persons furnishing them as the Court may, in the interests of the minor, think fit."*

Recommendation for amending the Act of 1956, section 6.

6.50. Taking up the fourth question, we are of the view that section 6 of the Hindu Minority and Guardianship Act, 1956 should *also be amended*[3] so as to allow the mother the custody of the minor, ordinarily till he or she completes *the age of* 12 *years.*[4] We may state in brief our reasons for this view. The period upto the age of twelve represents the formative years in the life of a child. It is in these formative years that a child develops such qualities as patience, modesty, honesty, readiness to help and respect for others. The education that the child receives in these years should be designed to make him or her a healthy individual of high intellectual and moral standard, capable of playing an active role in the development of the State and society. Now, it cannot be disputed that it is the mother's influence which moulds the character and qualities of a child. Men are what their mothers make them; no fondest father's fondest care can fashion the child's heart or shape his life. It was Napoleon who said "The future destiny of the child is always the work of the mother".

Need for amendment as to custody.

6.51. Legislative history of the provision[5] in the Act of 1956 relating to custody is of interest. Though the mother, in regard to her position as a natural guardian, is postponed to the father, yet the Act lays down, as already stated, that

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[1]Para 6.39, *supra*.

[2]If considered appropriate, the matter can be dealt with by a separate section to be inserted in the procedural provisions, say, as section 43A.

[3]To be carried out under section 6, Hindu Minority and Guardianship Act, 1956.

[4]See also para 6.47, *supra*.

[5]Para 6.45, *supra*.

the custody of a minor upto five years shall ordinarily be with the mother. In the original Bill, the age proposed was three years, but the Select Committee raised it to five years.[1] Even this enhancement did not satisfy all persons. Some Members of Parliament felt that the age should be further raised. A lady member[2] of the Select Committee wanted the custody of the minor to be with the mother till the minor attained majority. Another lady member wanted it to be raised to twelve. The two other male members wanted it to be raised to ten and thirteen respectively. Our proposal[3] that the age of custody should be raised to twelve is, therefore, not new

English law.

6.52. Development in England relative to the question may be noted. In England, as far back as 1839, the mother was given a right to the custody of her own children till they were seven years of age.[4] By subsequent legislation passed in the latter half of 19th century (Guardianship of Infants Act, 1886), she obtained the right to the custody till the children were sixteen years of age. Section 1 of the Act of 1925 extended the provisions of the Guardianship of Infants Act, 1886 and laid down that the rights of the mother in the matter of custody, care, guardianship etc. of the children shall be equal to that of the father; and that the welfare of the child should be the first and paramount consideration. It also provided that the Court shall not take into consideration whether, from any point of view other than the welfare of the infant, the claim of the father in respect of custody, upbringing etc. is superior to that of the mother or the claim of the mother is superior to that of the father. The Act of 1971 adopts the same principle. The Act of 1973 lays down complete equality of *sexes* as to matters concerning children.

Need of mother's care for child of tender age.

6.53. The child under twelve years of age needs a tender affection, a caressing hand and the company of his mother, and neither the father nor his family relations, however close, well-meaning and affectionate towards the minor, can appropriately serve as a proper substitute for the minor's mother. It should also be borne in mind that physical needs and comforts alone are not enough for the proper and healthy development of a child. Parental affection is indispensable for this purpose and in the case of a conflict between the parents when the child is under twelve years of age, the mother should have a preferential claim in regard to the child's custody. It is for these reasons that we have[5] recommended an amendment of the Act of 1956 as to the age upto which custody should ordinarily be with the mother.

Questions formulated at the outset how disposed of

6.54. For the sake of convenient, we may at this stage record briefly how the recommendations made above dispose of the questions that we had formulated[6] while commencing our discussion of section 17:—

(i) On the first question (relative importance of each consideration), we have preferred the progressive approach (minor's welfare to be paramount) and recommended its incorporation in the Act of 1890.

(ii) On the second question (elaboration of the concept of "welfare of the minor"), we have considered it proper to add to the content of section

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[1]Joint Committee on the Hindu Minority and Guardianship Bill (March, 1955) Report, clauses.

[2]E.g. Shreemati Seeta Pramanand (List of amendments).

[3]Para 6.50, *supra*.

[4]See Appendix 3.

[5]Para 6.50, *supra*.

[6]Para 6.39, *supra*.

17 of the Act of 1890. (This amendment will presumably become applicable to the Act of 1956 also).[1]

(iii) On the third question (procedure), we have recommended an improvement in the Act of 1890.

(iv) On the fourth question (custody), we have recommended an amendment in the Act of 1956, raising the age to 12 years.

Section 18.

6.55. This takes us to section 18 of the Act of 1890, which provides that where a Collector is appointed or declared by the Court by virtue of his office to the guardian of a minor, the order shall be deemed to authorise and require the person for the time being holding the office to act as guardian. In fact, this follows from the principle that the Collector is deemed to be appointed in his capacity as Collector.[2]

The section may be retained as it is.

Appointment of juristic persons as guardian.

6.56. As to the persons who can be appointed as guardians, we have already referred[3] to the need for clarification of the position in regard to the appointment of juristic persons. A specific provision on the subject is, in our view, needed. At the same time, certain safeguards are desirable in the interests of proper management of the property of the minor and proper care of his person. To achieve this object, we recommend that the following new section should be inserted as section 18A:—

"18A. *The Court may, if it is not practicable to appoint an individual as a guardian, appoint, as a guardian of the person or of the property or both of a minor, a person who is not an individual, provided that such person is an institution or organisation recognised for the purposes of this section by the State Government by notification in the Official Gazette, and is, by its constitution, empowered to undertake such guardianship.*"

VI. Restrictions as to appointment of guardian.

Section 19—Guardian not to be appointed by the Court in certain cases.

6.57. While, in general, the power of the Court to appoint a guardian—where such an appointment is required for the welfare of the minor—ought not to be subject to any restriction, the Legislature has considered it proper to impose a prohibition against an appointment by the Court in certain special cases, enumerated in section 19. In part, the section is intended to avoid a conflict between the general law relating to guardianship (the Act of 1890) and the special law relating to Court of Wards. The opening paragraph and clause (c) of the section can be explained on this basis. The other part of the section seems to be based on the assumption that by personal law, the husband of a minor married female and the father of a minor are vested with guardianship of the person of the minor, and the guardianship so vested ought not to be interfered with except where the guardian is unfit. Clauses (a) and (b) are based on some such assumption. How far the assumption as to the rule of personal law is accurate, and how far the hesitancy of the Legislature to interfere with such guardianship should be allowed to continue in the changed conditions, will be considered in due course. It will be convenient to quote the section. Section 19 is in these terms:—

"19. Nothing in this chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the

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[1] *Cf.* section 2, Hindu Minority and Guardianship Act, 1956.

[2] *Narasingrav Rav* v. *Luxmanrav Rav*, (1876) I.L.R. 1 Bom. 318, 320. (Decision under sections 11-15, Bombay Minors Act, 1864).

[3] See para 5.6, *supra*.

superintendence of a Court of Wards, or to appoint or declare a guardian of the person—

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

Analysis of section 19.

6.58. It will be noticed that section 19 lays down restrictions as to—

(1) cases in which a guardian cannot be appointed of property, and
(2) cases in which a guardian cannot be appointed of the person.

As to property, it bars the appointment or declaration of a guardian where the minor's property is under the superintendence of a Court of Wards. We have no particular comments on this part of the section.

As to the person of the minor, there are three restrictions contained in clauses (a) (b) and (c). Here again, clause (c) is concerned with a minor whose property is under the superintendence of a Court of Wards, and needs no comments. But clauses (a) and (b) require consideration. We shall first deal with certain points that are relevant to the entire section or to a major part of it, and then proceed to discuss points confined to particular clauses.

Section 19 to be either deleted or to be made subject to section 17.

6.59. The first and most fundamental question to be considered is how much of section 19 should be retained. In this connection, we would like to reiterate[1] the approach which we have indicated—that the minor's welfare ought to be the paramount consideration in proceedings for the appointment of a guardian. Section 17, understood in the above light and particularly after the amendment recommended by us, is intended to leave the discretion of the Court untrammelled by any other consideration—or, at least, to make other considerations subordinate to the minor's welfare. In contrast, section 19 is intended to fetter the discretion of the Court in certain respects. The case where there is a Court of Wards may perhaps be regarded as a special one. But in other respects the restriction in section 19 needs modification.

In this position, one alternative would be to delete section 19 altogether. But if that course is considered too radical or not acceptable for any other reason, certain modifications are required so as to ensure that section 19 is at least subject to section 17 and to effect certain other improvements which appear to be needed

Section 19 to be made subject to section 25.

6.60. One important modification is required in the law in order to maintain harmony with section 25. The latter section, dealing with applications for the custody of a minor, *regards the welfare of the minor as the sole consideration.* Even now, this is mentioned in section 25 and we propose to emphasise this aspect in dealing with section 25.[2] No doubt, it is true that section 19 is concerned with the appointment or declaration of guardianship—a wide area—while section 25 deals with only one particular aspect of guardianship, namely, custody. However, for the sake of clarity, it is desirable to ensure that the welfare of the minor is the paramount consideration.

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[1]See discussion as to section 17, *supra* (paragraphs 6.40 to 6.48).

[2]See discussion as to section 25, paragraphs 7.16 to 7.19, *infra.*

Welfare paramount under section 25.

6.61. It is not as though, in all cases where the father is not unfit, custody of the child should be left with the father.[1] It is the welfare of the child that is paramount.[2]

The correct approach is that taken in a recent Kerala case,[3] in which it was held that the only consideration that was paramount was the welfare of the child and it could not be correct to talk of the "pre-eminent position" of the parents or their exclusive "right" to the custody of the children when the future welfare of the children was being considered. The fact that the father was not found to be unfit to be a guardian did not necessarily mean that he was entitled to the custody of the child.

The position has been largely clarified by the Supreme Court[4] in a judgment to which we shall revert later also.[5] The Supreme Court observed:

> "The father's fitness from the point of view just mentioned *cannot override considerations of the welfare of the minor children.* No doubt the the father has been presumed by the statute generally to be better fitted to look after the children—being normally the earning member and head of the family—but the Court has in each case to see primarily to the welfare of the children in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education. The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they get their due share of affection and care from both the parents in their normal parental home."

Section 13(2) of the Act of 1956.

6.62. The Supreme Court was making these remarks in relating to a dispute that arose between the father and the mother regarding the custody of their minor son.

Section 13 of the Hindu Minority and Guardianship Act, 1956 is more specific and has, in categorical terms, provided in sub-section (2) as follows:—

> "(2) No person shall be entitled to the guardianship 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*"

Case law

6.63. In *Chander Prabha* v. *Premnath,*[6] the Delhi High Court, while awarding custody of a male child below five years to the mother, observed:—

> "The child under five years of age, in our opinion, needs most the tender affection, the caressing hand and the company of his natural mother and neither the father nor his female relations, however close, wellmeaning and affectionate towards the minor, can appropriately serve as a proper substitute
>
> "for the minor's natural mother,..... .....This is consistent with the role of nature and, in normal circumstances, deserves to be noted and acted upon"

Occasionally, however, section 19(b) does receive the construction that if the father is not unfit, he cannot be deprived of custody.[7-8] For this reason, it is desirable to amend section 25 as indicated above.

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[1] *Babubhai Patel* v. *Madavi Patel*, (1979) 1 M.L.J. 244, 250, para 13.
[2] *Ainunnisa* v. *Mukhtar Ahmad*, A.I.R. 1975 All. 67 (reviews cases).
[3] *Sebastian* v. *Thomas*, (1979) Kerala Law Times 536, 537 (30 July 1979).
[4] *Rosy Jacob* v. *Jacob*, A.I.R. 1973 S.C. 2090, 2100; (1973) 1 S.C.C. 840.
[5] Para 7.16, *infra*.
[6] *Chander Prabha* v. *Premnath*, A.I.R. 1969 Delhi 283.
[7] *Snehlata Mathur* v. *Mahendra Narain*, A.I.R. 1979 Raj. 29.
[8] *Reginald* v. *Sarojam*, A.I.R. 1969 Mad. 365.

6.64. Apart from this, section 19 creates difficulties in the case of children whose *custody* is, by personal law, entrusted not to the *father*, but to some other person — for example, maternal relations as in the case of Muslims.[1] Section 19 and proposed saving regarding custody.

Though the father is the guardian even of a Muslim girl who has not attained puberty,[2] it is the mother or mother's mother who is entitled to custody *until puberty*, amongst Hanafi Muslim.[3] This applies even to married girls, until puberty.[4]

For this reason also, it is desirable to amend section 25 as stated above.

6.65. We now proceed to a consideration of points concerning particular clauses of section 19. These clauses prohibit the appointment of a guardian in specified circumstances. Such a prohibition may arise from other rules also. For example, where a testamentary guardian has been properly appointed under a will duly executed, an order appointing another guardian cannot be made[5] until the powers of the guardian appointed under the will have ceased under the provisions of the Act. Section 19 and testamentary guardians.

6.66. It may also be mentioned that in the case of Hindus, section 19(b) is controlled[6] by section 2 of the Hindu Minority and Guardianship Act, 1956. However, we are at the moment concerned only with the specific prohibitions in the section. Effect of section 2, Hindu Minority and Guardianship Act.

6.67. Coming first to clauses (a) and (b), there is a controversy as to whether the person to whom preference is given by clause (a) or clause (b) (husband or father, as the section stands at present) can himself apply for being appointed or declared as a guardian. Many judicial decisions have taken the view that section 19 bars an application by such preferred persons. [6-12] Section 19, clauses (a) and (b)- — Application by father or husband.

6.68. Nevertheless, we see force in the view expressed in certain other judicial decisions[13] to the effect that all that section 19 means is that if a *third party* applies, he shall not be appointed or declared a guardian of the person of a minor and that[14] the section does not restrict the right of the father or husband to be appointed as guardian, because such an appointment may confer on him higher rights than what he has as the natural guardian and because, in dealing with the Object of section 19 and its proper scope.

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[1](a) *Fatima* v. *Shaikh Peda*, A.I.R. 1941 Mad. 944 (mother's mother v. father).
(b)*Nur Kadir* v. *Zuleikha*, (1884) I.L.R. 11 Cal. 649 (mother's father v. husband)

[2]*Fatima Bibi* v. *Shaikh Peda*, A.I.R. 1941 Mad. 944.

[3]See *Md. Shafi* v. *Shamin Banoo*, A.I.R. 1979 Bom. 56, 159, 165 (May).

[4]*Karban* v. *K.E.*, (1904) I.L.R. 32 Cal. 444, 446.

[5]Section 7(3).

[6]*Lalta Prasad* v. *Ganga Sahai*, A.I.R. 1973 Raj. 93 (reviews cases).

[7] (a) *Sukhdev v. Ram Chander*, A.I.R. 1924 All. 622.
(b) *Mt. Siddiq unnisa* v. *Nizanuddin*. A.I.R. 1932 All. 215, 217.

[8] *Bai Tara* v. *Mohanlal*, A.I.R. 1922 Bom. 405.

[9] (a) *Lakshamau* v. *Alla Vira*, A.I.R. 1925 Mad. 1085 (Baneaan & Jackson JJ.).
(b) *Re Dakshinamurthi*, (1969) 1 M.L.J. 845.

[10] *Dhan Kumari* v. *Mahendra*, A.I.R. 1923 Nag. 1919, 200.

[11] *Mt. Taj Begum* v. *Ghulam, Rasul*, A.I.R., 1923 Lah. 250 (father cannot be appointed).

[12] (a) *Mt. Chandra Kaur* v. *Chotey Lal*, A.I.R. 1925 Oudh 282 (father cannot be appointed).
(b) *S. Ahmad Agha* v. *Mt. Zohra*, A.I.R. 1925 Oudh 421 (father cannot be appointed).
(c) *Md. Saddig* v. *Wafati*. A.I.R. 1948 Oudh 51, 53 (father cannot be appointed).

[13] *Raghavaiya* v. *Lakshmiah*, A.I.R. 1925 Mad. 398 (Venkatasubba Rao & Jackson JJ.).

[14] *Kamini Mayi* v. *Bhushan*, A.I.R. 1926 Cal. 1193, 1194.

outer world, the certificate of the Court confers a greater importance on his power than he possesses as the natural guardian. In fact, in the Madras case[1] of 1925, there is a hint that the drafting of the present section is defective.

Need for amendment.

6.69. The position is therefore in need of clarification. On the merits, it is in the interests of justice to provide that clauses (a) and (b) do not apply where the husband or father[2] is the applicant for guardianship. Even where such a person is the natural guardian, he may well consider it desirable to be declared as a guardian, for reasons mentioned above.[3]

Comment in legal Journal.

6.70. In this connection, we may mention that long ago, an editorial in the Calcutta Weekly Notes,[4] commenting on the famous Privy Council decision relating to guardianship,[5] made the following suggestion for a reform of the law:—

> "If the District Court can entertain an application by a stranger to declare a father unfit to be his children's guardian, there is nothing in reason to exclude its jurisdiction to entertain a complaint *by the father* seeking to recover custody of his own children. If no application under the Guardians and Wards Act is competent, surely a suit would lie in the Court of the District Judge for a declaration of the father's rights and for such relief as may be necessary to work them out.
>
> "That is really the substance of the decisions of the High Courts in India to the effect that Act VIII of 1890 did not repeal *the general jurisdiction* of District Courts to entertain suits relating to the guardianship and custody of minors, and we should be sorry if the judgment of the Privy Council should be understood as definitely negativing that jurisdiction. If it has, *then surely the legislature should step in and do away with this anomaly.*[6] The District Court should have jurisdiction to entertain a father's suit or application for declaration of his rights as guardian and for recovery of custody of his minor children as against persons interfering with his rights. Such jurisdiction would, of course, have to be exercised in accordance with principles so lucidly explained in their Lordships' judgment. What we contend for is that a father whose rights of guardianship over his minor children have been interfered with should not be left in doubt either as to the Court whose protection he is to invoke, or as to the procedure he is to adopt to vindicate his rights; nor, if he is a resident in the Mofussil, should he be "compelled in every case to come up with his plaint to the Original Side of the High Court for remedies which the local courts are perfectly competent to give to persons other than the father."

The amendment suggested by us will substantially remedy the anomaly.

Section 19(a)

6.71. Incidentally, section 19(a) appears to be based on the assumption that after marriage the right of guardianship of the person and property of a female minor devolves upon her husband (if not unfit), even though *the husband be a minor.*

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1. *Raghavaiya* v. *Lakshmiah*, A.I.R. 1925 Mad. 398.
2. Also the mother if para 6.66 is accepted.
3. Para 6.68, *supra*.
4. Editorial note, "Father's remedy against deprival of custody of children" (1914) 18 Calcutta Weekly Notes (Journal) 209, 210.
5. *Annie Besant* v. *G. Narayaniah*, (1914) 18 Calcutta Weekly Notes 1089: I.L.R. 38 Mad. 807 (P.C.).
6. Emphasis added.

6.72. The provision in section 19(a) is reminiscent of the earlier English rule, under which, as soon as the daughter married, the father's natural jurisdiction over her, and his right to her custody during infancy, determined. Earlier English rule as to husband's control over wife.

> "For the happiness and the honour of both parties, it (the law) places the wife under the guardianship of the husband, and entitles him, for the sake of both, to protect her from the danger of unrestrained intercourse with the world by enforcing cohabitation and a common residence."[1]

This was the view taken by Coleridge J. The authority of this view was shaken by a later case[2] where it was stated that a husband had no such right to "custody" as a parent has over his child. In that case a wife was, by her own desire, living with her son (and apart from her husband). The Court refused to restore her to his custody.

Clause (a), if construed literally, would create an anomaly,—for example, where the husband himself is a minor. In an early Punjab case,[3] which was a suit for the custody of a wife when both the husband and the wife were found not to have attained puberty, the decree was refused and it was held that in Muslim law, a husband is not entitled to custody of the minor wife too young for intercourse. The case was not decided under section 19. If the matter arose under section 19, the Court can refuse the order only by regarding the husband as "unfit".

6.73. This shows the right of the husband to custody is not an absolute one. This naturally raises the question whether clause (a) of section 19 should be allowed to continue in its present sweeping form. We would have made a specific recommendation on the subject so as to avoid conflict with personal law, particularly in a matter where the present law goes beyond the best interests of the child. However, if our recommendation[4] to save the jurisdiction of the Court in regard to custody on a consideration of the *welfare of the minor* is accepted, the conflict referred to above would cease to have any practical importance. Right not absolute.

