



Eligibility and Procedures for Appointing Guardians

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ABSTRACT:

This research paper is an attempt to analyse critically the process of appointing a guardian and hence dealing with different facts and circumstances of appointment. Researcher tries to focus on the process of it rather than elaborate the statutes and provisions governing it throughout the paper. Dealing with Guardianship and Wards Act, 1890 which specifically meant to protect the interest of minors as well as to secure his/her property, and especially for persons from Hindu domicile Hindu Minorities and Guardianship Act, 1956, this paper discusses several relevant and landmark judicial pronouncements to build up a brief conclusion.

Apart from this, various sections of this paper deal with different aspects of the procedure, legality as well as validity of the statutory provisions to find out the solutions for the statement of the problem. Based on the secondary sources, this also highlights the controversies relating to the Hindu Minorities and Guardianship Act, 1956.

The appointed guardian as per the Act is the person who is going to take care of the minor or his/her property or both and hence the procedure must be clean and fair so as to show the excellence of the judiciary in the territory. Conclusion based on the secondary information and case laws this paper offers a brief exposure to the procedure as well as the eligibility to appoint guardian as per the current statutes.

Keywords: *Appoint, eligibility, guardians, procedure*

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I. Introduction:

1.1. Introduction:

Indian Society draws the picture of a guardian as a person who takes care of a child. In general, Parents are termed as guardians of the children. But the scenario changes when there is no parents moreover when there is no one to take care of that child, who is basically a minor. For such scenarios appointing a guardian is an essential requirement to look after that minor child as well as his/her property. So firstly, it is not necessary that the guardian should be in existence by default, it can be appointed also. The further argument is till what extent the appointed guardian is responsible to that child and then its procedure, eligibility comes into play. To deal with such facts and circumstances, Hindu Minorities and Guardianship Act, 1956 was enacted. While talking on this statutory provision, it set up a framework to appoint a guardian and also talks about who can appoint as well as who can be a guardian. Travelling through the procedure of appointing a guardian the first and foremost concern is it must be free and fair because that appointed person is going to take care of both child and his/her property. Basically, father is considered as the natural guardian of a minor child and after his death the mother is the natural guardian and beyond this no one can be the natural guardian of that child. There was wholesome law before 1956 about guardianship, guardianship and wards Act, 1890 was there but specifically dealing with Hindu religion there is now Hindu Minority and Guardianship Act, 1956. Section 4 of this Act defines the Guardian is the person who is responsible for taking care of that minor child as well as his property. These guardians can be appointed by the means of will by the natural guardian also. But there is chance of non-existence of will so at those circumstances it is Court who helps in appointing the Guardian of that minor child. There may be De-facto guardian for example grandfather, grandmother who becomes guardian automatically after the death of the parents of that minor.

1.2. Existing legal situation:

The situation of guardianship specifically for the Hindu religion is governed by the Hindu Minority and Guardianship Act, 1956. This applicable to all the person belongs to Hindu domicile throughout India except the state of Jammu and Kashmir. Also, this Act is can be applied to other religion except Muslim. As per this Act the minor is a person who is below the age of 18 years and the guardian is a person who takes care of that minor, his property or both the minor and the property. The guardian can be appointed as accordance will made by natural guardian can be declared from the Court of law and by de-facto there can be existence of appointed guardian. This is Act is basically framed for the welfare of the minor and his property who loses his natural guardian.

1.3. Opinions of other authors:

Researcher referred a number of articles, journals, books and relevant websites to collect information and understand the concept of guardianship. Before this paper there were several more scripts and contents on this topic and hence in relation to that researcher referred some portions to conclude this work.

An article, “*Legal Guardianship Guide: The Process of Appointing a Guardian*” by Romano & Sumner was referred, which talks about the basic process and requirements of the guardianship dealing with Hindu Minorities and Guardianship Act, 1956. It also discusses about how to proceed legally to appoint a guardian and very importantly what is the use of it. What are the different types of people involved in the total process is also mentioned in this article.

