



CHAPTER

3

Adoption

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Learning Outcomes

After the completion of this chapter, the students will be able to:

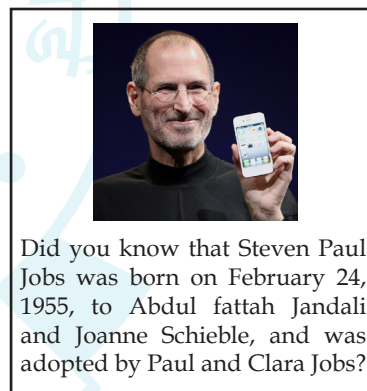
- Explain Adoption
- Contrast between the laws of guardianship under various religions
- Differentiate between the types of guardians

I. Adoption

A. What is Adoption?

Adoption is the act of establishing a person as parent to one who is not in fact or in law his child. It is the means by which a legal relationship is established between the parent and child who are not so related biologically. It is also defined as a process by which people take a child who was not born to them and raise him or her as a member of their family.

Earlier, the objective of adoption was mainly to secure performance of funeral rites and to preserve the continuance of one's lineage.



Did you know that Steven Paul Jobs was born on February 24, 1955, to Abdul fattah Jandali and Joanne Schieble, and was adopted by Paul and Clara Jobs?

B. Statutes governing Adoption

The Hindu Adoption and Maintenance Act, 1956

In India, the only statute governing adoption is the **Hindu Adoption and Maintenance Act, 1956**. Its ambit is confined only to Hindus.

The law codifies the legal process of adopting children by a Hindu adult and the legal obligations to provide maintenance to the various family members.

Law on adoption for other religions/ communities:

There is no law on adoption for Christians, Parsis, and Muslims. A person belonging to these communities has to get himself appointed as guardian under the Guardians and Wards Act, 1890. This Act applies to all communities and castes.

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The court will take into consideration the personal law of the minor while appointing or declaring a person as guardian under the Guardians and Wards Act, 1890. Once a person is appointed or declared as a guardian, he has to abide by the provisions of the Guardians and Wards Act, 1890.

II. Minor Custody and Guardianship

A. Who is a Minor?

Minor is a person who has not completed the age of 18 years under the Indian Majority Act, 1875.

B. Who is a Guardian?

A Guardian is a person who has rights and duties with respect to the care and control of a minor's person in relation to body or property (estate or wealth of minor).

These rights of guardian include the right to determine the child's upbringing in regard to religion, education, and other matters such as the disposal of properties and so on. A guardian is vested with the duty to act for the welfare of the minor. The welfare of the child is paramount consideration for the court in matters pertaining to custody and guardianship of the child.

In matters of custody and guardianship every community has its own laws.

C. The Guardians and Wards Act, 1890

This is a non-religious and universally applicable law regarding the issues relating to guardianship of a child in India.

The Guardians and Wards Act, 1890 was passed during the British period. This Act has authorized the court to appoint guardian for a minor child. The child may belong to any community.

D. The Hindu Minority and Guardianship Act, 1956

The Hindu Minority and Guardianship Act was enacted in 1956. This Act has codified the law relating to custody and guardianship of children belonging to the Hindu community.

Guardian includes the following:

- ❖ a natural guardian
- ❖ a guardian appointed by the will of the minor's father or mother
- ❖ a guardian appointed or declared by a court

E. De-jure and De-facto guardians

A guardian can be de-jure (authority vested by law) or de-facto (exercising power without being legally established).

Types of De-jure guardians

De-jure guardians can be of three types, they are:

- Natural guardians (by birth): Generally, father and mother are recognized as natural guardians of the child
- Testamentary guardians: Guardians appointed by will
- Certificated guardians: Guardians appointed by the court under the Guardians and Wards Act, 1890 are known as Certificated guardians



F. Natural Guardian

Natural Guardian of a Hindu minor: Section 6 of Hindu Minority and Guardianship Act, 1956 provides that the natural guardian of a Hindu minor boy or unmarried girl in respect of the minor's person as well as in respect of the minor's property is the father, and only after him, the mother. The mother is entitled to guardianship 'after' the father. Here, the term 'after' means 'in the absence of'. Ordinarily, the custody of a minor child who is below the age of five years is given to the mother.

Thus, a functional guardian (person who is looking after the welfare of the child and actually taking care of him) will be given responsibility of the guardianship. It is immaterial whether that person is a father or mother. The paramount consideration is the welfare of the child.

Position under Muslim Law

Muslims do not recognize mother as a guardian, whether natural or otherwise. But she has the '**right of hizanat**', which is the right of the mother to have custody of the child during early childhood.

A guardian appointed by 'will' is known as a testamentary guardian. Under the Hindu Minority and Guardianship Act, 1956, both the parents can appoint a testamentary guardian for the child.

Position under Muslim Law

But it is not so among Muslims. In Muslim law, only father has power to appoint a testamentary guardian. The mother has no such power.

III. Exercises

Based on your understanding, answer the following questions:

Q-1 The Act that codified the law relating to custody and guardianship of children belonging to the Hindu community is known as:

1. The Guardians and Wards Act, 1890
2. The Hindu Minority and Guardianship Act, 1956
3. The Hindu Adoption and Maintenance Act, 1956
4. The Hindu Marriage and Divorce Act

Q-2 Which of the following communities has a law on Adoption?

1. Christians
2. Parsis
3. Hindus
4. Muslims

Q-3 Anisha's (a minor) father appointed Anisha's aunt as her guardian in his Will under the Hindu Minority and Guardianship Act, 1956. Anisha's aunt is a:

1. Testamentary Guardian
2. Natural Guardian
3. De facto Guardian
4. Certificated Guardian

Q-4 Shanaya is a five year old Muslim girl. Her parents are separated. Which parent will get custody of the child and why?

Q-5 Anuj is the son of Neeta and Neelesh Pandey. The couple separated and both are eager to seek

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the custody of Anuj. Who will be Anuj's guardian under Hindu law? Explain the position of both the mother and father.

Q-6 Angad, a minor Sikh was staying in Delhi with his parents who were involved in a bitter battle over his custody. Explain with relevant provisions as to who will get his custody?

