

WOMEN RELATED LAWS

DGS Associates in association with ELSA- Lady Shri Ram College Alumni Association, had created a Legal Resource consolidating laws relating to women in the spheres of employment, crime, marriage, divorce and maintenance.

This compilation is part of the said endeavour to increase legal awareness by consolidating laws relating to adoption and succession in the following 2 parts.

WOMEN AND SUCCESSION

The law of succession is the law governing the transmission of moveable and immoveable property vested with a person upon his/ her death, to some other person or persons. Succession is of two types: Testamentary (**testate**) and Non-Testamentary (**intestate**).

TESTATE SUCCESSION

Testate succession is one that is governed by a Will or like instruments. The laws relating to testate succession for all communities in India including Hindus, Buddhists, Jains, Sikhs, Parsis¹ and Indian Christians,² except Muslims, is the Indian Succession Act, 1925 (**ISA**).

The following are certain general provisions of ISA and its application explained. Finally, testate succession with respect to Muslims have been explained.

Testate Succession among Hindus, Buddhists, Jains, Sikhs, Parsis, Jews and Indian Christians- The Indian Succession Act, 1925

Scope

The ISA was enacted to consolidate the law applicable to intestate and testate succession.³ The ISA applies to testate succession for all communities including Hindus, Parsis, Jews and Christians, except Muslims, in India.

¹ Clarence Pais v. Union of India 2001 (43) ALR 249.

² Mary Roy v. State of Kerala AIR 1986 SC 1011.

³ Objective, Indian Succession Act, 1925.

A Will, Codicil and Probate

A Will is the legal declaration of the intention of a testator with respect to his/ her property which he/ she desires to be carried into effect after his/ her death.⁴

A Codicil is an instrument made in relation to a Will, explaining, altering or adding to its dispositions and is deemed to form a part of a Will.⁵

A Probate is a copy of the Will certified under the seal of a Court, with a grant of administration to the estate of the testator.⁶

Who can make a Will

Every person of sound mind not being a minor may dispose of his/ her property by Will.⁷ The ISA states that no person can make a Will, while he/ she is in such state of mind such that he/ she does not know what he/ she is doing. This can be arising from intoxication or from illness or any other cause.⁸

In *N Ramaiah v. Nagaraj S*,⁹ it was held that explanation 1 to section 59 clarifies what can be disposed

by Will by a married woman and states that any property which she could alienate by her own act during her life can be disposed by Will.

In *Pershad v. The State of Uttar Pradesh*,¹⁰ the questions whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of capacity¹¹ and compliance with the rules for execution of a Will.¹²

Essentials of a Valid Will

It is not necessary that any technical words or terms of art be used in a Will,¹³ but only that the wording be such that the intention of the testator can be known therefrom. The testator must sign or affix his/ her mark to the Will, or direct some other person to do the same on his/ her behalf.¹⁴

A Will is required to be attested by 2 or more witnesses each of whom has witnessed the signature on the Will of the testator or some other person on his/ her behalf in their presence. However, no particular form of attestation is

⁴ Section 2(n), Indian Succession Act, 1925.

⁵ Section 2(b), Indian Succession Act, 1925..

⁶ Section 2(f), Indian Succession Act, 1925.

⁷ Section 59, Indian Succession Act, 1925.

⁸ *Jamuva Dasi v. Hari Dasi*, 1957 ALJ 667

⁹ AIR 2001 Karn 395.

¹⁰ AIR 1955 SC 443.

¹¹ Section 59, Indian Succession Act, 1925.

¹² Section 63, Indian Succession Act, 1925.

¹³ Section 74, Indian Succession Act, 1925.

¹⁴ Section 63, Indian Succession Act, 1925.

required and both witnesses do not have to be present at the same time.¹⁵

Void Will

A Will (or any part thereof) that is caused by fraud or coercion or such importunity that takes away the free agency of the testator is void.¹⁶ A Will or bequest not expressive of any definite intention is void for uncertainty.¹⁷

Revocation / Alteration of Will

The testator can revoke or alter the Will at any time when he/ she is competent to dispose of his/ her property by Will.¹⁸ Methods of revocation are by another Will or Codicil, by some writing declaring an intention to revoke the same and executed in the manner in which a Will is required to be executed, by the burning, tearing, or otherwise destroying the same by the testator or by some person in his/ her presence and by his/ her direction with the intention of revoking the same.¹⁹ If a Will is lost it will not be

presumed to be revoked.²⁰ When there is no obvious reason or clear motive for the testator to revoke the Will and yet the Will is not found on the death of the testator it may well be that the Will was misplaced or lost or was stolen by the interested persons.²¹

Effect of Probate

Probate of a Will when granted establishes the Will from the death of the testator and renders valid all intermediate acts of the executor as such.²²

Right as executor or legatee when established

No Court shall recognize the right of an executor unless he/ she has obtained the Probate of the Will under which he/ she claims.²³

This section shall not apply in the case of Wills made by Muslims or Indian Christians. Although Christian legatees are not barred from getting the Will Probate.²⁴

It shall only apply to:

¹⁵ (2010) 12 SCALE 470.

¹⁶ Section 61, Indian Succession Act, 1925.

¹⁷ Section 89, Indian Succession Act, 1925.

¹⁸ Section 62, Indian Succession Act, 1925.

¹⁹ Section 70, Indian Succession Act, 1925.

²⁰ Anna Maria Welch and Lucy Allen Welch v. Nathaniel Phillips, [1836] 1 Moore, P.C. 299.

²¹ Durga Prasad v. Devi Charan 1979 SCR (1) 873.

²² Section 227, Indian Succession Act, 1925.

²³ Section 213, Indian Succession Act, 1925.

²⁴ Kalarikkal Thressiamma And Anr. v. Kallidukkananikkal Joseph AIR 1998 KER 160.

1. Any Hindu, Buddhist, Sikh, Jain or Parsi;
2. Such Wills that are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immoveable property situated within those limits.²⁵

The ISA provides that Probate of a Will is not necessary in case where both the person and property are outside the territories of Calcutta, Madras and Bombay.²⁶

Jurisdiction for Probate

Jurisdiction lies with the District Judge in granting and revoking Probates etc. There lies concurrent jurisdiction of High Court in granting and revoking Probates.²⁷

Powers of Executor

An executor can act and exercise the powers given to him/ her under the ISA without obtaining

Probate. However, if the deceased was a Hindu, then the power of the executor to dispose of immoveable property vested in him/ her is subject to any restriction which may be imposed in this behalf by the Will appointing him/ her.

The only exception is if Probate has been granted to him/ her and the court granting the Probate, permits him/ her by an order in writing, to dispose of any immoveable property specified in the order in a manner permitted by the order.²⁸

Testate Succession among Muslims- General Principles

Scope

The Islamic law in the country is not a codified law. Therefore, the property rights are governed by either of the two schools of the Muslim personal law – the Hanafi and the Shia. The same rules are applicable if the deceased is a male or a female.