Another article, “*Guardianship Termination under Hindu Minority and Guardianship Act*” discusses on the reasons for the termination of the guardianship and also talks on the legal validity of the Act governing guardianship.

A blog named “*Procedure To Appoint A Legal Guardian For A Person Under Vegetative A Condition Or Coma*” was referred to understand the guardianship process for a person under coma or under some disabilities. These are exceptional cases and there are specific terms and condition framed by the Court for the welfare of those person.

II. Procedure to appoint a guardian:

The procedure to be followed for appointing a guardian must be very specific and should be done with good faith as because this will going to deal with a minor child and his property.

II.1. Person involved in the process:

there must be a minor who is free of mental and physical disorder and most importantly he unable to provide himself food, shelter clothing and financial assets as well as unable to take care of his physical health¹. Secondly there must be a person (guardian) who is appointed by the Court, as per the will made by the natural guardian or by de-facto. That person has to make financial decisions, and hence also considered as the guardian of the property of that minor. This person appointed also to take care of the physical and mental health of that minor. The person who is appointed by the Court of law is termed as ward and before the declaration he is termed as proposed ward.

II.1.1. Process of appointing:

The process starts with the interested person who at the preliminary stage hires an advocate to assist him with filling the application form. This form consists of all the relevant information about the proposed guardian including the list of his incapability or whether he is feasible for that particular place. After that the Court appoints an advocate termed as “Attorney ad Litem” who represents the proposed ward but for unusual circumstances where there is some dilemma for the appointment of the guardian, then the Court appoints another attorney who is termed as “Guardian ad Litem” for the further investigation of the case and he will prepare a report recommending whether there is any need of guardianship and if needed then who is to be chosen for the same.²

II.2. Contribution of Court:

¹ “Legal Guardianship Guide: The Process of Appointing a Guardian - Romano & Sumner” (*Romano & Sumner, PLLC* April 24, 2020) <<https://romanosumner.com/blog/legal-guardianship-guide-the-process-of-appointinga-guardian/>> accessed November 12, 2020

² “Legal Guardianship Guide: The Process of Appointing a Guardian - Romano & Sumner” (*Romano & Sumner, PLLC* April 24, 2020) <<https://romanosumner.com/blog/legal-guardianship-guide-the-process-of-appointinga-guardian/>> accessed November 12, 2020

The Court will further enquire the ability and feasibility of the proposed ward to will nurture the minor as well as take care of his property. The Court has to ensure the person is incapacitated, the proposed ward is interested enough, the property of that minor is well protected under the supervision of the proposed ward and his services and support will be there for the minor child.

II.3. Eligibility criteria:

The proposed guardian can be disqualified because of certain factors. He is considered to be an ineligible person if he hasn't attained the age of eighteen and hence it is considered as inexperience on the basis of lack of education or incapable of managing the property as well as the child. Secondly, the background of the person must be clear enough. So, a person cannot be appointed if he has been convicted of any sexual offence, assault, causing injury to any person, terrorist activities or due to engaging in violence against family.

II.4. Termination of Guardianship:

The Court in the interest of welfare of the minor has the right to terminate the guardianship as provided under section 13 of the Hindu minority and Guardianship Act, 1956.³The Court can terminate the Guardianship if the person is not appointed properly or having any criminal record. Also, it depends upon child's best interest. Sometimes it is due to wish of the natural guardians or parents. Terms also ends due to insufficient amount of earnings to run the livelihood of that child. After the child attains the age of 18 years, the guardianship terminated or the age of 18 years if the child wants to marry then also guardianship ends. Termination can also happen with the guardian wants to resign or the Court direct to resign him. Lastly termination can take place if the child dies before attaining the age of 18 years.

III. Guardians in special cases

III.1. Guardianship on appeal of an organization:

In case if a organization found any minor child who is in the abandon state and is incapable of nurturing himself and also having some sort of disability, then in such circumstances an organization can move an application seeking a guardian for that minor. And very importantly, if it is a registered organization then it can be a legal guardian also⁴. The local committee present there can be asked a registered organization to take the responsibility as well as the guardianship of that child. This registered organization can be NGO (Non-government organization), any association for children welfare or parents welfare, any organization which takes care of disable child, etc.

