UNIVERSITEIT ◆ VAN TILBURG

Onderzoek naar de internationaal privaatrechtelijke

implicaties van adopties uit India, waarbij mogelijk

sprake is van misstanden in de procedure

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1. Onderzoeksopdracht

Probleemstelling en achtergrond

In de periode van 1995 tot en met 2002 hebben vanuit India adopties plaatsgevonden waarvan wordt vermoed dat deze gebaseerd zijn op valselijk opgemaakte documenten, zoals afstandsverklaringen, geboorteaangiftes etc. Niet duidelijk is wat de juridische gevolgen zijn van de in Nederland op basis van deze mogelijk onjuiste documenten uitgesproken adopties.

Eind mei 2007 verschenen er in de media berichten over adopties uit India in de jaren 1995 tot en met 2002 die zouden zijn gebaseerd op valselijk opgemaakte afstandsverklaringen. Het zou gaan om ontvoerde kinderen die vervolgens via al dan niet vals opgemaakte documenten voor voogdijoverdracht met het oog op adoptie werden aangeboden aan wensouders. Dergelijke voogdijoverdrachten van kinderen zouden ook hebben plaatsgevonden aan Nederlandse echtparen, waarna de adoptie in Nederland werd uitgesproken.

De vraag die beantwoord dient te worden is of de adoptie door Nederlandse echtparen, die op deze manier een kind uit India hebben geadopteerd, rechtsgeldig is en zo nee, wat de gevolgen zouden zijn van een eventuele vernietiging van de Nederlandse adoptieuitspraak. Wat gebeurt er bijvoorbeeld als een inmiddels in Nederland geadopteerde 18-jarige in India naar de rechter stapt en om herroeping van de adoptie vraagt?

Doel van onderzoek

Inzicht krijgen in de juridische implicaties voor Nederlandse adoptiefouders indien blijkt dat hun kind is ontvoerd, als de adoptie is gebaseerd op een valse afstandsverklaring of als er anderszins juridische fouten in de procedure zijn gemaakt.

In het onderzoek moeten in elk geval de volgende vragen worden beantwoord:

-welk recht is van toepassing op in Nederland uitgesproken buitenlandse
adopties?

-welke rechter is bevoegd?

-wat zijn de gevolgen voor in Nederland gelegaliseerde adopties indien het
Nederlands recht van toepassing is?

-wat zijn de gevolgen voor in Nederland gelegaliseerde adopties indien het
Indiase recht van toepassing is?

2. Wijze van onderzoek en opbouw advies

Het onderzoek is door mij uitgevoerd door middel van het raadplegen van de relevante literatuur, het leggen van contacten met diverse leden (adoptiedeskundigen) van de ISFL[2] binnen en buiten India en door contacten met IPR-deskundigen in Nederland (Mr. L.Th.L.G. Pellis, Mr. G.E. Schmidt, Mr. A.P.M.J. Vonken).

In het navolgende ga ik eerst kort in op de achterliggende problematiek van (il)legale adoptie, vervolgens beschrijf ik de belangrijke rechtsgevolgen van de adoptie naar Nederlands en internationaal recht. Daarbij speelt ook mee het vinden van een antwoord op de vraag in hoeverre het Haags Adoptieverdrag en andere regels van Internationaal Privaatrecht een oplossing bieden voor dergelijke problemen van niet rechtsgeldig tot stand gekomen adopties en of er voorbeelden van rechterlijke beslissingen terzake zijn in andere landen. Tot slot zal ook in het onderzoek worden betrokken welke rol het VN-Verdrag voor de rechten van het kind (IVRK) zou kunnen spelen bij de oplossing van de onderhavige probleemstelling.

3. Achtergrond

De adoptie in het Nederlandse interne recht is een sinds 1956 bestaand juridisch instrument om het kind van een andere ouder bij nieuwe ouders onder te brengen en daaraan de meest vergaande gevolgen te verbinden, namelijk het doorknippen van bestaande familierechtelijke relaties met die ouders en hun familie en het vestigen van familierechtelijke betrekkingen met de nieuwe ouders en hun bloed- en aanverwanten. Zowel het Haags Adoptieverdrag als de Wet conflictenrecht adoptie houden rekening met het bestaan, in het interne recht van een aantal landen, van zwakke vormen van adoptie.

[2] International Society of Family Law (http://www.law2.byu.edu/isfl/index.php).

De zwakke adoptie (met gedeeltelijke instandhouding van de familierechtelijke relatie van het kind met zijn biologische ouders) kan overigens in beginsel in een sterke adoptie (het vestigen van een familierechtelijke relatie van het kind met zijn adoptiefouders en het doorknippen van de familierechtelijke relatie met zijn biologische ouders) worden omgezet. Om dit vergaande rechtsgevolg te verkrijgen moeten de regels van de procedure voor (interlandelijke) adoptie doorlopen worden.

Eind mei 2007 zijn er in de media berichten verschenen over adopties uit India in de jaren 1995 tot en met 2002 die zouden zijn gebaseerd op valselijk opgemaakte afstandsverklaringen. De signalen van illegale adopties beperken zich niet tot Nederland.
Zo vernam ik van een collega (Frau Mag. Martina Staffe) van het Oostenrijkse Bundesministerium für soziale Sicherheit und Generationen dat aldaar een geval speelt van een Ethiopisch meisje, dat ontdekte dat het vroeger heel anders werd genoemd dan in de dossiers staat aangegeven en waarvan nu vaststaat dat het via kinderroof in een adoptieprocedure terecht is gekomen. Het meisje is getraumatiseerd, stelt zich als donker kind in een blank gezin de situatie in Ethiopië veel rooskleuriger voor dan de werkelijkheid waarschijnlijk is en wil zo snel mogelijk terug naar haar ouders, voor zover die te vinden zouden zijn. De adoptiefouders treft overigens geen schuld.
In Zwitserland, zo hoorde ik van Dr. Heinrich Nufer (Marie Meienhofer-Institut te Zürich) speelde recentelijk een kwestie, waarin een broertje en zusje door een criminele bende uit het buitenland zijn ontvoerd, via een kinderhuis ter adoptie zijn aangeboden en via een officiële bemiddelingsorganisatie in twee verschillende Zwitserse adoptiegezinnen zijn terechtgekomen. Ook hier wordt gesteld dat zowel de adoptiefouders van het jongetje als die van het meisje (zijn zusje) niet op de hoogte waren van het feit dat hun adoptiefkind ook nog een broertje of zusje had in Zwitserland. Het jongetje is getraumatiseerd en wil alles weten van zijn achtergrond en liefst zo snel mogelijk terug naar zijn vaderland. Het zijn (voorbeelden van) drama's die alle partijen tot in het diepst van hun hart en leven treffen. Dat geldt voor zowel de biologische ouders, de adoptiefouders als 'last but not least' de kinderen zelf.

4. Adoptiemarkt: een markt van welzijn en geluk!?

Regelmatig duiken er verhalen op dat sommige mensen het heft in eigen handen nemen en langs al dan niet slinkse wegen proberen om buiten de officiële kanalen om het ouderschap van een kind van een ander 'op eigen naam' te krijgen. Ook blijkt in de rechtspraktijk dat steeds meer wensouders zelf een kind uit het buitenland halen en – na het kind geruime tijd in Nederland te hebben verzorgd en opgevoed - een verzoek indienen tot adoptie van het kind. In veel gevallen kan de rechter dan niet meer doen dan de ontstane status quo bezegelen met het uitspreken van een adoptie, maar soms houdt een rechter vast aan de formele uitgangspunten van adoptie en geeft de rechter geen toestemming voor afwijking van de rechtsregels.[3]

> Het op eigen houtje proberen een kind op 'eigen naam' te verkrijgen gaat dikwijls - achteraf - met problemen gepaard, zoals moge blijken uit de casus waarover het Hof Leeuwarden te beslissen kreeg (Hof Leeuwarden 6 oktober 2004, zaaknr. 0400271, LJN-nr. AR3391). De feiten waren aldus dat een vrouw zich onder de naam van de wensmoeder had laten inschrijven in het ziekenhuis. Na de bevalling deed de wensvader (valse) aangifte van de geboorte van hun kind. Het kind werd verder opgevoed door de wensouders. De draagmoeder kreeg echter spijt en zij en haar man vroegen vijf maanden na de geboorte om teruggave van hun kind en vernietiging van de geboorteakte. De rechtbank oordeelde dat de geboorteakte moest worden vernietigd en dat het kind terug moest naar de biologische ouders van het kind, de wensouders dienen het kind af te staan aan de biologische ouders. De grieven in hoger beroep die de wensouders aanvoerden tegen het gegeven bevel tot afgifte van het kind werden door het hof beoordeeld met als uitgangspunt dat enerzijds de (biologische) ouders in beginsel het recht en de plicht hebben het kind te verzorgen en op te voeden en anderzijds het kind in beginsel recht heeft door de (biologische) ouders te worden

[3] Vergelijk Hof 's-Gravenhage 13 juni 2007, LJN-nr: BA9067, waarin het hof besliste dat de wachttijd voor de adoptieprocedure gewoon in acht moest worden genomen, ook al maakte de man in kwestie geen gebruik van bemiddeling door een vergunninghouder, omdat dat niet kan voor kinderen uit Tibet. De man voerde aan dat deze wachttijd in zijn geval, waarin er al een adoptiekind beschikbaar is, zinloos was. Hij wilde op zo kort mogelijke termijn de minderjarige Tsepak in zijn gezin opnemen, maar het hof wees dat verzoek dus af.
Zie ook *Rechtbank Alkmaar 2 augustus 2006, LJN-nr: AY5536* waarin deze het verzoek afwees tot adoptie van een Chinese minderjarige die zonder verblijfstatus in Nederland verbleef en bij een Chinese man en zijn (thans Nederlandse) vrouw woonde. De rechtbank wees hen nog wel op de mogelijkheid tot het indienen van een verzoekschrift voor verkrijging van de gezamenlijke voogdij.
Zie ook afwijzend *Rechtbank Haarlem 5 oktober 2006, LJN-nr: AY9691* in een geval waarin de partner van de grootmoeder het kind wilden adopteren waarvan haar dochter, die in de drugshandel zat, moeder was.

> verzorgd en opgevoed, welk uitgangspunt uitzondering moet lijden indien het belang van het kind zich daartegen verzet. Op grond van het advies van een aantal deskundigen besliste het hof dat het risico voor de ontwikkeling van het kind bij afgifte aan de biologische ouders, nu het kind (op dat moment) achttien maanden oud was, niet zodanig zwaar is dat de belangen van het kind zich in casu tegen de afgifte verzetten. De verzoeken van de wensouders tot ontheffing of ontzetting van de ouders en om hen gezamenlijk met de voogdij te belasten, alsmede het verzoek tot adoptie werden deels niet-ontvankelijk verklaard en voor het overige was, volgens het Hof, niet voldaan aan de wettelijke vereisten. Het hof bekrachtigde dan ook de beslissing van de rechtbank.[4] De (sociale) ouders kregen twee weken de tijd om afscheid te nemen van het kindje alvorens het moest worden overgedragen aan de biologische ouders.

Overigens wil met het bovengestelde slechts zijn opgemerkt, dat wensouders soms heel ver willen gaan in het krijgen van een (liefst eigen) kind en dat soms slecht willende mensen en foute organisaties in die behoefte kunnen en willen voorzien. (zie ook Bijlage 1, waarin melding wordt gemaakt van de arrestatie van adoptiebemiddelaars in India).
De adoptiemarkt is een markt van welzijn en geluk, waarbij helaas nog al eens kwaadwillende personen en organisaties tegen grove betaling proberen te voldoen aan de vraag aan kinderen, welke vraag het aanbod overstijgt.
Dat doet er echter niet aan af, dat de overgrote meerderheid van adoptiefouders volkomen te goeder trouw is.

Ik ga er in het vervolg van mijn advies vanuit dat de betrokken adoptiefouders van de Indiase kindertjes *niet* op de hoogte waren van mogelijke babyroof, kinder-kidnapping, onvolkomen afstandsprocedures en dergelijke en dat zij volkomen te goeder trouw waren en erop vertrouwen mochten dat het hier om een kind ging dat door zijn genetische/biologische ouders op rechtsgeldige wijze is afgestaan.

[4] Ongeveer tezelfdertijd deed zich een geval voor van een Nederlands echtpaar dat voor hun terugreis naar Nederland bij het passeren van de douane op het vliegveld van Bogota werd gearresteerd, omdat zij de baby van hun Colombiaanse hulp (in een sporttas verstopt!) wilden meenemen naar Nederland.

Wat betreft de bemiddelingsorganisaties in het land van herkomst van de kinderen en in Nederland geldt dat van hen de grootst mogelijke zorgvuldigheid (check en double check) mag en moet worden verwacht als het gaat om de overdracht van kinderen die door de ouders zijn afgestaan of ter vondeling zijn gelegd. Een van de belangrijkste *controlepunten* daarbij lijkt mij te zijn, dat indien het kind *niet anoniem* is afgestaan zeer grondig gecontroleerd wordt of het hier daadwerkelijk de ouder(s) betreft of slechts iemand die als zogenaamde 'stand-in' afstand doet van het kind. Daartoe dienen betrouwbare verklaringen van artsen, verloskundigen e.d. te worden geëist. Immers, alles moet eraan gelegen zijn om te voorkomen dat zgn. opvangadressen, kinderhuizen en bemiddelaars in het land van herkomst misbruik maken van de situatie waarin de (biologische) ouder(s) verkeert/verkeren (zoals armoede, hongersnood, angst voor geweld van de zijde van de partner of ouders bij ontdekking van de zwangerschap, enz.). Is het kind wel anoniem afgestaan, dan wel gevonden als vondeling, dan dient mijns inziens door de plaatselijk bevoegde instanties alles in het werk te worden gesteld om de ouders van het kind op te sporen en hen te helpen bij hun problematiek en de eventuele afstand van het kind goed te begeleiden.