Incidentally, this particular problem does not arise in England, since the "law to which the minor may be subject" is superseded by the mandatory statutory rule which regards the welfare of the child as paramount.

6.74. The question may be raised whether clause (a) is needed at all the present day, when persons below 18 years of age are prohibited from marrying by the Child Marriage Restraint Act, 1929 as amended in 1978. If the present law relating to minimum age of marriage in India is complied with throughout India, there would not, in future, be any minor who is a female married in India. Utility of clause (a) in the light of child marriage restraint.

But there could still be minors who are married outside India (who are not Indian citizens) and who have come to reside in India, and there may also be minors married in India before 1978 (when the Child Marriage Restraint Act was amended so as to make 18 years the minimum age of marriage).

Hence clause (a) of section 19 cannot be deleted.

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[1] *Re Cochrane*, (1840) 8 Dowe 633.

[2] *R.* v. *Leggatt*, (1852) 18 Q. B. 781.

[3] *Dinu* v. *Abdulla*, (1894) Punjab Record 97-98 (Civil Judgement No. 351).

[4] Paragraphs 6.59 to 6.61 *supra*.

Section 19(b) —Equal status to be conferred on mother.

6.75. The next point is concerned with clause (b) of section 19. The preference given by section 19(b) is confined to *the father*. In view of the changed approach which we have recommended[1] in relation to the rights of each parent, it is necessary that the preference given in this clause to the father should be extended to the mother also, and she be placed on an equal footing with him. Accordingly, we recommend that in section 19(b), after the existing word "father", the words "or mother" should be inserted.

It may be noted in this context that the principle underlying section 19(b) has been held even now to apply to a mother as well as to a father, though with lesser force.[2]

Section 19, clauses (a) and (b) overlapping-Amendment recommended.

6.76. There also seems to be some obscurity as to the exact inter-relationship between clause (a) and clause (b) of section 19, inasmuch as a minor who is a married female may fall under both the clauses. The point requires to be attended to. In our view, it would be better to confine clause (b) to *persons other than married females*. We recommend a suitable amendment for the purpose.

Personal law.

6.77. We would also like to point out that in some respects, section 19(b) might conflict with personal law, in so far as clause (b) has the effect of giving pre-emptory preference to the father even where the father is not the natural and legal guardian by personal law.

Illegitimate children.

6.78. For example, in the case of an illegitimate child, the assumption underlying section 19(b) totally breaks down. The reason is that the father has no legal right of guardianship over such a child.

This was the position under uncodified rules of Hindu law[3] and is also the position under its codified version.[4] In Muslim law also, the position is the same. In fact, the right of the mother to custody can be enforced by habeas corpus.[5]

The position was settled long ago[6] in India for persons of both the communities. So long ago as 1864, Holloway J. made the following observations:[7]

> "All the analogies of Hindu law, as we have already shown, are against the view of a bastard taken by the law of England. There is an element in that law, the doctrine of Christianity, which would render any argument drawn from its provisions merely deluding. There is, and can be, no analogy."

In the case of persons of other communities also, there is fairly recent authority[8] specifically holding that the mother is the natural and legal guardian of the illegitimate child.

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[1] See discussion relating to section 17, *supra* (paragraphs 6.40 to 6.48). Also see paragraphs 6.66 and 6.69.

[2] *Sumitra Bai* v. *Subhadra Bai*, A.I.R. 1925 Nag. 178, 179.

[3] *Mahabir* v. *Raghubar*, A.I.R. 1933 Oudh 312, 313.

[4] Section 6(b), Hindu Minority and Guardianship Act, 1956.

[5] *Gohar Begum* v. *Suggi*, A.I.R. 1960 S.C. 93.

[6] (a) *In the matter of Saithri*, (1891) I.L.R. 16 Bom. 307, 317.
(b) *Venkamma* v. *Savitramma*, (1888) I.L.R. 12 Mad. 67, 68.
(c) *Shahjehan* v. *Munro*, 5 S.D.A. N.W.P. 39.

[7] *Mayna Bai* v. *Uttaram*, (1864) 2 M.H.C.R. 196, 203.

[8] *Pamela* v. *P.C. Martin*, A.I.R. 1970 Mad. 427, 428, 429, paragraphs 5 to 7 (Anglo-Indians)

6.79. In fact, the rule rests on certain fundamental considerations based on the natural bond. In the Madras case already referred to,[1] Holloway J., turning to Roman law, gave a quotation from Gaius (which we need not reproduce) and made the following observations: **Rationale.**

> "This great master (Gaius) considers, that, in not denying *the natural guardianship* between the erring mother and her sons and of the sons with one another, and admitting heritable tie between them, the praetor was moved by natural equity."

Paternity is a matter governed by 'jus civile' and maternity by 'jus nature'. The creative forces of nature itself have bound the mother to her issue, whether born in lawful or unlawful wedlock, in a manner wholly or utterly different from the bond between the father and his sons. This natural relationship and these inescapable facts are reflected in ancient Hindu law governing succession to the Stridhana property of women, and in the rules recognised almost everywhere as to custody and guardianship of illegitimate children.

Thus, the provision in section 19(b) is not in tune with the general law in regard to illegitimate children.

6.80. There may be other cases where the rigid rule in section 19(b) would be inappropriate as conflicting with personal law. For example, in the case of a foreigner governed by another system of law, the Court will have regard to the system of law by which he is governed, which may not necessarily recognise any preferential status for the father,[2] though the best interests of the child are paramount.[3] **Foreigners.**

6.81. In view of what is stated above, it appears to be desirable to exclude, from the scope of section 19(b), cases where, under personal law, the father is not the natural and legal guardian of the minor. This will also apply to the mother, if she is added in clause (b) as recommended above.[4] **Amendment of section 19(b) recommended.**

6.82. To summarise recommendations made above in the discussion relating to section 19, amendment is required on the points enumerated below:— **Summary of recommendations relating to section 19.**

(i) amending section 19 so as to apply the provisions of section 17 relating to welfare of the child;[5]

(ii) making it clear that in cases under section 25 in relation to orders as to custody,[6] welfare of the minor is the paramount consideration. (This amendment[7] will be made in section 25).

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[1] *Mayana Bai* v. *Uttaram*. (1864) 2 M.H.C.R. 196, 203.

[2] *Nugent* v. *Vetzera*. (1861-1873) All England Reports (Reprint) 318.

[3] (a) *Re Kernot*, (1964) 3 All England Reports 339, 343, 344 (Buckley J.).
(b) *Re B's Settlement*, (1940) Ch. 54.
(c) *Re P.*, (1964) 3 All E.R. 977, 983 (C.A.).

[4] Para 6.66, *supra*.

[5] Para 6.59, *supra*.

[6] Para 6.61, *supra*.

[7] To be carried out under section 25. See para 7.22, *infra*.

(iii) clarification that clauses (a) and (b) do not apply to the husband or father or mother[1] making an application[2] for being appointed or declared a guardian;

(iv) addition of the mother in clause (b);[3]

(v) excluding from clause (b) married females;[4] and

(vi) excluding from clause (b) cases where, by personal law, the father or mother[5] is not the natural and legal guardian of the minor.[6]

Recommendation for revising section 19.

6.83. To carry out the points made above, we recommend that section 19 should be revised as under:—

Revised Section 19

Restrictions as to appointment or declaration of guardian.

19. (1) Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

(2) Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the person—

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) of a minor, *who is not a married female,* and whose father *or mother* is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor;

Provided that—

(i) *in determining the question whether a person is unfit to be a guardian with reference to clause (a) or clause (b) of this sub-section, the welfare of the minor as explained in section* 17 *shall be the paramount consideration;*

(ii) *nothing in clause (a) or (b) of this sub-section shall apply to a case where the husband or the father or the mother, as the case may be, applies for being appointed or declared a guardian; and*

(iii) *nothing in clause (b) of this sub-section shall apply to a case where the father or the mother, as the case may be, is by the law to which the minor is subject, the natural guardian of the person of the minor*[7]

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[1]This is consequential on para 6.65, *supra*.

[2]Para 6.65, *supra*.

[3]Para 6.66, *supra*.

[4]Para 6.68, *supra*.

[5]Addition of the mother is consequential on para 6.65, *supra*.

[6]Para 6.71, *supra*.

[7]Besides this amendment of section 19, section 25 will be amended to ensure that the provisions of that section (section 25) apply notwithstanding anything contained in section 19.

CHAPTER 7

DUTIES, RIGHTS AND LIABILITIES OF GUARDIANS: SECTION 20 TO 30

7.1. The duties, rights and liabilities of guardians are dealt with in sections 20 to 37. These sections are not confined to guardians appointed by the Court, but apply to all guardians.[1] Scope.

7.2. Section 20 deals with the fiduciary relation of the guardian to the ward, and needs no change. Section 20.

7.3. Section 21 provides that a minor is incompetent to act as guardian of any minor, except his own wife or child, or, where he is managing member of an undivided Hindu family, the wife or child of another minor member of that family. A doubt has arisen as to whether the expression ("child" in this section includes an adopted child).[2] We think that the expression should be widely construed. No change, however, is required on this point. Section 21-Meaning of "child".

7.4. It is not clear whether "guardian" in this section is confined to the guardian of the person, or whether the section covers property. If the section is taken as extending even to guardianship of property, certain anomalies may arise. Anomalies as to property.

In the first place, the last few lines of the section assume that a minor can be a managing member of a Hindu family where he is the seniormost male member. However, on this point, the query raised by Sadasiva Aiyar J. in a Madras case (to be referred to later[3] on) should be noted.

In the second place, if the first 17 words of the section, ending with "his own wife or child" are taken as covering the guardianship of property also, the result would be that a minor can be guardian of the property of his family, though his own property would be subject to the guardianship of another person.

As to Hindus, it is now specifically provided that a minor shall be incompetent to act as guardian *of the property of any minor*.[4]

7.5. The following observations of Sadasiva Aiyar J. in a Madras case[5] are pertinent in this context:— Observations in Madras case.

> "I am very doubtful whether a minor can at all be the managing member of a Hindu family, though he is the senior male member. 'Guardian' in section 21 is evidently intended to include the guardianship of both person and property. It does seem anomalous that a minor could be the guardian of the person of his wife and children, that is, entitled to the custody of their person and the management of their properties, while his own person is subject to the custody of the legal guardian of his person, and (while) his properties are under the management of the legal guardian of his properties. But this particular section 21 cannot, in my opinion, be held to dero-

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[1] *Jiban Krishna* v. *Sailendra Nath*, A.I.R. 1946 Cal. 172.

[2] *Sundermoni* v. *Gokulanand*, 18 C.W.N. 160, 164.

[3] Para 7.5, *infra*.

[4] Section 10, Hindu Minority and Guardianship Act, 1956.
Ibrahim v. *Ibrahim*, A.I.R. 1917 Mad. 612, 615.

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gate from the rights of the legal guardian of a minor's own person. I might venture to suggest that the Legislature should amend section 21 by omitting the portion following 'child or' and by confining the rights of a minor guardian over his wife and child to the control of their persons so far as it is necessary to exercise his conjugal right and the right of fondling his child, so that he might have no power to interfere with the management of their properties and so that the guardianship of their properties might be vested in the guardian of his own properties."

Some High Courts have taken the view [1][that a minor can be a managing member of a Hindu undivided family.

Need for amendment of section 21.

7.6. It is unnecessary to express an opinion on this point. However, so far as section 21 is concerned, it is, on principle, anomalous that the same person (minor managing member) would be competent to act in matters concerning the property, while, in matters concerning the person, he is subject to the guardianship of another person. The need for an amendment of section 21 is obvious.

Recommendation as to section 21.

7.7. On a careful consideration of various aspects of the matter, we recommend that section 21 should be revised as under, to remove the anomaly mentioned above:—

"21. (1) A minor is incompetent to act as guardian of any minor *except as provided in sub-section (2).*

(2) A minor is competent to act as guardian of the person of his own wife or child so far as it is necessary to exercise "his conjugal right and his right in regard to the upbringing of the child."

Section 22.

7.8. This takes us to section 22, which deals with the remuneration of the guardian and permits him certain allowances. "Allowances" referred to in the section seem to cover only reward for the "care and pains in the execution of his duties". It does not seem to cover expenses to be incurred for the maintenance and education of the minor[2] (in the case of guardianship of the person). Such expenses are, at present, governed by rules.[3] It is, however, desirable that this should be expressly covered by the section, so as to make the section comprehensive. Accordingly, we recommend that the following sub-section should be added to section 22:—

"(3) *The Court may, in the case of a guardian of the person, also determine from time to time the amount to be allowed to the guardian for the support, health and education of the ward.*"

Section 23

7.9. Section 23 provides that a Collector appointed or declared to be the guardian is subject to the control of the State Government or of an authority notified by the State Government in this behalf. The section needs no change.

Section 24.

7.10. Section 24 provides that a guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education and such other matters as the law to which the ward is subject requires.

The section needs no change.

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[1](a) *Trimbak Raoji* v. *Lonkaran*, A.I.R. 1948 Nag. 324.
(b) *Budh Jena* v. *Dhoben Naik*, A.I.R. 1958 Orissa 7.
(c) Mulla, Hindu Law (1974), page 974.
[2]Section 24.
[3]Section 50.

7.11. Section 25, bearing the marginal note "Title of guardian to custody of ward", contains three sub-sections. Sub-section (1), which is concerned with the ward leaving or being removed from the custody of a guardian of the person, empowers the Court to make an order for the return of the ward to the custody of the guardian, *if such order will be for the welfare of the minor*. It also empowers the Court to "cause the ward to be arrested and to be delivered into the custody of the guardian". Section 25-Title of guardian to custody of ward.

Sub-section (2) confers on the Court, for the purpose of "arresting the ward", the powers of a Magistrate of the first class under section 100 of the Code of Criminal Procedure, 1882—now section 97 of the Code of Criminal Procedure, 1973.

Sub-section (3) provides that the residence of a ward against the will of the guardian with a person who is not the guardian does not, of itself, terminate the guardianship.

7.12. A number of questions arise with reference to section 25. In the first place, case law as to Court having jurisdiction under the section needs examination.[1] In the second place,[2] it is not clear whether the power under this section can be exercised where the ward has never lived with the guardian who now applies for custody. In the third place, the language of certain provisions of the section (where it speaks of "arresting the ward") is archaic.[3] In the fourth place,[4] although sub-section (1) of the section itself lays down the test of welfare of the ward, yet attempts are, from time to time, made—though mostly unsuccessfully—to argue[5] that the *rights of the guardian should also influence the decision*. Section 25-Questions to be considered.

Then,[6] since the section deals with a matter vitally affecting the interests of the minor, it is desirable to make a specific provision as to the extent to which his wishes should be respected.

Finally,[7] there is also one addition in a matter of procedure that we would like to make, so as to emphasise the need for associating women with the proceedings, wherever practicable.[8]

7.13. The first queseion concerns the Court having jurisdiction under the section. Although section 25 does not specifically lay down which is the competent Court, it seems to be the general policy of the Act to vest jurisdiction in a Court having jurisdiction in the place where the ward for the time being *ordinarily resides*.[9] However, the question seems to have arisen in regard to section 25, and it has been held[10-11] that whether the application is under section 9 (application for guardianship of the person or property) or under section 25 (application for restoration to custody), it is the district Court having jurisdiction in the place where the minor ordinarily resides that would have jurisdiction. Section 25—The competent Court.

We do not consider it necessary to recommend an amendment on this point

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[1]Para 7.13, *infra*.

[2]Para 7.14, *infra*.

[3]Para 7.18, *infra*.

[4]Para 7.19, *infra*.

[5]See arguments in *Margarate* v. *Chacko*, A.I.R. 1970 Ker. 1, 10, para 22 (F.B.).

[6]Para 7.19 *infra*.

[7]Para 7.20, *infra*.

[8]*Cf.* Order 32A, Rules 4-5, Code of Civil Procedure, 1908.

[9]See section 4(5)(b)(ii).

[10]*Chimanlal* v. *Rajaram*, A.I.R. 1937 Bom. 158, 159; 30 Bom. L.R. 44.

[11]*Maung Ba* v. *Ma Than*, A.I.R. 1929 Rang. 129.

[12]*Tilak Raj* v. *Asha*, A.I.R. 1979 Raj. 128.

Persons not having actual custody.

7.14. The second question to be considered with reference to section 25 is, whether a person who *never had actual custody of the child*[1] can take proceedings under the section.

According to the Allahabad,[2] Bombay,[3] Nagpur[4] and Patna[5] view, such proceedings cannot be entertained.

Other High Courts,[6-7] however, adopt a more liberal interpretation and hold that even if a child has never been in the actual custody of a guardian, yet the guardian has constructive custody, and also, that refusal by a person to return the minor to such guardian amounts to "refusal to return" within the meaning of the section.

According to a recent Andhra case,[8] the word "removal" is not limited to physical removal constructive removal clearly falls within its ambit. In a Punjab case[9] where both the parents lived together and subsequently a minor son of 6 years was taken away by the mother, it was held that there was a *constructive removal* of the child from the father's custody and the father had a right to apply under section 25.

Some of the earlier decisions on the subject are reviewed in the undermentioned ruling.[10] The conflict as to the scope of "custody" in section 25 was also noted in a recent Delhi case,[11] but the question was not decided, not being necessary for disposal of the case.

As we shall mention later,[13] the interpretation relying on "constructive custody" has received the implied approval of the Supreme Court.

Judicial decisions based on constructive custody.

7.15. The judicial decision which take the wider view[12] have, at present, to rely on the doctrine of ("constructive custody"— a doctrine which has received the indirect approval of the Supreme Court.[14] While the wider view on the subject would seem to do substantial justice, the result has not been achieved without straining the present language to some extent. Indeed, this was admitted in one of the earlier Madras cases on the subject.[15] It is perhaps for this reason that the Rangoon High Court,[16] while not accepting the liberal construction, hinted at the need for legislative action.

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[1]Para 5.12, *supra*.

[2]*Latif* v. *Shakoora*, A.I.R. 1973 All. 441.

[3]*Achratlal* v. *Chimanlal*, A.I.R. 1916 Bom. 129.

[4]*Dhan Kumari* v. *Mahendra*, A.I.R. 1923 Nag. 199, 200.

[5]*Abassi Begum* v. *Mustafa*, 52 I.C. 998, 1001 (Pat.).

[6](a) *Jwala Prasad* v. *Bachu Lal*, A.I.R. 1942 Cal. 215.

(b) *Basant Kaur* v. *Gian Singh*, A.I.R. 1939 Lah. 339.

(c) *Ibrahim* v. *Ibrahim*, A.I.R. 1917 Mad. 612.

(d) *Geeta* v. *Ratan*, A.I.R. 1966 M.P. 221, 222, para 5,9.

[7]See also Punjab and Andhra cases, *infra*.

[8]*Kota Karrenna* v. *Kota Paravathamma*, (1978) 1 An. W.R. 425.

[9]*Sunita Devi* v. *Rajpat Kaushal*, (1978) 80 Punj. L.R. 143.

[10]*Sushila* v. *Kunwar Krishna*, A.I.R. 1948 Oudh 226, 266, 270 para 18.

[11]*Akhtar Begum* v. *Jamshed Munir*, A.I.R. 1979 Delhi 67, 70, para 10 (March) (Prakash Narain J.)

[12]Para 7.15, *infra*.

[13]Para 7.14, *supra*.

[14]*Jacob* v. *Jacob*, A.I.R. 1973 S.C. 2090, 2098. See para 7.16, *infra*.

[15]*Ibrahim* v. *Ibrahim*, A.I.R. 1917 Mad. 612.

[16]*Manoo Ali* v. *Mawabi*, A.I.R. 1936 Rang. 63, 64.

7.16. It appears to us that it is desirable to expressly amend the language of the section in this regard, so as to reflect the true and just position. There can hardly be any doubt about the soundness of such an aproach. It would be strange if the law, while providing for and insisting on the due discharge by a guardian of his duties towards his ward, should deny him the means of discharging those duties.[1] In this connection, we may refer to the following observations of the Supreme Court[2]:— Need for amendment of section 25 as to constructive custody.