The rules of the Islamic law of succession are applicable to Muslims, unless amended or abolished due to violation of the

²⁵ G.Ganesan v. P.Sundari (2011) 4 MLJ 98.

²⁶ AIR (1968) PUNJ 108 (DB).

²⁷ Section 264 and 300, Indian Succession Act, 1925.

²⁸ Section 307, Indian Succession Act, 1925.

Constitution of India or any other law applicable.²⁹

The Hedaya, Fatwa, Alamgiri and Baillie are the works of authority with respect to a Will under Islamic law. The following are some principles with respect to the same.

1. A Muslim is not permitted to bequeath more than one-third of his/ her estate. So generally, even if he/ she makes a Will, two-third of the property would go by intestate succession. Where he/ she does not make a Will the entire property would go by intestate succession.³⁰
2. A Muslim cannot bequeath the property to a legal heir, and only to third persons.³¹
3. In the event, he/ she bequeaths more than one-third of his/ her estate or to any legal heir, consent of other heirs is mandatory to comply with the Will. If the heirs do not consent, the property must go to the heirs in the prescribed shares.

4. Such consent can be express or implied,³² and cannot be rescinded.³³
5. It is not necessary that the subject matter of the Will is in existence at the time of writing the Will, but it must be in existence at the time of death of the deceased.³⁴
6. A bequest to and unborn person is void, but a bequest may be made to a child in the womb, provided it is born within 6 months from the date of the Will.³⁵

The powers of an executor under Islamic law are similar to that under the ISA.

INTESTATE SUCCESSION

In the case of Hindus, Buddhists, Jains and Sikhs in India, intestate succession is governed by the Hindu Succession Act, 1956 (**HSA**). In the case of Muslims in India, intestate succession is governed by their personal law, which remains un-codified. Intestate succession in case of other communities, including

²⁹ Section 2, Shariat Act, 1937.

³⁰ Baillie, 625.

³¹ Baillie, 625; Ghulam Mohammad v. Ghulam Hussain AIR 1932 PC 81.

³² Faqir Mahomed Khan v. Hasan Khan (1941) 16 Luck. 93.

³³ Hedaya 671.

³⁴ Baillie, 624.

³⁵ Baillie, 624.

Parsis and Indian Christians, is governed by the provisions of the ISA.³⁶

A person is deemed to die intestate in respect of all property of which he/ she has not made a testamentary disposition which is capable of taking effect.³⁷

Therefore, intestate succession can be partial as well, for only part of the property that was not mentioned in the Will or that was mentioned to a successor who passed away with no further successors.³⁸

Hindu Law- The Hindu Succession Act, 1956

Scope

The HSA codifies the law relating to intestate succession amongst Hindus, Buddhists, Jains and Sikhs in India and also to the territories to which the HSA extends.

The Amendment Act of 2005

By the Amendment Act 2005, the daughters have been given equal rights (and obligations) in all

properties including coparcenary property in respect of a joint Hindu family governed by Mitakshara law. The legislature found the earlier law (prior to the Amendment) which excluded daughters from inheriting ancestral property as discriminatory, oppressive and a violation of their fundamental rights of equality guaranteed by the Constitution of India.³⁹

In terms of section 6 as amended by the Amendment Act 2005, a female member also becomes a coparcener and has a right in the joint family property by birth. They are also sharer members of the coparcenary property on a par with all the male members.⁴⁰ The Supreme Court has held that the rights are applicable to living daughters of living coparceners as on 9th September 2005 irrespective of when the daughter was born. However, any prior disposition or alienation (including partition) will not be affected.⁴¹

The Amendment Act 2005 also repealed the provisions regarding dwelling houses where women had limited rights of residence. The legislature stated that the said

³⁶ Objective, Indian Succession Act, 1925.

³⁷ Section 30, Indian Succession Act, 1925.

³⁸ Forks v. Cuffe (1908) 2 Chancery 500.

³⁹ Section 8, Hindu Succession Act, 1956.

⁴⁰ G. Sekar v. Geetha and Ors. (2009) 6 SCC 99.

⁴¹ Prakash and Ors. v. Phulavati and Ors (2016) 2 SCC 36.

provisions with respect to limited right in a dwelling house disentitled a female heir to seek partition in respect of such dwelling house which was wholly occupied by a joint family until the male heirs chose to divide their respective shares. Consequent to repealing the said provision, the disability of female heirs to seek partition is now removed.

However, the position of a widow not being allowed to act as Karta of the undivided family remains unaltered even after the Amendment Act of 2005. However, the widow can act as a Manager (and not Karta) of the HUF in her capacity to act as the guardian for a minor male coparcener.⁴²

The HSA does not apply to any property whose succession is regulated by the ISA under section 21 of Special Marriage Act, 1954.

Concepts

1. Heir: any person (male or female) entitled to succeed to the property of a Hindu who dies intestate.⁴³

2. Intestate: a Hindu who dies without making a testate disposition capable of taking effect in respect of a property owned by him or her.⁴⁴
3. Coparcenary property: a property that is owned by a Hindu joint family. It is divisible into ancestral property and joint family property which is not ancestral.⁴⁵
4. Joint Hindu family: It consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters, and the Hindu coparcenary. All persons acquire by birth an interest in the joint or coparcenary property. These are creatures of law and cannot be created by act of parties save in so far that by adoption a stranger may be introduced as a member thereof. It must, however, be remembered that a joint Hindu family springs from a Hindu male.⁴⁶

⁴² Shreya Vidyarthi v. Ashok Vidyarthi (2015) 16 SCC 46.

⁴³ Section 3(1)(f), Hindu Succession Act, 1956.

⁴⁴ Section 3(1)(g), Hindu Succession Act, 1956.

⁴⁵ Ram Chandra Dubey and Anr. v. Dy. Director of Consolidation and Ors. 1977 AWC 731 All.

⁴⁶ Commissioner Of Income-Tax v. M.M. Khanna 1963 49 ITR 232 Bom.

Succession of a Hindu Male

1. General rules of Succession of Hindu males dying intestate:

The property of a Hindu male who dies intestate i.e. without a testate disposition or Will, devolves in the following order of succession: Firstly, upon Class I heirs specified in the Schedule e.g.: son, daughter, widow, mother etc; Secondly, in the absence of a Class I heir, then upon the Class II heirs specified in the Schedule e.g.: father, son's daughter's son, son's daughter's daughter etc; Thirdly, in the absence of both Class I and II heirs, then upon the deceased man's agnates (persons related by blood or adoption wholly through males); Lastly, in the absence of all the aforesaid, then upon the deceased man's cognates (persons related by blood or adoption but not wholly through males).⁴⁷

The effect of the devolution under the aforesaid provision is that the person inheriting takes it as his/her separate property with all rights of

alienation and not as joint family property.⁴⁸

2. Order of Succession among heirs of Hindu male in Schedule:⁴⁹

- i. Class I heirs: these heirs take simultaneously to the exclusion of others according to the following rules:
 - a. Rule 1: widow (and all widows, if more than one) together take one share;
 - b. Rule 2: surviving sons, daughters and mother each take one share;
 - c. Rule 3: heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall between them take one share;
 - d. Rule 4: the devolution amongst the heirs under Rule 3 will be amongst them as per Rule 1 and 2 above.
- ii. Class II heirs: heirs in the first entry in Class II shall have preference over those in the second entry and so on in succession. Further, the heirs specified in a given entry in Class II shall share the property equally.

