Q-1 When can a Hindu wife demand separate residence and maintenance from her Husband? Describe the conditions in which this fight is forteited.

The right to maintenance, that is to say, the right to be supported and cared for by another, has primarily been a matter of personal obligation arising from the duty enjoined by nature upon man that he must continue the race including as it did, as civilization advanced, the duty to rear up a family and with it the duty to look after and support these members of the family who were unable to look after themselves by reason of their physical disability. These would include the newly born till they acquire, on becoming adult, the capacity to form and rear up their own family, the wife who rears them up, and the agel parents who had in their youth similarly brought up and supported the finals The right of a person to maintenance and the corresponding obligation another to provide it, are in their very nature, dependent upon a consideration of the character of relationship between them, their mean and mode of living.

The men and the mode of living are material to determine the quantum of the obligation. The hitherto normal condition of Hindu society being to in joint families, it became the rule that every member of the joint family entitled to reside in the joint family house and to be maintained out of t family funds, under the control of the Earth or the family manager, and on partition of the family taking place. members not entitled to a share in the joint property are entitled to a provision being made for their maintenance. The law of maintenance could not therefore be treated easily apart from the law of joint family and partition. However, because of the progressive weakening of the ties of joint family that bound the Hindus so far, accelerated in no small measure. by recent legislation which has tended only to destroy them, and the codification of the law of maintenance in the Hindu Marriage Act, 1955 (Ad 15 of 1955), and in the Hindu Adoptions and Maintenance Act 1956 (Act 78 of 1956), it has become necessary to treat the law of maintenance as a separate topic.

The right of maintenance is the offspring of the concept of joint Hindu family. The karta of joint Hindu family bears the responsibility of the maintenance of all the members of family, the observance of sanskaras in the case of every member and the marriage expenses thereof. The tight maintenance is available to those members also, who on account of their disabilities is disentitled to inheritance.

The right of maintenance includes all the reasonable necessaries of life such as fook, clothes and shelter. This might create an obligations which is the outcome of legal relationship.

This person entitled to maintenance, according to Dharmashastras, can be divided broadly into two categories firstly, the persons about whom the Dharmashastra lays down a binding duty and secondly those persons about Dam they lay down a general duty. The first category includes old age & infirm parents, legal wife, minor children. The second category includes parents in general, the preceptor's wife, a casual visitor guests and fine. Manu has said: Old infirm parents, a dedicated wife and the minor children are to be maintained by committing even thousands of offences.

Nature and extent of the right of maintenance-Twofold liability.-The liability to maintain arises out of nature of relationship with certain category of persons and under certain circumstances, which has got nothing to do with owning or not owning a property. In certain other conditions the liability is dependent only on owning the property. The liability in the former case is absolute and personal, arising out of relationship while in the latter can it is known as liability arising from ancestral property which is limited one.

1. Wife.- Under Section 18 of the Hindu Adoption and Maintenance Act, two separate rights have been centered on the wife;

(1) Right to maintenance

(2) Right to separate residence

Before the present legislation, an Act known as Right to Separate Residence and Maintenance Act, 1946 was in force, which has been repeated by Section 29 of the Act of 1956.

Before the Act of 1956 came into force it was treated as a binding duty of every husband to maintain his wife inspective of any property with him. Since it was regarded

as a personal liability. it handle required the possession of any ancestral or separate property with the husband as a condition precedent for entitling the wife to claim maintenance from him This right exists for the whole pan of her marital life as it is one of the necessary concomitant of marriage between them. The liability of the husband is not affected by the fact that she is quite rich The moral obligation of the husband has been rendered into a legal obligation, as the obligation is derived from the relationship between a Hindu male and his dependants.

Hindu law restricts the right of alienation of a husband so that he or the Karta of joint Hindu family does not alienate the property in a manner that the Wife and other dependants are not virtually deprived of their right of maintenance. The wife is entitled to claim maintenance cither out of the share of her husband in the joint Hindu family or of his own separate property. The wife living separately from her husband without a reasonable justification cannot claim maintenance because in that case she herself is guilty of the breach of marital obligations.

The Hindu Adoption and Maintenance Act, 1956 keeps alive the old textual law in this respect under Section 15 According to the provisions of the section all such wives whose marriages were solemnised before or after the enforcement of this Act are entitled to get maintenance from their husband during whole of their life. Although the right of maintenance is created under personal law yet it has been covered under a statutory umbrella in under to strenghten the right. But where the husband is an indigent and pauper he cannot be compelled to provide the maintenance allowance.