"In our opinion, section 25 of the Guardians and Wards Act contemplated not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian to properly look after the ward's health, maintenance and education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian of the necessary assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare. If the Court under the Divorce Act cannot make any order with respect to the custody of Ajit alias Andrew and Maya alias Mary and it is not open to the Court under the Guardians and Wards Act to appoint or declare guardian of the person of his children under clause 19 during his lifetime, if the Court does not consider him unfit, then, the only provision to which the father can have resort for his children's custody is section 25. Without, therefore, laying down exhaustively the circumstances, in our opinion, on the facts and circumstances of this case the husband's application under section 25 was competent with respect to the two elder children. The Court was entitled to consider all the disputed questions of fact or law properly raised before it relating to these two children. With respect to Mahesh alias Thomas, however, the Court under the Divorce Act is at present empowered to make suitable orders relating to his custody, maintenance and education. It is, therefore, somewhat difficult to impute to the Legislature an intention to set up another parallel Court to deal with the questions of the custody of a minor which is within the power of a competent Court under the Divorce Act.

"We are unable to accede to the respondent's suggestion that his application should be considered to have been preferred for appointing or declaring him as a guardian. But whether the respondent's prayer for custody of the minor children be considered under the Guardians and Wards Act or under the Indian Divorce Act, as observed by Maharajan J., with which observation we entirely agree, 'the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents'. It was not disputed that under the Indian Divorce Act this is the controlling consideration. The Court's power under section 25 of the Guardians and Wards Act is also, in our opinion, to be governed primarily by the consideration of the welfare of the minors concerned. The discretion vested in the Court is, as is the case with all judicial discretions, to be exercised judiciously in the background of all the relevant facts and circumstances. Each case has to be decided on its own facts and other cases can hardly serve as binding precedents, the facts of two cases in this respect being seldom—if ever—identical. The contention that if the husband is not unfit to be the guardian of his minor children, then, the question of their "welfare does not at all arise is to state the proposition a bit too broadly and may at times be somewhat misleading. It does not

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[1] *Cf.* observations in *Musheb Hussain* v. *Mt. Jawaid*, A.I.R. 1918 Oudh 376.

[2] *Jacob* v. *Jacob*, A.I.R. 1973 S.C. 2090, 2098.

take full notice of the real core of the statutory purpose. *In our opinion, the dominant consideration in making orders under section 25 is the welfare of the minor childhen*[1] and the considering this question due regard has, of course, to be paid to the right of the father 'to be' the guardian and also to all other relevant factors having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of their children, the approach has to be somewhat different from that adopted by the Letters Patent Bench of the High Court in this case. There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly *in terms of the welfare of his minor children* in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under section 25 merely because there is no defect in his personal character and he has attachment for his children—which every normal parent has."

Defect in present language.

7.17. The present language of the section does not carry out the intention. The word "remove" in its literal meaning means "take off or away from the place occupied, convey to another place, change situation of, get rid of, dismiss". There is no particular definition given in the Act. Doubt will persist as to its exact scope, if it is not clarified. The language of section 25 should, therefore, be widened to provide an adequate remedy for the guardian of the minor to have his right declared to the custody of the minor and to have his right enforced by adopting the machinery provided in the Act.

Section 25(1) and 25(2) — The arrest of the ward.

7.18. Thirdly, sub-section (1) of section 25 should be modified to remove that part of it which contemplates "arrest" of the minor. This is archaic.

As regards sub-section (2), which empowers the Court to exercise the powers of the Magistrate of the first class under section 100 of the Code of Criminal Procedure, 1882, it may be mentioned that the Code of 1882 has been repealed and replaced by successive later legislation. The corresponding provision in the Code of 1898 was section 100, and the corresponding provision in the present Code (of 1973) is section 97. Necessary substitution (which is only a verbal change) may be made in sub-section (2).

We recommend that section 25(1) and 25(2) should be amended accordingly.

Welfare of minor

7.19. Fourthly, it should be emphasised that the minor's welfare is the paramount consideration[2] in proceedings under section 25. This criterion is already indicated in sub-section (1) by the words "if ..... it will be for the welfare of the ward to return to the custody". However, it would be proper to re-emphasise this aspect.[3]

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[1]Emphasis added.

[2](a) *Rosy Jacob* v. *Jacob A. Chakramakkal*, A.I.R. 1973 S.C. 2090; para 7.16, *supra*.

(b) *Harichand* v. *Virbala*, (1974) 15 G.L.R. 499.

(c) *Manjit Singh* v. *Bakshish Singh*, A.I.R. 1952 Punj. 129 (reviews cases).

[3]See also discussion relating to section 19 (Chapter 6, *supra*).

7.20. In our opinion, it would also be proper to provide that the Court shall not make an order contrary to the wishes of a child of 14 or over, unless the Court is satisfied that such an order is necessary by reason of special circumstances. Guardian of child above 14.

7.21. Finally, the association of women in proceedings under section 25 will, we think, be a healthy improvement. This is already permissible under the Code of Civil Procedure,[1] but it should be made obligatory, where practicable, in proceedings under the section. Association of women.

In this connection, it would be of interest to note a provision recently introduced in the Children Act[2]—

> "(3) Every children's court shall be assisted by a panel of two honorary social workers possessing such qualifications as may be prescribed, of whom at least one shall be a woman, and such panel shall be appointed by the Administrator."

7.22. In the light of the above discussion, we recommend that section 25 should be revised as under:— Recommendation.

> "25. (1) If a ward leaves or is removed from the custody of a guardian of his person, *or is not in the custody of the guardian though the latter is entitled to such custody,* the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian *or to be placed in his custody, may make* an order for his return, or *for his being placed in the custody of the guardian, as the case may be.* *Proceedings for custody of ward.*
>
> (2) *For the purpose of enforcing the order,* the Court may exercise the power conferred on a Magistrate of the first class by *section* 97 of the Code of Criminal Procedure, *1973.*
>
> (3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.
>
> (4) *In making an order under this section, the Court shall regard the welfare of the ward as the first and paramount consideration.*
>
> (5) *The Court shall not under this section make an order contrary to the wishes of a child of fourteen years or over, unless "the Court is satisfied that such an order is necessary by reason of special circumstances.*
>
> (6) *In a proceeding under this scection, the Court shall, wherever practicable, make an endeavour to secure the services of a woman, whether related to the parties or not, including a woman professionally engaged in promoting the welfare of the family, for the purposes of assisting the Court in discharging the functions imposed by the law on it.*
>
> (7) *The provisions*[3] *of this section shall apply notwithstanding anything to the contrary contained in section 19."*

7.23. This taken us to section 26, which provides that a guardian of the person appointed or declared by the Court, unless he is the Collector or a guardian appointed by will or other instrument, shall not remove the ward from the jurisdiction of the Court which appointed or declared him without the leave of Section 26

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[1] *Cf.* O. 32A, Rule 4, Code of Civil Procedure, 1908.

[2] Section 5(3), Children Act, 1960, as amended in 1978.

[3] See discussion relating to section 19, *supra* and para 7.19, *supra.*

that Court, except for the prescribed purposes. The leave may be general or special and may be defined by the order granting it.

The section needs no change.

Section 27

7.24. Section 27 deals with the duties of the guardian of the property. Carrying out the principle laid down in section 20 (fiduciary relationship), it provides that the guardian is bound to deal with the property of the ward, as carefully as a man of ordinary prudence would deal with it if it were his own, and subject to the provisions of this chapter, he may do all acts which are reasonable and proper for the realisation, protection or benefit of the property. Although there is abundant case law on the section, it is mostly concerned with the application of the section in the innumerable situations of infinite variety that present themselves in actual life No serious problems arising from the substance or form of the section have come to notice and we do not therefore recommend any change in the section.

Section 28.

7.25. Section 28 deals with the powers of the testamentary guardian in respect of property. In brief, it provides that the power to alienate immovable property of the ward is subject to any restriction imposed by the will or other instrument under which he is appointed, unless he has been declared by the Court to be the guardian and the Court permits him by written order to dispose of any immovable property in a specified manner notwithstanding the restrictions imposed by the instrument.

The section needs no change.

Transfer of valuable, movable property.

7.26. Section 29 imposes certain limitations on the power of a guardian of property (not being the Collector or testamentary guardian) appointed or declared by the Court, in relation to the alienation of immovable property. Permission of the Court is required for the specified classes of transfers.

We notice that the section is silent as to the disposal of movable property, being concerned exclusively with immovable property. So far as movable property is concerned, the Act does not directly impose any restriction on the powers of the guardian, except such as may flow from the general fiduciary position of the guardian[1] or from obligatons imposed by the Court under sections 32 to 34 and similar general or residuary provisions.

Authority on this subject is scanty. In a Bombay case[2] decided under the Bombay Minors Act, 1864, it was held that the general rule was that a Hindu guardian could pledge the property of the ward for benefical purposes, and in respect of movables, there was no provision in section 18 of the Act of 1864. However, the incurring of marriage expenses was specifically prohibited by that Act.

The Act of 1890, as stated above, contains no direct provision on the subject.

Need for amendment of section 29 as to movable property.

7.27. The question to be considered is whether this position should be allowed to continue. It is conceivable that the property of the minor may comprise valuable movables, and *prima facie*, a specific provision safeguarding the interests of the minor in relation to such property appears to be needed.

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[1]Section 20, Guardians and Wards Act, 1890.

[2]*Maharana Shri Ranmal Singh* v. *Vadilal Vakhatchand*, (1894) I.L.R. 20 Bom. 61, 71, overruled on another point in I.L.R. 26 Bom. 221.

While we do not consider it necessary to lay down any rigid restrictions on the investment of funds of the minor of the nature contained[1] in the Indian Trusts Act, it is, in our opinion, desirable to make specific provisions as to the alienation of movable property exceeding certain value. In modern times, important classes of transactions may take place as to movables—such as shares, bank deposits and the like, and even jewellery and antiques. Leaving the disposal of such property entirely to be governed by the general or residuary provisions referred to above might sometimes seriously prejudice the interests of wards.

Recommendation as to section 29.

7.28. We therefore recommend that while retaining the substance of section 29 in so far as it governs immovable property, the following further provisions should be added in that section. [The present section may be re-numbered as sub-section (1)].

Sub-section to be added in section 29 (after re-numbering present section 29 as sub-section (1)).

(2) *Such person shall not, without the permission of the Court—*

(a) *mortgage, pledge or charge, or transfer by sale, gift, exchange or otherwise, any part of the movable property of his ward, being—*

(i) *money (whether in cash or invested in any form) exceeding rupees two thousand in value, or*

(ii) *other movable property exceeding rupees two thousand in value, or*

(b) *vary any investment exceeding rupees two thousand in value:*

Provided that nothing in this sub-section shall apply to any transaction undertaken by the guardian on behalf of the minor in the ordinary course of business or for meeting daily needs or for the immediate preservation and protection of the property.

Section 30—Recommendation.

7.29. The effect of contravention of the statutory restrictions as to the disposal of property by a guardian is dealt with in section 30. The section provides that a disposal of immovable property by a guardian in contravention of section 28 or section 29 is voidable at the instance of any other person affected thereby. The view taken in the majority of the judicial decisions seems to be that a proceeding to *set aside the transfer* made in contravention of the above restriction[2-9] is not needed.

Recommendation to amend section 30.

7.30. We do not consider it necessary to recommend any amendment in this regard. However, the word "immovable" should be deleted from section 30, so that it can apply to the disposal of movable property[10] as well—an amendment that is consequential on the proposed expansion of the scope[11] of section 29. We recommend that section 30 should be amended accordingly.

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[1]Cf. section 20, Indian Trusts Act, 1882.

[2]*Abdul Rahman* v. *Sukhdayal Singh*, (1906) I.L.R. 28 All. 30 (Banerji & Richards JJ.).

[3]*Jai Narain* v. *Bachu Lal*, A.I.R. 1938 Cal. 369, 372.

[4]*Jagarnath* v. *Chunni*, A.I.R. 1940 All. 416, 421 (Mohammad Ismail & Verma JJ.).

[5]*Mem Chandra* v. *Lalit Mohan*, (1912), 16 C.W.N. 715.

[6]*Lalit Kumar* v. *Nagendra Lal*, A.I.R. 1940 Cal. 589, 591.

[7]*Muthukumara Chetty* v. *Antony Udayar*, (1915) I.L.R. 38 Mad. 867, 877 (Sadasiva Ayyar & Spencer JJ.).

[8]*Sivammalai* v. *Arunachala*, A.I.R. 1938 Mad. 822 (Venkatesubba Rao & Abdul Rahman JJ.).

[9]*Jagadamba Prasad* v. *Anadi Nath*, A.I.R. 1938 Pat. 337, 349 (Wort & Manohar Lall JJ.).

[10]*Ghulam Hussain* v. *Ayesha Bibi*, A.I.R. 1941 Mad. 481, 482.

[11]See recommendation as to section 29, *supra*.

Section 31.

7.31. This takes us to section 31, Section 31 is a very detailed section, laying down with great care in what circumstances the Court ought to grant permission to the guardian to do the acts mentioned in the section. It provides that the permission shall not be granted except in case of necessity or for an evident advantage to the ward. Detailed provisions as to the form of the order and its contents are contained in the section, which also provides that the Court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof and shall record the statement of any person who appears in opposition to the application. Such a person may not necessarily be the relative or friend.[1]

Recommendation to amend section 31(3.)

7.32. In our view, it is desirable to add, in sub-section (3) of section 31, a specific provision to the effect that a Court may direct sale by public auction or private negotiation. We therefore recommend that in section 31(3), clause (aa) should be inserted as follows after clause (a):—

"(aa) *that the sale shall be by public auction or private negotiation.*"

In consequence, section 31(3)(b) should be revised as under:—

"(b) *that where the sale is to be by public auction, it shall be*..... to the highest bidder.....before the Court or some person etc. (rest as in the present section)."

Section 32.

7.33. Section 32 deals with the variation of powers of guardians of property appointed or declared by the Court, such variation to be for the advantage of the ward and consistent with the law to which the ward is subject.

The section needs no change.

Section 33.

7.34. Under section 33, a guardian appointed or declared by the Court may apply to the Court for its opinion, advice or direction on any "present question" respecting the management or administration of the property of the ward. The section also requires the Court to give notice to such person interested in the application as the Court thinks fit. The principal object of the section is to protect the guardian who states in good faith the facts and acts upon the opinion, advice or direction given by the Court. This is made clear in sub-section (3).

The section needs no change, case law on the section being mainly concerned with its application.

Section 34.

7.35. Section 34 imposes certain obligations on the guardian of property appointed or declared by the Court, not being the Collector. Though the matters dealt with may appear to be of an administrative character, some of them are important. In particular, the scope of the expression "balance due" in section 34(d) seems to have been the subject matter of some controversy, and will be discussed at the appropriate place.[2]

Section 34—Need for provision as to interest and for disallowing remuneration.

7.36. We may first deal with a point of substance. There appears to be need for a provision conferring on the Court power to award interest. At present, there is no such power in the Court, even though the guardian has retained the money improperly beyond the period for which he should have retained it, or has failed to account for the money and such failure is deliberate.

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[1] *Raja Venugopal* v. *Kadir Veluswami*, (1911) I.L.R. 35 Mad. 743, 744.

[2] See para 7.39, *infra*.

The need for a power to award interest has been pointed out in a Madras case.[1] On a careful consideration of the matter, we are of the view that such a power is needed. The justice of an order for the payment of interest in such circumstances is obvious. There should also be a power to disallow remuneration for failure on the part of the guardian to submit accounts or to make payment in time.

Recommendation to insert section 34(2).

7.37. We, therefore, recommend that a suitable provision on the subject should be inserted—say, as sub-section (2) in section 34, after re-numbering the present section as sub-section (1). The new sub-section could be somewhat on the following lines:—

> "(2) *If a guardian to whom sub-section (1) applies*
>
> (a) *fails to maintain regular accounts; or*
>
> (b) *fails to exhibit his accounts in the Court on the due date without proper cause; or*
>
> (c) *unduly delays exhibiting his accounts by failing to appear before the Court without proper cause; or*
>
> (d) *improperly retains any money or other property in his hands, whether or not he has been directed by the Court to make payment in respect thereof under clause (d) of sub-section (1),*[2]
>
> *the Court may, if in its view the justice of the case so requires,—*
>
> (i) *disallow the whole or any portion of the remuneration due to the guardian for the period of the account with reference to which default is committed, and*
>
> (ii) *also charge interest at such rate not exceeding twelve per cent per annum as the Court thinks just in the circumstances of the case, on the money or monetary value of the property in respect of which default is committed or which has been improperly retained by the guardian, for the period of such default or retention, without prejudice to any other proceedings which may be taken against the guardian.*"

Section 34(a)—Recommendation.

7.38. Clause (a) of section 34 requires the application to be "in the prescribed form". Such phraseology often receives a technical construction, so that minor departures from the "prescribed" form raise controversies. It would be better to substitute the words "according to the prescribed form". We therefore recommend that in section 34(a), for the words "in the prescribed form", the words "*according* to the prescribed form" should be substituted.

Section 34(d)—"balance due".

7.39. There seems to be a conflict of decisions of the question whether, in section 34(d), the "balance due" means the balance due as shown in the accounts exhibited by the guardian, or whether it means the balance due as found by the Court on an examination of the accounts. The former view has been taken by a few High Courts, namely, Calcutta,[3] Lahore,[4] Madras[5] and Nagpur.[6] In the Lahore case, however, the High Court regretted the position, because the sum was unquestionably due from the guardian.

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[1] *Kasipathy* v. *Venugopal*, A.I.R. 1950 Mad. 506, 507, 508 (Krishnaswami Naidu J.).

[2] Section 34 is to be re-numbered as sub-section (1).

[3] *Jagannath* v. *Mahesh*, (1916) 21 C.W.N. 688, 691; A.I.R. 1916 Cal. 459.

[4] *Hakim Ray* v. *Khandli Bai*, A.I.R. 1930 Lah. 420, 421.

[5] *Harikrishna* v. *Govindarajulu*, A.I.R. 1926 Mad. 478, 479, 480 and *Gopalaswamy* v. *Ramaiah* A.I.R. 1944 Mad. 396, 397.

[6] *Ramlalsao* v. *Tan Singh*, A.I.R. 1952 Nag. 135, 136, para 6 (Kaushalendra Rao & Deo JJ.).

The latter and the wider view has been taken by the Allahabad[1] and Patna[2] High Courts. Incidentally, the later Lahore view seems to fall in this category.[3]

Reasoning examined.

7.40. Some of the judicial decisions taking the narrower view have stated that the matter could be dealt with by the procedure laid down in sections 35 and 36, which contemplate a suit against the guardian, where an administration bond has or has not been taken, respectively. That procedure, however, is somewhat cumbersome and we do not see any reason why, in a proper case, the Court itself should not have power, under section 34(d), to direct payment. It is, no doubt, true that the inquiry under section 34 is, in general, of a summary nature—a reason advanced in support of the narrower view in one of the earlier Lahore cases.[4] However, as was pointed out in a later decision of the same High Court,[5] on such a view, the scrutiny of the accounts practically becomes a farce.

Amendment of section 34(d) recommended.

7.41. Whatever be the true construction of the present wording of clause (d), we are of the opinion that it will be in the interests of justice to expand the scope of the expression "balance due" in the context under consideration. We may mention that in the Madras case,[6] a hint as to need for amendment of the section was given. We therefore recommend that in section 34, at the end of the clause (d), the words "*and also the additional balance found due by the Court on an examination of the accounts, though not shown in the accounts exhibited by him, or so much thereof as the Court directs*" should be added.

An appeal may be provided against the order[7] under section 34(d), in view of its important.[8]

Section 34(3) to be inserted.

7.42. We are also of the view that before an order is passed under clause (d) of section 34, the guardian should be given a reasonable opportunity of being heard. This may be regarded as implicit in view of the adverse consequences of such an order, but we would like it to be made explicit. To achieve this object, we recommend the insertion of a new sub-section in section 34 on these lines:

> "(3) *The Court shall, before an order is passed under clause (d) of sub-section (1), give the guardian a reasonable opportunity of being heard.*"

Section 34A

7.43. Section 34A confers power on the Court to award remuneration for auditing accounts. The section was inserted by an amendment made in 1929 since it was considered that an adequate audit of accounts was desirable and had not been provided for in the law as it then stood. The same amendment inserted clause (ff) in section 50.