⁴⁷ Section 8, Hindu Succession Act, 1956.

⁴⁸ *Bajrang Gopilal Gajabi v. M.N. Balkundri and Ors.* AIR 1986 SC 1752.

⁴⁹ Section 9, 10 and 11, Hindu Succession Act, 1956.

- iii. Cognates and Agnates: the order of succession amongst cognates and agnates is determined by the degree of relationship (ascent or descent) with the intestate Hindu male.

Property owned by female Hindu to be her absolute property

Any property (moveable and immoveable) possessed by a female Hindu whether acquired by inheritance, devise, partition, in lieu of maintenance or arrears thereof, gift, stridhan, by her own skill, purchase, prescription or any other manner shall be owned by her as full owner of the said property.⁵⁰

However, if a female Hindu acquires any property by way of Gift, Will or any other instrument, where the terms prescribe a restricted estate in such property, then she will be a limited owner.

In *M. Shamugha Udayar v. Sivanandam*,⁵¹ it was held that this is confined to cases where the property is acquired for the first time as a grant without any pre-existing right in it. If the female had an existing interest in the

property, the property would be held by her as her absolute property.

Succession of a Hindu Female

1. General rules of Succession of Hindu females dying intestate:

The property of a Hindu female who dies intestate devolves in the following order of succession:⁵²

Firstly, upon the sons and daughters (including the children of a pre-deceased son or daughter); Secondly, upon the heirs of the husband; Thirdly, upon the mother and father; Fourthly, upon the heirs of her father; and Lastly, upon the heirs of her mother.

NOTE 1 – Notwithstanding the above order of succession, if the intestate Hindu female has inherited the property from her mother or father, then in the absence of a living son or daughter (including children of predeceased son or daughter), the property of such intestate Hindu female shall devolve upon the heirs of her father.

⁵⁰ Section 14, Hindu Succession Act, 1956.

⁵¹ AIR 1994 Mad 123.

⁵² Section 15, Hindu Succession Act, 1956.

NOTE 2 – Notwithstanding the above order of succession, if the intestate Hindu female has inherited the property from her husband or father –in-law, then in the absence of a living son or daughter (including children of predeceased son or daughter), the property of such intestate Hindu female shall devolve upon the heirs of her husband.

2. Order of Succession among heirs of a Hindu female dying intestate: The order of succession and distribution of property amongst heirs of a Hindu female dying intestate shall be according to the following rules:⁵³

- i. Rule 1: among the heirs as specified under the general rules of succession (see above), those in one entry shall be given preference to those in succeeding entry, and heirs in one entry shall take simultaneously;
- ii. Rule 2: surviving children of predeceased son or daughter will together take the share that would have belonged to

such predeceased son or daughter of the intestate;

- iii. Rule 3: devolution of property on heirs belonging to heirs of the husband;⁵⁴ heirs of her father;⁵⁵ heirs of her mother⁵⁶ shall be in accordance to the same rules as would have applied if the property had been the intestate's father's or mother's or husband's (as the case maybe) [see NOTE 1 and NOTE 2 above] and such person (father or mother or husband, as the case may be) had also died intestate immediately after the said intestate Hindu female.

Rights of child in womb

A child who was in the womb at the time of the death of an intestate and is born alive shall have the same rights to inherit as if she had been born before the death of the intestate Hindu female.⁵⁷

⁵³ Section 9, 10 and 11, Hindu Succession Act, 1956.

⁵⁴ Section 15(b), Hindu Succession Act, 1956.

⁵⁴ AIR 1994 Mad 123.

⁵⁵ Section 15(d), Hindu Succession Act, 1956.

⁵⁶ Section 15(e), Hindu Succession Act, 1956.

⁵⁷ Section 20, Hindu Succession Act, 1956.

Parsi Law- Indian Succession Act, 1925

Scope

Parsi law for partial and fully intestate succession is codified in Chapter III of Part V of the ISA titled “Special Rules for Parsi Intestates”. This is the only source of law that governs Parsi intestate inheritance.

Specific Rules

S no	Scenario	Division
1.	Where the intestate has left- <ul style="list-style-type: none">• A widow/ widower;• Children.	The widow or widower and each child receive equal shares of the property. ⁵⁸
2.	Where the intestate has left- <ul style="list-style-type: none">• Children;• No widow/ widower.	The property shall be divided among the lineal descendants in equal shares. ⁵⁹
3.	Where the intestate has left- <ul style="list-style-type: none">• A widow/ widower;• No children.	The widow or widower shall take half the said property. ⁶⁰
4.	Where the intestate has left- <ul style="list-style-type: none">• One parent;• Both parents;• Lineal descendants;• A widow or widower.	The parent or each of the parents shall receive a share equal to half the share of each child. ⁶¹
5.	Where the intestate has left- <ul style="list-style-type: none">• A widow/ widower;• Predeceased son leaving lineal descendants.	The widow/ widower and lineal descendants of the predeceased son shall be entitled equally to his/ her share of the intestate property. ⁶²
6.	Where the intestate has left- <ul style="list-style-type: none">• A widow/ widower;• Predeceased daughter leaving lineal descendants.	The share shall be divided equally among his/ her children. ⁶³
7.	Where the intestate has left- <ul style="list-style-type: none">• A widow/ widower;• Predeceased son, who has left a widow or a widower of a lineal descendant but no lineal descendant.	The widow/ widower shall be entitled to half the share of the predeceased son. Any residue shall be divided among other family members,

⁵⁸ Section 51, Indian Succession Act, 1925.

⁵⁹ Section 51, Indian Succession Act, 1925.

⁶⁰ Section 54, Indian Succession Act, 1925.

⁶¹ Section 51, Indian Succession Act, 1925.

⁶² Section 53, Indian Succession Act, 1925.