A Hindu wile would be entitled to separate residence without forfeiting her right to maintenance if-

(a) the husband is guilty of desertion, i.e, the husband, without any reasonable justification or without her consent or against her wishes, abondons her or wilfully neglects her;

(b) the husband 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) he is suffering from a virulent from of leprosy;

(d) he has any other wife living;

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

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

(g) there is any other cause justifying her living separately.

Maintenance in the present context includes provisions for food, clothing, residence, education and medical aid and treatment.

there is no inconsistency between this section and section 25(1) of the Hindu Marriage Act. The present provision intends to provide for maintenance to a wife whereas Section 25 (1) of the Marriage Act provides for the maintenance to the divorced spouse. The forum for application under this section would be the civil court and not the matrimonial court as under the Hindu Marriage Act.

The expressions 'desertion' and 'cruelty' are justifications for separate residence of the wife without prejudicing her right to maintenance have been interpreted in the same sense with their cognate meanings as explained in the context of Sections 10and 13 of the Hindu Marriage Act, 1955. It is now well settled that factum of separation and animus *deserendi* are essential for desertion and cruelty may be physical as well as mental.

A full bench judgment of the Kerala High Court, adopting a sociological approach towards the dimensions of desertion held that where the husband is guilty of desertion, it is sufficient to prove that has is living separately and not that there was animus deserendi. This provision is especially designed to help a Hindu wife. Social justice warrants that a wife living separately, in order to claim maintenance under this section has to prove only desertion by her husband. It is not necessary for her to prove animus deserendi. When a wife converts to other religion or leads an immoral life, she forfeits her right to separate residence and maintenance.

The right of maintenance, being personal, cannot be extended against any relations of the husband, during his lifetime irrespective of the fact that she has been abandoned by her husband. But if such relative is in possession of the husband's property, she could claim maintenance from him. If the property is transferred to any person or is attached under Sections 87 and 88 of the Criminal Procedure Code on account of some offence having been committed by the husband, then the wife's right to maintenance is forgone.

In obula konda reddi v. C. pedda venkat laxmi, the andhra pradesh high court interpreted the term "wife" used in Section 18 in a wider connotation. The court said that the term 'wife' does not signify wife whose marriage took place only under the Hindu Marriage Act, 1955 as this interpretation would strictly narrow down its meaning. The term would also include such wife whose marriage would be void within the meaning of that Act, so as to enable her to claim maintenance under the present Act. The above view of the Court is not undisputed because the void marriages do not confer any status upon the wife or husband as it is not treated to be a marriage at all and if she is not a wife in legal sense it would not be justified to hold her entitled to claim maintenance under section 18(1).

Section 18 of the Hindu Adoption and Maintenance Act confers a right on a wife to be maintained by her husband during her life-time. According to Mulla, the right of a wife for maintenance is an incident of the status or estate of matrimony and a Hindu is under a legal obligation to maintain his wife.

Recently court further observed that husband cannot deny for the maintenance if wife is highly qualified who sacrifices her lucrative career for sake of her family and if her husband neglects or refuses to maintain her on the ground that, she is highly educated and is capable of earning it is not a sufficient ground to refuse maintenance.

Recently, the court also observed that, strict proof of marriage is not necessary . Even the opinion expressed by local people having special means of knowledge is sufficient to prove factum of marriage.

According to this section, every female Hindu without having filed a petition for divorce, judicial separation and or nullity could claim maintenance, such a right is not available under Section 25 of the Hindu Marraige Act, 1955. Section 18 of the Hindu Adoption and Maintenance Act is not subject to Section 25 of the Hindu Marriage Act.

Where a decree concerning maintenance has been passed in favour of a wife living separately from her husband and subsequently they restore normal cohabitation it would not neutralise the effect of the decree and wife's right to maintenance does not come to an end. When a suit for maintenance is filed by the wife against the husband, the court has full discretion to allow for interim maintenance in favour of wife after the marital relationship between the two is established. But before allowing the maintenance allowance, the court must fully satisfy itself with the fact that the wife is living separately on reasonable justifications. This view has been held by the Assam and Kerala High Courts consistently. But in Ram *Chunnit Baliw Sm Shehlata*," the Orissa High Court held that a suit for maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 105 the court does not enjoy the power law interim maintenance This kind of power is not incorporated in Section is of the Act The right h interim maintenance of the wife cannot be juiced with her ultimate right to maintenance under the Act This kind of power cannot beer the court unless expressly provided under the law.

Where the wife filed a petition of restitution of conjugal right against husband and a compromise decree has been pod in it but the husband did not comply with the decree even after having taken the wife at her residence as a result of which the wife had to the separately, the court held the view that this kind of situation would amount to desertion wife and her night to maintenance under Section 18 of the Act would accrue.