The section needs no change.

Section 35.

7.44. Section 35 deals with the procedure for filing a suit against the guardian where an administration bond has been taken from the guardian.

The section needs on change.

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[1] *Sita Ram* v. *Gobindi*, A.I.R. 1924 All. 593, dissented from in *Ranganath* v. *Murarilal*, A.I.R. 1936 All. 179.

[2] *Mahomed Fariduddin* v. *Ahmad Abdul*, A.I.R. 1928 Pat. 255, 258

[3] *Chanan Singh* v. *Har Kaur*, A.I.R. 1933 Lah. 484, 485.

[4] *Faqir Mohammed* v. *Bhari*, A.I.R. 1932 Lah. 306

[5] *Chanan Singh S/o Har Kaur*, A.I.R. 1933 Lah. 484, 485.

[6] *Gopalaswamy* v. *Ramayya*, A.I.R. 1944 Mad. 397, 398.

[7] Cf. *Radha Krishan* v. *Khushy Ram*, (1921) 67 I. C. 309 cited in A.I.R. 1926 Mad. 478.

[8] See amendment recommended in section 47, *infra*.

7.45. Section 36 deals with the filing of a suit against the guardian where administration bond was not taken as contemplated by section 35. It empowers any person with leave of the Court to institute a suit as next friend against the guardian or his representative. Section 36—Recommendation.

Sub-section (2) of the section contains a reference to section 440 of the Code of Civil Procedure, which should now be read as Order 32, rules 1 and 4(2) of the Code of 1908. We recommend that the sub-section should be suitably revised for the purpose.

We are further of the opinion that where the Court has passed an order under section 34(d) requiring the guardian to pay in the Court the balance due, it should not give leave for the institution of a suit under this section in so far as the suit relates to that amount. The question of liability of the guardian would already have been dealt with in proceedings under section 34 and there should be no necessity for duplicating the proceedings so far as that amount is concerned. An exception may, however, be made where recovery otherwise than by suit is not practicable.

Accordingly, we recommend that a new sub-section (3) should be added to section 36, as follows:—

"(3) *Where the guardian has been required by the Court to make payment of the balance due under clause (d) of sub-section (1) of section 34, the Court shall not grant leave under this section for the institution of a suit against the guardian in so far as such a suit relates to the amount so required to be paid, unless the court is satisfied that recovery of that amount otherwise than by a suit under this section is not reasonably practicable in the circumstances of the case.*"

7.46. Section 37 deals with the general liability of the guardian as trustee. The principal object is to save the right of the ward or his representative to pursue any remedy against the guardian or his representative which, not being expressly provided in either section 35 or section 36, would be legally available against a trustee or the representative of the trustee. The opening part of the section contains the words "of the two last foregoing section". It is necessary to substitute, for these words, the words and figures "section 35 or 36" (in conformity with current legislative practice), and we recommend accordingly. Section 37-Recommendation for verbal amendment.

CHAPTER 8

TERMINATION OF GUARDIANSHIP: SECTIONS 38-42

Scope.

8.1 Five sections in the Act deal with the termination of guardianship. These are—

Section 38 — Right of survivorship among joint guardians.
Section 39 — Removal of guardian.
Section 40 — Discharge of guardian.
Section 41 — Cessation of authority of guardian.
Section 42 — Appointment of successor to guardian dead, discharged or removed.

Section 38.

8.2. Section 38 deals with the right of surviorship among joint guardians. A surviving guardian is allowed to continue to function as such, till the vacancy is filled up. The rule as incorporated in the section possesses practical utility.

The section may, therefore, be left undisturbed.

Section 39.

8.3. Section 39 provides for removal of the guardian by the Court on the specified grounds. Although there is considerable case law on the section, most of the reported decisions raise questions concerned with application of the section, rather than with the principle of the provision. In this position, we have no change to recomend in the section.

Section 40.

8.4. Section 40 deals with the discharge of a guardian, and seems to need no change.

Section 41(1)—Recommendation.

8.5. The circumstances in which the powers of are guardian ceases are dealt with in section 41. A few matters require discussion under the section.

In the first place, section 41(1) provides that the powers of a guardian of the person cease on the death, "removal" or discharge of the guardian. The expression "removal" has been construed[1] as including an implied removal under section 7(2). We are of the view that in order to avoid future controversy, it is desirable to add, in section 41(1), the words "*express or implied*" after the word "removal". We recommend accordingly.

Section 41 and its applicability to death of ward.

8.6. The second question is concerned with the death of the ward. Section 41(3) provides that when "for any cause" the powers of a guardian cease, the Court may require him or, if he is dead, his representative, to deliver as it may direct any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward.

There is, however, some doubt as to whether sub-section (3) of section 41 is applicable where the minor himself dies. The controversy hinges on the construction of the words "any cause" appearing in sub-section (3). The Allahabad High Court takes the narrower view in this respect.[2] In a Bombay case,[3] the

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[1] *Jiban* v. *Sailendra*, A.I.R. 1946 Cal. 272.

[2] *Chandra Bhukhan* v. *Sajan Kumar*, (1920) I.L.R. 42 All. 1, 4, 5.

[3] *Murlidhar* v. *Vallabhdas*, (1909) I.L.R. 33 Bom. 419, 421.

Court granted a discharge to the guardian on the death of the minor, thus impliedly adopting the wider view. The Lahore High Court[1] also takes the wider view.

Recommendation to amend section 41(1) and 41(2).

8.7. We think that the wider view should be incorporated by an express amendment of the section. Even at present, the language of section 41(3) is wide enough to include the case of a guardian ceasing to be such by reason of the death of the ward.[2] However, a doubt has been expressed as to whether the Court has any power in such a situation—the suggestion being that the parties must be left to litigate in an ordinary Court.[3] The position should be made clear by a suitable amendment recognising the wider scope of the section.

Accordingly, we recommend addition of the following words at the end of section 41(1)(c) and 41(2)(c):—

"or by the death of the ward".

Section 41(3)—Precise order.

8.8. Assuming that section 41 applies to the case of the death of the ward,[4] there is some obscurity as to the precise order to be passed by the Court in such a situation under section 41(3). Should it be an order for—

(a) delivery of the property to the heir of the minor, or

(b) filing of an inter-pleader suit,[5] or

(c) directing any other course?

Recommendation as to section 41(3).

8.9 Delivery to the heir would *prima facie* be an expedient alternative. However, there is no specific provision permitting delivery to the heir. The absence of power to direct delivery of the property of a deceased ward to an heir is likely to lead to serious hardship in certain cases. In our opinion, justice requires that the Court should be given[6] a wide discretion in the matter. To avoid needless controversy, the law should be amended to recognise by express enumeration the powers of the Court in this respect so as to obviate the doubt expressed in some decisions.[7]

View of Shadi Lal C.J.

8.10. In this connection, we would like to quote the observations of Shadi Lal C.J. in a Lahoure case.[8] The observations are as follows:—

"It is also conceded that these powers can be exercised when the guardianship of the property is determined by any of the causes specified in section 41(2). Why should be Court become functus officio, if the cause determining the guardianship is the death of the ward? Is there any reason for making this differentiation? Surely, the Court which has appointed the guardian and is acquainted with his dealings with the property is in a much better position than any other Court to settle various matters relating to his stewardship of the property. This method of deciding disputes about the nature and the extent of the property and the liability of the guardian with respect to that property provides not only an efficacious but a cheap and

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[1] *Shibcharan* v. *Bhawani*, A.I.R. 1928 Lah. 495, 496.

[2] *Kullappa* v. *Palaniappa*, A.I.R. 1951 Mad. 574, 575 (Vishwanath Shastri J.).

[3] *Tulasidas* v. *Madhavdas*, A.I.R. 1926 Mad. 148, 149 (Srinivas Ayyangar J.).

[4] Para 8.7, *supra*.

[5] See discussion in *Mt. Sugrabi* v. *Mustakem Khan*, A.I.R. 1944 Nag. 334, 335.

[6] *Kullappa* v. *Palaniappa*, A.I.R. 1950 Mad. 574 (Vishwanath Sastri J.).

[7] *Tulasidas* v. *Madhavdas*, A.I.R. 1926 Mad. 148, 149 (Srinivas Ayyangar J.)

[8] *Shiv Charan Lal* v. *Bhawani Shankar*, A.I.R. 1928 Lah. 495, 496.

expeditious remedy. There is no reason why the Court should be deprived of this jurisdiction when the guardianship is determined by the death of the ward".

Recommendation to insert sub-section (3A) in section 41.

8.11. In view of the points made above, we recommend that in section 41, a new sub-section, somewhat on the following lines, should be inserted:-

"(3A) *Where the powers of a guardian cease by reason of the death of the ward, the Court may, without prejudice to the powers conferred on it by sub-section (3), require the guardian, or if he is dead, his representative, to deliver the property or accounts referred to in sub-section (3) to such person as the Court may, after a summary inquiry, determine to be the person legally entitled thereto by reason of the death of the ward:*

"Provided that any determination by the Court shall be limited to the orders to be passed under this section and shall not affect the title of any other person claiming to be so entitled;

"Provided further that the Court may, in an appropriate case, direct any person claiming to be so entitled to take appropriate legal proceedings for the establishment of his title and make such orders as the Court thinks fit for the custody of such property or accounts pending the result of such legal proceedings."

Section 42.

8.12. This takes us to section 42, which provides for the appointment by the Court of a successor to a guardian in two cases:—

(i) where the guardian is discharged, or, under the law to which the ward is subject, ceases to be entitled to act; or

(ii) where the guardian is removed or dies.

In the first case, the power of the Court is confined to a guardian appointed or declared by the Court. In the second case, the power extends also to a guardian appointed by a will or other instrument. The procedure in Chapter 2 must be followed.[1] The terms of the section have created no problems, but a question has arisen as to how far an order appointing a second guardian under section 42 is appealable under section 47. We propose to consider the matter under the latter section.[2]

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[1]See, in particular, section 11.

[2]See discussion as to section 47, *infra* (para 9.7).

CHAPTER 9

SUPPLEMENTAL PROVISIONS: SECTIONS 43-51

9.1. Supplemental provisions are contained in sections 43 to 51. These are— Sections 43 to 51.

Section 43.	Orders for regulating conduct or proceedings of guardians and enforcement of those orders.
Section 44.	Penalty for removal of ward from jurisdiction.
Section 45.	Penalty for contumacy.
Section 46.	Reports by Collectors and Subordinate Courts.
Section 47.	Orders appealable.
Section 48.	Finality of other orders.
Section 49.	Costs.
Section 50.	Power of High Court to make rules.
Section 51.	Applicability of Act to guardians already appointed by Court.

9.2. With reference to section 43, it is only sub-section (4) that needs some comment. This sub-section contains references to sections 492 and 493 of the Code of Civil Procedure, which should now be revised so as to read as reference to Order 39, rules 1-2, Code of Civil Procedure, 1908. We recommend necessary amendment of section 43. Section 43—Recommendation.

9.3. In section 44, the amount of maximum fine needs revision in view of the decline in the purchasing power of the rupee since 1890. The section at present provides as under:— Sections 44 to 46.

> "44. If, for the purpose or with the effect of preventing the Court from exercising its authority with respect to a ward, a guardian appointed or declared by the Court removes the ward from the limits of the jurisdiction of the Court in contravention of the provisions of section 26, he shall be liable, by order of the Court, to fine not exceeding one thousand rupees, or to imprisonment in the civil jail for a term which may extend to six months."

Our recommendation would be to substitute, for the words "one thousand", the words "*five thousand*" rupees.

The amounts of fine mentioned in section 45(1), last paragraph also appear to need revision in view of the changed economic conditions. This paragraph mentions three amounts, in this context—

(i) the amount of fine as fixed initially must not exceed one hundred rupees;

(ii) in case of recusancy, a further fine may be imposed for a continuing default, but it must not exceed ten rupees for each day after the first during which the default continues;

(iii) the amount of the fine should not exceed five hundred rupees in the aggregate.

It would be appropriate to increase the first and third amounts tenfold, having regard to the decline in the purchasing power of the rupee since 1890.

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As to the second amount, since it is a further fine for a continuous default, a fivefold increase will do.

Accordingly, we recommend that the last paragraph of section 45(1) should be revised as under:

> "the person, guardian or representative, as the case may be, shall be liable, by order of the Court, to fine not exceeding *one thousand rupees*, and in case of recusancy to further fine not exceeding *fifty rupees* for each day after the first during which default continues, "and *not exceeding five thousand rupees* in the aggregate, and to detention in the civil jail until he undertakes to produce the minor or cause him to be produced, or to compel his return, or to deliver the statement, or to exhibit the accounts or to pay the balance, or to deliver the property or accounts, as the case may be."

Section 46 needs no change.

Section 47.

9.4. The list of appealable orders is given in section 47. We need not enumerate them, but shall confine ourselves to the points that need consideration.

Section 47 and orders under section 34(d).

9.5. The first point concerns orders under section 34, clause (d), which are, at present, not appealable. In our view, an order under this clause, even as the clause now stands, is an order of some importance and should be appealable. Observations of eminent Judges[1] have indicated the need for providing an appeal against these orders. After the amendment[2] which we have recommended in section 34(d), an appeal is all the more necessary against such orders, as their scope will now be much wider than at present.

An order refusing to pass a direction under section 34(d) should also be appealable. Of course, the appeal should be against a final order, and not a merely interlocutory one, whether it be one *directing* payment or one *refusing to direct* payment.

Section 47(ff)—Recommendation.

9.6. Accordingly, we recommend that in section 47, after clause (f), the following new clause should be inserted:

> "(ff) *under clause (d)[3] or [sub-section (1) of] section 34, requiring the guardian to make payment into Court of the balance due as specified in that clause or refusing so to require him, not being an interlocutory order in either case.*"

Section 47 and orders under section 42.

9.7. The next point relating to section 47 concerns orders under section 42. There seems to be a certain amount of obscurity[4] on the question whether an appeal lies against an order appointing a second guardian under section 42. The order is not specifically mentioned in the list of appealable orders as given in section 47. The Chief Court of Sind has taken the view[5] that the order under secton 42 really falls under section 7 and is therefore appealable. On the other hand according to the Calcutta view,[6] an appeal does not lie against an order under section 42, but if the Court, before passing such an order, has not complied with the procedure for removal of the guardian under section 39, then an appeal would lie against the order of removal.

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[1]E.g. *Gopalaswamy* v. *Ramayya*, A.I.R. 1944 Mad. 397 (Leach C.J.).

[2]Paragraphs 7.34 to 7.36, *supra*.

[3]Section 34 will be re-numbered as section 34(1) see Chapter 7, *supra*.

[4]Para 8.12, *supra*.

[5]*Ghulam Hyder* v. *Abdul*, (1914) 7 Sind Law Reporter 90; 23 Indian Cases 776.

[6]*Mahabir* v. *Bidhi Chand*, (1914) 20 Calcutta Law Journal 298; 27 Indian Cases 28.

In our opinion, this is a matter on which the position should be specifically laid down in the Act, particularly in view of the well recognised rule that a right of appeal must be given expressly. Having regard to the nature and effect of the order, there can hardly be any doubt as to the need for a right of appeal.

9.8. Accordingly, we recommend that in section 47, a new clause (k) should be inserted at the end of the section, in these terms:— Section 47(k)—Recommendation.

> "(k) *under section 42, appointing or declaring, or refusing to appoint or declare, a guardian as successor to a guardian in the circumstances specified in that section.*"

As a consequential change, in clause (j) of the section, the full stop at the end should be replaced by the word and punctuation mark; ";or".

9.9. This takes us to section 48, which reads as under:—

> "Save as provided by the last foregoing section and by section 622 of the Code of Civil Procedure, an order made under this Act shall be final, and shall not be liable to be contested by suit or otherwise." Section 48.
>
> [Section 622 of the Code of Civil Procedure of 1882 corresponds to section 115 of the Code of Civil Procedure, 1908].

9.10. The wording of the section is peremptory. But orders under the Act are intended for the protection and welfare of the minor, and the proceedings are not adversary in the usual sense. In a number of cases,[1] orders as to custody, sanction of alienations and the like have been cancelled or modified by the Court to suit changed circumstances[2-3]. The "finality" of the order is confined to a suit or any other form of litigation of a substantive character, and does not bear cancellation or modification of the order in appropriate cases. Effect of the section as judicially construed.

9.11. In particular, it is recognised that orders as to custody are temporary.[4] Temporary nature of orders.

A possible exception would be an order appointing a guardian[5]—an order which can either be contested on appeal[6] or (in effect) be set aside by taking proceedings for the removal of the guardian. But apart from such special situations, courts have, in general, attempted to achieve substantial justice by allowing review in suitable cases.[7] In an exceptional case, even an order of an appointment of a guardian has been recalled.[8]

9.12. In our view, the language of the section ought to be modified to bring it in harmony with the demands of justice and with actual practice of the courts. Need for amendment.

9.13. It may be noted that the provision in section 48 is, to a large extent, derived from the Act of 1874[9] relating to European British minors. Section 9 History of section 48.

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[1] See *Harnam Singh* v. *Komala Devi*, A.I.R. 1971 H.P. 25 (review cases).

[2] *Ram Harakh* v. *Jagannath*, A.I.R. 1932 All. 5, 8.

[3] *Nagardas* v. *Anand*, (1907) I.L.R. 31 Bom. 590.

[4] *V. Munisamappa* v. *Krishnamma*, A.I.R. 1959 Mys. 150.

[5] *Farid* v. *Mitho*, 143 P.R. 1906 followed in *Sharfan* v. *Vholi*, A.I.R. 1922 Lah. 395.

[6] Section 47.

[7] *Rashmoni* v. *Gonada*, A.I.R. 1915 Cal. 49; 19 C.W.N. 84, 88

[8] *Walmia Khatoon* v. *Kabiruddin*, A.I.R. 1958 Pat. 410.

[9] Section 9, European British Minors Act (13 of 1874).

of that Act provided that "Save as provided by section 8, no order passed under this Act in respect to the guardianship of a minor's person or property shall be liable to be contested in any other proceedings". However, it should be noted that by section 8 of the same Act, it was, inter alia, provided that "in cases instituted under this Act, the Court *shall be guided by the procedure prescribed in the Code of Civil Procedure* in so far as the same is applicable..... ". Thus, in the scheme of the Act of 1874, the provision of the Civil Procedure Code relating to review became applicable to all orders under that Act.

Recommendation to revise section 48.

9.14. In the light of the above discussion, we recommend that section 48 should be revised as under:—

"48. *(1) Save as provided by section 47 of this Act or by section 115 of the Code of Civil Procedure, 1908,* an order under this Act shall be final and shall not be liable to be contested by suit or otherwise.

(2) Nothing in this section shall affect the jurisdiction of the Court to vary, by way of modification, addition or omission, "an order passed under this Act, where the Court after due notice to the parties is satisfied that it is necessary or expedient to do so."

Section 49

9.15. We have disposed of section 48. Section 49 provides that the costs of any proceeding under the Act, including the costs of maintenance of a guardian or other person in the Civil Jail, shall, subject to rules made by the High Court, be in the discretion of the Court in which the proceeding is held. Although the corresponding provision[1] in the Code of Civil Procedure is more specific, it does not appear to be necessary to be so elaborate in the Act under consideration. The section may therefore be left as it is.

Section 49A (New)— Recovery as arrears of land revenue.

9.16. At present, the Act contains no direct provision for the recovery of various amounts that might become due under its provisions from guardians. Sections 35, 36, 43(4) and 45 do contain certain provisions which could be pressed into service, but these are indirect or secondary and the procedure is not expeditious. We are of the view that there is need for an express provision authorising the recovery of such amounts as arrears of land revenue.

Accordingly, we recommend that a new section—say, as section 49A—should be inserted in the Act on the subject as follows:—

"49A. *Any amount that becomes due under the provisions of this Act from a guardian by virtue of an order of the Court, without prejudice to any other mode of recovery,*[2] *be recoverable as arrears of land revenue.*"

Section 50

9.17. Section 50 enumerates the matters with reference to which rules can be made by the High Court.[3] It needs no change.

Section 51— To be repealed.

9.18. Section 51 deals with the application of the Act to a guardian appointed under any enactment repealed by the Act. These enactments were enumerated in a Schedule which was annexed to the Act 1890 as originally enacted and referred to in section 2. Section 2 and the Schedule were repealed in 1938 by the Repealing Act. By now, all such guardians must have been dead and the wards also must have either attained majority or died. We therefore recommend that section 51 should be repealed.