⁶³ Section 53, Indian Succession Act, 1925.

		without consideration of the predeceased son. ⁶⁴
8.	Where the intestate has left- <ul style="list-style-type: none"> • A widow or widower; • A widow or widower of any lineal descendant(s). 	The widow or widower shall receive one-third and the widow or widower of any lineal descendant(s) shall receive/ share another one-third of the property. The residue after the division shall be distributed among the relatives of the intestate. If there are no relatives entitled to the residue, the whole of the residue shall be distributed in proportion to the shares specified above. ⁶⁵
9.	Where the intestate has left- <ul style="list-style-type: none"> • A widow or widower of any lineal descendant(s); • No widow or widower. 	The widow or widower of any lineal descendant(s) shall receive/ share another one-third of the property. The residue after the division shall be distributed among the relatives of the intestate. If there are no relatives entitled to the residue, the whole of the residue shall be distributed in proportion to the shares specified above. ⁶⁶
10.	Where the intestate has left- <ul style="list-style-type: none"> • No widow or widower; • No lineal descendant(s); • No widow or widower of any lineal descendant(s). 	The next-of-kin shall receive the property. ⁶⁷

⁶⁴ Section 53, Indian Succession Act, 1925.

⁶⁵ Section 54, Indian Succession Act, 1925.

⁶⁶ Section 54, Indian Succession Act, 1925.

⁶⁷ Section 55, Indian Succession Act, 1925.

Relatives entitled to the Residue

For the purpose of above, relatives entitled to the residue include the following relations:

1. Father and mother;
2. Brothers and sisters (other than half brothers and sisters) and lineal descendants of such of them as shall have predeceased the intestate;
3. Paternal and maternal grandparents;
4. Children of paternal and maternal grandparents and the lineal descendants of such of them as have predeceased the intestate;
5. Paternal and maternal grandparents' parents;
6. Paternal and maternal grandparents' parents' children and the lineal descendants of such of them as have predeceased the intestate.⁶⁸

Next of Kin

For the purpose of above, the next of kin include the following relations:

1. Father and mother;
2. Brothers and sisters (other than half brothers and sisters) lineal descendants of such of them as shall have predeceased the intestate;
3. Paternal and maternal grandparents;
4. Children of paternal and maternal grandparents and the lineal descendants of such of them as have predeceased the intestate;
5. Paternal and maternal grandparents' parents;
6. Paternal and maternal grandparents' parents' children and the lineal descendants of such of them as have predeceased the intestate;
7. Half brothers and sisters and the lineal descendants of such of them as have predeceased the intestate;

⁶⁸ Schedule 2, Indian Succession Act, 1925.

8. Widows of brothers or half-brothers and widowers of sisters or half-sisters;
9. Paternal or maternal grandparents' children's widows or widowers;
10. Widows or widowers of deceased lineal descendants of the intestate who have not married again before death of the intestate.⁶⁹

General Rules

1. There is no distinction between those who were actually born in the lifetime of a person deceased and those who at the date of his/ her death were only conceived in the womb, but who have been subsequently born alive.
2. A lineal descendant of an intestate who has died in the lifetime of the intestate without leaving the following:
 - i. a widow or widower
 - ii. any lineal descendant
 - iii. a widow or widower of any lineal descendant

shall not be taken into account in the division of the property.

3. Where a widow or widower of any relative of an intestate has married again in the lifetime of the intestate, such widow or widower shall not be entitled to receive any share of the property of which the intestate.⁷⁰

Christian Law- Indian Succession Act, 1925

Scope

The inheritance law applicable to a person, who dies as a Christian, is contained in Part V of the ISA.⁷¹ The ISA is applicable, unless expressly excluded by any other enactment. This does not include any customary or other law relating to intestate succession.⁷² The same principle applies not only to intestate succession under S. 29(2) but also to testate succession under S. 58(2) of the ISA.⁷³

⁶⁹ Schedule 2, Indian Succession Act, 1925.

⁷⁰ Section 50, Indian Succession Act, 1925.

⁷¹ Mary Roy and Ors. v. State of Kerala and Ors. AIR 1986 SC 1011; Re: Rt. Rev. Casmir Gnanadickam Archbishop of Madras (1998) 3 MLJ 501.

⁷² Solomon and Ors. v. Muthiah and Ors. (1974) 1 MLJ 53.

⁷³ Msgr. Xavier Chullickal v. Raphael 2017 (3) KLJ 167; Taluk Land Board v. Cyriac Thomas (2002) 8 SCC 29.

Rules of Intestate Succession

S no	Scenario	Division
1.	Where the intestate has left- <ul style="list-style-type: none"> • A widow/ widower; • Any lineal descendants (children or grandchildren). 	One-thirds of his/ her property shall belong to the widow/ widower, and the remaining two-thirds shall go to his/ her lineal descendants. ⁷⁴
2.	Where the intestate has left- <ul style="list-style-type: none"> • Any lineal descendants (children or grandchildren); • Persons who are of kindred to the intestate. 	The property shall be divided per stripes among all lineal descendants. ⁷⁵ The rights of the lineal descendants exclude any right of a kindred to the property.
3.	Where the intestate has left- <ul style="list-style-type: none"> • A widow/ widower; • Persons who are of kindred to the intestate. 	One-half of his/ her property shall belong to the widow/ widower, and the other half shall go to those who are kindred to the intestate. ⁷⁶
4.	Where the intestate has left- <ul style="list-style-type: none"> • Only a widow/ widower; • No persons who are of kindred to the intestate; • No lineal descendant. 	The whole of his/ her property shall belong to the widow/ widower. ⁷⁷
5.	Where the intestate has left- <ul style="list-style-type: none"> • Any lineal descendants (children or grandchildren); • No widow/ widower. 	The property shall be divided per stripes among all lineal descendants. ⁷⁸
6.	Where the intestate has left- <ul style="list-style-type: none"> • Only persons who are of kindred to the intestate; • No lineal descendant; 	The kindred will get the whole of the property. ⁷⁹

⁷⁴ Section 33, Indian Succession Act, 1925.

⁷⁵ Section 41, Indian Succession Act, 1925.

⁷⁶ Section 33, Indian Succession Act, 1925.

⁷⁷ Section 33, Indian Succession Act, 1925.

⁷⁸ Section 36, 37, 38, 39, Indian Succession Act, 1925.

⁷⁹ Section 41, Indian Succession Act, 1925.

	<ul style="list-style-type: none"> • No widow/ widower; 	
7.	Where the intestate has left- <ul style="list-style-type: none"> • No kindred; • No lineal descendants; • No widow/ widower. 	The property shall go to the government. ⁸⁰

Per Stripe division among lineal descendants

This type of division means that an estate of a deceased is distributed equally in each generation of the family. For instance, if A dies, leaving three children (L, M, N) and M dies leaving two children (W, X),

- L and N will receive 1/3rd of A's estate;
- W and X will each receive half of M's 1/3rd share in A's estate.⁸¹

Division of Property among kindred

It is important to note that this interest shall only come into existence-

1. if there exist no lineal descendants;
2. following the widow/ widower receiving her half share in the property.

⁸⁰ Section 34, Indian Succession Act, 1925.

⁸¹ Section 36, Indian Succession Act, 1925.