Ten slotte zij in dit kader opgemerkt, dat verwacht mag worden dat de druk op de adoptieketel alleen nog maar verder zal toenemen, nu de adoptievoorwaarden mogelijk verruimd gaan worden en daarmee de spoeling (het beschikbare aantal potentiële adoptiekinderen zal zeer waarschijnlijk gelijk blijven of nog verder verminderen) nog dunner wordt.[5]

5. De erkenning en rechtsgevolgen van interlandelijke adoptieuitspraken

5.1 De erkenning van interlandelijke adoptieuitspraken

De interlandelijke adoptieprocedure moet op een zeer zorgvuldige wijze verlopen. Dat sluit echter niet uit, dat er toch wel eens fouten worden gemaakt, of dat later blijkt dat er 'gesjoemeld' is rond de afstand van de kinderen.

[5] Zie Kamerstukken 28 457 en 30 551

In Nederland is de adoptieprocedure voor een groot deel gestoeld op de Wet, Richtlijnen en Regelingen met betrekking tot de opneming van buitenlandse kinderen ter adoptie. De Wet opneming buitenlandse kinderen ter adoptie (hierna ook: Wobka) bevat geen regeling voor internationaal privaatrechtelijke kwesties inzake adopties.
Gezien het feit dat bij interlandelijke adoptie twee landen betrokken zijn, kunnen zich diverse problemen voordoen op internationaal privaatrechtelijk terrein. De huidige Nederlandse verwijzingsregels en regels met betrekking tot de erkenning van buitenlandse adoptiebeslissingen zijn voornamelijk ontwikkeld in de jurisprudentie.
Van belang voor het tot stand brengen van een zorgvuldige adoptieprocedure is het Haags verdrag inzake interlandelijke adoptie (Convention on International Co-operation and Protection of Children in Respect of Intercountry Adoption).[6] Dat verdrag bevat geen bepalingen inzake de rechtsmacht, het toepasselijke recht en de wederzijdse tenuitvoerlegging. Artikel 1 van dit verdrag noemt als doelen:

a. waarborgen vast te leggen om te verzekeren dat interlandelijke adopties op zodanige wijze plaatsvinden dat het belang van het kind daarmee is gediend en de grondrechten die hem volgens het internationale recht toekomen, worden geëerbiedigd;
b. een samenwerkingsverband tussen de Verdragsluitende Staten in het leven te roepen ten einde te verzekeren dat deze waarborgen in acht worden genomen en ontvoering, verkoop van of handel in kinderen aldus worden voorkomen;
c. de erkenning van overeenkomstig het Verdrag tot stand gekomen adopties in de Verdragsluitende Staten te verzekeren.[7]

Artikel 23 van het Haags Adoptieverdrag bevat een ruim erkenningsregime. Indien de bevoegde autoriteit van het land waar de adoptie is uitgesproken, een schriftelijke verklaring afgeeft waarin wordt geconstateerd dat de adoptie in overeenstemming met het verdrag tot stand is gebracht, wordt de adoptie in de andere verdragsstaten van rechtswege erkend.

[6] In mei 1993 is dit door de Haagse Conferentie voor Internationaal Privaatrecht aangenomen. Bij dit Verdrag zijn inmiddels 74 landen aangesloten. Zie de website van de Haagse Conferentie voor IPR: http://www.hcch.net/index_en.php?act=conventions.status&cid=69. Zie verder de Wet van 14 mei 1998 (Stb. 302) inzake de Uitvoering van het op 29 mei 1993 te 's-Gravenhage tot stand gekomen verdrag inzake de bescherming van kinderen en de samenwerking op het gebied van de interlandelijke adoptie en, in verband daarmee, wijziging van de Wet opneming buitenlandse pleegkinderen en enige andere wetten (Kamerstuk 24 811) als ook de Rijkswetten van 14 mei 1998 (*Stb.* 301 en 303).
[7] "Memorandum Concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", opgesteld door het Permanent Bureau van de Haagse Conferentie voor Internationaal privaatrecht, november 1989, p. 1-2. Zie ook Van Loon, 1995.

Uitdrukkelijk is bepaald dat in de verklaring moet worden opgenomen wanneer en van wie de instemmingen ingevolge art. 17 sub c zijn verkregen. Ingevolge deze regel wordt de 'adoptie dubbel op' overbodig. Immers, volgens het verdragsregime is het niet nodig dat een adoptie die is uitgesproken in de staat van herkomst opnieuw wordt uitgesproken in de staat van opvang om in dat land rechtsgevolg te creëren. Erkenning van rechtswege houdt in dat geen procedure voor de erkenning, de tenuitvoerlegging of de registratie noodzakelijk is, zo volgt uit de MvT 24 810 (R 1577) nr. 3, p. 23. Wel moet elke verdragsstaat aangeven welke autoriteit(en) bevoegd is (zijn) deze verklaring af te geven.

Het conflictenrecht is thans[8] geregeld in de Wet conflictenrecht adoptie[9] (hierna ook: WCA). Deze wet bepaalt dat de in het niet-verdragsland uitgesproken adoptie in Nederland van rechtswege wordt erkend indien de adoptie is uitgesproken door:
a) een ter plaatse bevoegde autoriteit van de vreemde staat waar de adoptiefouders en het kind zowel ten tijde van het verzoek tot adoptie als ten tijde van de uitspraak hun gewone verblijfplaats hadden; of
b) een ter plaatse bevoegde autoriteit van de vreemde staat waar hetzij de adoptiefouders, hetzij het kind zowel ten tijde van het verzoek tot adoptie als ten tijde van de uitspraak hun gewone verblijfplaats hadden.
Art. 7 betekent in concreto dat indien in een niet-Verdragsland de adoptie is uitgesproken door een ter plaatse bevoegde autoriteit alwaar het kind gedurende de adoptieprocedure zijn gewone verblijfplaats had, terwijl de adoptiefouders hun gewone verblijfplaats in Nederland hadden, die adoptiebeslissing niet in aanmerking komt voor erkenning van rechtswege. Voor dat soort gevallen is een erkenningsprocedure voorgeschreven, waarmee voorkomen wordt dat een in het land van herkomst van het kind gevoerde adoptieprocedure in Nederland nog eens moet worden overgedaan. Art. 7 lid 1 geeft de voorwaarden voor de erkenning:
a. de procedure van de Wet opneming buitenlandse kinderen ter adoptie moet zijn gevolgd; en

[8] Nederlandse ouders, die in het buitenland rechtsgeldig een kind hebben geadopteerd, waren tot 2004 genoodzaakt om bij de Nederlandse rechter een nieuw adoptieverzoek in te dienen, teneinde familierechtelijke betrekkingen tussen de adoptanten en het kind tot stand te brengen en daarmee ook het Nederlanderschap voor hun geadopteerde kind te verwerven. De reden hiervan was dat buitenlandse adopties in het algemeen niet als zodanig werden erkend en dat art. 5 lid 1 van de Rijkswet op het Nederlanderschap bepaalde dat Nederlander werd het kind dat in Nederland, de Nederlandse Antillen of Aruba bij rechterlijke uitspraak was geadopteerd. Dit werd ook wel de 'adoptie-dubbelop' genoemd.
[9] Wet van 3 juli 2003, Stb. 283; inwerkingtreding per 1 januari 2004.

b. de erkenning van de adoptie moet in het kennelijk belang van kind zijn; en
c. de weigeringsgronden van art. 6 lid 2 en lid 3 WCA doen zich niet voor.

Verder moet in dit kader worden opgemerkt dat de Wet Conflictenrecht Adoptie een complementair en subsidiair karakter heeft (vgl. art. 1 WCA), zodat zowel het Haags Adoptieverdrag 1993, de Nederlandse regelgeving inzake interlandelijke adoptie, de Uitvoeringswet bij het verdrag en de Wet opneming buitenlandse kinderen ter adoptie, voorrang hebben boven de WCA. Krachtens art. 3 lid 1 wordt op een in Nederland uit te spreken adoptie het Nederlandse recht toegepast (m.u.v. art. 3 lid 3 WCA). De keuze voor de toepassing van het Nederlandse recht sluit aan bij de thans in de rechtspraak en de doctrine overheersende opvatting (vgl. Kamerstukken II 2001/02, 28 457 nr. 3, p. 10). In dat kader zijn de artikelen 1:227 en 1:228 BW die beiden op een zeer gedegen wijze beogen het belang van het kind bij diens adoptie voorop te stellen en strenge criteria geven met betrekking tot de adoptiefouders als de toestemming van de oorspronkelijke ouders van het kind, zeer belangrijk. In zoverre staat het kinderbeschermingsaspect van adoptie nog steeds centraal.
De erkenningsregeling van de WCA ziet overigens alleen op de erkenning van buitenlandse adopties die na haar inwerkingtreding (1 januari 2004) tot stand zijn gekomen.

Kortom, Nederlandse adoptiefouders kunnen op drie manieren bewerkstelligen dat zij een familierechtelijke band krijgen met een buitenlands adoptiekind, namelijk door:

- erkenning of omzetting van een in een verdragsland tot stand gekomen adoptie (o.g.v. art 23 e.v. resp. art. 27 e.v. van het Haags Adoptieverdrag)
- bij een kind uit een niet-verdragsland kunnen zij het kind in Nederland naar Nederlands recht adopteren o.g.v. art. 1:227 jo. 1:228 BW;
- bij een kind uit een niet-verdragsland kunnen zij de rechter vragen de buitenlandse adoptie te erkennen (bij een zwakke adoptie) of om te zetten (bij een zwakke adoptie) in een sterke Nederlandse adoptie o.g.v. de bepalingen van de Wet conflictenrecht adoptie (vgl. de art. 6,7 en 10 WCA).[10]

[10] Vgl. L. Hertsig, Adoptie van buitenlandse kinderen door Nederlandse adoptiefouders, FJR 2005, p. 27 e.v. en R. van Coolwijk, Adoptie van buitenlandse kinderen door Nederlandse adoptiefouders: de overgangsbepaling van de Wet conflictenrecht adoptie, FJR 2004, p. 113 e.v.

De WCA vult het Haags Adoptieverdrag aan, omdat het adoptieverdrag geen regels van conflictenrecht bevat. Immers, het HAV laat het aan de staat van herkomst van het kind en aan de staat van opvang (de staat van de adoptiefouders) over om – met inachtneming van de uitgangspunten van het verdrag – onder toepassing van ieders eigen internationaal privaatrecht te beslissen of adoptie kan/mag worden toegelaten.

5.2. De rechtsgevolgen van de (interlandelijke) adoptie

De adoptie is een van de meeste vergaande rechtsinstituties. De rechtsgevolgen van een in Nederland uitgesproken adoptie zijn die welke verbonden worden aan een juridische afstammingsrelatie tussen ouder en kind. De belangrijkste gevolgen van een "sterke" adoptie zijn dat de familierechtelijke betrekkingen tussen de geadopteerde en diens (oorspronkelijke) bloed- en aanverwanten worden opgeheven en dat daarvoor in de plaats treedt de vestiging van een familierechtelijke relatie van de adoptandus met de adoptiefouders.[11] Uit de familierechtelijke betrekkingen vloeit een groot aantal rechtsgevolgen voort, zoals onder andere ten aanzien van het ouderlijk gezag, de achternaam van het kind (en soms de voornamen), het erfrecht, de kosten van levensonderhoud, de nationaliteit van de minderjarige, het omgangsrecht en diverse andere rechtsgevolgen die in Boek 1 BW en in andere wetten vermeld staan. Tussen het adoptiekind en zijn nieuwe én oude bloedverwanten ontstaat een huwelijksverbod (art. 1:41 BW). Ingeval het betreft een voorgenomen huwelijk tussen adoptiefbroer en -zus bestaat de mogelijkheid dispensatie te vragen aan de minister van Justitie van het huwelijksverbod (dit alles geldt ook bij het aangaan van een geregistreerd partnerschap).
In een aantal gevallen blijven de (*oorspronkelijke*) familierechtelijke betrekkingen nog wel van belang. Zo mag het geadopteerde kind niet met zijn vroegere zus trouwen: de bloedbanden behouden dus nog hun invloed (zie art. 1:41 lid 1 BW). Daarnaast blijven bloedbanden van belang inzake het verschoningsrecht bij de getuigenis ten aanzien van bloed- en aanverwanten (art. 191 Rv en art. 227 Sv). Is de ratio van de bepaling gelegen in de biologische verwantschap, dan blijft de bepaling ook na de adoptie jegens de biologische (en/of oorspronkelijke juridische) ouders en verwanten zijn gelding behouden.
De erkenning als bedoeld in de artikelen 6 en 7 WCA houdt tevens in de erkenning van:

[11] Bij partneradoptie blijft de familierechtelijke betrekking met de ouder, die echtgenoot, geregistreerd partner of andere levensgezel van de adoptant is, overigens wel in stand (artikel 1:229 lid 1 t/m 3 BW).

- de familierechtelijke betrekkingen tussen het kind en zijn adoptiefouders;
- het gezag van de adoptiefouders over het kind;
- de verbreking van de voordien bestaande familierechtelijke betrekkingen tussen het kind en zijn moeder en vader, indien de adoptie dit gevolg heeft in de staat waar zij plaatsvond.

Ingeval de adoptie in de staat waar zij plaatsvond niet tot gevolg heeft dat de voordien bestaande familierechtelijke betrekkingen worden verbroken, mist de adoptie ook in Nederland dat gevolg. Is dat laatste het geval, dan kan, indien het kind in Nederland gewone verblijfplaats heeft en daar voor permanent verblijf bij de adoptiefouders is toegelaten, een verzoek tot omzetting in een adoptie naar Nederlands recht worden ingediend (art. 9 WCA).

De adoptie heeft rechtsgevolg vanaf de dag waarop de adoptie-uitspraak kracht van gewijsde heeft verkregen (artikel 1:230 BW). De adoptie heeft geen terugwerkende kracht. De inschrijving van de uitspraak vindt plaats in:

- het geboorteregister bij de burgerlijke stand;
- het gezagsregister (bij de rechtbank);
- de gemeentelijke basisadministratie (zie art. 1:230 lid 2 BW).

6. Adopties uit India vóór de ratificatie van het Haags Adoptieverdrag

De beslissing van de rechter in India

India heeft pas in 2003 het Haags Adoptieverdrag ondertekend en geratificeerd. Voor die tijd was de rechter in India bevoegd op grond van de Guardians and Wards Act 1890, welke wet regels bevat ten aanzien van (de overdracht van) het gezag over kinderen die niet onder gezag staan aan derden en met betrekking tot hun adoptie. Voor adoptie was (ook nog) in 2002 vereist dat de aspirant-adoptiefouders Hindoes waren. Nu kunnen in India ook niet-Hindoes kinderen adopteren, met welke wetswijziging ook beoogd werd het aantal inlandse adopties te vergroten.