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[1]Section 35, Code of Civil Procedure, 1908 (costs).

[2]*Cf.* section 232, Income Tax Act, 1961 and *Jagdish Pratap* v. *State of U.P.* A.I.R. 1973 S.C. 1059.

[3]See also sections 10(1)(e), 11(1)(b), 31, 34(a) and 49.

CHAPTER 10

SUMMARY OF RECOMMENDATIONS

We summarise below the recommendations made in this Report.

Chapter 4—Definitions.

(1) The definitions contained in section 4 should be re-arranged in the alphabetical order.[1]

(2) The definiton of "guardian" in section 4(2) should be amended by adding an Explanation to cover a *de facto* guardian.[2]

Chapter 5—Empowerment of subordinate judicial officers.

(3) Section 4A(1) should be amended by substituting, for the words "original civil jurisdiction", the words "*unlimited* original civil jurisdiction", so that delegation of powers of the Court under the Act may be made only in favour of senior judicial officers.[3]

Chapter 6—Appointment and declaration of guardian.

(4) In section 7, an Explanation should be inserted to provide that "property" includes hereditary trusteeship.[4]

(5) In section 7, a new sub-section should be inserted to ensure that the Court can make an appointment of a guardian conditional on the performance of a condition by the guardian.[5]

(6) In section 8, a new clause—clause (bb)—should be added to entitle the minor himself to apply to the Court for the appointment of a guardian in certain cases.[6]

(7) In section 12, a provision should be added in express terms regarding power to make an interlocutory order (for production of the minor) in respect to proceedings under section 25.[7]

(8) In section 14, the present provision requiring Courts to send a report to the State Government (in case of multiple proceedings filed in Courts which are not subordinate to the same High Court) should be altered. Instead, this report should be submitted to the High Court in whose jurisdiction the proceedings were instituted. The High Court having jurisdiction over the place where they were first instituted should decide where the proceedings should continue.[8]

(9) Section 17 should be revised so as to make the minor's welfare the paramount consideration in the appointment of a guardian and to equalise the position of the mother with that of the father and to spell out the considerations relevant for determining what order will be for the minor's welfare.[9]

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[1]Para 4.5.
[2]Para 4.13.
[3]Para 5.2.
[4]Para 6.10.
[5]Para 6.21.
[6]Paragraphs 6.24 and 6.25.
[7]Para 6.30.
[8]Para 6.33.
[9]Para 6.48.

(10) In section 17, a new provision should be inserted to empower the Court to call for periodical reports from a guardian appointed by the Court.[1]

(11) Section 6 of the Hindu Minority and Guardianship Act, 1956 should be amended as to the age upto which the custody should ordinarily be with the mother. The age should be revised from five to twelve years.[2]

(12) A new section – section 18A—should be added as to the appointment of a juristic person as guardian, subject to certain conditions.[3]

(13) Certain amendments should be made in section 19 to ensure that the welfare of the minor becomes the paramount consideration in appointing a guardian.[4]

[As to making welfare of the minor paramount under section 25, see point concerning section 25, *infra*].

(14) It should be provided in section 19 that clauses (a) and (b) of the section do not apply where the husband or the father (or mother) is the applicant for guardianship.[5]

(15) In section 19(b), after the word "father" the words "or mother" should be added.[6]

(16) Section 19, clause (b), should be confined to persons other than married females.[7]

(17) Where, under personal law, the mother or the father is not the natural guardian of the minor, then he or she should also be excluded from the preferential position given by clause (b) of section 19.[8]

Chapter 7—Rights, duties and liabilities of guardians.

(18) Section 21, which empowers a minor to act as a guardian in certain cases, should be modified as recommended.[9]

(19) Section 22 should be amended to empower the Court to authorise the grant of expenses for the maintenance of the minor.[10]

(20) Section 25 should be revised—

(i) to make verbal changes in regard to the archaic phrase "arrest",

(ii) to make welfare of the minor paramount, and

(iii) to add a provision for consulting the wishes of the minor in certain cases.[11]

(21) In regard to proceedings under section 25, welfare of the minor should prevail notwithstanding anything to the contrary contained in section 19.[12]

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[1]Para 6.49.

[2]Paragraphs 6.50 and 6.53.

[3]Para 6.56.

[4]Paragraphs 6.59 and 6.83.

[5]Paragraphs 6.59 and 6.83.

[6]Paragraphs 6.75 and 6.83.

[7]Paragraphs 6.76 and 6.83.

[8]Paragraphs 6.81 and 6.83.

[9]Para 7.7.

[10]Para 7.82.

[11]Para 7.22.

[12]Para 6.61

(22) In section 29, provisions restricting the disposal by the guardian of movable property exceeding rupees two thousand in value, or variation by him of investments exceeding that value, without the permission of the Court, should be added. Exception may be made for certain specified cases.[1]

(23) Section 30 should be amended to delete the word "immovable", so that the section will apply to all property. This is consequential on the recommendation to expand the scope of section 29.[2]

(24) In section 31(2), an express provision authorising the Court to direct a private sale of property should be added.[3]

(25) Section 34 should be amended to confer power on the Court to direct the defaulting guardian to pay interest and to disallow remuneration for failure to submit accounts by the guardian.[4]

(26) In section 34(a), for the words "in the prescribed form", the words "according to the prescribed from" should be substituted.[5]

(27) In section 34(d), an amendment should be made to provide that the *balance as found by the Court* may be ordered to be paid by the guardian in case of default.[6]

(28) In section 34, a new sub-section should be inserted to require that the guardian should be given a reasonable opportunity of being heard before an order requiring payment under section 34(d) is passed.[7]

(29) In section 36(2), the reference to "Code of Civil Procedure" should now be suitably revised as a reference to 0.32, R. 1 and 4(2) of the Code of 1908.[8]

(30) A new sub-section (3) hould be added to section 36 as follows:—

> "(3) *Where the guardian has been required by the Court to make payment of the balance due under clause (d) of sub-section (1) of section 34, the Court shall not grant leave under this section for the institution of a suit against the guardian in so far as such a suit relates to the amount so required to be paid, unless the Court is satisfied that recovery of that amount otherwise than by a suit under this section is not reasonably practicable in the circumstances of the case.*"[9]

(31) The opening words of section 37 should be replaced by a reference to sections 35 and 36, in conformity with current practice in legislative drafting.[10]

Chapter 8—Termination of guardianship: sections 38-42.

(32) In section 41(1)(a), after the word "removal", the words 'express or implied" should be added.[11]

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[1]Para 7.28.
[2]Para 7.30.
[3]Para 7.32.
[4]Para 7.37.
[5]Para 7.38.
[6]Para 7.41.
[7]Para 7.42.
[8]Para 7.45.
[9]Para 7.45.
[10]Para 7.46.
[11]Para 8.5.

(33) In section 41(1)(c), the case of the ward's death should be added.[1]

(34) In section 41(2)(c) also, the case of the ward's death should be added.[2]

(35) In section 41, a new sub-section should be inserted to empower the Court to give certain directions as to the delivery of property on the death of the minor.[3]

Chapter 9—Supplemental provisions:
Sections 43—51

(36) In section 43(4), a reference to Order 39, Rules 1-2, Code of Civil procedure, 1908 should be substituted.[4]

(37) In section 44, the amount "one thousand rupees" should be raised to "five thousand rupees".[5]

(38) In section 45, the various amounts of maximum fine should be increased as recommended.[6]

(39) In section 47, a new clause (ff) should be inserted to provide for an appeal against an order directing or refusing to direct the guardian under section 34(d) to make payment of the balance due.[7]

(40) In section 47, a new clause (k) should be inserted to make appealable orders for the appointment of a successor guardian under section 42. As a consequential change, in clause (j), the word "or" should be added at the end, and the full stop should be replaced by a comma.[8]

(41) Section 48 should be revised so as to make an express provision for the variation of an order by the Court on certain grounds.[9]

(42) A new section 49A should be introduced to empower the recovery of various amounts due from a guardian under the Act as arrears of land revenue.[10]

(43) Section 51 should be repelaled.[11]

P. V. Dixit ..... Chairman

S. N. Shankar ..... Member

Gangeshwar Prasad ..... Member

P. M. Bakshi ..... Member-Secretary

22nd April, 1980.

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[1]Para 8.7.
[2]Para 8.7.
[3]Para 8.11.
[4]Para 9.2.
[5]Para 9.3.
[6]Para 9.3.
[7]Para 9.6.
[8]Para 9.8.
[9]Para 9.14.
[10]Para 9.16.
[11]Para 9.18.

APPENDIX 1

POSITION AS TO CUSTODY OF CHILDREN IN PERSONNEL LAW

Custody of children in Hindus is governed by the following statutory provision:—[1-2] Custody in Hindus.

> "6. *Natural guardian of a Hindu minor*: The natural guardians of a Hindu minor, in respect of the minor's person, as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—
>
> (a) in the case of a boy or an unmarried girl—the father, and after him, the mother:
>
> Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
>
> (b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;
>
> "(c) in the case of a married girl—the husband;
>
> Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—
>
> (a) if he has ceased to be a Hindu, or
>
> (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).
>
> *Explanation.*—In this section, the expressions 'father' and 'mother' do not include a step-father and a step-mother."

As to Muslims, under Hanafi law, the mother is entitled to the custody of a male child until the child attains the age of seven years and of a female child until puberty.[3-4] If the mother is absent or disqualified during the age of the child mentioned above, the custody of the child belongs, in Hanafi Law, to the specified female relatives. If the mother and the female relatives are all disqualified, then the father and (in his absence) the specified male relatives become entitled to custody.[5] After the ages mentioned above (i.e., in respect of a male child above the age of seven years or of a female child who has attained puberty), the father becomes entitled to the custody.[6] Custody in Muslim law (Hanafi)

Among Shias, the first right of custody is that of the parents, and priority between them is determined on the basis that the mother should be entitled during infancy, i.e. in the case of male till the age of two years and female till seven years. Later on, the father has the right to custody.[7] Among Shias failing the parents, the grand-father is entitled to the custody, and failing him, certain specified relatives are entitled.[8] Shia Law.

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[1]Section 6, Hindu Minority and Guardianship Act, 1956.

[2]For history of Hindu law, see Appendix 2.

[3]Tyabji, Muslim Law (1968), page 216, paragraph 238.

[4]As to husband's rights, see discussion as to section 1.

[5]Tyabji, Muslim Law (1968), page 217, paragraph 239, and page 218, paragraph 241.

[6]Tyabji, Muslim Law (1968), page 218, paragraph 242.

[7]Tyabji, Muslim Law (1968), page 228, paragraph 249, Summary.

[8]Tyabji, Muslim Law (1968), page 221, paragraphs 245 to 249.

APPENDIX 2

HISTORY OF THE LAW IN INDIA

I. Introductory

Impact of the British rule and nature of early legislation.

Evolution of the law of guardianship in India is one of the most interesting chapters in Indian legal history. The earlier developments in this field are vitally and integrally connected with the British rule and its impact on Indian legal institutions.

The British Government's original—and most important—non-trading activity in India was the collection of land revenue. To facilitate the collection of revenue from minors' estates, legislation became necessary. The second most important function of the British Government was the administration of justice. For the representation of minors in litigation, again, legislation was necessary. Litigation in those times was concerned mostly either with revenue or with proprietary matters. Early legislation relating to minors and guardians was therefore predominantly concerned with proprietary aspects. There was also an immediate need for regulating the affairs of European British subjects. This need resulted in the passing of a specific Act[1] applicable to European British minors.

Judge-made law.

However, side by side with this legislative development, another silent change was taking place through judge-made law. The West was gradually having its impact on some parts of personal law of the Hindus who,—first in the Bengal Presidency and later in big towns of the Bombay and Madras Presidencies—were coming into close contact with the ruling class, thereby imperceptibly imbibing some of their customs and practices. It was through this process that the practice of making wills (a practice which itself had travelled from the Roman law to the common law) came in vogue and gained recognition as part of the Hindu law as administered in British India.

Roman law had a system[2] of appointing testamentary guardians, and the appointment of a guardian by will also came to be recognised amongst Hindus. In a case of 1807 referred to by Strange,[3] the Pandit recognised, apparently as a matter of course, that the father's testamentary nomination of his brother as guardian should prevail against the claim of the natural guardian, the widow. The power of a father to appoint a guardian for his minor son by will was again recognised in a case reported[4] in 1867.

All these developments supplied the material that formed the content of the law of guardianship as it existed in the latter half of the 19th century.

Fragmented structure

However, social and political conditions—and the accidents of history—were responsible for a fragmented structure of the legislation on the subject. Uniformity and coherence were to a large extent lacking. For example—speaking of want of uniformity—the following peculiar features of the position before 1890 may be mentioned:

(a) different laws[5] were in force in different local areas, such as the Bengal Presidency, the Bombay Presidency and the Madras Presidency;

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[1]The European British Minors Act (13 of 1874).

[2]For Roman law, see Appendix 3.

[3]Strange, Hindu Law, Vol. 2, page 72.

[4]*Soobah Doorgah Lal Jha* v. *Rajah Neelamand Singh*, (1867) 7 W.R. 74 (Cal.).

[5]Details will be found *infra*.

(b) there were differences as regards the rules applicable to European British subjects and the rules applicable to others;

(c) there were also differences as between the jurisdiction exercisable by Chartered High Courts and the jurisdiction vested in other Courts--a difference which, to some extent, is continued[1] even by the Act of 1890.

II. Hindu Law

Ancient Hindu Law.

Rules laid down in the legal system on this subject are not new to India. In ancient India, infants and students were entitled to the special protection of the king, until the attainment of majority by he former and until the completion of study by the latter. The properties of minors were to be protected[2]. The duty of the king to protect his subjects thus especially extended to such persons.

According to the manusmriti,[3] the king shall protect the inherited (and other) property of a minor until he (the minor) has returned (from his teacher's house) or until he has attained majority.

"The minority ends with the sixteenth year".[4]

The parents patrae and its rationale.

In one of the comments on the Bill which led to the present Act, the role of the Courts in regard to appointment of guardians has been beautifully deduced from the duties of the king,[5] and also sought to be supported by reference to some of the ancient Indian law-givers. A verse of Baudhayana has also been quoted—

"The King is bound to defend his subjects, their goods and chattles, lands and tenements."

The comment has further observed--[5].

"Infants are incapable of taking care of themselves and are therefore peculiarly under the protection of the king. It is impossible for the king to do so *per se* in each individual case. He therefore delegates this care to his courts of law and equity, who exercise it by appointing guardians or curators, by guiding and controlling their acts and limiting may,--abrogating--the rights of natural guardians in some instances. Besides this, though the law imposes upon the father a duty in connection with his children and gives him credit for ability and inclination to execute it, yet that presumption, like all others, would fall in particular instances, and if an instance occurred in which the father was unable or unwilling to execute that duty or was actively proceeding "against it, of necessity the Crown must place somewhere a superintending power over those who cannot take care of themselves—vide Powell v. Cleaver."

Dr. Rattigant's view.

Dr. Rattigan's views are also of interest[6] as to the position in ancient India—

"Looking at the question from a legal aspect, it is to be observed that under both systems (Hindu and Muslim law), the ruling power is recog-

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[1]Section 4, Act of 1890; Section 12, Proviso, Hindu Minority and Guardianship Act, 1956.

[2]U.C. Sarkar, Epochs in Hindu Legal History (1958), pages 58 and 72.

[3]Manusmriti, VIII. 27; Vol. 25 S.B.E. (1967), page 237, and footnote 27.

[4]Kulluka on Narada, III. 37.

[5]National Archives, File relating to Act 8 of 1890, page 92/correspondence.

[6]Dr. Rattigan (in his comment on the Bill), National Archives, Legislative Department Papers relating to Act 8 of 1890, Appendix Y, pages 5-6.

nised as the supreme or universal guardian of all incapacitated persons,[1] and it is only a nautral corollary from this principle that in both systems we should also find a certain power of interference permitted to the sovereign in regard to the marriage of minors. Thus, in a text cited in the Nirnaya Sindhu (the highest authority in the Benares and Mahratta schools on questions relating to marriage), Chapter III, page 32, and attributed to Manu, a girl who has no relatives competent to give her in marriage is commanded to repair to the ruling power. And Narada in his Institutes (Capter XII, 22) lays down the same rule in these words: 'If there be none of these (i.e., relatives competent to give in marriage) the girl shall apply to the king, and, having obtained his permission to make her own choice, choose a husband for herself'. So also in the Muhammadan Law in default of the agnates, certain uterine relations, and the moula-al-mawalah, the power of giving in marriage is vested in the ruler and the kazi (see Bailey's Muhammadan Law, page 46; Amir Ali's Personal Law of the Muhammadans, page 192)."

III. Muslim Law

In Muslim law also, in default of the de jure guardians, the duty of appointing a guardian for the protection and preservation of the infant's property devolves on the Judge as the representative of the sovereign.[2]

Testamentary guardians.

It may also be mentioned that the capacity of Hindu and Muslim fathers to appoint, by their wills, guardians for their children after death has been recognised by the legislature in India since the date of the Permanent Settlement.[3]

We do not, however, propose to embark upon a detailed discussion of the rules of Hindu and Muslim law, as those rules do not seem to have furnished to any noticeable degree the source material for the content of the rules enacted in the Act of 1890.

IV. Position before 1890—The Acts and the Regulations.

Position before 1890.

It is now time to discuss the position in India before the Act of 1890. Before 1890, there was no all India Act dealing with the guardianship of minors. The matter was governed, in part, by several scattered Acts or Regulations and, in part, by certain uncodified rules of personal law. The principal legislative measures may be enumerated:

(1) Act 40 of 1858 (The Bengal Minors Act), originally applicable to the Bengal Presidency, but later also extended to the Punjab, Oudh etc. This Act did not apply to minors who were European British subjects, nor to persons under the superintendence of the Court of Wards.

(2) Act 9 of 1861 (An Act to amend the law relating to minors). This Act made certain provisions supplementing the legislation relating to minors. It was not applicable to European British subjects.

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[1]Authorities in Hindu Law—

(i) Colebrooke's Digest, Vol. III (London Ed.), page 542.

(ii) Manu, Chapter VIII, verse 27.

Muhammadan authorities -

(i) Macnaghten's Principles of M.L., Chapter VIII, paragraph 6; 12 Suth. W.R. 337.

(ii) Das Moslemische Recht von Micolans v. (Tornauw, page 153 leipzig, 1855).

[2]*Imambandi* v. *Mutsuddi*, (1918) I.L.R. 45 Cal. 892, 893 (C.P.C.).

[3]Trevelyan on Minors (1912), page 63, refers, *inter alia*, to Bengal Regulation 5 of 1799 and Bengal Regulation 1 of 1800.

(3) The Bombay Minors Act (20 of 1864) applicable to the Bombay Presidency. It did not apply to European British subjects.

(4) (a) Madras Regulation 5 of 1804 and certain other Regulations of the Madras Code, which were applicable to the Madras Presidency. These did not apply to European British subjects, or to persons under the superintendence of the Court of Wards.

(b) Madras Minors Act (14 of 1858).

(5) The European British Minors Act (Act 13 of 1874), relating to the guardianship of European British minors. It did not apply to territories within the jurisdiction of the Chartered High Courts.

(6) Provisions in the charters of the Chartered High Courts.

The legislation of 1858, 1864 etc. merely conferred expressly a certain jurisdiction on the courts and defined exactly the position of those who availed themselves of, or were brought under those Acts.[1] [2]

History of legislation on guardianship.

The genesis of these Acts is of interest. Soon after the establishment of the Court of Wards in Bengal,[3] it was found necessary to give to the Civil Courts powers to nominate guardians of minors over whom that Court possessed no power.[4]

The first major step in this direction was the enactment of Bengal Regulation 1 of 1800, which authorised Zillah Judges, where there were no testamentary guardians, to nominate guardians to disqualified landholders *not subject to the authority of the Court of Wards*. This Regulation, with others relating to the same subject, was repealed by the Bengal Minors Act (40 of 1858), which provided a machinery for the appointment of managers of the estates[5] and guardians of the person of minors (not being European British subjects)[6] residing in Bengal outside the limits of the original civil jurisdiction of the High Court.