III.2. Guardian for person under vegetative state or coma:

Division bench of Kerala High Court followed by Delhi High Court framed certain guidelines to provide guardian for person who is under vegetative state or in coma.⁵As previously, there was no specific statute to deal with such cases, the High Court of Kerala took the lead to enact certain guidelines for the same. It states that the person who wants to appoint the guardian should disclose his all tangible and intangible assets in the petition. To do this the Court will take the help of medical practitioners and neurologists. The best interest of the person under the state of coma should be taken in consideration and there shouldn't be any conflict regarding the appointing process. If any welfare association is taking the lead then a public official for example any social welfare officer or person having equivalent rank can only be appointed as a guardian for such cases. The Court holds the supreme power to modify the order as according the interest of the person under coma. The appointed person has to ensure every transaction dealing with the property of the comatose person is happening with his

³ "Guardianship Termination under Hindu Minority and Guardianship Act" (*Google*)

<<https://www.google.com/amp/s/blog.ipleaders.in/guardianship-termination-hindu-law/amp/>> accessed November 13, 2020

⁴ "Vikaspedia Domains" (*English*) <<https://vikaspedia.in/education/parents-corner/guidelines-for-parents-of-children-with-disabilities/guardianship>> accessed November 14, 2020

⁵ Lawyered.in, "Procedure To Appoint A Legal Guardian For A Person Under A Vegetative Condition Or Coma" (*Lawyered* September 19, 2020) <<https://www.lawyered.in/legal-disrupt/articles/procedure-appoint-legal-guardian-person-under-vegetative-condition-or-coma-advocate-abdul-azeez/>> accessed November 14, 2020

interest.⁶ In case the next friend of the person under coma is not acting as a guardian he/she has to move to court for the removal of guardianship from him/her. Most importantly in case of the transfer of the patient, from one state to another or one country to other, the appointed guardian has to seek permission from the apex Court for the same.⁷

III.3. Guardian of an incapacitated person:

The person having mental and physical disabilities appoints guardian and is commonly practised for recent decades. This is allowed to facilitate those disabled person and help them out to accomplish his/her desire. The guardianship to them allowed to exhibit dignity and self-respect to those disabled persons but the control of guardian over the person is quite limited in this case. The appointed guardian is expected to do as much as care to that person and to keep him/her mentally and physically well. Here the guardian is allowed to do only those works which are not accomplished by the disabled person with his own capacity for example, financial related decisions, medical decisions, educational and medical services, etc.⁸ The appointed guardian is also expected to submit periodical report of that person before the Court and also the list of activities with its financial assets.

IV. Judicial approach:

Before 1956, there was a common law regarding guardianship i.e., the Guardianship and Wards Act, 1890. The Court in its various judgements highlighted the excellence of both the Acts which are the Hindu Minority and Guardianship Act, 1956 as well as the Guardianship and wards Act, 1890. In the case of *Bhagyalakshmi v. K Narayana Rao*,⁹ the mother took away 3 children and left her husband. She further depended upon her aged father who is having insufficient earnings to run their livelihood. The Court here prioritized the financial superiority of the father and gave the custody of those children to the father and held that the elder son will get proper advice from the father and the daughters will physical and educational facilities under their father's observation. The same was further repeated in the case of *Jaswant Kaur v. Manjit Singh*, where the custody of the child was provided to father based on his economic superiority.