Overigens betekent de ratificatie van het Haags Adoptieverdrag voor India met name dat de procedures zijn aangescherpt en dat voor interlandelijke adopties de CARA-guidelines (deze bevatten adoptieprocedureregels) strikt moeten worden gevolgd, aldus ook de Supreme Court of India.

Het ongeschreven Nederlandse internationaal privaatrecht, zoals dat gold vóór de aansluiting van India bij het verdrag en vóór inwerkingtreding van de Wet conflictenrecht adoptie (hierna ook:

WCA), werd op de erkenning in Nederland van in India gegeven beslissingen toegepast. In het algemeen werden buitenlandse beslissingen houdende adoptie door Nederlandse adoptanten niet als zodanig erkend en werd derhalve geoordeeld dat daardoor geen familierechtelijke betrekkingen tot stand waren gekomen. Wèl ging de rechtspraktijk ervan uit dat door dergelijke beslissingen het gezag op de adoptanten was overgegaan. Omdat de beslissingen van de Indiase rechter voogdij-beslissingen waren, waarbij het gezag aan de Nederlandse (aspirant-)adoptiefouders werd overgedragen met het oog op een alhier uit te spreken adoptie en de Indiase kinderen op die grond het land India mochten verlaten, beoordeelde de Nederlandse rechter deze door de Indiase rechter gegeven voogdij-overdracht als een gezagsbeslissing en werd vervolgens naar Nederlands recht (art. 1:227 e.v. BW) de adoptie uitgesproken, waarbij ook gelet werd op de afstandsverklaring van de moeder.

Op basis van de voorhanden zijnde documenten moet geconcludeerd worden dat de Nederlandse rechter de gezagsbeschikking van de Indiase High Court of Madras als rechtsgeldig kon aanvaarden en dat er op vertrouwd mocht worden dat de afstandsverklaring en de overdracht van het gezag aan de Nederlandse adoptiefouders op een zorgvuldige wijze door de Indiase autoriteiten zijn getoetst. Daarbij moet in elk geval belang worden gehecht aan de bevoegdheid van de autoriteit die de gezagsbeslissing uitsprak, de zorgvuldigheid van de gevoerde procedure, de voorwaarden voor adoptie volgens de lex patriae van het kind (tevens de lex fori) en het belang van het kind als het belangrijkste element van de toetsing door de rechter.

Nederlandse ouders, die in het buitenland rechtsgeldig een kind hadden geadopteerd of zoals in India de voogdij overgedragen hadden gekregen, waren tot de inwerkingtreding van de WCA genoodzaakt om bij de Nederlandse rechter een nieuw adoptieverzoek in te dienen, teneinde familierechtelijke betrekkingen tussen hen en het kind tot stand te brengen en het kind de Nederlandse nationaliteit te doen verwerven. De reden hiervan was, zoals hiervoor uiteengezet, dat buitenlandse adoptie-uitspraken in het algemeen niet als zodanig werden erkend, omdat niet aan alle vereisten voor adoptie van het Nederlandse BW was voldaan en omdat art. 5 lid 1 van de Rijkswet op het Nederlanderschap bepaalde dat “Nederlander wordt het kind dat in Nederland, de Nederlandse Antillen of Aruba bij rechterlijke uitspraak is geadopteerd”. Dit werd ook wel de ‘adoptie-dubbelop’ genoemd. In Nederland gold destijds het cumulatiestelsel, dat inhield dat de Nederlandse rechter de adoptie alleen uitsprak wanneer zulks naar het nationale recht van de adoptanten als naar het nationale recht van het

adoptiefkind mogelijk was. Ook waar in het buitenland niet een adoptiebeslissing, maar een beslissing was genomen inzake de overdracht van het gezag over het kind aan de adoptiefouders (zoals in casu in India), moest in Nederland de adoptie (alsnog) worden uitgesproken. Dit zal ook in de betreffende zaken destijds zijn gebeurd.

7. Bevindingen

De vraag die ik aan (onder andere) Indiase contactpersonen heb voorgelegd, is of de voogdij-overdracht in India herroepen/vernietigd kan worden op grond van het feit dat de rechter een beslissing heeft genomen op grond van een valse verklaring en/of valse documenten. Waarschijnlijk hebben destijds vrouwen zich ten overstaan van de Indiase rechter voorgedaan als biologische moeders van het kind en heeft de rechter op grond van die verklaring aangenomen dat de moeders vrijwillig afstand deden van het kind.

Indien achteraf zou blijken dat de beslissing op onjuiste gronden is genomen, moet de vraag gesteld worden of dit zal kunnen leiden tot vernietiging van de rechterlijke uitspraken betreffende de voogdij-overdracht (met het oog op adoptie) die in India zijn gedaan. Indien dat zo is, leidt dat tot de vraag of de door de Nederlandse adoptierechter gedane uitspraak dan niet ook vernietigd moet worden, omdat de basis van die uitspraak (de voogdij-overdracht aan de adoptiefouders) vernietigd is.

7.1 Internationale bevoegdheid van de Nederlandse rechter om een adoptie uit te spreken

Voor de vraag of de Nederlandse rechter bevoegd was om in de periode vóór 2003 de adoptie van de Indiase kinderen uit te spreken, is van belang dat op dat moment Nederland wel was toegetreden tot het Haags Adoptieverdrag, maar India nog niet. In Nederland gold nog de regeling dat de adoptiebeslissing die in het buitenland was uitgesproken, alhier gold als een gezagsbeslissing.
Op 1 januari 2002 trad een belangrijke wijziging in van het burgerlijk procesrecht. Art. 429c lid 4 (oud) Rv bepaalde dat voor adoptiebeslissingen de rechter bevoegd was van de woonplaats van het kind. Als de woonplaats ontbrak dan was bevoegd de rechter van de werkelijke woonplaats van het kind en indien ook een werkelijke woonplaats van het kind in Nederland ontbrak, dan was bevoegd de rechter van de rechtbank in Den Haag. Het werd algemeen aanvaard, dat de relatieve competentie ook internationale bevoegdheid voor de

Nederlandse rechter schiep. Ten aanzien van adoptiezaken die onvoldoende aanknoping hadden met de Nederlandse rechtssfeer had de rechter steeds een discretionaire bevoegdheid ten aanzien van de rechtsmacht betreffende adoptiebeslissingen (forum non conveniens-regel).
Deze leer hield in dat hoe meer subsidiair bevoegd uit het oogpunt van distributie van rechtsmacht de rechter was, des te meer discretionaire bevoegdheid hij had om zijn rechtsmacht vast te stellen. Daarbij merkt Vonken op, dat bij de voorhanden rechterlijke adoptie-uitspraken opvalt dat de rechters slechts sporadisch een uitdrukkelijke overweging wijdden aan de vraag of hen rechtsmacht toekomt. Overigens is het beginsel "distributie bepaalt attributie" als algemene, indirecte grondslag voor de rechtsmacht van de Nederlandse burgerlijke rechter grotendeels[12] verlaten.

Sedert 1 januari 2002 is in de wetgeving geen plaats meer ingeruimd voor de forum non conveniens-regel als algemene exceptie. De rechtsmacht van de Nederlandse rechter in verzoekschriftprocedures wordt in algemene zin geregeld in art. 3 Rv (met een tweetal bijzondere regelingen in de artt. 4 en 5 Rv).

Thans geldt voor verzoekschriftprocedures en dus ook voor adoptieprocedures, dat de Nederlandse rechter rechtsmacht heeft indien de verzoeker (of één van de verzoekers) of een in het verzoekschrift genoemde belanghebbende in Nederland zijn woonplaats of gewone verblijfplaats heeft.
Op grond van zowel de adoptiebeslissingen vóór 1 januari 2002 als daarna geldt dat de Nederlandse rechter - nu het adopties door Nederlandse adoptiefouders betreft die ook in Nederland woonachtig zijn – bevoegd was en is.

7.2 Het op interlandelijke adopties toepasselijke recht

Alhoewel enige terughoudendheid past bij de inschatting van rechterlijke beslissingen of interpretaties zal de Nederlandse rechter ingevolge art. 3 WCA waarschijnlijk Nederlands recht hebben toegepast op een adoptie uit een niet-verdragsland zoals in het geval van de Indiase voogdijbeslissingen vóór 2003. Het is aannemelijk dat de Nederlandse rechter deze bepaling ook analoog zal toepassen op een vóór 1 januari 2004 (de datum dat de Wet conflictenrecht adoptie in werking trad) uitgesproken adoptie.

[12] Vgl. L.Th.L.G. Pellis, Internationaal Procesrecht: een dwarsdoorsnede, Boom Juridische uitgvers, 2005, p. 41 e.v.; zie ook art. 10 Rv.

De Wet conflictenrecht heeft echter geen terugwerkende kracht, maar uit de rechtspraak van vóór 2004 blijkt dat het toen reeds zeer gebruikelijk was om het Nederlandse recht toe te passen. Verwezen zij naar de memorie van toelichting bij het wetsvoorstel conflictenrecht adoptie. Thans verklaart art. 3 WCA, dat op een in Nederland uit te spreken adoptie, het Nederlandse recht van toepassing is. De rechtsgevolgen van de adoptie worden eveneens door het Nederlandse recht beheerst (artikel 4 Wet conflictenrecht adoptie; zie ook Rb Assen 9 juni 2004, NIPR 225). Art. 3 lid 2 WCA bevat een afzonderlijke regel voor de toestemming en/of raadpleging van het kind en andere personen of instellingen dan de adoptiefouders. Volgens deze bepaling is daarop het nationale recht van het kind van toepassing. In Indiase zaken moet dus het toestemmingsvereiste worden beoordeeld naar Indiaas recht. De Guardian and Wards Act bevat daartoe de procedure.

7.3 Herroeping van in Nederland uitgesproken adopties

Een herroeping van de in Nederland uitgesproken adoptie is mogelijk, maar slechts in het geval dat een kind zelf de adoptie wenst te herroepen en wel op grond van art. 1:231 BW. Noch de biologische, noch de genetische ouders kunnen de in het verleden gedane adoptie herroepen op de grond van art. 1:231 BW. Slechts het kind zelf en dan nog wel vanaf een zekere leeftijd en binnen een bepaalde termijn kan verzoeken de adoptie te herroepen. Ook dan nog is het de vraag of een herroeping van de adoptie door de rechter zal worden toegestaan, want het verzoek van de jongmeerderjarige kan alleen worden toegewezen indien de herroeping in het kennelijk belang van het geadopteerde kind is én de rechter van de redelijkheid der herroeping in gemoede overtuigd is.

Biologische ouders of adoptiefouders staan wat betreft de herroepingmogelijkheid ex. art. 1:231 BW dus aan de zijlijn en hebben niet de mogelijkheid om – als een soort spijtoptant – te verzoeken om doorhaling van de Nederlandse adoptie.

Daarnaast bestaat het buitengewone rechtsmiddel van herroeping van de adoptiebeschikking in engere zin ex. art. 390 e.v. Rv jo. 382 e.v. Rv (het vroegere rekestciviel), tenzij de aard van de beschikking zich daartegen verzet. Omdat dit rechtsmiddel is ingebed in het Nederlandse burgerlijk procesrecht, mag men ervan uitgaan dat daarop steeds het Nederlandse recht van toepassing is als lex fori, ongeacht het op de bestreden beslissing toegepaste recht.

Artikel 382 Rv luidt, dat een vonnis dat in kracht van gewijsde is gegaan, op vordering van een partij kan worden herroepen indien:

a. het berust op bedrog door de wederpartij in het geding gepleegd,

b. het berust op stukken, waarvan de valsheid na het vonnis is erkend of bij gewijsde is vastgesteld, of

c. de partij na het vonnis stukken van beslissende aard in handen heeft gekregen die door toedoen van de wederpartij waren achtergehouden.

Ex art. 1:383 RvBW moet dat rechtsmiddel van herroeping wel worden aangewend binnen drie maanden nadat de grond voor de herroeping is ontstaan en de eiser daarmee bekend is geworden. De termijn vangt niet aan dan nadat het vonnis in kracht van gewijsde is gegaan. De vordering tot herroeping wordt gebracht voor de rechter die in laatste feitelijke instantie over de zaak heeft geoordeeld (art. 1:384 Rv). De regeling voor de herroeping van vonnissen moet ex. art. 390 en 391 Rv van overeenkomstige toepassing worden beschouwd op de herroeping van beschikkingen.

De Hoge Raad heeft de mogelijkheid van (destijds) rekestciviel ook op adopties van toepassing verklaard. In casu had de verzoeker zijn rekestciviel gegrond op bedrog in de zin van art. 382 onder 1° Rv., daarin bestaande dat [verweerster 2] en [verweerder 1], ofschoon zij op de hoogte waren van de woon- en verblijfplaats van [eiser], althans deze op zeer eenvoudige wijze hadden kunnen achterhalen, het in 3.1 onder (v) vermelde verzoekschrift met vermelding van het onjuiste adres hebben ingediend.[13] De man in kwestie, die opkwam tegen een door de rechtbank uitgesproken stiefouderadoptie van zijn kinderen door zijn ex-partner en haar nieuwe echtgenoot, werd door de Hoge Raad in het gelijk gesteld.

Of de Nederlandse rechter bij een eventueel verzoek tot herroeping inderdaad zal overgaan tot vernietiging van de adoptie - als sprake is van een grond, genoemd in artikel 382 Rv - moet worden betwijfeld. Immers, de Nederlandse rechter zal doorgaans destijds hebben vastgesteld dat aan de vereisten voor adoptie was voldaan, namelijk dat afstand was gedaan van de ouderrechten en dat de adoptie in het kennelijke belang was van het kind.

