

Legal Framework governing Custody and Guardianship in India

Shubhi Singh¹

Abstract

*Law is a dynamic field that must diligently keep up with the complexities and enigmas of the legal system as time goes on. The laws about guardianship and child custody are closely related. **Guardianship** is the term for refers to a collection of privileges and rights that an adult has over a minor's person and property, while The term "**custody**" refers more specifically to the daily care and supervision, as well as the minor's upbringing. The phrase custody Neither secular nor religious Indian family law defines "custody." The term "guardian" under the **Guardians and Wards Act of 1890 (henceforth, GWA)** as an individual providing care for a minor or of his belongings, or both. The term "guardian" under the Guardians and Wards Act of 1890 (henceforth, GWA) as an individual providing care for a minor or of his belongings, or his person and belongings combined. A different phrase that the law uses is "natural guardian," which is the individual who is legally considered to be a minor's guardian and who is assumed to have the authority to take all choices made on the minor's behalf. The distinction between guardianship and custody under the law (or natural Guardianship) as an example, consider the following: certain religious personal laws, especially for minors.*

While the father is always the child's natural guardian, the mother is favoured to be the custodian. The e landscape of child custody agreements is evolving. Many nations worldwide have implemented a preference for shared parenting plans as opposed to sole custody agreements in cases of post-divorce child custody disputes. This trend has emerged primarily as a result of shifting family roles, with male carers taking on a greater role in raising children. duties) in addition to psychological research showing that having both parents involved in

¹ Law Student, NMIMS (Deemed to be University), Mumbai

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

raising a child is better than sole custody agreements. Nonetheless, these desires for joint custody are frequently weighed against the "child's best interest standard."

Keywords- *Guardianship, minor, custody, natural guardian, personal laws, post-divorce child custody, child's best interest*

Statutory Laws and Provisions

- (I) **Guardians and Wards Act, 1890:** This materialistic law governs guardianship and custody issues for children in India, regardless of their religious beliefs.
- (II) **Hindu Law:** It should be emphasized that anyone who identifies as a follower of Buddhism, Hinduism, Jainism, or Sikhism is subject to the two Acts that are covered under "Hindu Law".
 - (a) **Hindu Minority and Guardianship Act, 1956:** Guardianship and child custody were not covered by traditional Hindu law, The Hindu Minority and Guardianship Act, nevertheless, comprises several requirements about the protection and supervision of minor Hindu kids in contemporary statutory Hindu law.
 - (b) **Hindu Marriage Act, 1955:** Section 26 of the Hindu Marriage Act authorizes courts to pass temporary commands in any proceeding under the Act, concerning custody, maintenance, and teaching of minor children, in consonant rhyme with their desires.
 - (c) **Islamic Law:** Until the daughter reaches puberty and the son turns seven, the mother is the child's legal guardian, even though the father is the child's natural guardian. According to the idea of Hizanat, a mother is the best person to have custody of her children till a certain age, both throughout and subsequently the marriage is dissolved. This right cannot be taken away from a mother unless it is determined that her custody would be detrimental to the child's welfare, and she is disqualified due to misconduct or apostasy.
 - (d) **Parsi and Christian Law:** Courts may issue temporary orders for minor children's custody, maintenance, and education in any proceeding under the **Parsi Marriage and Divorce Act, 1936**, and Section 41 of the **Divorce Act, 1869**.

- (e) **Marriages that were recorded under the 1954 Special Marriage Act:** Regardless of the faith that either partner in the marriage may practice, this Act creates a unique kind of marriage that can be utilized by anyone in India and by all Indian citizens living overseas. When it comes to child custody, wedded pairs who register their wedding under the Special Marriage Act may refer to Section 38 of the Act. Section 38 gives the district court the authority to issue temporary orders while the case is pending and to include in the decree any terms that the court deems appropriate and reasonable regarding the upbringing, education, and custody of minor children, always trying to honour their wishes.

Guardians and Wards Act, 1890

The Guardianship and Custody Act (GWA) is a nonreligious legal framework that governs guardianship and custody matters for all children living in India, regardless of their faith. It permits District Courts to designate guardians for a minor's person or property in cases where the testamentary guardian or the natural guardian is under the minor's law. A person appointed under a will neglects to fulfil their obligations to the minor. The Act is a comprehensive code that lays out the guardians' responsibilities and rights, the process for replacing and removing them, and the remedies for wrongdoing on their part. It is a broad piece of legislation that supports the individual guardianship laws. Even though the personal law of the party applies the substantive law in a particular party, the GWA's established procedural law will apply. The GWA's Section 7 permits the minor's person, property, or both, the court shall designate a guardian if it is convinced that it is required for the minor's well-being.

