



The Indian Journal for Research in Law and Management

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Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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LAWS ON GUARDIANSHIP

Introduction

In the past, under common law, the father of a child was regarded as the sole guardian, holding authority over the child's well-being and property. The father's control extended to various aspects of the child's life, including conduct, religion, education, and maintenance. During this time, legal intervention was seldom sought, as courts generally refrained from interfering with the father's absolute authority. Mothers, lacking independent legal status, were considered without authority over their children, as their legal identity merged with that of their husbands after marriage. The advent of divorce granted mothers independent legal existence and residence, and although their rights to custody were gradually recognized through legislative efforts, the supremacy of paternal rights persisted despite various enactments, starting with the United Kingdom's Custody of Infants Act in 1839.

Certain significant changes contributed to the diminishing authority of fathers over children in English law. Courts, through various legal precedents, upheld *parens patriae* jurisdiction, signifying an increased role of the state as the ultimate parental authority. This shift aimed to replace the automatic guardianship of fathers and prioritize the well-being of the child when determining custody arrangements.¹

The Guardianship of Infants Act in 1886 marked a recognition of a mother's rights to custody. It empowered courts to appoint or remove guardians under specific circumstances and facilitated the appointment of testamentary guardians. In 1925, the Guardianship of Infant Act ensured equal footing for both parents in custody matters, emphasizing the child's welfare as the primary consideration. The Guardianship of Minors Act in 1973 granted mothers the same rights as fathers without requiring the father's consent, allowing mothers to independently

¹ In Re, O'Hara, (1990) 2 IR 232

exercise these rights. In cases of parental disagreement, the court gained authority to decide based on the principle of the child's welfare.

The custody concept in the Indian legal system is rooted in English law. Historically, prior to the 19th century in India, paternal custody was the norm, reflecting a male-dominated society. However, the emergence of the 'tender years doctrine' in the 19th century granted mothers custody rights for their minor children up to a specific age. In the 20th century, the 'best interest of the child' principle gained prominence, prompting courts to prioritize the child's well-being in custody decisions. Various Acts under different personal laws address custody matters. For Hindus, the Hindu Minority and Guardianship Act, 1956, along with the secular Guardians and Wards Act, 1890, apply. Muslims follow their personal law alongside The Guardians and Wards Act, 1890. Christians are governed by The Guardians and Wards Act, 1890, and The Divorce Act, 1869.

Types of Custodies

Various forms of child custody are granted in India, prioritizing the paramount welfare of the child. Physical custody is the most common, where one parent has primary custody, and the other retains visitation rights, ensuring the child's holistic development. Joint custody involves alternating custody between both parents, providing psychological support during separation. Bird's Nest Custody, less common in India, has the child in one residence while parents take turns staying. Third-party custody, or non-parental custody, entrusts custody to someone other than the biological parents, decided by family courts based on the child's well-being. Sole legal custody, or sole parental responsibility, designates one parent with complete responsibility for the child's care, including decision-making authority, while the other is granted visitation rights. These diverse custody arrangements aim to address the unique needs of families, with the court making decisions based on the best interests of the child.

Welfare of the child

The notion of prioritizing the child's best interests is inherently abstract, as it involves making the child's well-being the central focus. This assessment requires navigating the delicate balance of conflicting and intricate interests, considering legal, social, and ethical factors. Each case is unique, and establishing universal guidelines is challenging. A factor deemed crucial in one case may not carry the same significance in another.

Joint Guardians

In the *Kumar Jangirdar v. Chetana Ramatneesha*² case, the married couple mutually ended their marriage, placing paramount importance on the well-being of their six-year-old daughter. The court ruled for joint guardianship, with both parents sharing the role on a weekly basis as the child's physical custodian. Additionally, the court granted exclusive possession of the child's passport to the father, designating him as the legal guardian until the child reaches adulthood. However, the father was required to provide the mother with the child's passport whenever necessary for travel. This case, which involved shared custody, underscores the court's endorsement of joint guardianship when it aligns with the child's best interests.

A guardian is an individual responsible for the well-being and property, or both, of a minor. The natural guardian for a minor or unmarried girl is typically the father, and in the father's absence, the mother assumes this role. If the child is illegitimate, the mother alone acts as the natural guardian, while upon marriage, the husband becomes the natural guardian for a minor girl. Stepfathers or stepmothers are not recognized as natural guardians. A testamentary guardian can be designated through a will, and a court-appointed guardian is appointed by the court to care for a minor's person, property, or handle litigation on their behalf.

Courts may appoint someone other than a parent as a guardian for the protection of a minor. Guardianship can also be assigned for individuals with mental illnesses who are unable to care for themselves. Welfare institutions with custody of minors, mentally challenged individuals, or abandoned children may act as guardians or be appointed as such. In cases of inter-country adoption, a foreign national seeking adoption may initially be appointed as a guardian, with directions to adopt according to the laws of their home country.

India, with its diverse religious communities, follows different sets of personal laws governing family matters like marriage, divorce, succession, and guardianship. The legal systems of Hindu Law, Muslim Law, and the Guardians and Wards Act, 1890 represent three distinct frameworks. Guardians can be natural, testamentary, or appointed by the court. The issue of

² (2001) 4 S.C.C. 682 (India).

guardianship involves considerations for both the person and property of the minor, with often different individuals being entrusted with these responsibilities.

Conclusion

A guardian is an individual entrusted with the responsibility of overseeing a child's well-being, necessities, education, and fundamental needs. Typically, the father serves as the natural guardian, and in the absence or demise of the father, the mother assumes this role. Beyond the mother and father, no one else is recognized as the natural guardian. Established guardianship arises when legal custody is held by someone other than the child's parents. The guardian is vested with authority over the child, making decisions on their behalf and assuming legal responsibility for their well-being. Given the physical and mental undeveloped state of minors, coupled with their lack of experience, the care, attention, and security provided by a guardian become crucial for those under eighteen. India, being a secular country, has distinct guardianship laws for various religions, ensuring the maintenance of harmony within the nation.