S no	Kindred	Division
1.	Where intestate's father is living.	If the intestate's father is living, he/ she shall succeed to the property. ⁸² The father must have passed away for any other kindred to inherit an interest in the property. ⁸³
2.	Where intestate's father is dead, but his/ her mother, brothers and sisters living.	The mother and each living brother or sister shall succeed to the property in equal shares. ⁸⁴
3.	Where intestate's father is dead and his/ her mother, a brother or sister, and children of any deceased brother or sister living.	The mother, each living sibling and the children of the dead sibling are entitled to the property in equal shares. Such children shall only be entitled to the shares which their respective parents would have taken if living at the intestate's death. ⁸⁵
4.	Where only intestate's mother is living.	The property shall belong to the mother. ⁸⁶
5.	Where intestate has left only children of dead siblings.	Such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death. ⁸⁷
6.	If the intestate has none of the above living.	The property shall be divided equally among those of his/ her relatives who are in the nearest degree of kindred to the intestate. These include great

⁸² Section 42, Indian Succession Act, 1925.

⁸³ Section 42, Indian Succession Act, 1925.

⁸⁴ Section 43, Indian Succession Act, 1925.

⁸⁵ Section 44 and 45, Indian Succession Act, 1925.

⁸⁶ Section 46, Indian Succession Act, 1925.

⁸⁷ Section 47, Indian Succession Act, 1925.

		<p>grandparents or great grandchildren and children of brother and sister.</p> <p>However, the representation cannot go on to brother's grandson.⁸⁸</p>
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⁸⁸ Section 48, Indian Succession Act, 1925.

Special Case Scenarios

1. An adopted child has no right to inheritance under Christian intestate succession laws.⁸⁹
2. If an Order under the Indian Divorce Act, 1969 is passed for Judicial Separation, a wife is considered unmarried to the deceased (or the widower, as the case may be).
3. A posthumous child has the same right as if it was born at the date of the intestate.⁹⁰
4. An illegitimate child is not entitled to inheritance unless legitimised by a subsequent marriage or recognition.⁹¹
5. The religion of the Claimant for the application of the law is immaterial. What is relevant is only the religion of the deceased intestate (that he/she must be a Christian). Therefore, when the only living kindred of a Christian woman was a Hindu father, intestate succession happened in accordance with the ISA.⁹²

6. A step mother is not a kindred to the estate.⁹³

Islamic Law- General Principles

Scope

The intestate law of succession is derived from four sources i.e. the Holy Quran, *Sunna* (practice of prophet), *Ijma* (Consensus of the learned men of the community) and *Qiya* (deductions based on analogy on what is right and just).

This is, however, subject to Indian legislations. For instance, one of the rules was that a Muslim renouncing the Islamic religion is to be excluded from inheritance. However, this rule was abolished by the Freedom of Religion Act XXI of 1850.⁹⁴

The Quranic heirs consist of (a) heirs by affinity: wife, husband, and (b) heirs by blood relations: father, true grandfather, mother, true grandmother, daughter, son's daughter, full sister, consanguine sister, uterine brother, uterine sister.⁹⁵

⁸⁹ Ajit Datt v. Ethel Walters AIR 2001 All 109; Rabi v. Jasn Leela (2003) 3 Mad LW 409.

⁹⁰ Illustration (iv) of section 40, Indian Succession Act, 1925.

⁹¹ Arokyathammal v. Mookayee AIR 1959 Mad. 180.

⁹² Thevan v. Matherkuthy AIR 1990 NOC 47 (Ker).

⁹³ Rutland v. Rutland 2 PWms 216.

⁹⁴ Mulla's Principles of Mahomedan law, 22nd edition, Lexis Nexis (2017).

⁹⁵ Asaf A.A. Fyzee, Outlines of Mahommedan Law, 4th edition, Oxford University Press, New Delhi (1974).

The Hanafi school recognises only those relatives of a female as heirs whose relation to the deceased is through a male. This includes son's daughter, son's son and father's mother. Recognized sharers include uterine children, who share the same mother but different fathers, with respect to the mother's property. The Shia school, on the other hand, also accepts heirs who are related to the deceased through a female.

Heritable Moveable and Immoveable Property

There is no distinction in the Islamic law between moveable and immoveable property. What is left after the payment of funeral expenses and the discharge of his/ her debts and obligations is to be distributed according to the law of inheritance.

Muslim Joint family

There is also no distinction between ancestral and self-acquired property. This means that the law does not recognize the concept of a joint Muslim family, unlike in Hindu law.⁹⁶ There is also no presumption that members of a Muslim family that

resides together or carries on a business together and acquires property, the acquired property is for the benefit of the joint family, unlike in Hindu law.⁹⁷

However, if the custom of the family establishing joint holding is proved, it will be given effect. Therefore, in such a case, the liability to prove singular ownership will be on the person claiming the same.⁹⁸

Recognized Relations in Islamic Law

Important relations in Islamic Law include:

Sunni law:

- i. Parents (Father, Mother);
- ii. Spouse (Husband, Wife);
- iii. Children (Son; Daughter);
- iv. Siblings (Full Brother/ Sister; Consanguine Brother/ Sister; Uterine Brother/ Sister)
- v. Grandchildren or True Grandparents, however high/ low.

True and False grandparents: True grandparents are those between whom no female intervenes, such as father's parents, father's father's parents etc.

⁹⁶ Sahul Hamid v. Sulthan AIR 1947 Mad 287.

⁹⁷ Sahul Hamid v. Sultan AIR 1947 Mad. 287.

⁹⁸ Mohammed Ibrahim v. Syed Muhammad Abbubakkar AIR 1976 Mad. 84.

False grandparents are those between whom there exists a female relation, such as mother's parents, mother's father's parents, mother's mother's parents, father's mother's parents etc.

Shia law:

The heirs are divided into:

- consanguine heirs (blood relations) and
- heirs by marriage (husband or wife).

The main difference between Sunni and Shia law is the equal relevance of relatives through a woman, such as false grandparents.

Therefore, the consanguine relations are divided into three classes:

I.

- i. Parents.
- ii. Children and other lineal descendants.

II.

- i. Grandparents (True and False- there is no distinction).
- ii. Brothers and sisters and their descendants.

III.

- i. Paternal uncles and aunts of the deceased and of his/ her parents and grandparents and their descendants.
- ii. Maternal uncles and aunts of the deceased and of his/ her parents and grandparents and their descendants.

Of these three classes of heirs, the rule of thumb is (I) excludes (II) and (II) excludes (III). However (i) and (ii) of each class succeed together.

Heirs

In Sunni law the heirs are divided into three groups:

1. Sharers (*Ashabul faraiẓ*): This class of sharers have a Quranic right to their share in the intestate property.
2. Residuaries (*Asabah*): Following sharers' property division, the remaining property is divided among this class of relations.
3. Distant Kindred (*Dhauil-arham*): In the absence of the above (with the exception of spouses and sole female sharers or residuaries), this class of relations are entitled to the property. However, if

there does exist any male in the above classes, these relations would not be entitled to any property.