Hindu Minority and Guardianship Act, 1956

There are no principles about child custody and guardianship in classical Hindu law. Within the Joint Hindu Family, the Karta was in charge of overseeing all dependents and managing. Because of this, particular legal guidelines about guardianship and custody were not deemed to be essential. However, the Hindu Minority and Guardianship Act, 1956, a statute that was

passed in modern times, (henceforth, HMGA) stipulates that a minor's natural guardian is their father, followed by their mother.

According to the HMGA's Section 6(a)²:

- 1) The father is the child's natural guardian if they are a minor boy or girl who is not married; if he passes away, the mom.
- 2) The custody of a minor who has not completed the age of five years shall ordinarily 'be with the mother

In **Gita Hariharan v. Reserve Bank of India**³, the Supreme Court questioned the constitutionality of Section 6(a) of the Indian Constitution, arguing it violated the guarantee of equality of sexes under Article 14⁴. The court interpreted the term "after" to mean the father's absence, which could be temporary, total apathy, or inability due to illness. Therefore, in the above specific situations, the mother could be the natural guardian even during the lifetime of the father. Section 13 of the HMGA declares that, in deciding the guardianship of a Hindu minor, the welfare of the minor shall be the paramount consideration 'and that no person can be appointed as guardian of a Hindu minor if the court thinks that it will not be for the welfare 'of the minor.

The **Hindu Marriage Act, of 1955** allows courts to issue interim orders regarding custody, maintenance, and education of minor children, by their wishes. The Act also allows courts to revoke, suspend, or vary these orders. In Islamic law, the father is the natural guardian, but custody falls with the mother until the son reaches seven and the daughter reaches puberty. The concept of **Hizanat** ensures that the mother is most suited to custody of her children, and courts

² Hindu Minority and Guardianship Act, 1956, section 6(a)

³ Gita Hariharan v. Reserve Bank of India, (1999) 2 SCC 228, 25

⁴ Indian Const. Art. 14

have sometimes upheld this right. In Parsi and Christian law, guardianship for these children is governed by the GWA.

Natural Guardian

The Hindu Minority and Guardianship Act, 1956, specifies in Section 6⁵ who a minor's natural guardian is in various situations. The natural guardian is enlisted to serve as:

- a) The father, followed by the mother, in the case of a boy or an unmarried girl: With the understanding that a child under five years old will typically be under the mother's custody.
- b) The mother, followed by the father, when there is an illegitimate boy or girl who is not married.
- c) If the girl is married, her husband: But keep in mind that the terms "father" and "mother" in this section do not refer to a stepfather and a stepmother.

The Distinction between Guardianship and Custody

The designation of a guardian and minor custody are two distinct matters. There is a small difference between the term's "guardianship" and "custody." Physical control over an individual or piece of property is connected to the idea of custody. The idea of trusteeship is similar to that of guardianship. Regarding the person for whom he is designated as a guardian, a guardian acts as a trustee. Being a guardian entails more responsibilities than being a simple custodian. The custody may be brief and intended to serve a particular function. **Sumanbai Wamanrao Gondkar v. Ramesh Tukaram Gadhwe**⁶,. Depending on the specific proofs and situations of each case, the guardianship issue may be distinct and independent from the custody question. According to **Athar Hussain v. Syed Siraj Ahmed**⁷, the court is not

5 Hindu Minority and Guardianship Act, 1956, Section 6

6 Wamanrao Gondkar v. Ramesh Tukaram Gadhwe 2007 SCC Online Bom 975

7 Athar Hussain v. Syed Siraj Ahmed (2010) 2 SCC 654

restrained by the bar envisioned under Section 19 of the Guardians and Wards Act, 1890, when it comes to custody matters.

The best interest of the child standard is a global principle guiding actions concerning children, as stated in the Convention on the Rights of the Child. It states that a child should be separated from their parents if they abuse or neglect them. The standard is flexible and adaptable, reflecting contemporary family attitudes. However, it is unpredictable and information-intensive, leading to unnecessary pre-court bargaining. It also focuses on the child's predicaments without considering the parents' feelings and intentions, as they are also family actors.

