

DE JURE NEXUS LAW JOURNAL

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De Jure Nexus

ABSTRACT

Every natural guardian has an obligation towards their child to act for the best interest. They are required to take proper and reasonable care of his child and property. It includes taking care of the interests of the child, fulfilling his various needs such as educational, medical and many more. Parents should also do proper upbringing of the child and inculcate good habits in them and also to make decisions for the benefit of the child and his property. The law governing custody of children is linked with that of guardianship. Guardianship refers to stack of rights and powers that major possess which is in relation to the person and property of the minor.

INTRODUCTION

There are several acts and statutory laws in India pertaining to Guardianship . It include ‘Guardianship and wards act , 1890 ‘, Hindu Marriage Act , 1955 (section 26 of this act provides proceeding under the act with respect to custody , maintenance of minor etc)¹, special marriage act , 1954 (section 38 of this act talks about custody of the children)² . It also includes Hindu

¹ In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made:⁵⁸ [Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.]

² Custody of children.—In any proceeding under Chapter V or Chapter VI the district court may, from time to time, pass such interim orders and make such provisions in the decree as it may seem to it to be just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes wherever possible, and may, after the decree, upon application by petition for the purpose, make, revoke, suspend or vary,

Minority and Guardianship act , 1956 . *Section 13 of this act states that the Welfare of minor child should be of paramount consideration – (1) In the appointment or declaration of any person as guardian of a Hindu minor by the court, the welfare of the minor shall be of paramount considerations. 2. None of the person shall be entitled to become the guardian of the child under the purview of this Act or of any law in relation to guardianship in marriage among the Hindus, if the court is of the opinion that his or her guardianship will not be for the welfare of the minor child.* This act states about the welfare of the child and grant right to the court to terminate the guardianship of any person if the appointment of the guardian is not made for the welfare of the child which is considered to be of paramount consideration.



DEFINITION

- In this act , **Minor** is the one who is below the age of 18 years .
Guardian is the person having the care of the minor or his property or both of this person and property which includes Natural guardian , guardian appointed willing by the child's mother or father , guardian appointed by court , person who is empowered to act as such by or under any law relating to any court of law.

FACTORS TO CONSIDER BEFORE TERMINATING GUARDIANSHIP

- Child's best interest- Person asking the end of Guardianship should prove that it's not on child's best interest . In a landmark case in which the court had to decide the custody of t girl child *Thirty Hoshie Dolikuka v. H.S. Dolikuka* ³ an eleven-year-old girl used to live with her father. The mother alleged that the father fragmented the thinking of the child in a way that caused the daughter a lot of psychological trauma and a nervous breakdown. The father wanted of having the guardianship and custody of the child, and on the contrary, the mother wanted to remove the child from the custody of the father. The mother of that child wanted to send her again in the boarding school . As the mother was working woman , she had the means to earn and she will be able to meet the required expenses of the boarding school of the child . The Hon'ble Supreme Court overruled this judgement of the High Court stating that whether a woman is working or not is an irrelevant to consider while giving guardianship and custody to anyone of them . The court cannot judge her ability to take care of the child on the basis of her being a working woman . The Court then

from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending. 1[Provided that the application with respect to the maintenance and education of the minor children, during the proceeding, under Chapter V or Chapter VI, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.

³ AIR 1982 SC 1276

decided in favour of the mother that she should have custody of her daughter until the time she completes the age of 16 years.

- **Parent's wishes** If the parent of the child wants back the custody of the child and wants to live with the child again, the court shall make sure that the parent has: **proper residence** – to keep the child in a stable and proper place, **sufficient means to earn** – parent should have reliable source of earning to support the child with all the facilities like educational, medical etc. In the case of **Bhagyalakshmi vs K. Narayan Rao**⁴, the court considered the warning and whether the father is economically stable or not and then gave the custody and guardianship rights to them. There were 3 children who were taken away by the mother who left her husband. After the period of 3 years the father filed a suit for the custody of all the 3 children. The judge observed that the mother was economically dependent on her aged father and did not have sufficient means to earn. This ultimately will generate the fear of the children being helpless and to live in deplorable conditions after the death of their grandfather and then they will be devoid of all facilities that are needed for the welfare and best interest of the children. The court came to the conclusion that the father could provide them with all necessary facilities those children and would work on best interest of the children.
- **Fit or sufficiently Rehabilitated-** Court has to ensure that the parents are fit enough to take the child under their guardianship. **Section 19 (a) and (b) of the Guardians and Wards Act, 1890**,⁵ it is important to ensure that the husband and the father of the child are fit enough to become the guardian of the child. They shall make sure of that fact that the parents have recovered from their prior decision of giving the child into the guardianship of another person.