In Shia law, for the purpose of determination of shares of heirs, there exists two classes, sharers and residuaries. There is no separate class of heirs referred to as “distant kindred”.

General Principles of Islamic Succession of estate of Muslim women

1. Principle of Double Share for Males: The general rule for succession is that succession is to happen for male and female relations of the same level in 2:1 ratio, meaning that for every $\frac{2}{3}$ rd share of a male, a female of the same relation to the deceased will receive $\frac{1}{3}$ rd the amount of property.
2. Principle of Exclusion: In Sunni law, the nearer relation excludes the more remote. Therefore, a father will succeed in the place of a grandfather, a son will succeed in the place of a grandchild and so on and so forth. This has been embodied in the

three classes of relatives in Shia law, as explained above.

3. Principle of Representation: The right of an heir apparent will come into existence for the first time on the death of an ancestor. Therefore, no one is entitled to any interest in the property until such time of death. Therefore, this expectant right cannot be transferred by succession⁹⁹ or otherwise,¹⁰⁰ or renounced.¹⁰¹ However, in Shia law, for the limited purpose of calculating shares of heirs, the principle of representation is allowed.¹⁰²
4. Principle of Vested Interest: If a sharer dies before distribution of the property of the deceased, then the successor will have a vested interest in his/ her share under both Sunni and Shia law.¹⁰³
5. Succession in case of Homicide: Under the Sunni law, a person who has caused the death of another, whether intentionally or accidentally, is barred from succession to the

⁹⁹ Abdul Wahid v. Nurad Bibi (1885) 11 Cal 597.

¹⁰⁰ Sulaiman Sahib v. Khader Ibrahim (1952) 2 Mad. L.J. 104.

¹⁰¹ Banoo Begum v. Mir Abed Ali (1908) 32 Bom. 172.

¹⁰² Section 93, Mulla's Principles of Mahomedan law, Lexis Nexis (2017).

¹⁰³ Section 56 Mulla's Principles of Mahomedan law, Lexis Nexis (2017).

deceased's property. Homicide is not a bar under Shia law.¹⁰⁴

6. Principle of Return: If there is a residue left after satisfying claim of sharers, but no one else entitled to the property, it is re-divided among the sharers in proportion to their shares, except in certain cases. This is applicable to the husband and wife as well, if there exists no other heir.¹⁰⁵
7. Principle of Increase: If upon assigning of shares to the sharers, it is found that the total exceeds unity, each share of the sharer is proportionally diminished or increased by bringing in a common denominator.

A woman's right in succession

1. A wife is entitled to $1/8^{\text{th}}$ the share of the husband's property when there are children from the marriage and $1/4^{\text{th}}$ the share in case of no children, as a sharer.
2. A mother is entitled to $1/6^{\text{th}}$ the share of a child's property if the deceased has children or siblings. In case there exists no such children or siblings, the mother is entitled to $1/3^{\text{rd}}$ the property. In case there exists a wife, the mother gets $1/3^{\text{rd}}$ the property following deduction of the wife's share.
3. A true grandmother is entitled $1/6^{\text{th}}$ the share if there is no mother/ nearer relative.
4. A daughter, if there exists no son, is entitled to half the share of property as a sharer. However, if there are more than two daughters, the share becomes $2/3^{\text{rd}}$. If there exists a son, the daughter takes half the portion of the son, inheriting as a residuary.
5. A granddaughter, if by a son, is entitled to half the property's share if she is the sole grandchild, $2/3^{\text{rd}}$ the property's share, if she has female siblings, $1/6^{\text{th}}$ the property share, if her father has a sister (as a sharer) and half her brother's share, if she has a brother (as a residuary).
6. A sister, whether full or consanguine, will be entitled to half the property's share if

¹⁰⁴ Section 58 Mulla's Principles of Mahomedan law, Lexis Nexis (2017).

¹⁰⁵ Abdul Hamid Khan v. Peare Mirze (1935) 10 Luck. 550.

she is the only sibling or $2/3^{\text{rd}}$ if she has other female siblings. In the event of a male sibling, she will be entitled to half the male sibling's share, as a residuary. If she is a uterine sister, she will be entitled to $1/6^{\text{th}}$ of the property share if she is the only uterine sibling or $1/3^{\text{rd}}$ the share is there are two or more siblings, when there is no children, grandchildren, father or true grandfather.

7. An aunt, if on the paternal side will be entitled to $2/3^{\text{rd}}$ the share of the property of the deceased, along with all paternal uncles and aunts (to be divided equally among aunts and half the value of the property of the uncle). The remaining $1/3^{\text{rd}}$ goes to the maternal side aunts and uncles. If there are no relatives on the paternal/ maternal side, the other side will be entitled to the whole.

Challenge to Succession laws

Inheritance under Islamic law is challenged in Delhi High Court in Sahara Kalyan Samiti and Anr v. Union of India. The grounds are that there is a violation of the fundamental right to equality enshrined under Articles 14, 19, 21 of the Constitution of India. This is since women under the present Islamic law in force are, by the mere factum of their being women in the nature of a wife or a daughter, are only entitled to half of the share of their male counterparts.¹⁰⁶

¹⁰⁶ Sahara Kalyan Samiti and Anr v. Union of India WP(C)1892/2017.

WOMEN AND ADOPTION

Adoption is permitted under two legislations: the Hindu Adoption and Maintenance Act, 1956 (**HA&M Act**) applicable to Hindus, Buddhists, Jains or Sikhs and the Juvenile Justice (Care and Protection) Act, 2015 (**JJ Act**) applicable to all Indian citizens, irrespective of religion.

Prior to JJ Act, Muslims, Christians and Parsis, had to approach court under the Guardians and Wards Act, 1890 to become guardians to minors. Under the JJ Act, the relationship confers a status of parent and child and not guardian and ward. This includes rights such as those under intestate succession.

Adoption

Adoption is the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.¹⁰⁷

¹⁰⁷ Section 2(2), Juvenile Justice (Care and Protection of Children) Act, 2015.

Hindu Adoptions and Maintenance Act, 1956

The HA&M Act was enacted to deal with the legal process of adopting children by a Hindu adult and the legal obligations of a Hindu to provide 'maintenance' to various family members including their wife or wives, parents, and in-laws.

Scope

The HA&M Act codifies the law relating to adoptions and maintenance amongst Hindus, Buddhists, Jains and Sikhs in India. The HA&M Act gives equal rights to male and female Hindus to adopt.