[13] Hoge Raad 20 april 2001(LJN-nr: AB1253), NJ 2002, 392 m.nt. HJS)

Daarenboven bepaalt art. 3 lid 1 IVRK, dat bij alle maatregelen betreffende kinderen, ongeacht of deze worden genomen door openbare of particuliere instellingen voor maatschappelijk welzijn of *door rechterlijke instanties* (cursivering, PV), bestuurlijke autoriteiten of wetgevende lichamen, de belangen van het kind de eerste overweging moeten vormen. Dat betekent dat de Nederlandse rechter, zo die al verzocht wordt om de adoptie te herroepen/vernietigen, de belangen van het kind voorop dient te stellen en moet beoordelen wat de consequenties voor het kind zouden zijn van een positieve beslissing op een dergelijk verzoek. Mijns inziens zal dat er toe leiden dat een herroeping van de adoptie – vooropgesteld dat de adoptiefouders volkomen te goeder trouw waren en zijn - niet zal worden toegestaan. Echter, indien in dat geval de adoptie in stand wordt gelaten kan uiteraard het kind zelf wel te zijner tijd – in de beperkte periode van twee tot vijf jaren na zijn meerderjarigwording - vragen om herroeping van de adoptie. Dat verzoek kan alleen worden toegewezen op de gronden die vermeld zijn in art. 1:231 lid 2 BW.

Zou de herroeping wel slagen, dan zou dit betekenen dat de Nederlandse adoptie-uitspraak ongedaan wordt gemaakt. Aannemelijk is echter dat de Indiase voogdijbeschikking in Nederland nog steeds het effect zou hebben dat daaraan destijds is toegekend, nl. dat het gezag op de adoptanten is overgegaan. Indien deze aanname juist is, is de consequentie dat het niet mogelijk is de zaak terug te draaien zonder dat de in beide landen gegeven beslissingen ongedaan worden gemaakt.

7.4 Aantasting van de Indiase voogdijbeslissing?

Op grond van het ingewonnen advies van Dr. Anil Malhotra, advocaat en adoptierechtdeskundige in India, moet worden aangenomen dat de voogdijbeslissing van de Indiase rechter moeilijk aantastbaar is, waar deze schrijft:

> “A reading of the above provisions (Sections 7, 8, 9 ,10,11,13,17 and 26 of the GWA, PV) specifies the persons who are entitled to apply for guardianship, powers of the Court to make an Order for guardianship, Court having the jurisdiction to entertain the application, procedure on admission of application, leading of evidence before making of Order of guardianship and matters to be considered by Court in appointing a guardian. Likewise, the Guardian Court can permit the removal of the ward from its jurisdiction. A reading in totality of the above provisions and the three documents mentioned above reveals that there has been

> proper compliance with the provisions of the GWA which has led to the permission for the adoption in the Netherlands for which purposes the children had been permitted to be taken out of India to the Netherlands (zinsdeel van mij, PV)
> Hence, parental permission in terms of the GWA was duly granted to the adoptive parents and there was no infirmity in the same which is proved by the conclusive order of the High Court of Madras dated December 10, 1997."

Bovendien antwoordt hij op de vraag of de Indiase rechter de ooit gedane voogdijbeslissing zal herroepen:

> "In view of the position of law quoted above, it may not be possible for any Indian Court to declare the adoption void since the Courts in India have not granted any adoption Order in the first place. However, it may be pointed out that Sections 39, 40, 41 of the GWA talk of the removal, discharge and cessation of the authority of the guardian. Obviously, they would apply only till the Guardianship Order is not superceded by an adoption order. In the present case since the Dutch adoption order has already superceded the Indian guardianship order, it may be extremely difficult to seek setting aside of the Guardianship Order. Moreover, keeping in view the paramount consideration of the best interest of the children, it may be highly unlikely to upset a guardianship order when the adoption order is already in place. It would be appropriate if the matter is examined by the Dutch Court itself to adjudge the best interest of the children since the children are in the Netherlands and being subject to Dutch law, it would be in the fitness of things that the matter be adjudicated according to the law of domicile/ nationality rather than law of origin which may not apply in the present case."

Professor Agrawal[14] is echter van mening dat de voogdijbeslissing op grond van de Guardian and Ward Act vernietigd kan worden,:

> "Thus, the handing over of the child to the destitute children home by the pretended mother was illegal, therefore, giving of the child first under the Guardian and wards Act, 1890 and also his adoption under the Dutch adoption law was equally illegal. The natural parents are entitled as such to take back the abducted child."

[14] Director, Indian Institute of Comparative Law, Former Dean, Faculty of Law, University of Rajasthan, 6/146 Malviya Nagar, Jaiur 302017, India.

Ik concludeer hieruit dat het aan de rechter in India is om uit te maken of op grond van de gegevens in de betreffende dossiers moet worden aangenomen dat het een onrechtmatige voogdijoverdracht betreft en dat daarmee de Indiase voogdijbeslissing met het oog op interlandelijke adoptie vernietigd zal kunnen worden. Een dergelijke beslissing zou op zichzelf geen gevolgen hebben voor de geldigheid van de Nederlandse adoptie-uitspraak, indien die nog bestaat, maar zij zou mogelijk een belangrijk element kunnen vormen in een herroepings-procedure waarin wordt getracht de Nederlandse adoptie-uitspraak aan te tasten.

8. Vraagstelling en advies

Door de minister van Justitie is verzocht antwoord te geven op tenminste de volgende vragen:
1. Welk recht is van toepassing op in Nederland uitgesproken buitenlandse adopties?
2. Welke rechter is bevoegd?
3. Wat zijn de gevolgen voor in Nederland gelegaliseerde adopties indien het Nederlands recht van toepassing is?
4. Wat zijn de gevolgen voor in Nederland gelegaliseerde adopties indien het Indiase recht van toepassing is?

Op grond van het voorgaande zal ik deze vragen hierna kort beantwoorden:

Ad. 1
Op de in Nederland uitgesproken adoptie is Nederlands recht van toepassing (zie hierboven onder 5.1). Op de herroeping, door de Nederlandse rechter, van de Nederlandse uitspraak, is Nederlands recht van toepssing. Op de voogdijbeslissing in India was, volgens verkregen informatie, Indiaas recht van toepassing. Op een verzoek tot vernietiging van die beslissing is eveneens Indiaas recht van toepassing.

Ad. 2
De Nederlandse rechter is bevoegd indien het kind zijn woon- en/of verblijfplaats heeft in Nederland (art. 3 Rv), als het de eventuele herroeping van Nederlandse adoptieuitspraken betreft. Herroeping van een Indiase voogdijuitspraak is een zaak die door de rechter in India moet worden beslist.

Ad. 3
Mocht de voogdijbeslissing van de Indiase rechters in India worden vernietigd, dan heeft dat tot gevolg dat naar Indiaas recht het gezag berust bij de biologische ouders. Dit heeft echter op zichzelf geen gevolg voor de Nederlandse uitspraak. Mocht vervolgens een procedure tot herroeping o.g.v. artikel 382 Rv bij de Nederlandse rechter worden geëntameerd, dan is het aan de Nederlandse rechter om te bepalen welk gewicht hij toekent aan die Indiase nietigverklaring. Daarbij is het zeer waarschijnlijk dat bij de beslissing inzake het kind artikel 3 van het IVRK de uiteindelijke doorslag zal geven.

Men kan zich ook een omgekeerd scenario voorstellen, waarbij eerst in Nederland een herroepingsprocedure wordt gevolgd. Indien die zou slagen – en gelet op artikel 3 IVRK lijkt de kans daarop gering - , zou dat betekenen dat naar Nederlands recht de familierechtelijke betrekkingen tussen de adoptiefouders en het kind worden verbroken en die tussen het kind en zijn oorspronkelijke ouders worden hersteld. Echter, aannemelijk is dat de nog bestaande Indiase voogdijbeschikking wordt geacht zijn effect in Nederland te hebben behouden, zodat het gezag nog steeds bij de adoptiefouders berust.

Ad 4.
Zie vraag 2. Aannemelijk is dat de Nederlandse rechter destijds Nederlands recht heeft toegepast. Maar ook indien hij vreemd recht zou hebben toegepast, zou een herroepingsprocedure op grond van artikel 390 jo. 382 Rv door Nederlands recht worden beheerst.
Indien het Indiase recht van toepassing is zijn er voor in Nederland uitgesproken adopties geen gevolgen, tenzij de rechter in India de destijds gegeven voogdijbeslissing vernietigt en alhier door de biologische ouders een beroep wordt gedaan op herroeping van de adoptiebeslissing.
In dat geval mag worden aangenomen dat op de herroeping van de adoptie het Nederlandse recht volop van toepassing is.
Dat laat onverlet dat de biologische ouders in India de desbetreffende ontvoerders en bemiddelingsorganisaties in rechte (doen) vervolgen en aansprakelijk stellen voor het aan hen toegebrachte leed.

Er zijn mijns inziens geen garanties te geven voor de adoptiefouders noch voor de Indiase ouders, nu rechters zich – bij een daartoe strekkend verzoek – zullen moeten uitlaten over de vraag wat met de adoptie- en/of met de in India gegeven gezagsbeslissing moet gebeuren.

Overigens valt te verwachten dat in India naar aanleiding van de ratificatie van het Haags Adoptieverdrag en een aangescherpt toezicht (zie de website van de Haagse Conferentie voor IPR met het antwoord van India op de Questionnaire[15] en de aandacht van de media in Bijlage 1) eventuele misstanden tot het verleden zullen behoren. Dat wil overigens niet zeggen dat dat ook voor andere landen geldt. De adoptiemarkt verplaatst zich naar die landen waar nog aanbod van adoptiekinderen is en die markt lijkt zich nu naar (centraal en oost) Afrika te gaan verplaatsen. Extra alertheid van de bemiddelende organisaties en het ministerie van Justitie is dan ook geboden.

Overige vragen:

5. Bieden het Haags Adoptieverdrag en andere regels van Internationaal Privaatrecht een oplossing voor dergelijke problemen van niet rechtsgeldig tot stand gekomen adopties?

In de onderhavige zaak is een complicerende factor dat achtereenvolgens in de twee betrokken landen beslissingen zijn genomen. Onder de vigeur van het Haags Adoptieverdrag 1993 en van de Wet conflictenrecht adoptie (in werking sinds 1 januari 2004) wordt in beginsel niet meer in Nederland een adoptie uitgesproken, maar gaat het om erkenning van de buitenlandse adoptie.

Het Haags Adoptieverdrag verplicht centrale autoriteiten van verdragsstaten tot samenwerking, een verplichting waarop buiten de verdragsregeling géén beroep kan worden gedaan. De verplichting dient ruim te worden opgevat, in die zin dat samenwerking óók geboden is in een zaak als de onderhavige. Verder voorziet het verdrag in kwaliteitsnormen voor vergunninghoudende instellingen, hetgeen betekent dat verdragsstaten elkaar daarop kunnen aanspreken. Verder voorziet het verdrag in een procedure die de zorgvuldige totstandkoming van interlandelijke adopties moet waarborgen. Het verdrag gaat er echter vanuit dat als eenmaal het groene licht is gegeven voor de overkomst van het kind naar het land van opvang, het proces onomkeerbaar is geworden. Het verdrag bevat geen regeling voor de ongedaanmaking van een interlandelijke adoptie ingeval de adoptie niet op een juiste wijze tot stand is gekomen. Gelet op het karakter van het verdrag is dat begrijpelijk.

[15] http://www.hcch.net/index_en.php?act=publications.details&pid=3585&zoek=india

De landen zelf zijn verantwoordelijk voor een goede regeling van én controle op de wijze waarop adopties tot stand komen en dienen goede controle uit te oefenen op de bemiddelende instanties.
Wel geldt de algemene exceptie dat de erkenning van een adoptie mag worden geweigerd indien, gelet op de belangen van het kind, de adoptie kennelijk niet verenigbaar is met de openbare orde in een Verdragsluitende staat (art. 24 HAV) c.q. – voor niet-verdragsadopties - de erkenning van die beslissing kennelijk in strijd met de openbare orde zou zijn (art. 6 lid 2 sub c WCA). Verder wordt verwezen naar hetgeen hiervoor is uiteengezet over de criteria voor erkenning van niet-verdragsadopties van artikel 7 WCA.

6. Zijn er voorbeelden van rechterlijke beslissingen in andere landen?

Ik heb verschillende collega's gevraagd of zij op de hoogte waren van dergelijke andere kwesties, maar alleen een collega uit Malta stuurde mij twee (zij het tegengestelde) uitspraken:

> Ronald Apap versus Ruby Ritchie proprio et nomine Court of Appeal 27 October 1995 decided that the child should be returned to the father as blood ties were all important. Apap had never been married to Ritchie but had acknowledged the child on his birth certificate. Ritchie placed the child with prospective adopters without his knowledge. At law he had the right to be heard before the adoption was concluded. The court removed the child from the placement and returned him to the father.
>
> This is diametrically opposed to the judgement in Martin Vella (Constitutional Court 22 April 1991; App.263/89) where the court felt that in the best interest of the child he should remain with the adopters. Vella had a relationship with an unmarried girl (she was under 18 at the time - an added complication) and when the child was placed for adoption decided to acknowledge the child. The court felt there was no real family and that it was in the child's best interests to remain with the adopters. Vella went to Strasbourg but the case was dismissed prima facie as he had been heard according to law (contra Keegan where the law did not provide for such hearing).

Van een collega uit Engeland (Prof. J. Masson) hoorde ik van een casus die gespeeld heeft rond een kind dat uit Bosnië werd geadopteerd en waarvan de papieren niet in orde waren. Daar heeft de rechter op grond van het belang van het kind beslist dat het kind bij de

Britse adoptiefouders mocht blijven, omdat het belang van het kind daarmee het meest gebaat was.

7. Welke rol speelt het VN-Verdrag voor de rechten van het kind (IVRK) een rol bij de oplossing van de onderhavige probleemstelling?

Zoals ik hierboven reeds stelde, zullen – zelfs wanneer de voogdij-beslissing en de daarop gebaseerde adoptiebeschikking voor vernietiging/herroeping vatbaar zouden zijn – zowel de Nederlandse als de Indiase rechter de belangen van het kind, zoals neergelegd in het VN-Verdrag voor de rechten van het kind voorop dienen te stellen, hetgeen er hoogstwaarschijnlijk in zal resulteren, dat de status quo niet gewijzigd zal worden. Wel zal de rechter kunnen bepalen dat de biologische ouders toegang tot c.q. contact met het kind moeten zullen krijgen en in elk geval ook geïnformeerd/geconsulteerd zullen mogen worden over belangrijke ontwikkelingen in het leven van het kind.