Similar provision was made for the Madras Presidency by Madras Regulation 5 of 1804, section 20, and 10 of 1831, section 3, and for Bombay Presidency by Act 20 of 1864, which was in terms similar to Act 40 of 1858.

Act of 1858—Genesis.

The Bengal Minors Act (40 of 1858) was the result of certain practical difficulties which had been revealed by the case law or otherwise in the working of the law. For example, a Hindu guardian, even if he acted honestly, was in difficulty as to how he ought to deal with a minor's property under circumstances of pressure. The family might be very seriously in debt, but it was often doubtful whether the minor was liable for a portion of the debts, or whether the necessity was sufficiently urgent to justify the sale or mortgage of the immovable property of the minor. Sometimes, the guardian was a purdanashin lady or other member of the family, ignorant of the law, and might be influenced by the members of the family whose interests were adverse to those of the minor. In this state of the law, the estates of the minor were constantly sold or mortgaged without legal necessity—sometimes sold on ruinous terms. Purchasers as well as minors were found the victims of fraud and ignorance, and dealing with the

[1] *Ram Chander* v. *Brojonath*, (1877) I.L.R. 4 Cal. 929, 939.

[2] *Sham Kuar* v. *Mohanunda*, (1892) I.L.R. 19 Cal. 301, 308.

[3] Bengal Regulation 10 of 1793.

[4] Trevelyan, The Law relating to Minors (1912), page 75.

[5] Bengal Minors Act (40 of 1858), section 1.

[6] See *Callychurn Mullick* v. *Bhuggobuttychurn Mullick*, (1872) 10 B.L.R. 231.

[7] *Sikher Chund* v *Dulputty Singh*, (1879) I.L.R. 5 Cal. 363, 380, 381.

property of minors had proved a source of litigation. It was to remedy these evils that one of the provisions—section 18 was enacted, the intention being not only to protect the interest of the minor, but also to throw upon the civil courts a large share of the duties and responsibilities which had previously been thrown upon the guardians and to which the guardians had, as a rule, been found to be unequal.

Section 3 of the Bengal Minors Act provided that no guardian could institute a suit or defend a suit connected with a minor without a certificate of administration.

Act of 1858 - section 4.

Section 4 of Act of 1858 ran thus[1]—

"Any relative or friend of a minor in respect of whose property such certificate has not been granted, or, if the property consist in whole or in part of land or any interest in land, the Collector of the district may apply to the Civil Court to appoint a fit person to take charge of the property and person of such minor."

Act of 1861

In 1861, there was passed an Act to amend the law relating to minors. The principal provisions are to be found in sections 1 and 2, which are quoted below:[2]

"I. Any relative or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor may make an application by petition, either in person or by a duly constituted agent, to the principal Civil Court of original jurisdiction in the district by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an "examination of the Petitioner or his agent, if he appear by agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition and the determination of the right to the custody of guardianship of such minor.

"II. The Court may direct that the person having the custody or being in possession of the person of such minor shall produce him or her in Court or in any other place appointed by the Court on the day fixed for the hearing of the petition or at any other time, and may make such order for the temporary custody and protection of such minor as may appear proper."

The rest of the Act of 1861 (from section 3 onwards) was mainly concerned with matters of a procedural nature. Section 3 required the Court, after hearing the statements of the parties, to make an order regarding custody or guardianship. Section 4 required the Court to be guided by Act 8 of 1859 (Act for simplifying the procedure of Courts of Civil jurisdiction not established by Royal Charter) as far as applicable. Section 5 provided for an appeal to the sudder court from an order of the lower court under the Act, and section 6 provided that "any order passed under this Act in respect to the custody of guardianship of a minor shall not be liable to be contested in a regular suit". Section 7 saved certain laws, as also the jurisdiction of the Supreme Court and Court of Wards.

Section 8 defined the term "Sudder Court".

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[1]Bengal Minors Act, 1858, section 4.

[2]Act 9 of 1861 (An Act to amend the law relating to minors).

The Bombay Minors Act of 1864 was passed in these circumstances:[1] Act of 1864.

"It was deemed expedient by the Bombay Government, on certain representations from the Judges of the late Sudder Adawlut, to make provision for the better protection of the property of minors. The judges suggested that an enactment was required analogous to Act XL of 1858. Such an enactment was accordingly framed with such alterations as the different circumstances of the Bombay Presidency demanded, and was passed by the Court of the Governor of Bombay. The Act provided that proceedings of the Zillah Judges with reference to minors "should be open to appeal to the High Court of Judicature in Bombay. But it is stated in the Letters Patent of the High Court that the appellate jurisdiction of that Court is confined to cases already subject to appeal to the Sudder Adawlut, and to cases which shall become subject to appeal to the High Court by virtue of such laws and regulations relating to civil procedure as shall hereafter be made by the Governor General in Council.

"It was thus clear that, consistently with this provision in the Letters Patent, the Government of Bombay in its legislative capacity was not competent to give an appeal to the High Court in a *new class of cases*. Assent to the Bill was accordingly withheld by the Governor General, and the Government of Bombay has requested that an Act to secure the attainment of the objects in view may be passed by this Council. The proposed Act is founded on Act XL of 1858 with certain necessary alterations as to the agency by which the law is to be administered."

Neither Act 40 of 1959 (Bengal Minors Act) nor Act 20 of 1864 (Bombay Minors Act) was intended to alter or affect any provisions of Hindu or Mahomedan law, as to guardians who did not avail themselves of those Acts. The scope of these enactments was merely to confer expressly a certain jurisdiction and to define exactly the position of those who availed themselves of, or were brought under, those Acts, leaving persons to whom any existing rules applied, unaffected. The Legislature did not mean to sweep away all ancient law on the subject or to subject to one inflexible rule the property of all minors. For example, a Hindu widow (as mother and natural guardian of her minor son), could dispose of property belonging to the minor, even though she had not obtained a "certificate" of administration under those Acts.[2] Acts of 1858 and 1864— Scope of.

As regards legal proceedings taken on behalf of minors, in Bengal, no guardian could institute or defend a suit connected with the estate of a minor, unless he had obtained a certificate of administration.[3] In this respect the law has undergone a change in the Guardians and Wards Act, 1890. Under the Act of 1858 (Bengal Minors Act), a "certificate" was essential, but under the Act of 1890, it is not required. Legal Proceedings by minors.

As was observed in the Statement of Objects and Reasons appended to the Bill[4] which led to the Act of 1890—

"One effect of the assimilation of the law will be to do away with the rule, which obtains in the Presidencies of Bengal and Bombay, that no person shall be entitled to institute or defend any suit connected with a minor's estate of which he claims the charge until he has obtained a certificate of administration."

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[1]National Archives, File relating to Act 8 of 1890, notes portion, pages 2, 3.

[2](a) *Ram Chander* v. *Brojonath*, (1877) I.L.R. 4 Cal. 929, 939.

(b) *Honapa* v. *Mhalpi*, (1891) I.L.R. 15 Bom. 259, 261.

(c) *Murari* v. *Tayana*, (1896) I.L.R. 20 Bom. 286, 289.

[3]See section 3 of Bengal Minors Act (40 of 1858).

[4]Statement of Objects and Reasons to the Bill of 1886.

Legislation in force in Madras.

So much as regards the Presidencies of Bengal and Bombay. In Madras, besides Regulation 5 of 1904, the following Regulations and Acts contained a part of the law on this subject, viz[1]:—

Regulation 3 of 1802.
Regulation 10 of 1831.
Act 19 of 1841.
Act 21 of 1855.
Act 14 of 1858 (Madras Minors Act).
Act 9 of 1861 (An Act to amend the law relating to minors).

Act of 1874

It remains now to notice the European British Minors Act, 1874 passed to provide in the Punjab and elsewhere for the guardianship of European British subjects.

Section 2 dealt with definitions. Appointment of a guardian by the parent was provided for in section 3. Incidentally, section 3 of the Act of 1874 is the genesis of section 5 of the Act of 1890 (The section is now repealed).

Under section 4, if the Court within whose jurisdiction the minor resided found that a guardian of his person or property had not been provided for under section 3, the Court could appoint a guardian of his person or property or both.

Sections 5 to 9 of the Act of 1874 dealt with procedural matters. Section 10 contained elaborate rules for awarding custody. The guardian's duties, rights and liabilities were dealt with in sections 10 to 25. An interesting provision was that contained in section 12, to the effect that a ward is presumed to be of his father's religion and the guardian, in the absence of a direction of the Court to the contrary, must train the ward in such religion. However, if the ward is old enough to form an intelligent preference for any religion, the Court in giving such direction "shall attend to such preference". Another interesting provision was that contained in section 21, which provided that on the death of one or two or more joint guardians, whether appointed by a parent (section 3) or by the Court (section 4), the power continued to the survivor or survivors until a further appointment is made by the Court. It would also be interesting to note that amongst the causes for removal of guardian was one mentioned in section 22(g) of the Act of 1874, under which the Court could remove a guardian on the arrival within the local limits of the Court "of some person whose guardianship the Court may think likely to be more beneficial to the minor than the guardianship of the person so removed".

V. State of the law and difficulties felt

Immediate occasion for the Bill.

The legislation mentioned above constituted the background of the Act of 1890. The immediate occasion for undertaking the legislation that culminated in the Act of 1890 was furnished by certain practical difficulties that had been experienced in the working of the Bombay Minors Act, 1864. These difficulties had been brought to the notice of the Government of India by the Bombay High Court through the Local Government. The difficulty was thus described[2]—

Act xx of 1864, Section 2.

"Any person may assume the charge of a minor's property without any sanction from the civil court. No one need take out a certificate "unless for the purpose of enabling him to institute or defend a suit connected with the estate of which he claims the charge. If he does not profess to claim the charge of the property, he may dispense with a certificate even

[1]National Archives, File relating to Act 8 of 1890, page 37/correspondence.
[2]National Archives, File relating to Act 8 of 1890, page 6/Notes.

for the purpose of litigation. He may institute a suit as next friend, or defend it as guardian for the suit. If he takes out a certificate he cannot deal with any immovable property without the sanction of the civil court previously obtained; and every alienation made by him without such sanction is absolutely invalid; while an alienation made with such sanction cannot, except under special circumstances, be impeached. On the other hand, a person who does not take out a certificate is absolutely beyond control, and can deal with the minor's property as he pleases." Act XX of 1864 section 2. Act X of 1877, Chapter XXXI. Act XX of 1864, section 18, I.L.R. 2 Cal. 282. I.L.R. 4 Cal. 929.

"It can hardly be said that this state of the law is favourable to the interests of the minor. There is nothing to compel a self-constituted administrator to apply to the Court for a certificate; but on the contrary, there is every inducement to him not to do so. Now I think that, in the case of every considerable estate, and especially when it consists of "immovable property, it is desirable that every administrator should be obliged to satisfy the Court of his fitness before he meddles with the property."

Though the suggestion pertained only to the Bombay Act, it was, on an examination of the subject in the Legislative Department, thought that since the Bengal Minors Act, 1858 was drawn on the same lines as the Bombay Act, the improvements suggested in the Bombay Act would be needed in that Act also. It was further pointed out that the European British Minors Act, 1874 had also created several anomalies. For example, its provisions were confined to "European" British subjects, and were inapplicable to Eurasians. Need felt in Bengal.

Some problems had arisen in Madras also. The minute of the Chief Justice of Madras[1] is of interest in this context— Position in Madras.

"Although the Acts XL of 1858 and XX of 1864, which gave rise to the present reference, do not apply to this presidency, and the difficulties arising on construction of these Acts in connection with Chapter XXXI of the Code of Civil Procedure have consequently not been "experienced here a review of the law relating to minors obtaining in this presidency will show that it is, as interpreted by the courts, defective in that it leaves certain minors without adequate protection and fails to provide sufficiently for the representation and protection of minors whose property becomes the subject of litigation.

"Regulation V of 1804 created for this presidency a Court of Wards. By section 3, it was enacted that, where property charged with direct payment of rents or revenue to Government should devolve by inheritance on persons incapacitated by age, & c., from taking charge of the said property on their own behalf, the Collector should transmit to the Court of Wards a report stating the circumstances, and that the Court of Wards should thereupon state the case with their opinion and judgment to the Governor in Council to the end that the decision and orders of the Governor in Council might be passed thereon."

The following is another interesting comment[2] dealing with the position in Madras:—

"I think there can be little doubt that the present is a most favourable opportunity for dealing with the question of the 'care of the persons and

[1]Minute of Chief Justice of Madras: National Archives, File relating to Act 8 of 1890, pages 37, 38 etc. (correspondence).

[2]National Archives, File relating to Act 8 of 1890, page 124/correspondence.

property of minors in India'. The flaws and defects pointed out by the Bombay High Court in Act XX of 1864 exist in a great measure in Act XL of 1858, and probably they are also to be found in Madras Regulation V of 1804. The advantages of effecting a general improvement in all these laws by passing one general consolidated Act applicable to the whole of India are so self-evident as not to need much discussion. The principle of codification has been adopted by the Government of India, and is being carried out. The present proposal is one step more in the same direction. Thus the passing of one general Act will not only be in accordance with this principle, but it will enable the Legislature to remedy the defects that are now found to exist. The Bengal Act was passed a quarter of a century ago. It was inevitable that defects and omissions should come to the light in this interval. These require to be remedied, and the rulings passed in this time by the High Courts require to be engrafted in the positive enactment. I am therefore of opinion that a sufficient case has been made out to warrant the matter being taken in hand for "the purposes of further legislation. It may be pointed out that there are at present the Majority Act, Act IX of 1861, the Court of Wards Act and others, all relating to the different branches of the same subject. If the law is to be codified, all these Acts might be taken up, and *one general Act passed* on the subject applicable to the whole Empire, thus forming an additional chapter to the Indian Statutes Book on the Law of Guardian and Ward."

Comprehensive law considered desirable.

In view of this position, it was suggested[1] that it may be considered generally whether the best plan would not be to consolidate and amend the law relating to minors for all India. There were defects in Act 40 of 1858, and it might be useful to invite all Local Governments to report what amendments if any, were required in the law prevailing in each province.

Request for all India Bill.

Because of the difficulties felt, the Legislative Department was requested to be good enough to prepare and introduce into the Council of the Governor General for making Laws and Regulations a Bill prepared (on the line suggested), applicable to all classes, extending to the whole of British India, embodying such of the provisions of Act 40 to 1858, and Act 13 of 1874, as were suitable and repealing the Acts and Regulations which related to the appointment of guardians by the civil courts. It would be for the Legislative Department to consider what further detailed provisions may usefully be inserted in the Bill, in order that the proposed measure may be made as complete and comprehensive as possible. A second Bill might be necessary in order to make the amendments required in Chapter 31 of the Code of Civil Procedure then inforce.[2]

On the whole, therefore, it was considered proper to propose a comprehensive and self-contained law that would apply to the whole of British India.

Bill and comments thereon.

A draft Bill prepared by the Legislative Department was, under the authority of a Government Resolution, circulated for comments to local governments, judges, the bar and the public.

It was in this background that the Bill was introduced[3] in 1886 in the Council of the Governor General.

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[1]National Archives File relating to Act 8 of 1890, Pages 7—8/ notes.

[2]National Archives, File relating to Act 8 of 1890, page 3/correspondence.

[3]Statement of Objects and Reasons, Gazette of India (Jan.-June 1886), page 76.

VI The Bill of 1886 and proceedings thereon

The following abstract of the proceedings of the Council of the Governor-General of India relating to the Bill are of interest[1]:— **Proceedings of Governor General in Council.**

"GUARDIANS AND WARDS BILL

The Hon'ble Mr. Scoble presented the Report of the Select Committee on the Bill to consolidate and amend the law relating to Guardian and Ward. He said[2]:—

"This Bill was introduced nearly four years ago by my hon'ble friend Mr. Ilbert,[3] and, as the constitution of the Council has changed considerably since its introduction, I think it desirable, in presenting the Report of the Select Committee, to say a few words as to the objects of the measure and the general scope of its provisions.

"The Hindu and Muhammadan, as well as the "English, law lays down certain general principles regarding the relationship of guardian and ward, and the application of these general principles has been regulated by several enactments of the Indian legislature. Besides the numerous local Regulations and Acts constituting Courts of Wards for the different Provinces, and defining their powers and duties, there are several Acts of this Council making provisions for the care of the persons and property of Hindu and Muhammadan minors not brought under the superintendence of these Courts. Act XL of 1858 was passed with this object for the Bengal Presidency, and its operation extends also to the North-Western Provinces and Oudh, the Punjab, Lower Burma, the Central Provinces and Ajmere. Act XX of 1864 reproduces for the Bombay Presidency, with some variations, the Bengal Act of 1858. Act IX of 1861 amends the law for hearing suits relative to the custody and guardianship of minors in British India generally. As regards minors who are European British subjects, the Supreme Courts, and afterwards the High Courts, had jurisdiction under their Charters; and Act XIII of 1873 provided for minor of this class resident in those parts of the country to which the Jurisdiction of the Chartered High Court does not extend.

"In 1881 the Bombay Government drew attention to certain defects in Act XX of 1864, and suggested an amendment of the Act in order to remove difficulties which had been experienced in the administration of minors' estates under its provisions. Examination showed not only that the Bombay criticisms were sound as regards the particular Act in force in that Presidency but that several of them were applicable to the Bengal Act also, and that there was room for material improvement both in the form and in the substance of the Acts generally. Before taking action, however, Local Governments and other authorities were consulted, with the result that the Bill now before the Council was introduced by Mr. Ilbert on the 12th March, 1886.

"In his speech on that occassion my hon'ble friend indicated with great clearness the lines on which the Bill had been framed.

"'Nothing' he said, 'can be further from my intention than to interfere with Hindu family customs or usages, or to force Hindu or Muhammadan family law into unnatural conformity with English law. But, on looking into the European British Minors Act, which was framed with special reference

[1]National Archives - Legislative Department (April, 1890), Proceedings Nos. 1 to 426— Guardians and Wards Act 1890—Appendix A23.

[2]Gazette of India, January to June 1890, Part VI, page 36.

[3]Statement of Objects and Reasons: Gazette of India, January to June 1886, page 76.

to the requirements of what may be "called English minors, it appeared to me that almost all its simple and general provisions were applicable, or might with a little modification be made applicable, to Hindus and Muhammadans as well as to English guardians.....Accordingly, what I have done has been to take as my model the European British Minors Act, which is the latest and fullest of the Indian Acts relating to guardians, and to frame on its lines an Act applicable as a whole to all classes of the community, but containing a few provisions limited in their application to particular classes .....It is not intended by this measure to make any alteration in Hindu or Muhammadan family law'."

"In the second place, my hon'ble friend stated[1]—

" 'The Bill will not repeal or supersede the enactments relating to the different Courts of Wards. The provisions of those enactments,' he said, 'are intimately connected with the administrative machinery of the different Provinces; and it would be either impossible, or at least very difficult, to supersede them by a general Act applying to the whole of India. "They will accordingly be left outstanding. The Bill will relate only to such guardians as are appointed or recognised by the ordinary Civil Courts, and there will be an express saving for the jurisdiction and authority of the different Courts of wards."

"Lastly, my hon'ble friend proposed,

'in deference to what appear to be the views of the High Courts on this point,..... that the jurisdiction of the High Courts under their Charters is to be maintained alongside of their jurisdiction under the Act'.

"Since the Bill came into my hands the principles thus laid down have been carefully adhered to. Its provisions have been most attentively considered by two Select Committees, and it has been twice referred for opinion to Local Governments. If it now fails of completeness as a consolidation of the law on the subject to which it relates, it is not for want of consideration, but because consideration has shown the difficulties which stand in the way of complete treatment of so complicated a subject. *Ad ea quae frequentius accidunt jura adaptuntur*: exceptional cases must be left to be dealt with by the Courts of Law, as they arise."

VII. Enactments repealed.

The Act of 1890 replaced the pre-existing enactments, or so much thereof as was surviving. The following enactments were repealed[2] by the Act:—

Number and year	Title or subject	Extent of repeal
	Acts of the Governor General in Council	
14 of 1858	Minors (Madras)	The whole.
40 of 1858	Minors (Bengal)	So much as had not been repealed.
20 of 1864	Minors (Bombay)	The whole.
9 of 1861	Minors	The whole.
7 of 1870	Court-fees	Section 19 H, and article 10 of Schedule I.
4 of 1872	Punjab Laws	So far as it related to Act 40 of 1858.
19 of 1873	North-Western-Provinces Land-revenue.	Section 258.