Recently in *Kusum Krishnaji Rewatkar* v *Krishmtji Natiuji Reunitkar*, the Bombay High Court held that under Section 18 of Hindu Maintenance Act that the wife can recover the marriage expenses of daughter from her husband. In this case wife filed a suit against husband for recovery of marriage expenses of their daughter. She lived with his daughters, separately since last 25th years and she had spent money for performance of marriages of their daughters. Under Hindu law father is bound to make provision for marriage of daughter The Court observed that there is no ground to deny marriage expenses to her. So the wife is entitled to recovery of reasonable expenses from his husband.

Where the husband has another living wife, the other wife acquires the right to maintenance irrespective of the fact that wife was formerly wedded or subsequently wedded. Where the wife sues for a separate maintenance on the ground that the second wife is still living, such a right could be claimed only after the enforcement of the present Act. If the wife refuses to live with the husband on the ground that he has kept another wife, that would not amount to desertion by the wife and hence it would not bring her right to maintenance to an end under this Section. Where the wife is living separately from her husband on the ground that her husband has married another wife, she, in that case, can live separately and would not forfeit her right to maintenance.

In *Abbayolla* M. *Subba Reddy v. Padmamma*, the court held: "the wife whose marriage has been solemnised by a Hindu rite, but her marriage is void, on the ground that the first wife of the husband is living at the time of marriage. The second wife claimed maintenance from husband, but court observed that husband's second marriage is bigamous and void *ab initio*. The second woman cannot get the status of a wife as the first wife is living. Hence she cannot get a right to claim maintenance under Section 18 of the Act.

In *Kesarbai* v. *Hari bhai* the court held: "where the husband keeps a concubine in the same house or usually resides with her, there the wife acquires a right to claim maintenance by living separately. The very fact that he usally resides with the concubine proves that a married person normally lives with her without changing his normal residential place. His conduct within a determined defined period, his mental attitude by frequent visit to the concubine, his statements, his relation to that lady etc. are the factors which are to be taken into consideration for determining the fact of his usual cohabitation with the concubine. According to the rendering of this sections if the concubine is residing in the same house, the wife acquires the right of separate residence and maintenance but where the concubine is residing in the same marital home and wife has separated, then wife could not bring a suit for maintenance under section 18(2)(b). Under this sub-section in order to claim maintenance and the right to separate residence, it is necessary to prove the fact of wife and the concubine living in the same matrimonial home. But in the above circumstances while the concubine is living in the same house and the wife is residing separately, she could claim maintenance under Section 18(2)(g).

Where the wife resides separately and claims maintenance on the ground that the husband is used to drinking, the court held that the wife does not Jequire the right of separate residence and maintenance simply because the Husband drinks. Where the husband treats her with cruelty along with drinking that becomes a strong case of her maintenance and living separately.

The expression any other wife used in Section 18(2d) of the Act, intends to mean legally wedded wife. Where the husband is living with some other lady. notwithstanding he treats her as his wife, she can't be regarded his wife. In ***Mangala Bhivaji Lal*** v. **Dhondiba Rambhau Aher**, the court observed that, a person solemnized second marriage before Hindu Marriage Act came in operation Alter coming into force of Hindu Marriage Act: she claw maintenance under Section 18(2) of Maintenance Act. In this case the court luild that she is not entitled to claim maintenance in Section 18(2d) of maintenance Act. Where the wife's right to maintenance is not covered under various grounds mentioned in clauses (a) to (f) of Section 18(2) his right could be covered under clause (g) and the court in its discretion would allow maintenance, for example, in the case of ***Subbe Gondu*** the wife was living separately from her husband and she claimed for her maintenance. While she was living separately, her husband brought a woman at his residence and started living with her as her husband. She was thus not a legally married wile within the meaning of Section 18(2)(d). The claim of his legally wedded wife could not be accepted under the above sub-action but it was accepted under Section 18(2)(g).

In Bauramma v. Siddappa leevappa Patarad, the court held that the wife whose marriage has been solemnised by a Hindu rite, but her marriage was dissolved by an agreement. t appears that the husband contracted a second marriage in the year 1977. Thereafter, the plaintiff has averred that her husband and second wife started ill-treating her, harassing her and threw her out of the house. The plaintiff was forced to seek shelter in her relative's place and as she is unable to support here in the evening of her life, had approached the con for grant of maintenance. In these circumstances to probabilise that they had been separated by an agreed arrangement and as such there is no liability in the part of the husband to maintain the wife. In this case, the court observed that we take note

of this submission only to the extent of denying maintenance in respect of earlier years but the wife is definitely entitled for maintenance from the date of the suit claim

When wife is not entitled to separate residence and maintenance :

The wife does not remain entitled to separate residence and maintenance

(1) when she becomes convert,

(2) when she becomes unchaste,

(3) when she resides separately without any reasonable justification,

(4) when the wife lives separately as a result of compromise and waives her right of maintenance

Section 18(3) provides only for the first two grounds under which the right of separate residence and maintenance is forfeited. The latter two grounds have been evolved from the judicial pronouncement

Recently, in ***Surjit Singh*** v. Gurdev Singh, the Court observed that if wife is living in adultery, there is no ground to deny her interim, maintenance. particularly when she was not in position to maintain herself.