Landmark Case Laws

In a landmark decision on gender equality, the Supreme Court held in **ABC v. The State (NCT of Delhi)**⁸ 66 on July 6, 2015, that even an unmarried mother has to be acknowledged as a legal guardian without requiring her to reveal the identity of the child's biological father, guardian. The aforementioned ruling reflects the Apex Court's innovative thinking, which aims to maintain business as usual at varying times.

Even though the son had lived with his father since birth, which was a compelling argument in support of the father in **Gaurav Nagpal v. Sumedha Nagpal**⁹ father, the Supreme Court overturned this decision and gave the mother custody along with visitation rights. for the dad. Several High Courts have ruled that the father and his family's increased financial success is not a guarantee of a child's wellbeing and that it doesn't challenge the mother's presumption. When choosing who gets custody.

In **Ashish Ranjan v Anupama Tandon**¹⁰, the mother was initially granted custody, and the court made a note that the child's mind had been influenced to the point where he had no

8 ABC v. The State (NCT of Delhi) [Arising out of SLP (Civil) No. 28367 of 2011

9 Gaurav Nagpal v. Sumedha Nagpal Civil Appeal No. 5099/ 20078, SC 2008.

10 Ashish Ranjan v Anupama Tandon, Contempt Petition (Civil) No. 394 of 2009, SC 2010.

affection or respect for the father, the applicant. This, the Court decided. were a breach of the father's visitation rights, and as such, constituted contempt of court. Currently, there is neither an assumption that the father is the child's natural guardian nor an assumption that the mother is more suited to care for the child biologically.

Guardianship of Mentally Ill Persons and the Process of Appointing Guardians

A guardian is a person designated to look after another person, according to the Mental Health Act of 2017. As designated guardians, they are responsible for the person under their care and protection. All legal decisions are made on behalf of the person in question by the guardian.

Children in India who turn eighteen are regarded as majors and are not covered by custody laws. Although it is not required, it is always beneficial to apply for legal guardianship under the terms of the National Trust Act, of 1999, as it provides for the appointment of guardians for individuals with disabilities. Individuals with autism, cerebral palsy, and mental disabilities may require legal representation even after 18 years of age, but limited guardianship may be necessary due to enabling mechanisms and scientific facilitations that allow them to function with varying independence.

The **Rights of Persons with Disabilities Act 2016 (RPD Act)**, Section 13, acknowledges that people with disabilities possess the legal capacity to make financial decisions, inherit property, and other matters. It stipulates that the government must take the necessary steps to make it possible for people with disabilities to own property in their names and engage in financial transactions without facing discrimination. Equal legal capacity for people with disabilities is another requirement of the statute. Limited guardianship is allowed under Section 14 for people with disabilities who need more help or support. It is anticipated that the limited guardian will make decisions with the approval of the disabled individuals who designate them and based on mutual trust.

In the case of **Kailas Natarajan v. District Police Chief**¹¹, the Kerala High Court denied the petitioner's writ of habeas corpus, which sought the release of his 21-year-old partner and "yoga student" from what she claimed to be her parents' unlawful custody or forced detention. He had leaned on the ruling of the Supreme Court in *Shafin Jahan v. Asokan K.M.*, which held that an adult is capable of making their own decisions in life free from interference.

The Indian Constitution grants constitutional courts *parens patriae* jurisdiction in child custody matters, prioritizing the child's welfare. However, this power is only invoked in exceptional cases, such as when a mentally ill person is produced before the court in a writ of habeas corpus. The courts cannot invoke this doctrine in every case, as it is limited to cases where the parties are mentally incompetent or have no legal guardians.

The **National Trust Act, of 1999** outlines the conditions for custody of individuals with mental illness in Section 14. Under this section, a committee at the local and state levels may assign guardianship to individuals who are mentally incapacitated. The district collector, who will then appoint the parent or guardian if the request is granted, must receive a formal guardianship application. Applications for legal custody and visitation may be filed online via the official website or locally with the local committee. The following people may submit a guardianship application:

- (a) the disabled person's parent or other family member.
- (b) Any registered group with the guardian's approval
- (c) Additionally, the local committee must consider the following two factors when granting the guardianship:
 - (d) Does the person with mental retardation require a guardian?
 - (e) the reason behind the guardianship request.

¹¹ Kailas Natarajan v. District Police Chief 2021 SCC Online Ker 337

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

The application is processed by the local committee following their satisfaction.

The **National Trusts Act** provides guidelines for individuals who qualify to be guardians for mentally disabled adults. Regulations 11 and 12 outline the qualifications for applicants, including parents, siblings, relatives, organizations working for welfare, and destitute or abandoned individuals.