Requisites of a valid Adoption

No adoption shall be valid unless:

1. the person adopting has the capacity and right to take in adoption;
2. the person giving in adoption has the capacity to do so;
3. the adopted person is capable of being taken in adoption and

4. the adoption is in compliance with provisions of the HA&M Act.¹⁰⁸

For instance, the law does not recognise an adoption by a Hindu of a person other than a Hindu.¹⁰⁹

Capacity of a Hindu to take in adoption

The capacity for any Hindu to adopt is that he/ she must of sound mind and not a minor. If the Hindu adopting has a living spouse, then adoption must be with the spouse's consent unless she/ he has ceased to be a Hindu, has renounced the world or has is of unsound mind.¹¹⁰

Determination of adoptive mother

Where a male Hindu who has a living wife adopts, then the wife shall be the adoptive mother.

Conditions for valid adoption by a female Hindu

If the adoption is by a female Hindu and the person to be adopted is a male, the adoptive

mother should be at least 21 years older than the person to be adopted.¹¹¹ Further, in case of adoption of a male, the adoptive mother or father should not have a Hindu son or son's son or son's son's son alive at the time of adoption. In case of adoption of a female, the adoptive mother or father should not have a Hindu daughter or son's daughter alive at the time of adoption.

Juvenile Justice (Care and Protection of Children) Act, 2015

Scope

The provisions of JJ Act shall apply to all matters concerning children in need of care and protection including adoption. The JJ Act governs both intra and inter country adoption.¹¹² This law allows adoption of children, irrespective of religion.¹¹³

¹⁰⁸ Section 6, Hindu Adoptions and Maintenance Act, 1956.

¹⁰⁹ Kumar Sursen vs. State of Bihar and Ors AIR 2008 Pat 24.

¹¹⁰ Section 7 and 8, Hindu Adoptions and Maintenance Act, 1956.

¹¹¹ Section 11, Hindu Adoptions and Maintenance Act, 1956.

¹¹² Objective, Juvenile Justice (Care and Protection of Children) Act, 2015.

¹¹³ Section 56, Juvenile Justice (Care and Protection of Children) Act, 2015.

Authorities under the Act

For this purpose, a Child Welfare Committee¹¹⁴ and Central Adoption Resource Authority (**CARA**), under the Ministry of Women & Child Development, Government of India are set up.¹¹⁵ CARA monitors the adoption process basis the guidelines laid out by the Supreme Court of India in a landmark case of *Laxmikant Pandey v. Union of India*¹¹⁶

An Indian prospective parent can make an application at their State's Adoption Coordination Agency appointed and certified by CARA in every state.¹¹⁷ CARA also recognizes foreign adoption agencies for sponsoring foreign adoption applications.¹¹⁸

Effect of Adoption

Adoption shall be resorted to for ensuring right to family for the orphan, abandoned and surrendered children.

A child in respect of whom an adoption order is issued by the court, shall become the child of the adoptive parents. The

adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, for all purposes, including intestacy, with effect from the date on which the adoption order takes effect. From this date, all the ties of the child in the family of his or her birth shall stand severed and replaced by those created by the adoption order in the adoptive family.¹¹⁹

Fundamental principles governing adoption

The following fundamental principles shall govern adoptions of children from India:

1. The child's best interests shall be of paramount consideration;
2. Preference shall be given to place the child in adoption with Indian citizens and with due regard to the principle of placement of the child in his own socio-cultural environment, as far as possible;

¹¹⁴ Section 27, Juvenile Justice (Care and Protection of Children) Act, 2015.

¹¹⁵ Section 68, Juvenile Justice (Care and Protection of Children) Act, 2015.

¹¹⁶ (1984) 2 SCC 244.

¹¹⁷ Section 67, Juvenile Justice (Care and Protection of Children) Act, 2015.

¹¹⁸ Section 59, Juvenile Justice (Care and Protection of Children) Act, 2015.

¹¹⁹ Section 63, Juvenile Justice (Care and Protection of Children) Act, 2015.

3. All adoptions shall be registered on Child Adoption Resource Information and Guidance System and the confidentiality of the same shall be maintained by the CARA.¹²⁰

Children eligible for adoption

The following shall be eligible for adoption, namely:

1. Any orphan or abandoned or surrendered child, declared legally free for adoption by the Child Welfare Committee;
2. A child of a paternal/maternal uncle or aunt, or paternal/maternal grandparent;
3. Child of spouse from earlier marriage, surrendered by the biological parent(s).¹²¹

Abandoned child, Orphaned child and Surrendered child

An abandoned child is a child deserted by his biological or adoptive parents or guardians, who has been declared as

abandoned by the Child Welfare Committee after due inquiry.¹²²

An orphan is a child who is without biological or adoptive parents or legal guardian or whose legal guardian is not willing to take, or capable of taking care of the child.¹²³

A surrendered child is a child, who is relinquished by the parent or guardian to the Committee, on account of physical, emotional and social factors beyond their control, and declared as such by the Committee.

Children competent for inter country adoption

If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent within sixty days from the date the child has been declared legally free for adoption, such child shall be free for inter-country adoption.

Children with physical and mental disability, siblings and children above five years of age may be given preference over other

¹²⁰ Adoption Regulations, 2017.

¹²¹ Adoption Regulations, 2017.

¹²² Section 2(1), Juvenile Justice (Care and Protection of Children) Act, 2015.

¹²³ Section 2(42), Juvenile Justice (Care and Protection of Children) Act, 2015.

children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by CARA.¹²⁴

Eligibility of prospective adoptive parents

1. The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.
2. In case of a couple, the consent of both the spouses for the adoption shall be required.
3. A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by CARA.
4. A single male is not eligible to adopt a girl child.¹²⁵

Procedure for adoption by Indian prospective adoptive parents living in India

1. Indian prospective adoptive parents living in India, irrespective of their religion, may apply for the same to a Specialised Adoption Agency.
2. The Specialised Adoption Agency will prepare the home study report of the prospective adoptive parents
3. Upon finding them eligible, a child declared legally free for adoption will be referred to them, along with the child study report and medical report of the child.
4. On the receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order.
5. On the receipt of a certified copy of the court order, the

¹²⁴ Section 59, Juvenile Justice (Care and Protection of Children) Act, 2015.

¹²⁵ Section 57, Juvenile Justice (Care and Protection of Children) Act, 2015.

Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents.

6. The progress and wellbeing of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by CARA.¹²⁶

Procedure for inter-country adoption of an orphan or abandoned or surrendered child

1. The prospective parents may be a non-resident Indian, overseas citizen of India, person of Indian origin or a foreigner.
2. An eligible non-resident Indian, overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.
3. The prospective adoptive parents living abroad, irrespective of their religion, if

interested to adopt, may apply for the same to an authorised foreign adoption agency, CARA or a concerned Government department in their country of habitual residence.

4. A home study report of such prospective adoptive parents shall be prepared.
5. On the receipt of the application, CARA will examine and if it finds the applicants suitable, a child will be matched.
6. A child study report and medical report of the child to such parents, who may accept such child.
7. On receipt of the acceptance, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order.
8. On the receipt of a certified copy of the court order, the specialised adoption agency shall obtain a passport for the child.