[1]Mr. Ilbert.

[2]National Archives, Legislative Department Papers relating to the Act, Appendix C, page 14.

Number and year	Title or subject	Extent of repeal
13 of 1874	European British Minors	The whole.
15 of 1874	Laws Local Extent	So far as it related to any enactment repealed by this Act.
17 of 1875	Burma Courts	Section 96.
20 of 1875	Central Provinces Laws	So far as it related to Act 40 of 1858.
18 of 1876	Oudh Laws	So far as it related to Act 40 of 1858.
	Madras Regulations	
5 of 1804	Court of Wards	Section 20, and so much of sections 21 and 22 as related to persons and property of minors not subject to the superintendence of the Court of Wards.
10 of 1831	Minors' Estates	Section 3.

VIII. Age of majority

History of legislation on majority.

History of the legislation relating to majority in India is also a fascinating topic.[1] The Hindu and Muslim laws current in Bengal with reference to the age of majority were recognised in Bengal by the Bengal Regulation 10 of 1973,[2] which declared that minority with respect to both Hindus and Muslims was limited to the expiration of the fifteenth year. That section was, however, rescinded by Bengal Regulation 26 of 1793, by which[3] the minority of Hindu and Muslim proprietors of estates paying revenue to Government, was declared to extend to the end of the *eighteenth year.*

The next enactment, affecting the age of majority of Hindus and Mahomedans in Bengal was Act 40 of 1858 (the Bengal Minors Act), which provided for the care by the Civil Court of the persons and property of minors (not being European British subjects), who had not been brought under the superintendence of the Court of Wards. For the purposes of that Act the age of majority was fixed at *eighteen years.*[4] Act 40 of 1858 has since been repealed.[5]

By the Bengal Court of Wards Act[6], which placed under the superintendence of the Court of Wards all minor proprietors of entire estate (other than proprietors who were subject to the jurisdiction as respects infants of a High Court), the word "minor" was defined[7] as a person under the age of eighteen years.

This Act was repealed in 1879, and the repealing Act[8] defined a "minor" as a person who had not completed his age of *twenty-one years.*

Madras Regulation of 1804.

Madras Regulation 5 of 1804, which *inter alia* constituted a Court of Wards[9] for the Madras Presidency, provided[10] that "where minors may succeed to heritable property, they shall not, in any case, be competent to take charge of, or to administer their own affairs during the period of their minority, and for the better understanding thereof the duration of minority shall, without exception, continue until the *completion of the eighteenth year of age.*"

[1]Trevelyan, The Law relating to Minors (1912), pages 4-5.

[2]Section 28, Bengal Regulation 10 of 1793 (which established the Court of Wards).

[3]Section 2. The unrepealed portions of Regulation 26 of 1793, were repealed by Act 29 of 1871, save as therein provided.

[4]Section 26, Act 40 of 1858.

[5]Guardians and Wards Act, 1890.

[6]Act 4 of 1870 (Bengal Court of Wards Act).

[7]Section 2, Bengal Court of Wards Act (4 of 1870).

[8]Section 3, Bengal Court of Wards Act, 1879 (Act 9, Bengal Code of 1879).

[9]That Regulation was repealed by section 2, Madras Act 1 of 1962.

[10]Section 4 Madras Regulation 5 of 1804 (Court of Wards).

Bombay law and Madras law.

The Bombay Minors Act (20 of 1864) which was in force in the Bombay Presidency contained provisions similar to those of Act 40 of 1858. The Madras Minors Act (14 of 1858) contained somewhat similar provisions.

Age of majority for special purposes.

To add to the complications of the law as to the age of majority before the passing of the Indian Majority Act 9 of 1875, there were several other enactments fixing the age of majority for the special purposes of such Acts.[1] The enactments pointed in different directions for different purposes.

Controversy as to Bengal Minors Act.

In the Bengal Minors Act (40 of 1858), the definition of the word "minor"[2] was contained in section 26, which laid down, "for the purposes of this Act, every person shall be held to be a minor who has not attained the age of 18 years". This section had been the subject of conflicting interpretations in Calcutta. According to one view, 18 was the age of majority only in cases where the estate of the minor had been brought under the charge of the Civil Court. According to another view, whether or not the intervention of the Civil Court be invoked, 18 was the limit of minority.

For example, Mr. Justice Phear held that the expression "for the purposes" in section 26 "meant relative to all that forms the subject of this Act," i.e., the protection of the person and property of infants. He thus made 18 years the limit of minority for all purposes of contract. Mr. Justice Jackson carried this even further, holding that the age of minority was for all purposes extended to 18 years. The discussion on this point is contained in the undermentioned rulings:

1 W.R.C.R. 75
3 W.R.C.R. 50.
10 W.R.F.B. 36.
15 W.R.C.R. 452.
5 B.L.R. 81.
11 W.R.C.R. 561.
7 B.L.R. 607.
8 B.L.R. 379.
10 B.L.R. 240.

Indian Majority Act, 1875.

The law respecting majority thus remained in an unsettled state until the Indian Majority Act of 1875 was passed. That Act (as its preamble states) was passed for prolonging the peroid of non-age and attaining more uniformity and certainty respecting the age of majority in case of persons domiciled in British India.

Uniform age adopted in 1890.

The Act of 1890 adopted a uniform age for all purposes for appointing a guardian. This was achieved by adopting, by reference, the definition of "minor", as given in the Majority Act, 1875. The age as given in that Act was 18 years. Once a guardian was appointed, the age of majority was extended to 21 years. The latter result was achieved by amending the Indian Majority Act, 1875—an amendment effected by the Act of 1890.

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[1]See—

(a) The Indian Succession Act (10 of 1865), section 3, applied to Hindus by the Hindu Wills Act (21 of 1870), section 6.

(b) The Limitation Act (9 of 1871), section 3.

(c) The Government Saving Bank Act (5 of 1973).

(d) Indian Christian Marriage Act (16 of 1872), section 3.

(e) The N.W.P. Land Revenue Act (19 of 1873), section 3(12).

National Archives, File relating to Act 8 of 1890, page 91/correspondence.

APPENDIX 3

ENGLISH LAW, AND ITS EVOLUTION

I. Introductory

Introduction.

English law on the subject of guardianship of minors and custody of children is not to be found codified in one single enactment. So much of it as is statutory is scattered in several enactments. Part of it is still non-statutory. Broadly speaking, the sources of the English law on the subject are the following:—

(1) Legislation on the subject of guardianship and custody (including testamentary guardianship).

(2) Legislation relating to children.

(3) The law relating to inherent jurisdiction of the High Court in relation to wardship.

(4) The law relating to habeas corpus, in so far as it deals with the recovery of custody of minors below the age of discretion.

Evolution of law.

Legislation on the subject, particularly the statutes passed during the last half a century or so, shows that much of the field has come to be regulated by the State. The "rights" of the parents have receded into the background, while the welfare of the child has come into the foreground. This stage has not, however, been reached without considerable experimentation. Even now, the complexity of the legislation relating to children and the frequency with which it has been subjected to amendment, rather shows that the final solution to the problem of securing the welfare of children is not within easy reach.

A very brief history of the manner in which the law has evolved would not be out of place.

Evolution in recent times.

The law on the subject of guardianship of infants has undergone great changes in recent years.[1] Originally based largely on the patriarchal and feudal theories of the family, it was readjusted to modern conditions on the abolition of feudal tenures in 1660,[2] and again, with the increasing recognition of the equality of husbands and wives before the law, in 1886 and 1925. The key-note of the law is, however, not the traditional rights of the father, nor the abstract rights of the mother, *but the welfare of the child;* and this principle was expressly affirmed by the Act of 1925 as the 'first and paramount consideration'.

The principle has been reiterated[3] in the Act of 1971, and again in the Act of 1973.

In this process, the two great instruments of law reform—equity and legislation—have played a notable part. The role of judicial decision in common law courts has been limited because of the constraints that attach to improvement in the law by the judicial process.

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[1]Jenks, The Book of English Law (1953), pages 229-230.

[2]The Tenures Abolition Act, 1660.

[3]The Tenures Abolition Act, 1660.

II. Roman law

Significance.

Before we deal with the history of legislation in England, it would be appropriate to refer briefly to certain interesting features of Roman law. Much of the modern law of guardianship owes its genesis—if not in the content, at least in its concepts—to the Roman law. For example, the classification of guardians into legal, testamentary and certificated guardians, which we find in modern legal systems, has a striking parallel in the scheme of the Roman law relating to tutela. So have the topics of powers of guardians, legal safeguards and many other matters. The very expression "minor" is ultimately derived from the phraseology of Roman law.

Patria potestas and development of guardianship.

In Roman law, by virtue of *patria potestas*, the father was not only the head of the family, but had extensive powers. "Children begotten in lawful wedlook are in the power of the parents."[1] Guardianship in Roman law began as a projection of the *patria potestas* into the future, with a view to protection of the family property after the death of the testator.[2] Protection of the *person* came later, and did not assume importance until the institution of the "dative guardian" (guardian appointed by the Magistrate) came into prominence.

Concept of Tutela.

There were two kinds of guardianship, distinguished as tutela and cura (curatio) in Roman law.

Tutela was defined as "a right and power exercised over a free person who, on account of tender years, cannot take care of himself, given and allowed by civil law".[3]

Where the father was alive, *patria potestas* was in operation and the question of tutela did not arise, in general. The father could also make a testamentary appointment of guardianship. In certain situations, where the above types of guardians did not exist, certain Roman Magistrates had power to appoint magisterial guardians (*tutela dativa*). In the city of Rome, there was a special praetor for the purpose.

Roman law as to puberty.

Tutela was integrally linked with puberty. In the theory of the Roman law, a person came in the full enjoyment of his personal and proprietary rights on the attainment of puberty (14 years for boys and 12 years for girls). Upto the age of puberty, his or her interests were looked after, and protected, by the "tutor" in the absence of the father. The essence of *tutela* consisted in the assistance which the tutor had to give to enable juristic acts to be performed by the person below age. This was because of the doctrine that as such persons were not legally independent persons (*sui juris*), their transactions required the approval of a guardian (tutor).[4]

Persons above puberty.

Tutela ceased at puberty, but certain other developments relevant to the protection of persons who had attained puberty should be noted. By an "interdict", the Praetor could nullify transactions into which a person under 25 had entered because of his lack of business sense.[5]

Statutory provisions as to persons above puberty.

An early statute allowed persons above the age of puberty (14 for males and 12 for females as stated), and below the age of 25 years, to be placed under the *temporary* control of curators, without whose consent certain alienations of

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[1]Justinian, Institutes, Book 1, title 9, section 86.

[2]Lee, Elements of Roman Law (1955), page 91, para 137.

[3]Servius (Consul B.C. 51, First Commentary on the Edict), quoted by Justinian.

[4]Encylopaedia Americana, "Roman Law—Law of Persons—Guardianship".

[5]Derrett, Introduction to Legal Systems 1968, page 25.

property could not be made. At a later date, Emperor Marcus Aurelius initiated the practice of allowing the minor to get a *permanent curator* appointed.[1]

The parallel institution of *cura minorium* was thus developed, to save young persons from the consequences of their own lack of judgment at an age over puberty. This was meant for persons below 25.[2] (*Minor* XXV Anniis). In the beginning, the praetor exercised certain powers in *individual* cases to prevent over-reaching of the minor. Later, a curator was appointed on the minor's application.[3] In later law, the distinction between tutor and curator was progressively blurred.

Tutela in Roman law compared with present English doctrine.

The *tutela impuberum (upto puberty)* in the classical law corresponds broadly to the English concept of guardianship of infants, but its original purpose was somewhat different from the modern one of guardianship. Modern guardianship is concerned exclusively with the interest of the ward. Primitive *tutela* was concerned more with the rights of the guardian.[4]

Right of guardianship.

As to the persons who could be guardians, the earlier rule[5] in Roman law was that the nearest male agnate was the guardian in the case of a person under puberty (14 for males, 12 for females, as already stated), if the minor was not under *patria potestas*.[6] Later, cognates were substituted by Justinian.[7] Being based on a rule of law, this guardianship was called *tutela legitima*—an expression derived from the *lex* of the Twelve Tables (450 B.C.). But the father could appoint a testamentary guardian—*tutor testamentarius*—and in later times, failing both of such guardians, a magistrate would appoint a tutor.

Women could not be "tutors" in Roman law. In fact, they themselves had to be under a "tutor" (if they were not under *patria potestas*), except in certain special cases (e.g. vestal virgins). This position slowly underwent modification and was abolished in 410 A.D.

Provisions for protection of wards.

The Roman law had many provisions for protecting wards against mal-administration by, or misconduct of, tutors. Any person other than the ward could take proceedings for the removal of a tutor on the ground of mis-conduct—a provision originating in the Twelve Tables. After the termination of guardianship, the ward or his heirs could file an action for liquidation of accounts and could claim double damages against a tutor who had been guilty of embezzlement—also a provision dating from the Twelve Tables.[8] In the later Republic, a more general remedy called the *actio tutelae* could lie after the termination of the guardianship.

Security.

Guardians were sometimes required to furnish security, and this security could be demanded even from legal guardians in appropriate cases.[10] If the Magistrate, in a case requiring security, failed to take it, he exposed himself to a subsidiary action for consequential damages.[11] The tutor had to make an inventory of the estate of the pupil and his own property was subject to a general "hypothec"—

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[1]Lee, Elements of Roman Law (1955), page 93.
[2]Lustinian, Institutes, Book I, Title 23, sections 139-141.
[3]Nicholas, Roman Law (1975 reprint), pages 93-94.
[4]Nicholas, Roman Law (1975 reprint), page 90.
[5]Nicholas, Roman Law (1975 reprint), page 90.
[6]Encyclopaedia Britannica—"Roman Law—Law of Persons—Guardianship".
[7]Lee, Elements of Roman Law (1955), page 87, para 128.
[8]Nicholas, Roman Law (1975 reprint), page 95.
[9]Lee, Elements of Roman Law (1955), page 90, para 136.
[10]Lee, Elements of Roman Law (1955), page 90, para 136, item 4.
[11]Lee, Elements of Roman Law (1955), pages 90-91, para 136, item 4.

a charge which law created in favour of a pupil or a minor over the whole of the estate of the tutor or curator.[1]

Lunatics.

The Roman law had also a provision for the appointment of curators of lunatics, as well as an institution for the guardianship of the spendthrift (*cura prodigi*).[2] The latter institution is understood to be still in force in the civil law system in some countries. By the law of The Twelve Tables, mad men (*furiosi*) were placed under the curatorship of the nearest agnate.

III. The Middle Age—Judicature Act

Crown as feudal overlord.

The position in England may now be dealt with. In the Middle Ages the Crown as feudal overlord exercised a guardianship over the person and estate of its infant tenants-in-chief.[3] This guardianship, which was exceedingly profitable to the guardian, was enforced in the Court of Wards, but on the abolition of that court and of the system of military tenures, at the Restoration, the feudal aspect of this jurisdiction vanished. The Crown, however, did not abandon the infant when it ceased to be able to make a profit out of him. On the contrary, it came to claim, as "*parens patriae*" protective jurisdiction over all infants in the kingdom, and this jurisdiction was entrusted to the Court of Chancery. It would be impossible to go into the details of the jurisdiction here, but we may notice that the court could appoint guardians of the infant whenever, through the death or misconduct of the parents this course was necessary; and even though no guardian was appointed, it was possible by taking the appropriate steps to constitute the infant a ward of the court, with the result that no important step in connection with his upbringing could be taken without the court's sanction. This jurisdiction in cases of infancy still exists, and was exercised by the Chancery Division of the High Court[4] till recently. It has now been transferred to the new Family Division.

View of Pollock and Maitland

Pollock and Maitland make this observation[5] as to the state of the law in earlier times:—

> "This part of our law will seem strange to those who know anything of its next of kin. Here in England old family arrangements have been shattered by seignorical claims, and the King's Court has felt itself so strong that it has had no need to re-construct a comprehensive law of wardship. That the King should protect all who have no other protector, that he is the guardian above all guardians, is an idea which has become exceptionally prominent in this much governed country. The King's Justices see no great reason why every infant should have a permanent guardian because they believe they can do full justice to infants."

Father's right after end of feudal system.

When the feudal system came to an end, the position changed. Where the Court did not appoint a guardian, the father's right to control and custody of his children was, except as limited by statute (e.g. section 4, Custody of Children Act, 1891), absolute—even against the mother.

IV. The position before the Judicature Acts

Position upto the sixties

Upto the sixties of the last century, the father's right was, by and large, predominant in England. To some extent, the rigour of the law was softened by the

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[1]Lee, Elements of Roman Law (1956), page 177, para 263 and page 91, para 136, item 5.

[2]Encyclopaedia Britannica—"Roman Law—Law of Persons—Guardianship".

[3]Radcliffe and Cross The English Legal System (1971), page 144.

[4]*Cf.* G. Cross, "Wards of Court" (1967) 83 L.Q.R. 200-14

[5]Pollock & Maitland, History of English Law, Vol. 2, page 312.

jurisdiction exercisable by the Court of Chancery in regard to infants. The doctrine of "welfare of the child" was slowly finding its feet, in so far as, along with the right of the father, it was considered relevant to consider the welfare of the minor whenever the circumstances of the case so justified it.

Guardianship by nature and nurture.

The parent, it has been said[1], is guardian by nature and nurture—a view taken both by the Court[2] of Chancery and by the courts of common law.[7]—[12]

View of Canonical law.

This doctrine of guardianship "by nature and nurture" would appear to be based upon the doctrine of natural justice as derived from antiquity:—

> "Le pier ou la mier, mes un etranger ne peut justifier le pois d'un enfant per raison de norture." ("The father or the mother may take possession of a child by reason of nurture but not a stranger"; per Danby, J., Year Book, 8 Edw. 4, Wich Pl. 2).

The early canon law (with which equitable views are closely associated) exhibits the same view:[13]

> "Infants infidelium licite haptizatur, si parentes idest pater, mater, avus, avia val tutores, consentant": Codex, Juris Canonici, Can. 750, paraphrased.

The Summa Theologica reveals the same mediaeval attitude concerning the rights (both as to religion and as to custody) of parents over their children, in an extreme case, thus:

> "It is against natural justice if a child before coming to the use of reason were to be taken away from its parents' custody, or anything done to it against its parents' wish." "A son before coming to the use of reason is under his father's care". [Part II (second part), question 10, art. 12]; as to religion "Contra justitiam naturalem esset, si pueri invitis parentibus baptizarentur"; (Summa Theologica, 3, Question 68, art. 10).

Legislation of 1839.

The Custody of Infants Act, 1839 (Talfourd's Act), empowered the Court of Chancery to give the mother,[14]—

(i) custody of her children until the age of seven, and

(ii) access to them until the children come of age.

But a mother guilty of adultery was excluded[15] from these rights. The dominance of the father continued.

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[1]See *Carroll* (1930) All E R Rep at page 210.

[2]*Ex parte Hopkins*, (1732) 24 E.R. 1009, L.C.

[3]*Stileman V Ashdown*, (1742) 2 Atk. 477; 26 E.R. 688, L.C.; Simpson on Infants (1926), page 91.

[4]*De Manneville* V *De Manneville*, (1804) 32 E.R. 762, L.C.

[5] *Re Marquis of Salisbury and Ecclesiastical Comrs.*, (1876) 2 Ch. D. 29 (C.A.).

[6]*Ex parte Skinner* (1824) 9 Moore, C.P. 278 (Rule at common law).

[7]*R.* v. *De Manneville*, (1804) 5 East, 221; 1 Smih. K.B. 358; 102 E.R. 1054. (Child an infant at the breast).

[8]*Re Hakewill*, (1852) 12 C.B. 223; 138 E.R. 888.

[9]*R.* v. *Greenhill*, (1836) 4 Ad. & El. 624.

[10]*R.* v. *Clarke, Re Race*, (1857) 7 E. & B. 186; 119 E.R. 1217.

[11]*R.* v. *Howes, Ex parte Borford*, (1860) 3 E. & E. 332; 121 E.R. 467.

[12]*Cartlidge* v. *Cartlidge*, (1862) 2 Sw. & Tr. 567; 164 E.R. 1117.