In the case of **of jjabhai vithalrao Gajre Vs Pathankhan and others**⁶ it was held that a father may be declared unfit, because he may not be well in economic stability or he could be a person with an unsound mind, and may not be conscious or might not ensure physical comfort to the child, or is separated with the mother of that child and has been living separately for a certain period of time or if he has remarried to someone

⁴ AIR 1983 Mad 9.

⁵ Section 19 (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

Section 19 (b) - 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

⁶ AIR 1971 All 248

Provides all necessary facilities The welfare of the child is always of paramount consideration and the court has to ensure that the parents whom to custody be given will provide with all the educational facilities etc

- **Child's wishes** - Once the child has completed the he age of 12 years, he or she can ask the court to consider his wish of living in a particular place which may not necessarily be with the guardian appointed .

HOW CAN GURADIANSHIP BE ENDED ?

- **Attainment of Majority** when the child completes the age of 18 years , the child can maintain himself by own, therefore court may allow to remove the guardian appointed .
 - **Child decided to Marry** - if a girl child decides to marry, the husband will be her guardian. If the husband is a minor, his guardians will be the guardian of that of the girl child . If a male child marries while he is minor then guardians of the girl child will become his guardians as well.
 - **Child is adopted by the adoptive parents** – if the child is adopted by a parents other than biological parents they the adoptive parents will be the guardian of the child .
 - **If the child dies before attaining the age of 18 years** - Guardianship can be ended if the child dies before attaining the age of 18 years.
 - **The court ends the guardianship** – if in the case where the child who is over the age of 12 years asks the court to end the guardianship. Also, of the parents of the guardian decide to take back the custody of the child then , they can approach the court stating valid reasons in order for the removal of the guardianship over the child .
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- **Resignment of Guardian** - guardian can end the guardianship over the child just by resigning. But , a notice has to be served to the people who should be notified about the end of guardianship like any near relatives of the child. The person resigning needs to go through a court hearing wherein he is required to prove him that it is for the benefit of the child that he should resign.

GROUND FOR DISQUALIFICATION

- **Ceases to be a Hindu** –If the person appointed as a guardian ceases to become hindu or choose to adopt and convert into other religion , or decided to become atheist and follow no religion , then the guardianship may end . In the case of ‘**Vijaylakshmi Vs. Police Inspector, 1991**, it was held that when the father converted his religion to become a non-Hindu then the mother shall be the natural guardian of the child .’
- **Leave the materialistic world or become sanyasi** – The guardian who is appointed to the child chooses to renounce the world and free from all his liabilities or civil death of him and step out of all his duties, rights, obligations by giving up and wants to live a peaceful life, he is removed from being the guardian of the child and his guardianship terminates .

USE OF MINOR'S PROPERTY FOR PERSONAL USE

A guardian is always expected and required to work for the best interest of the minor . If a guardian has dealt with the property of the child without his knowledge and which is not for the benefit of the property of the child and which may be for his own use , and Any decision on the property of the child which may be for his personal use will result in his removal of him as the guardian. Any unwarranted borrowing of property by the guardian will result in his removal as the guardian of the child .

CONCLUSION

Guardianship allots the guardian with rights and responsibilities to take care of the child and his property . There may be situation where the appointed guardian is not for the best interest of the child or may have mishandled the rights and responsibilities granted to him in such case guardianship can be terminated only the court so that child do not get isolated . The said article provided some factors to considered before ending the guardianship and the ground on which guardianship comes to an end and few grounds of disqualification . Thus there are certain observation by the judiciary of India that is looked upon before ending the guardianship . Thus these are some factors for the various aspect of guardianship.

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