Het kind zelf kan dan te zijner tijd besluiten of het zijn biologische ouders een grotere plaats in zijn leven wil toedichten en de rechtsband met hen wil versterken via een eventuele herroeping van de adoptie ex. art. 1:231 BW.

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Bijlage 1: Uit: Frontline , Adoption Market

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P.V. Ravindranath (extreme right), his son Dinesh Kumar and wife Vatsala Ravindranath, who were running the Malaysian Social Service Society, at the Police Commissionerate in Chennai on May 7. The three were remanded by the Central Crime Branch in connection with the alleged child adoption racket.

Chennai police arrested five people for kidnapping and selling about 350 children to an adoption agency in the city. Several lost children seem to have been given in adoption to families abroad over the last decade. Ironically, the police have found all the paperwork by the adoption agency to be clear. This highlights the need to look into the existing adoption system that allows for child trafficking under the guise of a perfectly legal adoption process.

Frontline investigation and documents available with it reveal that this is not an isolated case. Bending rules, circumventing norms, and following illegal and unethical ways to "source" children and sell them to foreigners under the guise of adoption is not uncommon among some agencies in Tamil Nadu.

The State has 21 licensed adoption agencies, of which nine are also recognised for inter-country adoption. In 1991, an adoption cell was created in Tamil Nadu and a State-level committee set up to review the activities of the voluntary organisations. Criteria were specified for issuing the licence for in-country adoption. But these norms are observed more in the breach. There are, however, some honourable exceptions.

The July 2, 2004 "Report of the Joint Inspection of Peace (Poor Economy and Children's Educational Society) Home, Coimbatore, Tamil Nadu," by the Central Adoption Resource Agency (CARA) after the agency's inter-country adoption (ICA) licence expired is revealing. It charges that:

"The agency has tampered relinquishment deeds (surrendered directly to the Home), created false siblings, followed various unethical practices, i.e. giving wrong information about Maheshwari, Arvindh and Aruna [some children in the agency at the time of the inspection].

"The entire recording seems to have discrepancy.

"While siblings Arvindh and Aruna were admitted at

A 2002 picture of Dr. J. Radhakrishnan, Salem District Collector at the time, receiving a female baby for the cradle centre in Salem.

According to the relinquishment deed, Maheshwari and her sibling were surrendered by their widowed mother. But the inspection team found that Maheshwari's father was alive; she was left there for better education; and the sibling she was paired with was actually not her brother.

"Several registers/records are not properly maintained.

"The registration of the Society is not proper...

"While more than 40 Indian parents have registered for children, the agency has not shown interest to complete home studies of the families."

Despite the severe indictment in the inspection report and a show-cause notice sent to the agency that got no reply, the CARA renewed Peace Society's ICA licence in April 2005.

According to a recent study, "Adoption Agencies and Institutional Practices in Tamil Nadu: A Sociological Study," by Sujata Mody for Malarchi Women's Resource Centre, adoption in Tamil Nadu is a complex maze of sleaze, with unethical and illegal "dealings." Says Sujata: "Even a very superficial investigation into inter-country adoptions from Tamil Nadu opens up a can of worms." According to the study, only NGOs (as elsewhere, except Andhra Pradesh) offer adoption services in Tamil Nadu. "If these `homes' of varying size and background have one thing in common it is the free flouting of norms and adopting various dubious methods to bend rules and `source' babies. Of course, as always, there are

exceptions."

Most agencies, according to the study, are run as a "family business" and keen only on lucrative inter-country adoptions (ICA). In this there seems to be cooperation. For instance, agencies without an ICA licence transfer babies to those with one.

Babies missing from government hospitals have been traced to adoption agencies. For instance, in 1999, four babies missing from the Salem General Hospital were found at an agency in Chennai. The police filed a case in the Chengalpattu District Court against the agency's director. CARA immediately revoked the agency's ICA licence and the Tamil Nadu Social Welfare Department suspended its in-country licence. But the agency's in-country and inter-country adoption licences were revived after the police arrested five persons for stealing the babies from the hospital. The question of how the stolen babies landed with the agency remains unanswered.

The recent arrest by Chennai's Central Crime Branch of P.V. Ravindranath, Director of the Chennai-based Malaysian Social Service Society (MSSS, which had been placing children in adoption between 1991 and 2001), and his family members for their alleged involvement in kidnapping and selling children, has blown the lid off a major racket in child trafficking. A five-member gang was also arrested for kidnapping and selling about 350 children to the MSSS between 1991 and 2001. Even as scores of parents who had lost their children in the last decade are queuing outside various police stations in the State to see if their child figures in the list given by those arrested, the police are investigating the probable links the five-member gang could have with other adoption agencies.

Licensing of agencies is the single most important tool of disciplining and monitoring adoption agencies. The threat of withdrawal of licence is often the only way to ensure compliance. However, there is evidence that the procedures of licensing are flouted

and officers are "pressured to issue licence." Says Sujata: "The licences of several agencies have been revoked. But soon enough, they have also been restored. This is an indicator of the weak regulatory and licensing system."

To promote in-country adoption, the number of agencies allowed to do ICAs is generally limited. But there are instances where the Department of Social Welfare in Tamil Nadu has been keen - indeed, in a hurry - to give inter-country licences to agencies. For instance, according to former CARA Chairperson Andal Damodaran, a Coimbatore-based agency, which was operating with an in-country licence for barely one year (the usual time is three years), was issued a CARA licence to do ICAs.

The agency, which was severely indicted by a Government of India inspection team last year (a copy of the report is with *Frontline*) for malpractices and improper records, was recently issued the ICA licence. According to the inspection team, the agency has indulged in "unethical practice" by tying up with a U.S. adoption institution, International Families Incorporated (IFI), to which it has proposed most of the children and from which it has received substantial donations.

Sourcing babies

Investigation reveals that babies are "sourced" from remote towns and villages. According to Sujata Mody, they are surrendered, abandoned, trafficked, stolen, bought, and even kidnapped.

Often, abandoned children are declared "surrendered" by fabricating documents so that they are free to be given for adoption without obtaining a certificate, which may take a little longer, from the Child Welfare Committee. According to a former member of Tamil Nadu VCA, some agencies "never get abandoned babies; they are always surrendered." A former employee of an adoption agency said that even the surrender documents are not always signed

in the presence of a notary public as mandated by law; several documents are also signed by the same person. According to Chandra Thanikachalam of the Indian Council of Child Welfare, even if the scrutinising agency doubts the veracity of the surrender documents, it has no powers to initiate a probe.

Many agencies run short-stay homes for destitute and pregnant women, who are encouraged to give away their babies for adoption. According to Sujata Mody's study, a Chennai-based agency has a rehabilitation scheme for unwed pregnant mothers who, till giving birth, are even employed to take care of other babies in the agency. The agency says it conducts re-marriage for widowed/separated and deserted women, and has special facilities for the new-born. In fact, the agency explains that the high cost of adoption is because often it has to support women through pregnancy.

Many unwed pregnant mothers are directed to short-stay homes by government hospitals after an abortion has failed or is too late. Even agencies that do not have short-stay homes allow unwed mothers to live on their premises, until the babies are born. For instance, according to Sujata Mody, a Chennai-based agency admitted to keeping "pregnant women in difficult circumstances" at its home till they give birth. She says: "Usually, the babies are taken away for adoption and the women encouraged to leave the home."

According to former Tamil Nadu VCA member Vidya Reddy, while babies are generally poorly fed to look weak and sick so that they are rejected by Indian parents, once they get the VCA nod for ICA, they are fed well and cared for very well to be showcased to prospective foreign adopters. She says: "There is always a difference in weight before and after VCA clearance."

According to Sujata Mody, *prima facie*, there may be no reason to suspect the dealings and transactions in

babies from unwed mothers in the short-stay homes. But there seems to be a conflict of interest here that offers scope for unethical practices. An agency staff member confirmed that poor women signed the relinquishment paper without realising the import of their act. Instances of mothers coming back to ask for their baby - even within the stipulated two-month period - are common.

The role of the Department of Social Welfare

According to Sujata, the Department of Social Welfare (DSW) "routinely conducts inspections and files inspection reports, sends out show-cause notices, gets a routine follow-up done, and then routinely renews the licence of the agency or, in some instances, even recommends it for inter-country licence." For instance, the inter-country adoption licences of two agencies were revoked by the Tamil Nadu DSW in 1999-2001, although they continue to hold the permit for in-country adoption. Serious charges of malpractices, including those of child trafficking, had been levelled against them. One of the licensed agencies, which houses orphans in Hosur, has been issued a show-cause notice for irregularities and anomalies by the DSW.

Despite large-scale fraud, the number of adoptions has increased in Tamil Nadu. Of the 1,742 adoptions done between 1991 and 2001, nearly a fourth happened in the last two years. According to Andal Damodaran, the number of children given in in-country adoptions has also increased. Between 2000 and 2004, the number of agencies with in-country licence has doubled, from 10 to 21, and two new agencies were issued inter-country licences.

At a workshop in Chennai, (reported in *The Hindu*, December 27, 2003), adoption agencies complained that there was not enough staff meaningfully to evaluate the foster homes, or follow-up on the child's progress. They agreed that the screening process was inefficient and the documentation improper and that procedures were violated. But they attributed this

largely to inadequate funding and staff. They also agreed that some agencies were violating State procedures by changing the antecedents of the child, to please prospective parents. For most agencies, responsibility ends when they hand over the baby to the adoptive parents or, in some cases, "when they receive the money for the baby."

The adoption agencies seem to have no clear policy for charging for the babies they place in adoption although CARA has set certain rates. The adoption agencies in Tamil Nadu charge between Rs.3,000 and Rs.5,000 a month for a child. Aside from this, there is a service charge and a set of fees for home study, scrutiny, lawyers, and registration fee, which may add up to about Rs.8,000. Most agencies are unwilling to reveal the amounts they collect from foreign adoptive parents; they only admit to "charging more". Most institutions have tie-ups with government hospitals for treatment of the infants, but they conjure up large medical bills that are charged to the adoptive parent.

The DSW, according to reliable sources, has received several complaints by adopting parents. Adoption, insists, Vidya Reddy, should not be the main focus; it should be part of a larger welfare programme. But many agencies seem to run it as the main, even the only, programme.

In fact, agencies justify ICA for healthy babies on the ground that they run up huge medical and maintenance costs for the children. Some rationalise the high amounts recovered from foreign adoptive parents by saying that this "subsidises" Indian adoptions. Further, the agencies receive donations - in money and in kind - towards capital costs such as building and land. For instance, according to the Report given by CARA after it inspected the Coimbatore-based Peace Society on July 2, 2004, the agency has been getting huge donations from the Washington-based International Families Incorporated and in 2003-04, over Rs.27 lakhs from E.A. Rao, an NRI.

According to Sujata Mody's study, from 1998 to 2002, various adoption agencies in Tamil Nadu received from their foreign counterparts grants ranging from Rs.20 lakhs to Rs.2 crore.

Foreign adoptive parents pay their local agencies, which send the sums as "grant-in-aid" to their Indian counterparts. It is difficult to find out how much each parent in the foreign country has paid - but, according to some estimates, it ranges from $10,000 to $50,000. There is, however, a clear link between inter-country adoptions and foreign contributions. In fact, many agencies admit they cannot survive without doing inter-country adoptions.

In this context of funding, it is useful to note that none of the adoption agencies in Tamil Nadu now accesses the State government's Shishu Griha Scheme (SGS), which helps in-country adoptions. Under the scheme, agencies are given Rs.6 lakhs every year to take care of 10 children until they are given in adoption. According to Vidya Reddy, an important reason deterring agencies from accessing the grant could be the need for "greater accountability and governmental interference, which these agencies may not want."

Most agencies, under the guise of protecting privacy and pleading a lack of acceptance of adoption in India, continue to cover up their lack of financial accountability and lack of transparency. Inadequate funds are used as a pretext for remaining understaffed to be understaffed and poorly equipped. The lack of resources is cited as an excuse for deficient service, such as poor and incomplete home studies and shoddy follow-up of adoptive parents.

When contacted, a DSW official who did not wish to be named pointed out that ICA comes under CARA and "we have nothing to do with it."

The Tamil Nadu study raises some important questions: Are babies really surrendered by parents who face economic and social crises? Have enough

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efforts been made to counsel and support parents to keep the girl babies rather than abandon them? Have all avenues to unite the children with their biological parents been explored? Has serious effort been made to place babies with Indian adoptive families? Are CARA guidelines being followed? What is the real motive of these agencies? And, what if any is the role of the "cradle baby" scheme in this web of unethical and illegal adoption procedures?

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Bijlage 2: http://wcd.nic.in/gawaact.htm
THE GUARDIANS AND WARDS ACT,1890
[Act No. 8 of Year 1890, dated 21st. March, 1890]

CHAPTER I: PRELIMINARY
1. Title, extent and commencement
(1) This Act may be called the Guardians and Wards Act, 1890.
(2) It extends to whole of India l[except the State of Jammu and Kashmir].2[***]
(3) It shall come into force on the first day of July, 1890.
2. [Repealed by the Repealing Act, 1938, s. 2 and Sch.]
3. Saving of jurisdiction of Courts of Wards and Chartered High Courts
This Act shall be read subject to every enactment heretofore or hereafter passed relating to any Court of Wards by 3[any competent Legislature, authority or person in 4[any State to which this Act extends]]; and nothing in this Act shall be construed to effect or in any way derogate from , the jurisdiction or authority of any Court of Wards , or to take away any power possessed by 5[any High Court 6[* * *]].
4. Definitions
In this Act, unless there is something repugnant in the subject or context,-
(1) "minor" means a person who , under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority;
(2) "guardian" means a person having the care of the person of a minor or of his property or of both his person and property;
(3) "ward" means a minor for whose person or property or both there is a guardian;
(4) "District Court" has the meaning assigned to that expression in the Code of Civil Procedure, 1882 (14 of 1882)7, and includes a High Court in the exercise of its ordinary original civil jurisdiction;
8[(5) "the court" means-
(a) the District Court having jurisdiction to entertain an application under this Act for an order appointing or declaring a person to be a guardian; or
(b) where a guardian has been appointed or declared in pursuance of any such application-
(i) the court which, or the court of the officer who, appointed or declared the guardian or is under this Act deemed to have appointed or declared the guardian; or
(ii) in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides; or.