[13]See *Re Carroll*, (1930) All E.R. at page 218.

[14]Custody of Infants Act, 1839.

[15]Talfourd's Act, 1839 (2 & 3 Vic. c. 54).

Case of Agra-Ellis

The cases of Agar-Ellis[1] furnish a strong example of the vigorous enforcement of the rights of the parents—especially, the father. The conflict there was between a Protestant father and a Roman Catholic mother, the father asserting his rights in a way in which members of the Court as men disapproved of. Cotton, L.J., expressed his view thus in one of the cases:[2]

> "It has been said that we ought to consider the interest of the ward. Undoubtedly. But this court holds the principle that when, by birth, a child is subject to a father, it is for the general interest of families and for the general interest of children, and really for the interest of the particular infant, *that the court should not, except in very extreme cases,* interfere with the discretion of the father, but leave him to responsibility of exercising that power which *nature has* given him by the birth of the child."

and Bowen, L.J. (24 Ch. D. at page 337 *Agar-Ellis)* observed:

> "The court must never forget, and will never forget, first of all, the rights of family life, which are sacred. I think all that could be said on that subject has been said far better than I could repeat it by Kindersley, V.C., in the case of *Re Curtis,*[3] and the cases to which he there, refers. Those are as to the *rights of family life.* Then we must regard the benefit of the infant; but then it must be remembered that if the words 'benefit of the infant' are used in any but the accurate sense, it would be a fallacious test to apply to the way the court exercises its jurisdiction over the infant by way of interference with the father. It is not the benefit to the infant as conceived by the court, but it must be the benefit to the infant having regard to the *natural law* which points out that the father *knows far better*[4] as a rule what is good for his children than a court of justice can.
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> "But in that case the court was so slow to decide anything as to religion adverse to the possible views of the parent that, whereas "Malins, V. C., had made an order that the children should be brought up as members of the Church of England, the Court of Appeal, while arriving at the same result, struck out the declaration, leaving the matter to the decision of the father."

Legislative developments as to custody 1886.

These cases, which excited strong feeling at the time owing to the rival claims of father and mother, were probably one of the causes which led to the insertion of section 5 of the Guardianship of Infants Act, 1886, which provided:[5]

> "The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the "liability of the father for the same or otherwise as to costs as it may think just."

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[1] *Re Agar-Ellis, Agar-Ellis* v. *Lascelles,* (1878) 10 Ch. P. 49; (1883) 24 Ch. D. 317.

[2] *Re Agar-Ellis,* (1883) 24 Ch.D. 317, 334.

[3] *Re Curtis,* (1839) 28 L.J. Ch. 458; sub nom. *Curtis* v. *Curtis,* 34 L.T.O.S. 10.

[4] Emphasis added.

[5] Section 5, Guardianship of Infants Act, 1886 (49 & 50 Vic. c. 27).

Court and (since 1886) by country courts was extended (subject to certain limita- Act of 1891.
(as to religion of the child):—

> "Upon any application by the parent for the production or the custody of a child, if the court is of opinion that the parent ought not to have the custody of the child, and that the child is being brought up in a different religion to that in which the parent has a legal right to require that the child should be brought up, the court shall have power to make such order as it may think fit to secure that the child be brought up in the religion in which the parent has a legal right to require that the child should be brought up. Nothing in this Act contained shall interfere with or affect the power of the Court to consult the wishes of the child in considering what order ought to be made, or diminish the right which any child now possesses to the exercise of its own free choice."

V. Position after the Judicature Acts

Position after Judicature Act.

After the Judicature Acts, the Court of King's Bench, which had previously acted on the strict common law views of parental rights, was enabled, by the fusion of law and equity prevailing, to add to its powers the equitable view of the Court of Chancery representing the King as *parents patriae*.[2] The Judicature Act expressly provided that equity shall prevail. But, the court still vigorously enforced the right of the parents, especially of the father, to control the religious education of a young child.[3]

Provisions as to claims for custody.

However, since the middle of the nineteenth century, Parliament has intervened in a series of statutes, the effect of which has been to whittle down the father's rights further and also to give the mother positive rights to custody which even equity did not accord to her.[4]

The process of reform initiated[5] in 1839 was gathering momentum.

Custody of Infants Act, 1873.—This Act extended the principal of Talfourd's Act of 1839, by empowering the court[6] to give the mother custody until the child reached the age of 16. It did not, however, repeat the proviso relating to her adultery. Section 2, which is still in force, introduced a further reform, which had long been overdue, by enacting that agreements as to custody or control in separation deeds (which had formerly been void as contrary to public policy) should be enforceable so long as they were for the child's benefit.

Guardianship of Infants Act, 1886.—This further extended the provisions of the earlier Acts by empowering the Court to give the mother custody of her children until they reached the age of 21. Furthermore, the father was now stopped from defeating the mother's rights after his death by appointing a testamentary guardian, for it was enacted that the mother was to act jointly with any guardian so appointed, and for the first time she herself was given limited powers to appoint testamentary guardians.

Custody of Children Act, 1891.—This Act was passed as the direct result of a number of cases in which parents had succeeded in recovering from Dr.

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[1]Section 4, Custody of Children Act, 1891 (15 & 16 Geol 5 c. 45).

[2]*Cf.* section 44, Supreme Court of Judicature Consolidation Act, 1925.

[3]*Re Carroll*, (1930) All E.R. Rep. at pages 200-201.

[4]Bromley, Family Law (1971), pages 269-270.

[5]Custody of Infants Act, 1839.

[6]Bromley, Family Law (1971), pages 269-270.

Barnardo children whom they had placed in his now famous "homes", or whom they had abandoned and he had taken. It provides that if a parent has abandoned or deserted his (or her) child, the burden shall shift to him to prove that he is fit to have custody of the child claimed and that the court may refuse to give him possession of the child altogether (section 1). Moreover, if at the time of the parent's application for custody the child is being brought up by another person, the court may now, upon awarding custody to the parent, order him to pay the whole or part of the costs incurred in bringing it up (section 2).

Guardianship of Infants Act, 1925.—It may be noted that the Act of 1925 gave statutory effect to the rule that in any dispute relating to a child the court must regard its welfare as the first and paramount consideration. It also completed the process of assimilation of the parents' rights by enacting that neither the father nor the mother should from any other point of view be regarded as having a claim superior to the other and by giving to the mother the same right to appoint testamentary guardians as the father. Jurisdiction to make orders relating to custody etc. which had formerly been exercisable only by the High Court and (since 1886) by county courts was extended (subject to certain limitations) to magistrates' courts.

How far welfare of child paramount in Chancery.

There is some controversy as to the extent to which the principle of "welfare" was regarded as paramount in Chancery. Speaking of the Guardianship Act, 1925, Lord Donovan remarked in 1969, that it seems "incredible" that Parliament should have passed such an enactment as section 1 of the Act of 1925, if the position were that it "made no difference at all to the law as already expounded by the judges"[1]. He did not agree that the Act "enacted no new law".

On the other hand, Lord Upjohn maintained that the Act "enshrined the view of the Chancery Courts",[2] and Lord Guest apparently agreed with him.[3]

On balance, it would seem that there was some lingering uncertainty (when the Bill was drafted) as to the extent to which the "welfare" principle had encroached on basic parental rights.

In the Act of 1925, the language of the opening section—"Where in any proceeding before "any court..... the custody or upbringing of an infant .....is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration....."—seemed to place the matter beyond all doubt. Yet, astonishingly, this did not prove to be so. Another forty-four years were to pass[4] before it was settled that welfare considerations really *must predominate* in all custody proceedings.

VI. Modern developments

The position in 1953 was as follows:—[5]

Father as legal guardian.

"Subject to this fundamental principle (welfare of the child) an infant's father still remains his sole *legal guardian* during his (the father's) lifetime; but this fact, of course, adds little, if anything, to the father's primary position as a parent. On the father's death, the infant's mother becomes, either sole guardian, or guardian jointly with a guardian appointed by the deed or will of the father, or, in default, by the Court. And, even during

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[1] *J. v. C.*, (1970) A.C. 668, 727D; (1969) 1 All E.R. 788, 834, 835.

[2] *J. v. C.* (1970) A.C. 668, 724E; (1969) 788, 832.

[3] *J. v. C.*, (1970) A.C. 668, 697F.

[4] *J. v. C.*, (1970) A.C. 668.

[5] Jenks, Book of English Law (1953), pages 229-230.

the father's lifetime, the mother has the same right to apply to the Court in respect of any matter affecting the infant as the father has, and an equal right to appoint by deed or will a guardian to act after her death as co-guardian with her surviving husband, or, if he is dead, the guardian appointed by him. In the event of differences of opinion between the surviving parent and the guardian appointed by the deceased parent, the Court may award sole custody of the infant to either, as it may consider best for the welfare of the infant."

VII. Present position

Custody—English Act of 1971.

The principles on which questions relating to custody, upbringing etc. of minors are to be decided, is thus laid down in the English Act of 1971[1]: —

"1. Where in any proceedings before any Court (whether or not a court as defined in section 15 of this Act)

(a) the custody or upbringing of a minor;

(b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof,

is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether, from any other point of view, the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

Act of 1973.

Section 1(1) of the Guardianship Act, 1973 now provides as follows:—

"1.—(1) In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other.

...."

In *proceedings* for custody etc. such equality was already provided in 1971.[1] But in the absence of such proceedings, the father's rights prevailed.[2] That position is also now modified by the Act of 1973 referred to above.

Father as natural guardian and mother's position.

This would seem to have practically abolished the rule of the common law whereunder the natural guardian of legitimate child[3] was the father, and the mother did not share the guardianship as such while he is alive.

VIII. Custody

History of right to custody.

Coming specifically to the topic of custody of children, the father's right to custody of his legitimate children was complete and exclusive in England in the middle ages. It was only in the 19th century[4] that the mother could be

[1]Section 1, Guardianship of Minors Act, 1971.

[2]Tenures Abolition Act, 1660.

[3]*Ex. p. Hopkins*, (1732) 3 p. Wms. 152, per Lord King L.C.; *Re-Agar-Ellis*, (1883) 24 Ch.D. 317, 335.

[4]Custody of Infants Act, 1839 (2 & 3 Vic. c. 54) (Repealed in 1873).

awarded access to a child until the child reached the age of seven years. The Act is said to have been passed after the judgement in R. V. Greenhill[1] [See *Warde* v. *Warde,* (1849) 2 Ph. 786]. Where there was no testamentary or Court guardian, the mother was, in equity, guardian for nurture.[2] Later,[3] the mother could be awarded custody of a child until it reached the age of sixteen years. In 1925,[4] the mother was given an equal right through the court to the custody of the child and in 1971,[5] the mother was given exactly the same rights and authority as the law allows to the father in England.

Illegitimate child.

As regards the illegitimate child, the position was just the reverse in England. In the middle ages, such a child was regarded as a *filius nullius*.[6] By the end of the 19th century, the mother had the right of custody over her illegitimate child.[7] The father had no right to custody even though the legislation imposed on him the duty to maintain the illegitimate child. Upto 1971 this position continued, subject to one modification, namely, that in certain cases the orders for custody could not be passed without the father's consent. Now,[8] both the parents have the same equal right to apply to the court for custody of the illegitimate child.

IX. Testamentary guardianship

Testamentary guardianship.

Testamentary guardianship in England is based on statute. The earliest statute[9] was passed in the time of Charles the Second. It conferred power on the father to appoint a guardian by deed or will for an infant upto the age of 21 years. The father himself need not be a major (under the Statute as originally enacted). Later, however, this concession was restricted to deeds[10] and only a major can now appoint a guardian by will in England.

The testamentary power was hotly opposed by the King and his officers, while it was dedulously supported by the Church and its dignitaries. Finally, the Church triumphed. Until recently, the Ecclesiastical Courts dealt with all testamentary matters and granted probate. So it was necessary, in the time of Charles II, to have a statute empowering the father to appoint a guardian.

This does not mean that under the Common Law the father had not the right of guardianship, but under the peculiar tenures obtaining in England and the law of primogeniture, the power of the father to appoint a guardian for his heir was resisted till the legislature intervened.[11] The power to appoint a testamentary guardian was later given to the mother also (in 1886).

X. Children's Acts

Side by side with these developments as to guardianship and custody, legislative measures for the welfare of children have come in quick succession. With the passage of the latest Act—Children Act, 1975—this branch of the law has become the most complex.

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[1]*R. v. Greenhill,* (1836) 4 Ad. & El. 624.

[2]*R.* v. *Clarke,* (1857) 7 El. & Bl. 186.

[3]Custody of Infants Act, 1873 (36-37 Vic. c. 12) and Guardianship of Infants Act, 1886 (40-50 Vic. c. 27).

[4]Guardianship of Infants Act, 1925 (15-16 Geo. 5 c. 45).

[5]Section 1, Guardianship of Minors Act, 1971.

[6]See discussion of Law Commission of India, 62nd Report (Workmen's Compensation Act) pages 32-34, paragraphs 2.4 to 2.6.

[7]Bastardy Laws Amendment Act, 1872 (35-36 Vic. c. 65).

[8]Sections 9 and 14, Guardianship of Minors Act, 1971.

[9]Tenures Abolition Act, 1660, 12 Charles II, c. 24.

[10]The Wills Act, 1837 (1 Vict. c. 26, section 7).

[11]Pollock & Maitland, History of English Law, Vol. 2, page 312.

Originally, legislation for children provided for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected and delinquent children and for the trial of the later. The Children Acts contain elaborate provisions for the establishment of a specialised machinery in terms of juvenile/children's courts, remand/observation homes, certified/approved/special schools, probation and after-care services. Besides, the Acts envisage an effective utilisation of voluntary welfare agencies at various stages of apprehension, treatment and rehabilitation of children in need of care and protection.

The Children Act, 1975 expanded the scope of this legislation. Its provisions may be thus summarised, so far as they concern the position in England— Children Act of 1975.

(i) The Act provides a means whereby, as an alternative to adoption, relatives and others looking after children on a long term basis can apply for and obtain the legal custody of the children. Such persons may apply for, what is called, a "custodianship" order and this vests "legal custody" of the child in the applicant, who becomes known as the child's "custodian". The Act thus introduces a new concept. A "custodian" appears to be in a similar position to a parent having custody of his child, but the Act deliberately refrains from giving him the designation "guardian". "Custodianship" may be said to be a new form of guardianship though giving less rights and powers than guardianship, and to be similar to, but not identical with, custody.

(ii) Section 33 provides that, on the application of any qualified person who is not the mother or father of the child, the court may make a custodianship order vesting legal custody of the child in the applicant. "Legal custody" is defined in section 86. A person is "qualified" when (i) he is a relative or step-parent and he has the consent of a person with custody and the child has had his home with him for the three months preceding the application (though step-parents are not qualified in certain circumstances [See section 33(5) and (8)], or (ii) he is anybody else, has the same consent and the child has had his home with him for 12 months, including the three months preceding the application, or (iii) he is anybody with whom a child has had his home for three years including the three months preceding the application. So, where a child has lived for three years away from a person who has legal custody of him, the person, if any, with whom he has lived for that period is entitled to ask the court to make him the custodian and give him legal custody, though such legal custody is not equivalent to the legal custody the first person had.

(iii) Provision is made for certain supplementary orders to accompany a "custodianship" order. Orders for access and maintenance may be made (section 34). Custodianship orders may be revoked and varied (section 35).

(iv) A court is empowered, in cases where the requirements for making an adoption order have been satisfied, to make a custodianship order instead, if it is of the opinion that such an order would be more appropriate. A custodianship order may also be made in favour of someone where a parent has applied for custody under the Guardianship of Minors Act, 1971, section 9 (see section 37).

(v) Section 38 provides a means whereby disputes between joint custodians about a child's upbringing can be resolved by the court making an order.

Provision is made for local authority investigation of application for custodianship orders, and for welfare reports to be obtained by the courts (sections 39-40).

(vi) Section 41 restricts, pending a court decision, the removal of a child from an applicant for custodianship who has looked after him for three years.

Further provisions deal with enforcement and effect of custodianship orders (sections 42, 43 & 44). Custodians are empowered to apply for affiliation orders in certain circumstances (section 45).

XI. Habeas Corpus

Habeas Corpus.

In England, Habeas Corpus has also long been used to gain the custody of infants. The writ is issued on the application of the party seeking custody and is directed against whoever has the control of the infant.[1] Though, in theory, it still rests on the idea of relieving an illegal restraint, the ordinary rules of family law apply in custody cases, and the matter is heard in the Family Division (previously, the Chancery Division).

An application for custody is a proceeding which involves "not a question of liberty, but nurture, control and education".[2] As Scrutton L.J. said in his picturesque language,[3] proceedings (by way of habeas corpus) for custody are being used "not for the body, but for the soul of the infant".

Nature of the writ and its unenforceability.

The essence of the writ habeas corpus has always been to free the infant from any unlawful restraint or ill-usage, and the court has never been bound to deliver him to anyone. If, therefore, the infant had reached years of discretion and escaped beyond the control of the father, he would not be delivered to the father without examination, but would be allowed to elect where he should go.[4] In other words, the right of the father to custody in such cases became unenforceable by the father,—at any rate by habeas corpus proceedings in a court of law—once the infant had reached years of discretion, though the right continued to exist in theory until the infant attained the age of twenty-one.[5]

However, so long as the infant remained in the actual custody of the father, the father[6] had a legal right to the control of his infant children, and if the infant were of the years of discretion, the court would interfere only on the same grounds as it would have interfered if the infant were under that age (though it was recognised that a young child requires very different treatment from an older one, and conduct of a father which might be tolerated in the case of one might be perfectly intolerable in the case of the other.

Age of discretion.

The age of discretion was apparently fourteen years in the case of a male,[7] but, by argument from the provisions of one statute,[8] it was sixteen in the case of a female infant.

So far as concerned an illegitimate child, it seems that the infant could elect, or at least its wishes would be taken into consideration, as soon as it had passed the age of nurture,[9] though the position was, of course, basically different in that no one appeared to have *had any right to the custody* of an illegitimate child after it had attained the age of nurture.

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[1]Sharpe, Law of Habeas Corpus (1976), pages 168, 169.

[2]*Barnardo* v. *McHugo*, (1891) 1 Q.B. 194, 203 (Lord Ezher M.R.).

[3]*Re Carrol* (1931) 1 K.B. 317, 331.

[4]*R.* v. *Greenhill*, (1836) 4 A. & E. 624.

[5]See *Hargreaves's note to Coke upon Littleton*, 88b and *Re Agar-Ellis*, (1883) 24 Ch.D. 317.

[6]*Re Agar-Ellis*, (1883) 24 Ch.D. 317.

[7]*R.* v. *Clarke*, (1857) 7 El. & Bl. 186; *Thomasset* v. *Thomasset*, (1894) p. 295.

[8]The statute (1557) (4 & 5 Phillip & Mary c. 8) relates to abduction.

[9]*Re Lloyd*, (1841) 3 Man. & Gr. 547; *R.* v. *Clarke*, (1857) 7 El. & Bl. 186; *Re White*, (1848) 10 L.T. 349.

XII. Wards of Court

A minor can be made a ward of court only upon the making of an application for an order to that effect. Prior to 1949, an infant became a ward automatically when an action or other proceeding relating to his person or property was commenced in the Chancery Division, but now a specific application is required.[1] Procedure.

The court has an extensive and special jurisdiction over wards of courts in respect of both their person and their property, and exercising that jurisdiction it acts in a parental and administrative manner. Thus, the court will decide who is to have the custody, care and control of the ward and who is to have access to the ward and what access is to be allowed. It will control where the ward is to live and will not permit him to be removed from the jurisdiction of the court without leave. It follows that it can make orders for his maintenance, and supervises his education and religious upbringing and investigates proposals as to marriage.[2] Of the recent English cases illustrating this jurisdiction, the most important is that in which the court refused permission to allow the sterilisation of a girl of about 11 years of age, who was supposed to be mentally defective.[3] Jurisdiction.

In the exercise of this jurisdiction also, the welfare of the minor is the paramount consideration.[4]

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[1]Section 9(1), Law Reform (Miscellaneous Provisions) Act, 1949.

[2]Halsbury, 4th edition, Vol. 24, page 266, para 597.

[3]*Re Re D. (Minor)* (1976) 1 All E.R. 326.

[4]*J.* v. *C*, (1969) 1 All E.R. 788. (E.L.)

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