In the case *Vijayalakshmi v. police Inspector, 1991*,¹⁰ the Court stated that the mother shall be the natural guardian if the father converts himself to be a non-Hindu. But as India is considered to be a secular country the Judiciary sometime allows the same as in the case of *Raj Kumar Gupta v. Barbara Gupta*, the father was Hindu and the mother was a Christian, after their separation the child was left with the mother for a period of 3 years. The Court gave the custody to mother stating that the child is of very little age and living with the mother for a long period. The apex Court also highlighted that Hindu doesn't refer to non-Hindu and if the parents have never been a Hindu then in that case, section 6 of the Hindu minorities and Guardianship Act, 1956 is not applicable.¹¹

For the person under a vegetative state or in coma, the Kerala High Court came up with certain guidelines in the case of *Gopalakrishnan v. State of Kerala and ors., 2019*,¹² as discussed in the previous chapter. It discusses about how to deal with the process of guardianship when the person to whom the guardian is appointed is in vegetative state or in coma. The same was further followed by the Delhi High Court in the case of *Vandana Tyagi v. Government of national capital territory of Delhi*.

⁶Mandhani A and others, "Spouses Can Be Appointed as Guardians for Comatose Patients to Manage Their Properties: HC" (*ThePrint* June 16, 2020) <<https://theprint.in/judiciary/spouses-can-be-appointed-as-guardians-for-comatose-patients-to-manage-their-properties-hc/442543/>> accessed November 15, 2020

⁷Mandhani A and others, "Spouses Can Be Appointed as Guardians for Comatose Patients to Manage Their Properties: HC" (*ThePrint* June 16, 2020) <<https://theprint.in/judiciary/spouses-can-be-appointed-as-guardians-for-comatose-patients-to-manage-their-properties-hc/442543/>> accessed November 15, 2020

⁸"Guardianship of Incapacitated or Disabled Persons" (*Findlaw* August 31, 2018) <<https://family.findlaw.com/guardianship/guardianship-of-incapacitated-or-disabled-persons.html>> accessed November 16, 2020

⁹*Bhagyalakshmi v K Narayana Rao* (Kerala High Court)

¹⁰*Vijayalakshmi vs The Inspector Of Police on 10 July, 2019* (Madras High Court)

¹¹"Guardianship Termination under Hindu Minority and Guardianship Act" (*Google*)

<<https://www.google.com/amp/s/blog.ipleaders.in/guardianship-termination-hindu-law/amp/>> accessed November 13, 2020

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V. Conclusion:

Travelling through various aspects of guardianship, one thing is very clear that a guardian is appointed to look after a person, his property or both person and the property. The whole concept deals with the interest and welfare of a person who in his capacity cannot take decision over his mental physical wellness as well as unable to make decision over his assets. The Hindu Minorities and Guardianship Act, 1956 was enacted to specifically deal with guardianship among Hindu domicile but it was also interpreted by the Court that Hindu doesn't refer to non-Hindu, while Muslims are not governed by this Act.

Two problem statements which were raised, dealt with significant concern throughout. The procedure for appointing guardian is very simplest one while terms and conditions for the same are quite situational. The Court has major contribution to determine the guardian when there is no existence of will by the natural guardian. It is the duty of the Court to use the Act dynamically to deal with various problems regarding guardianship. The process of appointing a guardian in any of the situation, the significant factor is consent and interest of the person for whom the guardian will be appointed, apart from that, the Court many a times preferred to go with economically superior person among the proposed guardian to ensure that the minor child facilitated with all benefits available.

So, it is the utmost concern in the process that the person is capable of nurturing that child. Talking on the eligibility criteria, it is different at different circumstances while one factor remains constant and that is the best interest of the person for whom the guardian will be appointed. Again, this is checked whether the person is capable of doing the same and person below the age of eighteen years are not considered as a guardian due to less educational experience as well as lack of responsibilities. Preferably relatives or the next friends are chosen as the guardian in absence of natural guardians but person having past criminal records or having charge of sexual assault, children abuse, ect are not provided with responsibility as a guardian. Also, if among the proposed guardian, there is one, who previously engaged in terrorist activities, he/she will not be appointed as a guardian. Guardianship can also be terminated as and when required. There are various circumstances where the term ends for example resignation by the guardian, death of the child before attaining the age of 21 years, end of minority, ect. The total process of guardianship is quite situational and depends on series of activities hence the Act governing the same as well as the Court has the significant role to regulate the guardianship process in India.

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