(c) in respect of any proceeding transferred under section 4A, the court of the officer to whom such proceeding has been transferred;]
(6) "Collector" means the chief officer in charge of the revenue administration of a district and includes any officer whom the State Government, by notification in the Official Gazette may, by name or in virtue of his office, appoint to be a Collector in any local area or with respect to any class of persons, for all or any of the purposes of this Act;
9[(7) [* * *]; and
8. "prescribed" means prescribed by rules made by the High Court under this Act.
4A. Power to confer jurisdiction on subordinate judicial officers and to transfer proceedings to such officers
(1) The High Court may, by general or special order, empower any officer exercising original civil jurisdiction subordinate to a district court, or authorise the Judge of any District Court to empower any such officer subordinate to him, to dispose of any proceedings under this Act transferred to such officer under the provisions of this section.
(2) The Judge of a District Court may, by order in writing, transfer at any stage any proceeding under this Act pending in his court for disposal to any officer subordinate to him empowered under sub-section (1).
(3) The Judge of a District Court may at any stage transfer to his own court or to any officer subordinate to him empowered under sub-section (1) any proceeding under this Act pending in the court of any other such officer.
(4) When any proceedings are transferred under this section in any case in which a guardian has been appointed or declared, the judge of the District Court may , by order in writing, declare that the Court of the Judge or officer to whom they are transferred shall, for all or any of the purposes of this Act, be deemed to be the court which appointed or declared the guardian.

CHAPTER II: APPOINTMENT AND DECLARATION OF GUARDIANS
5. Power of parents to appoint in case of European British subjects [Rep. by the Part B States (Laws) Act, 1951 (3 of 1951), s. 3 and Schedule].
6. Saving of power to appoint in other cases
In the case of a minor, 10[***] 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.
7. Power of the court to make order as to guardianship

(1) Where the court is satisfied that it is for the welfare of a minor that an order should be made-
(a) appointing a guardian of his person or property, or both, or
(b) declaring a person to be such a guardian,
the court may make an order accordingly.
(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the court.
(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.
8. Persons entitled to apply for order
An order shall not be made under the last foregoing section except on the application of -
(a) the person desirous of being, or claiming to be, the guardian of the minor; or
(b) any relative or friend of the minor; or
(c) the Collector of the district or other local area within which the minor ordinarily resides or in which he has property; or
(d) the Collector having authority with respect to the class to which the minor belongs.
9. Court having jurisdiction to entertain application
(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.
10. Form of application
(1) If the application is not made by the Collector, it shall be by petition signed and verified in manner prescribed by the Code of Civil Procedure, 1882 (14 of 1882)7, for the signing and verification of a plaint, and stating, so far as can be ascertained,-
(a) the name, sex, religion, date of birth and ordinary residence of the minor;

(b) where the minor is a female, whether she is married, and if so, the name and age of her husband;
(c) the nature, situation and approximate value of the property, if any, of the minor;
(d) the name and residence of the person having the custody or possession of the person or property of the minor;
(e) what near relations the minor has, and where they reside;
(f) whether a guardian of the person or property or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment;
(g) whether an application has at any time been made to the court or to any other court with respect to the guardianship of the person or property or both, of the minor, and if so, when, to what court and with what result;
(h) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both;
(i) where the application is to appoint a guardian, the qualifications of the proposed guardian;
(j) where the application is to declare a person to be a guardian, the grounds on which that person claims;
(k) the causes which have led to the making of the application; and
(l) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.
(2) If the application is made by the Collector, it shall be by letter addressed to the court and forwarded by post or in such other manner as may be found convenient, and shall state as far as possible the particulars mentioned in sub-section (1).
(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act, and the declaration must be signed by him and attested by at least two witnesses.
11. Procedure on admission of application
(1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing-
(a) to be served in the manner directed in the Code of Civil Procedure,1882(14 of 1882)11 on-
(i) the parents of the minor if they are residing in 11[any State to which this Act extends;]
(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor;
(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant; and
(iv) any other person to whom, in the opinion of the court special notice of the applicant should be given; and

(b) to be posted on some conspicuous part of the court-house and of the residence of the minor, and otherwise published in such manner as the court, subject to any rules made by the High Court under this Act, thinks fit.
(2) The State Government may, by general or special order, require that when any part of the property described in a petition under section 10, sub-section (1), is land of which a Court of Wards could assume the superintendence, the court shall also cause a notice as aforesaid to be served on the Collector in whose district the minor ordinarily resides and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.
(3) No charge shall be made by the court or the Collector for the service or publication of any notice served or published under sub-section (2).
12. Power to make interlocutory order for production of minor and interim protection of person and property
(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 sections 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 her 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.
13. Hearing of evidence before making of order
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.
14. Simultaneous proceedings in different courts
(1) If proceedings for the appointment or declaration of a guardian of a minor are taken in more courts than one, each of those courts shall, on being apprised of the proceedings in the other court or courts, stay the proceedings before itself.

(2) If the courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court 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.
12[(3) In any other case in which proceedings are stayed under sub-section (l),the court shall report the case to, and be guided by such orders as they may receive from their respective State Governments.]
15. Appointment or declaration of several guardians
(1) If the law to which the minor is subject admits of his having two or more joint guardians of his person or property or both, the court may, if it thinks fit, appoint or declare them.
13[* * *]
(4) Separate guardians may be appointed or declared of the person and of the property of a minor.
(5) If a minor has several properties, the court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.
16. Appointment or declaration of guardian for property beyond jurisdiction of the court.
If the court appoints or declares a guardian for any property situate beyond the local limits of its jurisdiction, the Court having jurisdiction in the place where the property is situate shall, on production of a certified copy of the order appointing or declaring the guardian accept him as duly appointed or declared and give effect to the order.
17. Matters to be considered by the court in appointing guardian
(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 minor is old enough to form an intelligent preference , the court may consider that preference.
14[* * *]
(5) The court shall not appoint or declare any person to be a guardian against his will.
Comment: We are, however, satisfied having regard to the circumstances of the case and the past history that the custody of the child should be immediately given to the mother as the child is less than 5 years old. The mother will, therefore, have the custody of the

child. It will, however, be open to the father, that is, respondent No. 1 to apply for the custody of the child in appropriate guardianship proceedings. The respondent No. 1, however, will be entitled to visit the residence of the petitioner @page-SC1157 and be with the child during week ends (on Saturdays and Sundays)., Smt. Manju Tiwari v. Dr. Rajendra Tiwari, AIR 1990
SUPREME COURT 1156
18. Appointment or declaration of Collector in virtue of office
Where a Collector is appointed or declared by the court in virtue of his office to be guardian of the person or property or both, of a manor, the order appointing or declaring him shall be deemed to authorise and require the person for the time being holding the office to act as guardian of the minor with respect to his person or property or both, as the case may be.
19. Guardian not to be appointed by the court in certain cases
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 married female and whose husband is not, in the opinion of court, unfit to be guardian of her person; or
(b) 15[* * *] 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.

CHAPTER III: DUTIES, RIGHTS AND LIABILITIES OF GUARDIANS GENERAL
20. Fiduciary relation of guardian to ward
(1) A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or by this Act, he must not make any profit out of his office.
(2) The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor and generally all transactions between them while the influence of the guardian still lasts or is recent.
21. Capacity of minors to act as guardians
A minor is incompetent to act as guardian of any minor except his own wife or child or where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family.
22. Remuneration of guardian

(1) A guardian appointed or declared by the court shall be entitled to such allowances, if any, as the court thinks fit for his care and pains in the execution of his duties.
(2) When an officer of the government , as such officer , is so appointed or declared to be guardian, such fees shall be paid to the government out of the property of the ward as the State Government, by general or special order, directs.
23. Control of Collector as guardian
A Collector appointed or declared by the court to be guardian of the person or property or both, of a minor shall, in all matters connected with the guardianship of his ward, be subject to the control of the State Government or of such authority as that Government, by notification in the Official Gazette, appoints in this behalf.
GUARDIAN OF THE PERSON
24. Duties of guardian of the person
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.
25. Title of guardian to custody of ward
(1) If a ward leaves or is removed from the custody of a guardian of his person, the court, if it is of opinion that it will be for the welfare of the ward to return to the custody of the guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian.
(2) For the purpose of arresting the ward, the court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1882 (10 of 1882)16.
(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.
26. Removal of ward from jurisdiction
(1) A guardian of the person appointed or declared by the court , unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.
(2) The leave granted by the court under sub-section (l) may be special or general and may be defined by the order granting it.
GUARDIAN OF PROPERTY
27. Duties of guardian of property
A guardian of the property of a ward is bound to deal therewith 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.

28. Powers of testamentary guardian

Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift , exchange or otherwise , immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

29. Limitation of powers of guardian of property appointed or declared by the court

Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the court to be guardian of the property of a ward, he shall not without the previous permission of the court, -

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward, or

(b) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

30. Voidability of transfers made in contravention of section 28 or section 29

A disposal of immovable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.

31. Practice with respect to permitting transfers under section 29

(1) Permission to the guardian to do any of the acts mentioned in section 29 shall not be granted by the court except in case of necessity or for an evident advantage to the ward.

(2) The order granting the permission shall recite the necessity or advantage, as the case may be, describe the property with respect to which that act permitted is to be done, and specify such conditions, if any, as the court may see fit to attach to the permission; and it shall be recorded, dated and signed by the Judge of the court with his own hand, or, when from any cause he is prevented from recording the order with his own hand, shall be taken down in writing from his dictation and be dated and signed by him.

(3) The court may in its discretion attach to the permission the following among other conditions, namely,-

(a) that a sale shall not be completed without the sanction of the court;

(b) that a sale shall be made to the highest bidder by public auction before the court or some person specially appointed by the court for

that purpose, at a time and place to be specified by the court, after such proclamation of the intended sale as the court subject to any rules made under this Act by the High Court, directs;
(c) that a lease shall not be made in consideration of a premium or shall be made for such term of years and subject to such rents and covenants as the court directs;
(d) that the whole or any part of the proceeds of that act permitted shall be paid into the court by the guardian, to be disbursed therefrom or to be invested by the court on prescribed securities or to be otherwise disposed of as the court directs.
(4) Before granting permission to a guardian to do an act mentioned in section 29, 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 hear and record the statement of any person who appears in opposition to the application.
32. Variation of powers of guardian of property appointed or declared by the court
Where a guardian of the property of a ward has been appointed or declared by the court and such guardian is not the Collector, the court may, from, time to time, by order, define, restrict or extend his powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with the law to which the ward is subject.
33. Right of guardian so appointed or declared to apply to the court for opinion in management of property of ward.
(1) A guardian appointed or declared by the court may apply by petition to the court which appointed or declared him for its opinion, advice or direction on any present question respecting the management or administration of the property of his ward.
(2) If the court considers the question to be proper for summary disposal, it shall cause a copy of the petition to be served on, and the hearing thereof may be attended by, such of the persons, interested in the application as the court thinks fit.
(3) The guardian stating in good faith the facts in the petition and acting upon the opinion, advice or direction given by the court shall be deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject- matter of the application.
34. Obligations on guardian of property appointed or declared by the court
Where a guardian of the property of a ward has been appointed or declared by the Court and such guardian is not the Collector, he shall-
(a) if so required by the court, give a bond, as nearly as may be in the prescribed form, to the Judge of the court to ensure for the benefit of the Judge for the time being, with or without sureties, as may be

prescribed engaging duly to account for what he may receive in respect of the property of the ward;
(b) if so required by the court , deliver to the court, within six months from the date of his appointment or declaration by the court, or within such other time as the court directs, a statement of the immovable property belonging to the ward, of the money and other movable property which he has received on behalf of the ward up to the date of delivering the statement, and of the debts due on that date to or from the ward;
(c) if so required by the court, exhibit his accounts in the court at such times and in such form as the court from time to time directs;
(d) if so required by the court, pay into the court at such time as the court directs the balance due from him on those accounts, or so much thereof as the court directs; and
(e) apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of those persons may be a party, such portion of the income, of the property of the ward as the court from time to time directs, and, if the court so directs, the whole or any part of that property.
17[34A. Power to award remuneration for auditing accounts
When accounts are exhibited by a guardian of the property of a ward in pursuance of a requisition made under clause (c) of section
34 or otherwise, the court may appoint a person to audit the accounts, and may direct that remuneration for the work be paid out of the income of the property.]
35. Suit against guardian where administration - bond was taken
Where a guardian appointed or declared by the court has given a bond duly to account for what he may receive in respect of the property of his ward, the court may on application made by petition and on being satisfied that the engagement of the bond has not been kept, and upon such terms as to security, or providing that any money received be paid into the court, or otherwise as the court thinks fit, assign the bond to some proper person, who shall thereupon be entitled to sue on the bond in his own name as if the bond had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustee for the ward, in respect of any breach thereof.
36. Suit against guardian where administration-bond was not taken
(1) Where a guardian appointed or declared by the court has not given a bond as aforesaid, any person , with the leave of the court, may, as next friend, at anytime during the continuance of the minority of the ward, and upon such terms as aforesaid, institute a suit against the guardian, or, in case of his death, against his representative, for an account of what the guardian has received in respect of the property of

the ward, and may recover in the suit, as trustee for the ward, such amount as may be found to be payable by the guardian or his representative, as the case may be.
(2) The provisions of sub-section (1) shall, so far as they relate to a suit against a guardian, be subject to the provisions of section 440 of the Code of Civil Procedure as amended by this Act, 1882 (14 of 1882)18.
37. General liability of guardian as trustee
Nothing in either of the two last foregoing sections shall be construed to deprive a ward or his representative of any remedy against his guardian, or the representative of the guardian, which, not being expressly provided in either of those sections, any other beneficiary or his representative would have against his trustee or the representative of the trustee.
TERMINATION OF GUARDIANSHIP
38. Right of survivorship among joint guardians
On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the court.
39. Removal of guardian
The court may, on the application of any person interested, or of its own motion, remove a guardian appointed or declared by the court, or a guardian appointed by will or other instrument, for any of the following causes, namely,-
(a) for abuse of his trust.
(b) for continued failure to perform the duties of his trust;
(c) for incapacity to perform the duties of his trust;
(d) for ill-treatment, or neglect to take proper care, of his ward;
(e) for contumacious disregard of any provision of this Act or of any order of the court;
(f) 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;
(g) for having an interest adverse to the faithful performance of his duties;
(h) for ceasing to reside within the local limits of the jurisdiction of the court;
(i) in the case of a guardian of the property, of bankruptcy or insolvency;
(j) by reason of the guardianship of the guardian ceasing, or being liable to cease, under the law to which the minor is subject:
PROVIDED that a guardian appointed by will or other instrument, whether he has been declared under this Act or not, shall not be removed-

(a) for the cause mentioned in clause (g) unless the adverse interest accrued after the death of the person who appointed him, or it is shown that the person made and maintained the appointment in ignorance of the existence of the adverse interest, or
(b) for the cause mentioned in clause (h) unless such guardian has taken up such a residence as, in the opinion of the court, renders it impracticable for him to discharge the functions of guardian.
40. Discharge of guardian
(1) If a guardian appointed or declared by the court desires to resign his office, he may apply to the court to be discharged.
(2) If the court finds that there is sufficient reason for the application, it shall discharge him, and if the guardian making the application is the Collector and the State Government approves of his applying to be discharged, the court shall in any case discharge him.
41. Cessation of authority of guardian
(1) The powers of a guardian of the person cease-
(a) by his death, removal or discharge;
(b) by the Court of Wards assuming superintendence of the person of the ward;
(c) by the ward ceasing to be a minor;
(d) in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the court, by her marriage to a husband who is not, in the opinion of the court, so unfit; or
(e) 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.
(2) The powers of a guardian of the property cease-
(a) by his death, removal or discharge;
(b) by the Court of Wards assuming superintendence of the property of the ward; or
(c) by the ward ceasing to be a minor.
(3) 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 directs 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.
(4) When he has delivered the property or accounts as required by the court , the court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered.
42. Appointment of successor to guardian dead, discharged or removed

When a guardian appointed or declared by the court is discharged, or, under the law to which the ward is subject, ceases to be entitled to act, or when any such guardian or a guardian appointed by will or other instrument is removed or dies, the court, of its own motion or on application under Chapter II, may, if the ward is still a minor, appoint or declare another guardian of his person or property, or both, as the case may be.