Applications can be made by either parents or a single parent, with the latter being carefully chosen unless they are no longer Indian inhabitants, of unsound minds, offenders, or impoverished. The claimant can name families, siblings, or any institution as their caretaker. If an organization is appointed, it must be registered under appropriate laws and the local commission can make substitute provisions if found incompetent.

The application process involves receiving an application form from the local level commission or downloading it from the official internet site. If an organization or other person is applying for guardianship, they must submit the consensus of the parents. After submitting all pertinent documents, the application procedure is considered complete.

Directive 13¹² of the National Trust regulation provides the process for getting and confirming a request for guardianship. A local-level committee (LLC) is designated to grant guardianship, scrutinizing the application, and ensuring the potential guardian is appropriate for the mentally ill person. The committee will advise parents and assess the need for a guardian, only providing guardianship in cases where the mature is completely incapable of making sovereign decisions. Fractional guardianships may be provided when essential.

Removal of a guardian can occur through Section 17¹³ of the National Trust Act. A person selected as the custodian can be removed if they are abuses, neglects, misappropriates, or neglects the person's belongings. The mentally retarded person's relatives, parents, or an

¹² National Trust Act, 2001, Regulation 13.

¹³ *ibid*

association can apply for the deletion of the guardian. If the local commission is satisfied with the accusations, it can eliminate the guardian and employ another person or take other dealings in the interest of the psychologically incapacitated person.

Voluntary guardians can be removed through the same rules as voluntary guardians. Involuntary guardianship can be removed if the credential of authority has been cancelled under Section 51 of the Persons with Disabilities. The necessity for guardianship can include looking after the corporeal, communal, and psychological well-being of the person, managing their property, opening bank accounts, and assisting them in accessing government schemes.

Guardianship of Mentally Ill Persons

Custody and divorce disputes can spiral out of control, and it hurts deeply to witness that the defenceless child is ultimately the victim of the parents' emotional and legal squabbles. The parent's interests, not the child's, may frequently be reflected in the eventful custody agreement. What will happen to the child is the main concern in a custody dispute, but typically the child is not a real participant in the proceedings. The child typically neither defines nor is represented in the traditional sense of the word, even though the best interest's principle mandates that the child's interests be the main focus. The dissolution of the marriage has a significant impact on the psychological equilibrium of the child, and The breakdown of the marriage has a significant impact on the psychological balance of the child, how well parents maintain healthy relationships with their kids has an impact on how well the child adjusts to the changes. An early step in examining this unique circumstance that calls for a particular articulation of children's rights is to concentrate on the rights of the child in the event of parental conflict. Sobhan **Kodali v. Lahari Sakhamur**.¹⁴

¹⁴ Kodali v. Lahari Sakhamuri, 2019 7 SCC 311

In the case of **Avinash Chander Mookhy vs General Public & Ors**¹⁵, Sukh Darshan Jain filed a petition for the appointment of a guardian under Section 53(1) of the Mental Health Act, 1987 for Ms. Saroj Kumari, daughter of the late Sh. Dharam Chand Mukhi. The petition claimed that Ms. Saroj Kumari was under the care of Ms. Swaran Kanta Mukhi, who died, claimed to be a family friend of the respondents, and could effectively take care of her and her property. The appellant, along with the respondents, also filed a written statement claiming to be the petitioner. However, the trial court rejected the petition, stating that none of the petitioners could be appointed as guardians for Ms. Saroj Kumari Mukhi. The court found that the petitioners, including the appellant, were not competent to file the application for judicial inquisition or serve as the guardians of the mentally ill person. The appellant appealed the decision, arguing that they were not ready to take responsibility for their sister and had shown no interest in staying in India. The court directed the appellant to be present in court to assess his bona fides and later filed another affidavit stating that he was willing to take legal guardianship but could not travel to India. The court found no merit in the appeal, as a stranger, a friend of the appellant, cannot be appointed as guardian of a mentally ill person.