Q-2 Define Adoption and describe and main requisite and conditions of a valid adoption.

Meaning of Adoption.- According to Manu adoption is the taking of non, an a substitute for the failure of a male issue. Thus it is a transplantation of a son from the family in which he is burn to another family where he is given by the natural parents by way of gift. The Adopted son is thus taken an having been born in the new family. He acquires all the rights and status in this new family and his ties with the old family come to an end. Manu says, "He whom his father and mother give to another as son provided that the dance have no issue, if required be of the same class and affectionately disposed, is considered as a son given, the gift been confirmed by pouring water The religious motive behind the adoption in evident from Baudhayana's text which reads as follows take thee for fulfilment of my religious duties. take thee to continue the line of my ancestor

The foundation of the doctrine of adoption is the duty which every one owes to his ancestor to provide for the continuance of the line and the solemnisation of the necessary rites. With the passage of time the number of subsidiary sons diminished with the increasing abhorrence and repulsion to the sexual looseness which characterised the recognition of many of them, and the importance of the adopted son began to increase. The rise of the adopted son in the estimation of the society was further accelerated by the Brahmin priests who advocated the institution of adoption as absolutely necessary for every sonless man's solvation both here and the world beyond. It was on account of the firm belief of every Hindu that by leaving a male child in this world, he can secure himself from the torments of the next world as also to the secular desire for the perpetuation of family names, the institution of adoption became most popular. In *rama subbaya* v. *chenchu rammayya* they the Privy Council observed: "that the substitution of a son of the deceased for private them of the thing and the consequent devolution of property at me accessory to it."

The ancient Hindu Law recognised five kinds of adopted son, but they were reduced only to two namely, the **Dattaka** and the **Kritrima**. The Duttaka form is prevalent throughout India where the **Kritrima** form is in use in Mithila and the adjoining states The two authoritative works on adoption namely, Dattaka Mimansa and the Dattaka Chandrika emphasied upon the religious or spiritual necessity of adoption as

well as upon its secular With them. according to PN. Sen, Adoption had two aspects, In its aspects, it consisted of gift and acceptance which could only result in transfering the boy from the parental dominion of the donor to that of the donee, but in far as adoption was supposed to establish a certain non-sensuous religious relation carrying with it certain religious and juristic consequences, it could only be reached by the due performance of the religious ceremonies prescribed According to this view, therefore, the later by giving his son to another without the accomplishment of the religious ceremonies can perhaps make the son slave to the latter, provided he has got the necessary authority to make such gift, but in order to create filial relation with a person who is not the natural father, so as to make the boy competent to take part in the religious ceremonies in his adoptive family as a member there of, the religious rites, prescribed by the shastras for adoption must be duly performed The Supreme Court agreeing with earlier decisions of the Privy Council has expressed the view that the validity of an adoption to be determined by spiritual rather than temporal considerations and that devolution of property is only secondary importance.

The Legislature, while passing Hindu Adoption and Maintenance Act, 1956 has accepted only the secular object of adoption Under this Act the daughter could also be adopted even when she is incompetent to offer funeral oblation and perform last rites of deceased, although she can only continue the family line of the adopted family. The Act does not provide for the performance of any religious ceremonies at the time of adoption. It prescribed only the act of actual giving and taking of the child. This fact renders the act of adoption as a secular act.

Adoption is not recognised in any other personal laws. There is no provision of adoption in Mohammedan law nor is it recognised by the English or the Parsi law. It is recognised by Hindu law, but even in this system of law there were some families' or castes' where adoption was prohibited by custom and if such custom was proved, effect was given to it by the court but according Section 4 of the Act, all texts, rules, interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of the Act shall cease to have effect. Thus any such custom amongst any section at Hindu families prohibiting he adoption will be invalid and adoption hade in such family or caste shall be regarded as lawful.

In *Amin chand and others* v. *Sukhbir singh*, the Court observed that, custom relating to adoption has ceased to have any force alter the enforcement of the Adoption Act. Because the customs do not make any provision for challenging adoption under the Act In view of provisions of Adoption Act appointed of heir under customs is not the same as adoption under Adoption Act. Under this Act the adopted child is completely transposed from the family of the natural birth to the adoptive family. However, in case of appointment of heir under the custom it was not possible. Consequently in matters of adoption the passion of the Act, shall have overriding effect and shall prevail over the custom.