CHAPTER IV: SUPPLEMENTAL PROVISIONS
43. Orders for regulating conduct or proceedings of guardian, and enforcement of those orders
(1) The court may, on the application of any person interested or of its own motion, make an order regulating the conduct or proceedings of any guardian appointed or declared by the court.-
(2) Where there are more guardians than one of a ward and they are unable to agree upon a question affecting his welfare, any of them may apply to the court for its direction, and the court may make such order respecting the matter in difference as it thinks fit.
(3) Except where it appears that the object of making an order under sub-section (1) or sub-section (2) would be defeated by the delay, the court shall, before making the order, direct notice of the application therefor or of the intention of the court to make it, as the case may be, to be given in a case under sub-section (1), to the guardian or, in a case under sub-section (2), to the guardian who has not made the application.
(4) In case of disobedience to an order made under sub-section (1) or sub-section (2), the order maybe enforced in the same manner as an injunction granted under section 492 or section 493 of the Code of Civil Procedure, 1882 (14 of 1882)19, in a case under sub-section (1), as if the ward were the plaintiff and the guardian were the defendant or, in a case under sub-section (2), as if , the guardian who made the application were the plaintiff and the other guardian were the defendant.
(5) Except in a case under sub-section (2), nothing in this section shall apply to a Collector who is, as such, a guardian.
44. Penalty for removal of ward from jurisdiction
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.

45. Penalty for contumacy
(1) In the following cases, namely,-
(a) If a person having the custody of a minor fails to produce him or cause him to be produced in compliance with a direction under section 12, sub-section (1), or to do his utmost to compel the minor to return to the custody of his guardian in obedience to an order under section 25, sub-section (1); or
(b) if a guardian appointed or declared by the court fails to deliver to the court, within the time allowed by or under clause (b) of section 34, a statement required under that clause, or to exhibit accounts in compliance with a requisition under clause (c) of that section, or to pay into the court the balance due from him on those accounts in compliance with a requisition under clause (d) of that section;
(c) if a person who has ceased to be a guardian , or the representative of such a person, fails to deliver any property or accounts in compliance with the requisition under section 41, sub-section (3),
the person, guardian or representative, as the case may be, shall be liable, by order of the court, to fine not exceeding one hundred rupees, and in case of recusancy to further fine not exceeding ten rupees for each day after the first during which the default continues, and not exceeding five hundred 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.
(2) If a person who has been released from detention on giving an undertaking under sub-section (1) fails to carry out the undertaking within the time allowed by the Court, the court may cause him to be arrested and recommitted to the civil jail.
46. Reports by Collectors and subordinate Courts
(1) The court may call upon the Collector, or upon any court subordinate to the court, for a report on any matter arising in any proceeding under this Act, and treat the report as evidence.
(2) For the purpose of preparing the report the Collector or the Judge of the subordinate court, as the case may be, shall make such inquiry as he deems necessary, and may for the purposes of the inquiry exercise any power of compelling the attendance of a witness to give evidence or produce a document which is conferred on a court by the Code of Civil Procedure, 1882 (14 of 1882)7.
47. Orders appealable
An appeal shall lie to the High Court from an order made by a 20[* * *] court-
(a) under section 7, appointing or declaring or refusing to appoint or declare a guardian; or

(b) under section 9, sub-section (3), returning an application; or
(c) under section 25, making or refusing to make an order for the return of a ward to the custody of his guardian; or
(d) under section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the court, or imposing conditions with respect thereto; or
(e) under section 28 or section 29, refusing permission to a guardian to do an act referred to in the section; or
(f) under section 32, defining, restricting or extending the powers of a guardian; or
(g) under section 39, removing a guardian; or
(h) under section 40, refusing to discharge a guardian; or
(i) under section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians or enforcing the order ; or
(j) under section 44 or section 45, imposing a penalty.
48. Finality of other orders
Save as provided by the last foregoing section and by section 622 of the Code of Civil Procedure 1882 (14 of 1882)21, an order made under this Act shall be final, and shall not be liable to be contested by suit or otherwise.
49. Costs
The costs of any proceeding under this Act, including the costs of maintaining a guardian or other person in the civil jail, shall, subject to any rules made by the High Court under this Act, be in the discretion of the court in which the proceeding is, had.
50.Power of High Court to make rules
(1) In addition to any other power to make rules conferred expressly or impliedly by this Act, the High Court may from time to time make rules consistent with this Act-
(a) as to the matters respecting which, and the time at which, reports should be called for from Collectors and subordinate courts;
(b) as to the allowances to be granted to, and the security to be required from, guardians, and the cases in which such allowances should be granted;
(c) as to the procedure to be followed with respect to applications of guardians for permission to do acts referred to in sections 28 and 29;
(d) as to the circumstances in which such requisitions as are mentioned in clauses (a), (b), (c) and (d) of section 34 should be made;
(e) as to the preservation of statements and accounts delivered and exhibited by guardians;
(f) as to the inspection of those statements and accounts by persons interested;

17[(ff) as to the audit of accounts under section 34A, the class of persons who should be appointed to audit accounts, and the scales of remuneration to be granted to them;]
(g) as to the custody of money, and securities for money, belonging to wards;
(h) as to the securities on which money belonging to wards may be invested;
(i) as to the education of wards for whom guardians, not being Collectors, have been appointed or declared by the court; and
(j) generally, for the guidance of the courts in carrying out the purposes of this Act.
(2) Rules under clauses (a) and (i) of sub-section (1) shall not have effect until they have been approved by the 22[State Government], nor shall any rule under this section have effect until it has been published in the Official Gazette.
51. Applicability of Act to guardians already appointed by Court.
A guardian appointed by, or holding a certificate of administration from a civil court under any enactment repealed by this Act shall, save as may be prescribed, be subject to the provisions of this Act, and of the rules, made under it, as if he had been appointed or declared by the court under Chapter II.
52. Amendment of Indian Majority Act
[Repealed by the Repealing Act, 1938 (1 of 1938), s. 2 and Sch.].
53. Amendment of Chapter XXXI of the Code of Civil Procedure
[Repealed by the Code of Civil Procedure, 1908 (5 of 1908), s. 156 and Sch. V]

THE SCHEDULE
Enactments repealed -[Rep. by the Repealing Act, 1938 (1 of 1938), s. 2 and Sch.]
Foot Notes
1. Substituted for words "except Part B States" by Act No. 3 of 1951, and Schedule.
2. The word "and" omitted by Act No. 40 of 1949 and Schedule II.
3. Substituted for words "the Governor-General in Council or by a Governor or Lieutenant-Governor in Council" by AO, 1937.
4. Substituted for words "Part A States and Part C States", by Act No. 3 of 1951, section 3 and Schedule.
5. Substituted by the AO, 1937, for words "any High Court established under the Statute 24 and 25 Victoria, Chapter 104 (an Act for establishing High Courts of judicature in India)".
6. The words "established in Part A States and Part C States", omitted by Act No. 3 of 1951, section 3 and Schedule.
7. Refer to the Code of Civil Procedure, 1908 (5 of 1908).

8. Substituted by Act No. 4 of 1926, for the original clause (5).
9. Clause (7) omitted by Act No. 3 of 1951 and Schedule.
10. The words "who is not a European British subject", omitted by Act No. 3 of 1951, section 3 and Sch.
11. Substituted for the words and figures "a Part A State or a Part C State" by Act No. 3 of 1951, section 3 and Sch..
12. Substituted by the AO, 1937 for the original sub-section (3).
13. Sub-sections (2) and (3) omitted by Act No. 3 of 1951.
14. Sub-section (4) omitted by Act No. 3 of 1951.
15. The words "subject to the provisions of this Act with respect to European British subjects" omitted by Act No. 3 of 1951.
16. Refer to section 97 of the Code of Criminal Procedure, 1973 (2 of 1974).
17. Inserted by Act No. 17 of 1929.
18. Refer to Order XXXII, rules 1 and 4(2), in Schedule I to the Code of Civil Procedure, 1908 (5 of 1908).
19. Refer to Order XXXIX Rules 1 and 2 in Schedule I to the Code of Civil Procedure,1908 (5 of 1908).
20. The word "district" repealed by Act No. 4 of 1962.
21. Refer to section 115 of the Code of Civil Procedure, 1908 (5 of 1908).
22. Substituted by A.L.O.1950, for the words "Provincial Government".

Bijlage 3:
http://punjabrevenue.nic.in/hadoptact(1).htm#Requisitesofavalid

Hindu Adoptions And Maintenance Act, 1956
[78 of 1956, dt. 21-12-1956] [1]

An Act to amend and codify the law relating to adoptions and maintenance among Hindus
Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:-

Chapter 1
Preliminary

1	Short title and extent
2	Application of Act
3	Definitions
4	Overriding effect of Act

Chapter II
Adoption

5	Adoptions to be regulated by this Chapter
6	Requisites of a valid adoption
7	Capacity of a male Hindu to take in adoption
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Hindu Adoptions And Maintenance Act, 1956

CHAPTER 1
PRELIMINARY

1 Short title and extent
(1) This Act may be called the Hindu Adoptions and Maintenance Act, 1956
(2) (2) It extends to the whole of India expect the State of Jammu and Kashmir.

2 Application of Act
(1) This Act applies-
(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana of Arya Samaj,
(b) to any person who is a Buddhist, Jaina or Sikh by religion and
(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of the law in respect any of the matters dealt with herein if this Act had not been passed.
Explanation : The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:-
(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina, and Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; [2][**]
[3][(bb) any child, legitimate or illegitimate who has been abandoned both by his father and mother or whose parentage is known and who in either case is brought up as a Hindu, Buddhist, Jaina or Sikh; and]
(c) (c) any person who is convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion.
(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification the Official Gazette, otherwise directs.
(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person whom this Act applies by virtue of the provisions contained in this section.

3 Definitions

In this Act, unless the context otherwise requires :-

(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family.

PROVIDED the rule is certain and not unreasonable or opposed to public policy :

PROVIDED FURTHER that, in the case of a rule applicable only to a family, it has not been discontinued by the family ;

(b) "Maintenance" includes-

(i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;

(ii) in the case of an unmarried daughter, also the reasonable expenses of and incidents to her marriage ;

(c) "Minor" means a person who has not completed his or her age of eighteen years.

COMMENTS

Where the custom is such as permitting the second marriage during the lifetime of the spouse cannot be given the force of law keeping in mind the statutory provision against bigamy Raghuvira Kumar v Shankmukha Vadivu 1970 (2) MLJ 193

As per the custom prevailing in Himachal Pradesh, daughter is conferred a right where for she can make a representation in non-ancestral property including the property of a collateral- Ram Rakha v. Ram Rakshi 1983 HP 18

A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in particular locality, although contrary to or not consistent with the general common law of the realm. A custom to be held valid must have four essential attributes. First it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin; and fourthly it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the person whom it is alleged to affect.- Halsbury's law of England 4th ed. vol. 12 para 401.

4 Overriding effect of Act

Save as otherwise expressly provided in this Act.-

(a) any text, rule of interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

COMMENTS

Where the adoption takes place following the custom, then the custom must be such as not in contradiction of statutory provisions laid down as regards adoption. That adoption which is against the provision of the Act is invalid.- Kartar Singh v. Surjan Singh 1975 (1) SCR 742

CHAPTER II
ADOPTIONS

5 Adoptions to be regulated by this chapter

(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provision shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the right of any person in the family of his or her birth.