In the case of **Tapan Chanda vs The District Judge, Cachar & Ors on 10 August 2017**¹⁶, The petitioner, a mentally ill woman, filed a writ petition against the guardianship certificate granted by District Judge Cachar, Silchar in 20.06.2007. The court found no infirmity in the claims of Smt. Suparna Dey is the mother of the mentally ill person. The petitioner argued that the certificate was fraudulently obtained by respondent, Suparana Dey, in a civil litigation between the petitioner and Suparana Dey. The court construed the appropriate law under which the respondent was appointed as the guardian of Ganapati Dey, the Mental Health Act, 1987, rather than the Guardian and Wards Act, 1890. The court also ruled that for a mother to apply for guardianship of her mentally ill child, no other person unless contested by the father, is a

15 Avinash Chander Mookhy vs General Public & Ors, CWP No.1190 of 2013

16 Tapan Chanda vs The District Judge, Cachar & Ors CWP 5061/2012

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

necessary party in such a proceeding. The court concluded that the petition was against the certificate issued by the District Judge, even though it may be argued that it was obtained fraudulently. The court also ruled that the act of the petitioner in arraying the learned District Judge, Cachar, as the respondent in the writ petition is deprecated. If the petitioner is aggrieved by the judicial order, the appropriate remedy would be to prefer an appeal or assail the certificate in any other appropriate manner as provided under the law.

Mrs. Indira vs K.P.V. Menon¹⁷ on 15 July 2010, The appellant, the wife of a mentally ill husband, filed a petition under Sections 50, 52, and 54 of the Mental Health Act 1987 to be appointed as the manager of her husband's family pension. The parents of Sankaranarayanan did not respond to the petition, and the District Court dismissed the petition. The appellant's counsel argued that she approached the court to enable her family to receive a family pension from the Central Government under Rule 54 of the Central (Civil Services) Pension. The Act 1987 aims to consolidate and amend laws related to the treatment and care of mentally ill persons, and to make better provisions for their property and affairs. The appellant filed a petition under Sections 50, 52, and 54 of the Act, which outline the procedures for holding judicial inquisitions, appointing guardians and managers, and appointing managers for the management of property. The District Court can serve a notice to the alleged mentally ill person, appointing a guardian and administrator if the person is found to be mentally ill and incapable of managing their property. If the person is found to be capable of managing their property, the District Court may appoint the same person as the guardian and manager. The District Court can also appoint a manager for the management of property if the property can be taken charge of by a Court of Wards under any law in force. If the property consists of terrestrial or interest in land that cannot be taken charge of by the Court of Wards, the District Court may direct the Collector to take charge of the person and any part of the property or interest therein. In summary, the appellant's petition outlines the procedures for holding judicial

¹⁷ Mrs. Indira vs K.P.V. Menon, MFA.No. 159 of 2004

inquisitions, appointing guardians and managers, and managing property. The court's decision on the matter is final and will be based on the specific circumstances of the case.

Conclusion

In conclusion, the legal framework governing custody and guardianship in India is intricate and multifaceted, involving various statutory laws and provisions. The Guardians and Wards Act of 1890 serves as a comprehensive and non-religious foundation for matters related to guardianship and custody, applying to children across all religious beliefs. However, specific religious laws such as Hindu Law, Islamic Law, Parsi and Christian Law, and the Special Marriage Act of 1954 also play crucial roles in shaping custody arrangements.

The Hindu Minority and Guardianship Act of 1956 defines the natural guardian of a minor, emphasizing the father's role, followed by the mother, with specific provisions for children under five years old. Legal precedents, such as the Gita Hariharan case, have challenged and interpreted these provisions to ensure the child's welfare remains the paramount consideration in guardianship decisions.

The distinction between "guardianship" and "custody" is highlighted, with custody referring to the daily care and supervision of a minor, and guardianship encompassing a broader set of rights and responsibilities. The evolving landscape of child custody, favouring shared parenting plans, reflects changing family dynamics and a focus on the child's best interests.

The document further delves into the legal intricacies of guardianship for mentally ill persons, emphasizing the importance of the Mental Health Act of 2017 and the Rights of Persons with Disabilities Act of 2016. The National Trust Act of 1999 outlines the process for appointing guardians for mentally disabled individuals, considering factors such as the need for guardianship and the reasons behind the request.

KnowLaw

KnowLaw Journal on Socio-Legal and Contemporary Research

A Publication of KnowLaw

Volume 02

KnowLaw

Prominent case laws, such as ABC v. The State and Gaurav Nagpal v. Sumedha Nagpal, illustrate the courts' commitment to gender equality and the child's best interests in custody decisions. The document also highlights specific cases related to the guardianship of mentally ill persons, emphasizing the legal procedures involved in such matters.

In conclusion, the legal landscape governing custody and guardianship in India is dynamic, shaped by both secular and religious laws, with a strong emphasis on the child's welfare and best interests. Legal precedents and evolving societal norms contribute to an ongoing refinement of these laws to meet the complexities of contemporary family structures and individual circumstances.