According to Sir Henry Mayne the entire law of adoption is based on different texts of Manu and Vashishta and Metaphor of Shaunak.

Texts of Manu.--Manu says Day, equal by caste, whom his mother or his father affectionately gives confirming the gift with a libation of water, in times at distress to a man as his son for he is without a son, must be considered as an adopted son Thus an adopted son shall be regarded as having been born in the adoptive family and his all relations with the natural family come to an end. Thus this text of Manu implies three things : (1) the father, and mother only can give the child in adoption (2) the adoptee must be in distress on account of sonlessness, and (3) the bay must be of same class.

Text of Vashishta -Vashishta says: Man formed of uterine blood and virile seed proceeds from his mother and father as an effect from its cause. Therefore the father and mother have power to give, to sell and to abandon their sons.

Adopt of kshattriayas in their own class positively, of vaisyas from amongst those of class, of sudras from amongst those of the sudras class."

Saunaka says: "that the boy to be adopted must be one bearing the story of a while implied that the son to be adopted must have the capability of being begotten by the adoptor through Niyoga or appointment or e like" It means that only such peon should be adopted when mother when married might have been legally married with the adopted

father The bone meaning has been clearly accepted by the Privy Council in ***Bhagwan Singh*** .In this way the texts of Man and Vasishtha were further amplified by the metaphor of Shaunaka who in his turn gave an elaborate test on adoption.

PRESENT LAW-The Hindu Adoption and Maintenance Act. 1956 has now completely codified the law adoption and has materially medias These changes corresponded the needs of dynamism of Hindu society. Now after the enforcement of this Act, every adoption shall be made in accordance will the provisions of this Act. Any adoption made in contravention of the provisions of this Act shall be void.

The Act received the assent of the President on 21st of December 1954 Act extends to whole of India accept the state of Jammu and Kashmir it will apply to all the Hindus living within the territory in india. The Act does not mention any thing regarding the adoption which had taken place here the enforcement of the Act, therefore it implies that all the adoptions which became effective before the coming of the present Act should be taken to be valid it they were in accordance with the previous law, Irrespective of the fact that they are in consonance with the present Act or not.

Changes made by the Act.- The Act has brougt about remarkable changes in the law of adoption, some of which are as under:-

(1) The Act will apply only to Hindus but the term Hindu has been interpreted in a very wide connotation so as to include Jains.Sikh and Buddhists All the texts, rules and customs, which were in vouge, immediately before the Act came into existence shall cease have effect with respect to any matter for which provision is made in this Act.

(2) The Act specially affected the night and capacity of a Hindu female to adopt a child. A married women cannot adopt a child in the life time of her husband without his consent. After the death of the husband she becomes fully competent to adopt a child. She no longer requires the prior consent of her husband to adopt after the death of her husband Hindu female's right to adopt has been considerably enlarged. She can adopt even during her maidenhood or after the death of her husband in case he had died success

(3) The Act provides for the adoption not only of boys but also of girls

(4) The Act does not provide for the performance of ceremony of 'Datta Homam'. The only requirements under the Act is to transfer the bury or the girl physically and acceptance of the child in adoption by the adptor.

(5) There have been a significant changes in the law relating to the consequences of a vilid adoption. Now after the Act the adopted child can not divest any person of any property in the adoptive family which has already vested in him. Under the old law the adopted son was competent to divest any colleteral of any property which had vested in him before the act of his adoption, but under the present Act the adopted child cannot do the same.

Thus the Doctrine of Relation Back has been completely abrogated according to which a son adopted by the widow was deemed to have come into existence in the adoptive family on the day of the death of her husband.

(6) Now under the present Act a male Hindu cannot adopt a child except with the consent of his wife whereas no such law existed prior to the Act. Under the old law the widow could not adopt except the content of her husband. The law has been reversed

(7) The present law of adoption has been applied to all the sub-schools of Mitakshara an well as Dayabhag alike and all the difference which existed between two schools have come to an end.

The concept of adoption has undergone a remarkable change. It is no longer based on the religious and spiritual considerations. The old law emphasised upon the need of the adoption in order to extend spritual benefit to the father and ancestors and to continue family line. The secular aspect was secondary but the present Act has completely ignored the spiritual aspect and rendered it completely secular This fact becomes distinct from the fact that the Act has permitted the adoption of a girl also and secondly, the ceremony Datta Homam is no longer necessary for adoption.