¹²⁶ Section 58, Juvenile Justice (Care and Protection of Children) Act, 2015.

9. The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.
10. Progress reports about the child in the adoptive family will have to be submitted with CARA.¹²⁷

Overseas adoption by a person with habitual residence in India

A foreigner, a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if interested to adopt a child from India, may apply to CARA for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by CARA.¹²⁸

Procedure for inter-country relative adoption

1. A relative living abroad, who intends to adopt a child from his relative in India must obtain an order from the court and apply for no objection certificate from CARA.
2. CARA will issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child on receipt of the order and the application from either the biological parents or from the adoptive parents.
3. The adoptive parents will then receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time.¹²⁹

¹²⁷ Section 59, Juvenile Justice (Care and Protection of Children) Act, 2015.

¹²⁸ Section 59, Juvenile Justice (Care and Protection of Children) Act, 2015.

¹²⁹ Section 60, Juvenile Justice (Care and Protection of Children) Act, 2015.

Court Procedure

Before issuing an adoption order, the court shall satisfy itself the following:

1. The adoption is for the welfare of the child;
2. Due consideration is given to the wishes of the child having regard to the age and understanding of the child;
3. That there is no payment or reward in consideration of the adoption, except the fees or service charge or child care corpus.

The adoption proceedings will be in camera and disposed off within a period of two months.¹³⁰

Guardians and Wards Act, 1890

Personal laws of Muslim, Christian, Parsis and Jews do not recognise adoption. Prior to the JJ Act, 2000, if a person belonging to such religion had a desire to adopt a child, he could take the guardianship of such child under the Guardians and Wards Act, 1890 (**GW Act**).

The GW Act only makes a child a ward, not an adoptive child. According to the GW Act, the moment a child turns to the age of 21, he is no longer considered as a ward and treated as individual identity.

Scope

A guardian is a person having the care of the person of a minor or of his property or of both his person and property.¹³¹ A ward is a minor for whose person or property or both there is a guardian.¹³²

Appointment of Guardian

A guardian may be appointed

1. By a Court appointing or declaring a person as a guardian;
2. By will or other instrument.¹³³

The Application may be made to the District Court having jurisdiction in the place where the minor ordinarily resides.¹³⁴

¹³⁰ Section 61, Juvenile Justice (Care and Protection of Children) Act, 2015.

¹³¹ Section 4(2), Guardians and Wards Act, 1890.

¹³² Section 4(3), Guardians and Wards Act, 1890.

¹³³ Section 7, Guardians and Wards Act, 1890.

¹³⁴ Section 9, Guardians and Wards Act, 1890.

Application to Court for Appointment of a Guardian

An Application can be made by the following people:

1. The person desirous of being, or claiming to be, the guardian of the minor;
2. Any relative or friend of the minor;
3. The Collector of the district or other local area within which the minor ordinarily resides or in which he has property;
4. The Collector having authority with respect to the class to which the minor belongs.¹³⁵

A Court will not appoint or declare a guardian to the following person-

1. a minor who is a married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person;

2. a minor, other than a married female, 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.¹³⁶

Procedure following Application for appointment of Guardian

Following Application, the Courts will provide notice to the parents of the minor or the person having custody/possession.¹³⁷ Following this, there will be a hearing¹³⁸ and consideration of evidence.¹³⁹ An interlocutory order may be made for production of minor and interim protection of person and property.¹⁴⁰ Finally the Court will decide as to whether a guardian will be appointed, considering the minor's welfare.¹⁴¹

Duties of Guardian

The relationship between a guardian and a ward is a fiduciary relationship. This means that a guardian must not make any profit out of his office.¹⁴² A

¹³⁵ Section 8, Guardians and Wards Act, 1890.

¹³⁶ Section 19, Guardians and Wards Act, 1890.

¹³⁷ Section 11, Guardians and Wards Act, 1890.

¹³⁸ Section 11, Guardians and Wards Act, 1890.

¹³⁹ Section 13, Guardians and Wards Act, 1890.

¹⁴⁰ Section 12, Guardians and Wards Act, 1890.

¹⁴¹ Section 17, Guardians and Wards Act, 1890.

¹⁴² Section 20, Guardians and Wards Act, 1890.

guardian of the person of a ward is charged with the custody of the ward must look to his support, health and education, and other such matters.¹⁴³

A guardian of the property of a ward is bound to deal therewith as carefully as if it were his own and may do all acts which are reasonable and proper for the realization, protection or benefit of the property.¹⁴⁴

Removal of Guardian

The Court may, on the application of any person interested, or of its own motion, remove a guardian appointed for any of the following causes:

1. For abuse of his trust.
2. For continued failure to perform the duties of his trust;
3. For incapacity to perform the duties of his trust;
4. For ill-treatment, or neglect to take proper care, of his ward;
5. For contumacious disregard of any provision of the GW

Act or of any order of the Court;

6. For conviction of an offence implying, in the opinion of the Court, a defect of character which unfits him to be guardian of his ward;
7. For having an interest adverse to the faithful performance of his duties;
8. For ceasing to reside within the local limits of the jurisdiction of the Court;
9. In the case of a guardian of the property, of bankruptcy or insolvency;
10. By reason of the guardianship of the guardian ceasing.

Cessation of duties and powers of a Guardian

The duties and powers of a guardian of the person cease-

1. By his death, removal or discharge;

¹⁴³ Section 24, Guardians and Wards Act, 1890.

¹⁴⁴ Section 27, Guardians and Wards Act, 1890.

2. By the Court of Wards assuming superintendence of the person of the ward;
3. By the ward ceasing to be a minor;
4. In the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person;
5. In the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.¹⁴⁵

Personal laws v. Adoption laws

The Supreme Court in *Shabnam Hashmi vs the Union Of India*¹⁴⁶ held that prospective parents irrespective of their religious background are free to adopt children, since personal beliefs and faiths must be honoured but cannot dictate the operation of the provisions of an enabling statute (JJ Act).

Since the Muslim Shariat Law did not recognise an adopted child to be on par with a biological child, The petitioner, Ms. Shabnam Hashmi was allowed only guardianship rights over a young girl she had brought home from an adoption home.

To this, it was held that the legislature, which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue, has passed the JJ Act, which must therefore take precedence.

A reliance was placed on similar holdings in *Re: Manuel Theodore D'Souza*¹⁴⁷ and *Philips Alfred Malvin Vs. Y.J.Gonsalvis & Ors.*¹⁴⁸ where in the right to adopt was recognized.

Therefore, the right to adopt a child by a person as per the provisions of the JJ Act would prevail over all personal laws and religious codes in the country.

¹⁴⁵ Section 41, Guardians and Wards Act, 1890.

¹⁴⁶ (2014) 4 SCC 1

¹⁴⁷ (2000) 3 BomCR 244.

¹⁴⁸ AIR 1999 Kerala 187.