COMMENTS

Adoption that takes place after the death of the husband contrary to the will of deceased husband and after the Act came into force it was held that, legality of the adoption is to be considered in accordance with the provision of Act, and the adoption cannot be held invalid just for the fact that it was against the directions as mentioned in the will of deceased husband.- Kavuluru V. Kuntamukkala 1971 (1) An. WR 134

6 Requisites of a valid adoption

No adoption shall be valid unless-

(i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) (iii) the person adopted is capable of being taken in adoption; and

(iv) (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

COMMENTS

Where any of the requirements as laid down under s.6 are not strictly observed, that non-observance of the requisite or requisites is enough

to convert the adoption as invalid one.-Dhanraj v. Suraj Bai 1972 Raj LW 612
Doctrine of factum valet does not have its application in case the adoption is against what is said by the provisions of the Hindu Adoption and Maintenance Act, 1956-Lalla Ram v. Gohri Ram 1972 All WR (HC) 612

7 Capacity of a male Hindu to take in adoption
Any male Hindu who is sound mind and is not a minor has the capacity to take a son or a daughter in adoption:
PROVIDED that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.
Explanation: If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of the them is unnecessary for any of the reasons specified in the preceding proviso.
COMMENTS
The person taking in adoption must not suffer from idiocy or insanity; he must have the capacity enough to understand the nature of the Act and what would be the legal effects of adoption . Simultaneously it is not the requirement the person concerned must be possessed with a very high degree of intelligence. There is a very strong presumption favouring soundness of mind.-Babubarelal v. Gulzari Devi 1979 All LJ 1333
Deaf and dumb but possessed with the capacity to express through signs and gestures, though not clearly, is to be taken as a person of sound mind.-Ambrish Kumar v. Hatu Prasad 1981 HLR 781
Proviso places a restriction as concerned to right to take in adoption that makes the consent of the wife a necessity so as to make the adoption valid. The consent must be obtained prior to the civil adoption takes place and not later on where the proviso is disregarded adoption is not valid.-Badrilal v. Bheru 1986 (1) HLR 81.
In the case of divorce the consent is not necessary but in the case of judicial separation, consent would be necessary. In case of two wives, consent must be of both the wives despite the fact that one of them was not living under the same roof for a big job of twenty or thirty years.-Bhooloo Ram v. Ram Lal 1989 (2) HLR 162

8 Capacity of a female Hindu to take in adoption
Any female Hindu :-
(a) Who is of sound mind,
(b) who is not a minor, and

(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption.

COMMENTS

After the completion of the age of eighteen, a woman gets the capacity to adopt even though. she herself is unmarried. Where after the adoption, she is married, her husband would be step-father and she herself would remain adoptive mother as earlier. Adoption by an unmarried can also take place despite the fact that she is having an illegitimate child. - Ashoka Naidu v. Raymond AIR 1976 Cal 272.

A married woman has got no right to take in adoption during the subsistence of the marriage. But where the husband has completely and finally renounced the world or he had ceased to be Hindu or some competent court has declared him to be of unsound mind, the wife can adopt.- Dashrath V. Pandu 1977 Mah LJ 358

9 Persons capable of giving in adoption

(1) No person except the father or mother the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provision of 1[sub-section (3) and sub-section (4)], the father, if alive, shall alone have the right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu has been declared by a court of competent jurisdiction to be of unsound mind.

(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

1[(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.]

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or

give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

Explanation: For the purposes of this section-

(i) the expression "father" and "mother" do not include an adoptive father and an adoptive mother; 2[***]

3[(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 or mother; and

(b) a guardian appointed or declared by a court: and]

(ii) "court" means the city civil court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

COMMENTS

Where the adoption takes place and step-son is given in adoption by step-mother having no capacity to give in adoption such an adoption is not valid one by virtue of s.5(1) read with s.6(ii)-Dhanraj v. Suraj Bai 1975 (Supp) SCR 73

It is the District Court where in the application for giving and taking in adoption has to be moved and not in the Family Court. How and in what manner the permission is to be made there is no such mention under the Act and the provisions that have to be followed are there as laid down under Guardians and Wards Act.-Central Bank Relief & Welfare Society, In re AIR 1991 Kar 6

10 Persons who may be adopted

No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:-

(i) he or she is Hindu;

(ii) he or she has not already been adopted;

(iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

COMMENTS

There is a bar imposed by this s. 10 and that being a married person cannot be adopted. But the case is different where there is some custom among Jats of Punjab and Haryana in having a legal sanction

and judicially recognised where under the custom permits the adoption of married person-Amar Singh V.Tej Ram 1982 (84)Punj LR 2387
The person above the age of 15 years cannot be given in adoption and if there is some custom permitting that the same must be strictly pleaded and proved-Mahalingam v. Kannayyar AIR 1990 Mad. 333. 1989 (2) MLJ 3441
Existence of custom be it family or tribal custom having its applicability to the parties concerned whereby the adoption of a person married or of the age of more than 15 years is permitted, is all that is required to be established by the provision of section 10 so as to make adoption valid.-Maya Ram v. Jai Narian 1989 (1) HLR 352

11 Other conditions for a valid adoption
In every adoption, the following conditions must be complied with:
(i) if the adoption is of a son, the adoptive father or mother by whom adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;
(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption)living at the time of adoption;
(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty one years older than the person to be adopted;
(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty -one years older than the person to be adopted;
(v) the same child may not be adopted simultaneously by two or more person;
(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth 1[or in case of an abandoned child or child whose parentage is not known, from the place or family where it has been brought up] to the family of its adoption:
PROVIDED that the performance of datta homam shall not be essential to the validity of adoption.

COMMENTS
Requirement of an age gap of 21 years between the adoptee and the adopted, if violated is sufficient to render the adoption invalid.- Golak Chandra v . Kritibas AIR 1979 Ori. 205

Where the case is, one child is given to the family of other so that the child is brought up, this giving of the child does not constitute adoption. There must be an intention to give and to take the child in adoption.- Kewal Singh v. Bakshish Singh 1975 (77) Punj LR 321
Absence of parents at the time of adoption ceremony and not proving the giving and taking the child in adoption, adoption was held invalid. v.Bakshish Singh -Kewal Singh 1979 HLR 431

12 Effects of adoption
An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family :
PROVIDED that -
(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;
(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.
COMMENTS
The assumption that all the ties of child with the family of his or her birth shall be severed operates only from the day the adoption takes place and from the day the ties are replaced by those created by the adoption in the adoptive family.-Kanwaljit Singh v. State of Haryana 1981 Pun LJ 64.
Adopted girl is conferred an entitlement to succeed the property within the meaning of s.8 of Hindu Succession Act despite the fact that the property was owned by the deceased by reason of his adoption.- Neelawwa v. Shivawwa 1988 (2) HLR 799.
Under the provisions of s.14 of the Hindu Succession Act, widow becomes an absolute owner, and it is not possible that the child adopted by her is divesting her of the right which has already been vested in her.- Dinaji v.Dadde AIR 1990 SC 1153.
Where the property is in absolute terms vested in a person as the last surviving coparcener a child subsequently adopted cannot divest him of it .-Krishnabai v. Ananda Sevaram AIR 1981 Bom 240

13 Right of adoptive parents to dispose of their properties

Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will.

COMMENTS

Where the child is taken in adoption by the sole surviving widow, oral relinquishment by her in favour of adopted child is valid and effective.-Hirabai v. Babu Manika AIR 1980 Bom. 315

14 Determination of adoptive mother in certain cases

(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the senior-most in marriage among them shall be deemed to be the adoptive mother and the other to be step mothers

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be step mother of the step mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step father of the adoptive child.

15 Valid adoption not to be cancelled

No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

16. Presumption as to registered documents relating to adoption

Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

COMMENTS

In case a challenge is thrown to the deed of adoption on the ground of its execution being by fraud, coercion or undue influence, it is for the party challenging the document that has to establish that the execution was so vitiated.-Sushil Chandra v. Bhoop Kunwar AIR 1977 All 441.
Presumption as to registered documents relation to adoption is only a rebuttable presumption.-Bhoolo Ram v. Ramlal 1989 (2) HLR 162

Where the validity of the adoption was asked for on the ground of not obtaining the consent if the husband on account of his unsound mind but this fact found no place in the plaint as required by order 6, rule 6, CPCand there was only the presentation of registered document it was held that presumption as under s. 16 of Hindu Adoption and Maintenance Act would prevail over the provision of order 6, rule 6 of C.P.C. It is for the other party if it wants to, to rebut the presumption.- 1979 MP LJ 591.

17 Prohibition of Certain Payments

(1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

(2) If any person contravenes the provision of sub-section (1), he shall be punishable with imprisonment which may extend to six months, or with fine, or with both .

(3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorised by the State Government in this behalf.

CHAPTER III
MAINTENANCE

18 Maintenance of wife

(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance -

(a) If he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of willfully neglecting her;

(b) If he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) If he is suffering from a virulent from of leprosy;

(d) If he has any other wife living ;

(e) If he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion ;

(g) if there is any other cause justifying her living separately;
(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

COMMENTS
The words "wife or widow" in the context of marriage, succession or maintenance enactments are of restrictive legal character and imply relationship which is not recognised by land-Rajesh Bai v. Santha Bai 1982 HLR 445.
A man marrying a second time, during the lifetime of his wife, second wife though, having no knowledge of the first marriage, is not entitled to claim maintenance under s, 125 of the Code of Criminal Procedure, as she was not legally wedded wife and for that the marriage was void.-Jamuna Bai v.Anant Rao 1988 Cr LJ 793.
There is no forum provided under the Act so as to claim maintenance. Maintenance can only be claimed through regular suit.-Krishan Lal v. Sudershan Kumari 1979 HLR 576.

19 Maintenance of Widowed daughter-in-law
(1) A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law.
PROVIDED and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance -
(a) from the estate of her husband or her father or mother, or
(b) (b) from her son or daughter, if any, or his or her estate.
(2) Any obligation under sub-section (1) shall not be enforceable if the father- in- law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the re-marriage of the daughter-in-law.
COMMENTS
Liability of the father-in-law comes to an end where the widow is remarried or she has obtained a share in the coparcenery properties while partition. But her right to share in the separate property of her husband or in his interest in coparcenery property cannot be divested.-Animuthu v. Gandhimmal 1977 HLR 628.

20 Maintenance of children and aged parents
(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.
(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends insofar as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.
Explanation: In his section "parent" includes a childless step-mother.

COMMENTS
There is no liability casted upon step-son as to maintain his step mother under this section, though the step-son is liable to maintain her as a dependent- Pannalal v. Fulmani AIR 1987 Cal 768
Unmarried daughter, aged or infirm parents can enforce their rights only in these cases where they are unable to maintain themselves from their own earnings or from the property owned by them where almost all the property is given in gift by the mother to her only daughter and the rest of property is sold by her to her brother, she gets entitled to be maintained by her daughter.-Munnidevi.v. Chhoti AIR 1983 All 444.

21 Dependants defined
For the purposes of this Chapter "dependants" means the following relatives of the deceased:
(i) his or her father ;
(ii) his or her mother;
(iii) his widow, so long as she does not re- marry
(iv) his or her son or the son of his predeceased son or the son of predeceased son of his predeceased son, so long as he is a minor: PROVIDED and to the extent that he is unable to obtain maintenance, in the case of a grandson from his father's or mother's estate, and in the case of a great - grand son, from the estate of his father or mother or father's father or father's mother;
(v) his or her unmarried daughter, or the unmarried daughter of his predeceased son or the unmarried daughter of a predeceased son of his predeceased son , so long as she remains unmarried;
PROVIDED and to the extent that she is unable to obtain maintenance, in the case of a grand - daughter from her father's or mother's estate and in the case of great-grand- daughter from the estate of her father or mother or father's father or father's mother;
(vi) his widowed daughter :
PROVIDED and to the extent that she is unable to obtain maintenance
(a) from the estate of her husband, or
(b) from her son or daughter if any, or his or her estate; or

(c) from her father-in-law or his father or the estate of either of them ;

(vii) any widow of his son or of a son of his predeceased son, so long as she does not remarry:

PROVIDED and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate; or in the case of a grandson's widow, also from her father-in-law's estate

(viii) his or her minor illegitimate son, so long as he remains a minor;

(ix) his or her illegitimate daughter, so long as she remains unmarried.

22 Maintenance of dependents

(1) Subject to the provisions of sub section (2) the heirs of a deceased Hindu are bound of maintain the dependants of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

(3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

(4) Notwithstanding anything contained in sub section (2) or sub section (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act.

COMMENTS

A person having concubine and he himself dying after the Act coming into force, would confer a right to maintenance upon the concubine.- Laxminarasamma v. Sundaraamma AIR 1981 AP 88.

Where no property is inherited by the brothers from their father, they cannot be compelled to contribute for the marriage of their sister.- Challaiyan v. Salia Krishan AIR 1982 Mad 148.

Where there is no maintenance from the estate of the husband or from her son or daughter such Hindu widow, is to be taken as dependant of the father-in-law under this section as s,19 would not be having its application to such a case .-Bitala Kunwari v. Girand Singh AIR 1983 All 425.

23 Amount of maintenance

(1) It shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so the court shall have due regard to the considerations set out in sub- section (2), or sub- section(3), as the case may be, so far as they are applicable.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to.-

(a) the position and status of the parties;

(b) the reasonable wants of the claimant ;

(c) if the claimant is living separately, whether the claimant is justified in doing so;

(d) the value of the claimant's property and any income derived from such property , or from the claimant's own earnings or from any other sources;

(e) the number of persons entitled to maintenance under this Act

(3) In determining the amount of maintenance, if any, to be awarded to a dependent under this Act, regard shall be had to.-

(a) the net value of the estate of the deceased after providing for the payment of his debts;

(b) the provision, if any, made under a will of the deceased in respect of the dependant;

(c) the degree of relationship between the two;

(d) the reasonable wants of the dependant;

(e) the past relations between the dependant and the deceased;

(f) the value of the property of the dependant and any income derived from such property; or from his or her earnings or from any other source;

(g) the number of dependants entitled to maintenance under this Act.

COMMENTS

Quantum of maintenance depends upon a gathering together or all the facts of the situation, the amount of free estate, the past life of the married parties and the families a survey of the conditions and necessities and rights of the members, on a reasonable view of the change of circumstances possibly required in the future, regard being of course to the scale and mode of living to the age, habits, wants and class of life of the parties.-Rashmi Mehra v.Sunil Mehra AIR 1991 Del.44

24 Claimant to maintenance should be a Hindu
No person shall be entitled to claim maintenance under this chapter if he or she has ceased to be a Hindu by conversion to another religion.

25 Amount of Maintenance may be altered on change of circumstances:
The amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration.
COMMENTS
When the power is conferred to alter the prior decree or agreement it definitely includes a power to annul the same if the circumstances requires so.- Dattu Bhat v. Tarabai AIR 1985 Bom.106

26 Debts to have priority
Subject to the provision contained in section 27 debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this act.

27 Maintenance when to be a charge
A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise,

28 Effect of transfer of property on right to maintenance
Where a dependant has a right to receive maintenance out of an estate, and such estate or any part thereof its transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right.

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