Essentials of valid adoptions-Section 6 of the Act enumerates the requisites of a valid adoption. The Act has made remarkable changes in this regard Section 6 of the Act runs as follow:-

"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) the person adopted is capable of being taken in adoption.
(iv) the adoption is made in compliance with the other conditions mentioned in this chapter."

In short, the essentials of a valid adoption are:---

Present law. - Under the present law, according to Section of the Hindu Adoption and Maintenance Act there are four essential conditions for a valid adoption. These conditions are mandatory, if these conditions have not been complied with the adoption would become void. These conditions are as follows:

(1) The person adopting a child has the capacity, and also the right, to take in adoption, (Sections 7 and 8)

(2) The person who is giving the child in adoption has the capacity to do so. (Section 9).

(3)The person adopted is capable of being taken in the adoption (Section 10%)

(4) The adoption is made in compliance with the other conditions mentioned in Section 11 of the Act.

Failure of compliance with of any these requirements will render the adoption null and void. The section of a mandatory character, The requirements are cumulative and must be complied with The requirement about giving in adoption by a competent person is applicable both in case of a minor and an adult person who by custom, may be adopted.

Who can adopt-Sections 7 and s of the Hindu Adoption and Maintenance Act, 1956 lay down the rule as to who can adopt. Section 7 deals with the rights of a Hindu male to

adopt a child and Section 8 deals with the rights of a female to adopt. For a valid adoption the adoption must have the capacity and right to adopt simultaneously.

The capacity of a male Hindu to adopt.-According to Section 7 any male Hindu who is of sound mind and is not a minor, that is, he has completed the age of 18 years, has the capacity to take a son or daughter in adoption. In case he has a wife living, he shall not adopt except with the consent of his wife. The consent may be dispensed with if the wife has finally renounced the world or has ceased to be a Hindu (by conversion to any religion other than Hinduism, Jainism, Buddhism, Sikhism) or if she has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect.

This section has effected an important innovation in the old Hindu law. Now the consent of the wife or the wives, as the case may be would be necessary for a valid adoption. The Act permits the adoption not only of a male but also of a female. It has lost its religious aspect and only its secular character remains unaffected as it is found among the Jains and Sikhs Recently in *Sarabjeet Kabir* v. *Gurumal Kaur*, the Court upheld that it adoption taken by the husband without consent of the wife, that adoption will be illegal.

There are two points to enable a male Hindu to adopt a child namely (a) he must not be minor (b) he must be of sound mind. Under old Hindu Law, for purposes of adoption the age of majority according to Mitakshara School was 15 years but under the present Act the age of majority shall be counted on the completion of 18 years. Adoption by a male Hindu who is himself a minor is void *ab initio* and can not become valid by mere ratification Adoption by a person of unsound mind is no adoption at all.

Q-3 Explain the kind of guardians and their Rights under the Hindu Minority And Guardian ship Act 1956.

Guardian-Meaning of.- A guardian means a person who owns the responsibility to take care of the person of another or of his property, or of both. Section 4 of the Guardian and Wards Act also defines the term "the term "guadian" in the same sense. Section 4(b) of the Hindu Minority and Guardianship Act defines the word "guardian" as follows:-

"guardian" means a person having the care of the person of a minor, or of his property, or of both his person and property and includes-

(i) a natural guardian;

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

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

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

Besides the above, there are two more types of guardian namely,

(a) *de facto* guardian, and

(b) *ad hoc* guardian.

The former has been mentioned in the Act while the latter does not find any place.

Karta guardian .-Under the pre-Act law, the father's right to act as the guardian of his minor children extended, in the Naitikastras, to the person and the separate property of the mirror. Coparcenary property was controlled by the Karta of the family In the Dayabhaga areas a minor whose father is alive can have no interest in company property, as such, it extended the person and the whole of the minor's property

The undivided interest of a minor in joint family property has been specifically excluded from the purview of the Act by excluding it from the meaning of the term minor's property a used in Section 6 Under the provisions of the Act the undivided Interest al a minor in joint family property is excluded from the meaning of the term "minor's property therefore, the law remains what it was in effect of minor's interest in coparcenary property. No District Court or other interior Court may, under the Guardians and Ward Act 1890, appoint a guardian in respect of a minor's Interest in coparcenary property under the management of the Karta of the miner's family, such Karta being him an adult, but the High Courts always could and may, under their inherent powers appoint a person other in the Karta as guardian of a minor's interest in coparcenary property.

Natural Guardian

A natural guardian is one when account of his natural relationship with e minor became a guardian. In other words a natural guardian is a person takes care of the pension of a minor or of his property or of both by virtue of his nearness in the blood relationship Although Hindu law recognizes a big band of guardians but the number of natural guardian is limited, as it can be seen in the Act itself.

The father is the natural guardian of his children during their minority and after him comes the mother. No one else can claim guardianship of the miner. The powers of the father to act as natural guardian does not come to an end simply because the child is being looked after by his aunt and is living with her.

The father may, in exercise of his discretion a guardian entrust the custody and education of his children to another, but the authority which he confers is revocable, subject to the statutory restrictions and the court's order The father's rights over his minor child are absolute and uncontrolled. He is also the proper judge of the school in which h e ward. The Madras High Court has held that no one other than the father and tailing him the mother has an absolute right to have the guardianship and custody of an unmarried Hindu minor girl. The Hindu law recognises primarily the father and legal guardian and custodian of his unmarried minor daughter when he is alive. Failing the fatherly the mother comes into picture and he should assume such guardianship and custody only in a contingency Section 6 of the present Act does not make any substantial alteration in the law on the subject and gives legislative sanction to the principles well established already.

Natural Guardians under the Act. The father is the natural guardian of the person and of the separate property of his minor children. Next to him is the mother. Section 6 of the Act reads as under:

"The natural guardians of Hindu mine in respect of minor person as well as in respect of minor's property (including his or her undivided interest in joint family property), are--

(a) in the case of a boy or unmarried girl the father, and after him, the mother provided that the custody of a minor who has not completed the age of five years shall ordinarily be the mother:

(b) in case of an illegitimate boy or an illegitimate girl the mother and after her, the father

(c) in case of a married girl, the husband.

Explanation. - In this section the expression 'father and mother do not include a step-father and a step-mother.

Thus the section deals with three different kinds of natural guardian of a minor. If the minor is a boy an unmarried girl, the natural guardian would be firstly the father and thereafter the mother and nobody else. If the minor gets married. the husband becomes her natural guardian. The section makes distinction between guardianship and custody Guardianship ordinarily includes custody and care of the minor which could be equated with guardianship of the person and custody and control of the property The guardianship in the present context means not only the guardianship of the person of the minor but also separate property of the minor. If the minor has not completed 5 years of age, the custody of the minor shall ordinarily be with the mother, but the father would still continue as guardian of the child. The words "shall ordinarily be with the mother do not necessarily mean that the custody of a child below 5 years with the father is illegal In *Jijabai* v. *Pathan khan,* the Supreme Court held that where a mother is living separately from the father for over twenty years and managing the affairs of her daughter, who was under her care and protection, will be regarded as her natural guardian In such as the father would not be considered as alive. The mother alone would be entitled to exercise the right of natural guardian with respect to let pension and property and she could bind the minor's property by lease. Similarly where a father tails to discharge the responsibility of a guardian or is guilty of negligence or becomes disabled, the mother acquires every right of guardianship irrespective of any such declaration by the court The Supreme Court held that the father is not in actual charge of the trains of the minor, but the minor is in die exclusive care and custody of her mother and she can act in all respects as natural guardian of the minor. The actions of mother would be valid even during the lifetime of

the father who would be deemed to be absent for the purpose of Section 6a) of Hindu Minority and Guardianship Act..

Powers of a natural guardian-Section 8 of the Act deals with the powers of a natural guardian with respect to minor's person or property, Section 8 runs s under:

"Section 8.--The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary and reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate's but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian 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 the minor, or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which

the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or subsection (2) is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardian and Wants Act, 1890, shall apply to and in respect of an application for obtaining the permission of the court under sub-section(2) in all respect as if it were, an application for obtaining the permission of the court under Section 29 of the Act, and in particular-

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of Section 4-A thereof;

(b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of Section 31 of the Act:

(c) an appeal shall lie from an order of the court refusing permissions to the natural guardian to do any of the acts mentioned in sub-section (1) of this section to the court to which appeals ordinarily tie from the decisions of that court.

(6) In this section court means the City Civil Courts or District Courts or a court empowered under Section 4-A of the Guardians and Wards Act. 1890, within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the local limits of whose jurisdiction any portion of the property is situate."

Testamentary Guardian : Section 9

A testamentary guardian is one who is appointed by a will of the natural guardians of the minor Father who is the natural guardian of his minor children can appoint guardian for them who are known as testamentary guardians Section of the Hindu Minority and Guardianship Act. 1956, relates to the testamentary guardians and their powers. Under old Hindu Law a testamentary guardian appointed by father could function even though when the mother was alive. But according to Section 9, even though the father has appointed a guardian if the mother is alive, she would be his guardian, and she also can appoint under her will a guardian of her own choice. But if the mother does not appoint any guardian, the appointment of the guardian under "father's will come into operation. Such a testamentary guardian becomes tunctional only after the death of natural guardians, as a will come into effect only on the death of its executor. Section 9 of the Act runs as follows:

"(1) A Hindu father entitled to act as a natural guardian of his minor legitimate children may, by will appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in Section 121 or in respect of both,

(2) An appointment made under sub-section (1) shall have no effect a the father predeceases the mother, but shall revive, if the mother dies without appointing by will, any person as guardian.

(3) A Hindu widow, entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor illegitimate children by reasons of the fact that the father has become disentitled to act as such, may by will appoint a guardian for any of them in respect of minor's person or in respect of minor's property (other than the undivided interest referred to in sub-section (2) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children, may by will appoint a guardian for any of them in respect of the minor's persons or in respect of the minor property or in respect of both.

(5) The guardian so appointed by will has the power to act as the minor's guardian alter the death of the minor's father or mother, as the case may be, and to exercise all the powers of a natural guardian under this Act to such extent and subject to such restrictions, if any as are specified in this Act and in the will.

(6) The right of guardian so appointed by will shall, where the minor is a girl, cease on her marriage."

Thus according to the above section the following persons can exercise the right to appoint a testamentary guardian in respect of minor's person or property or both

(1) father, natural on adoptive
(2) mother, natural or adoptive
(3) the widowed mother, natural or adoptive.

Powers of testamentary guardian.-The testamentary guardian becomes entitled to act as the guardian of the minor after the death of the natural guardian. He can exercise all the rights and powers of a natural guardian to such extent and subject to such restrictions as are specified in the Act and in the will. Thus the powers of testamentary guardian and the natural guardian are the name except that the power of a testamentary guardian to deal with property belonging to the minor is also subject to the restrictions imposed by the will.

Since the powers of the testamentary guardians are similar as that of natural guardian, it is relevant to know that Section 8 of the Hindu Minority and Guardianship Act, 1956 deals with the powers of the natural guardian. Section 8 lays down that the natural guardian has every power to do any act subject to the provisions of the law if necessary or found to be beneficial to the estate of the minor. However, it should be noted that a natural guardian has no power to sell make a gilt or exchange any property of the minor without the permission of the Court In the same way natural guardian can't lease the property of the minor for more than five years or more than one year beyond the date on which the minor attains majority. According to Section 8 any disposal of the immovable property made by the natural guardian in violation of Section 8 is voidable at the option of the minor The Act directs that where an application for the permission to dispose of the property is made by the natural guardian, it should be granted only if it is satisfied that there is necessity justifying the disposal of the property or that such disposal would be beneficial to the estate of the minor.

DE FACTO GUARDIAN

A minor child when he has no legal guardian, some nearer relation takes the responsibility of the management of his property and on his application to the court as guardian, if the court appoints him, he becomes the court guardian However, such person, if he does not make application to the court, but manages the property of minor, he is referred to as de facto guardian. He is also referred to as de facto manager of the property, because a de facto guardian of a minor, is neither a legal guardian nor a testamentary guardian and nor a guardian appointed by the court, but he is a person, who himself, has taken over the management of the affairs of the minor, as if he were a natural guardian. He had no lawful authority but can dispose of the property in case of emergency. But such de fiche guardian's power to dispose of the property is abolished by Section 11 of the Hindu Minority and Guardianship Act. 1956.

Under old Hindu law nothing has been said about the de facto guardian, but this type of guardian was quietly recognised in practice. The Privy Council in ***Hanuman Prasad case***,' as early as in 856 observed that under Hindu law, the right of a *bona fide* incumbrancer, who has taken from a de facto guardian a charge of land, created honestly, for the purpose of saving the estate, or tor the benefit of the estate, is not affected by the union of the *de facto* with the *de Jure* title. With this judgment a silent recognition was

extended to the status of *de facto* guardian. Later in *Kandamudi* v. *Myneni*, Justice Kania observed that Hindu law tried to find a solution out of two difficult situations cone, when a Hindu child has no legal guardian, there would be no one who would handle at manage his estate in law and thus without a guardian the child would not receive any income from his property, and secondly, a person having no title could not be permitted to intermeddle with the child's estate so as to cause loss to him. The Hindu law found a solution to this problem by according legal status to *de facto* guardians.

Ad Hoc guardians.- when a person acts as guardian of the minor for certain particular purposes, he would be known as ad hoc guardian. An ad hoc guardian does not find any place in the Act and any alienation of minor's property by him would be void. The Madras High Court in Sri *Aurobindo* Society Pondicherry v. Ramadoss Naidu, clearly observed that the position in law of *ad hoc* guardians is that their acts are null and void and cannot bind the minor although they are purported to be effected in the minor's interest. for *ad hoc* guardians are neither de jure nor de facto guardians."