

# Appointment of Guardian of Person and Property of Child

Presented by

*Yogesh Kumar Gupta*

*District and Sessions Judge*

*Tehri Garhwal*

## Section 7 G&W Act 1890

**7. Power of the Court to make order as to guardianship.—(1) where the Court is satisfied that**

**it is for the welfare of a minor that an order should be made—**

**(a) appointing a guardian of his person or property, or both, or**

**(b) declaring a person to be such a guardian, the Court may make an order accordingly.**

**(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.**

**(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act**

# Section 9 of G&W Act 1890

9. Court having jurisdiction to entertain application.—

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

# Section 2 of The Hindu Minority and Guardianship Act, 1956

2. Act to be supplemental to Act 8 of 1890.—The provision of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardian and Wards Act, 1890 (8 of 1890).

# Section 6 of The Hindu Minority and Guardianship Act, 1956

6. Natural guardians of a Hindu minor.—The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an 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 with the mother;

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

(c) in the case of a married girl—the husband: Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi). Explanation.—In this section, the expression “father” and “mother” do not include a step-father and a step-mother.

the case of a legitimate child, a mother can become a guardian only after the death of the father or upon his incapability to become a guardian.

In [Section 6\(a\)](#), the custody of a child below 5 years should be with the mother unless it is in the opinion of the court that the custody of the child to the mother would not be in the welfare of the child.

In [\*Ms. Githa Hariharan and another v. Reserve Bank of India and another, \(AIR 1992 SCC 228\)\*](#), a question was raised whether the custody of a minor child can be given to the mother in the absence of the father. It was held that the term “after” in Section 6(a) should be read in a wider sense that would include “in the absence of” instead of “after the lifetime”.

# Guardian appointed by the court

The court is empowered to appoint a guardian of a child upon the failure of natural and testamentary guardians. The Guardians and Wards Act, 1890 is applicable for the appointment of a child's guardian belonging to any community. The district court is empowered under the Act to appoint a guardian after considering the welfare of the child. The High Court also has inherent power to appoint a guardian for a minor which the court sparingly exercises.

# Cases when guardian cannot be appointed

Section 19 of the act provides where a Guardian cannot be appointed by the court in certain cases. The court shall not assign a guardian if the property is under the guidance of the courts of wards or to declare a guardian of the person who:

- In the case of the minor who is a married female and whose husband is fit to be a guardian.
- In the case of the minor female who is not married and her father or mother living, she is fit to be the person's guardian.



# **K.S. Narayana Elayathu Vs. Sandhya 2021 SCC Online Ker 6231**

It is held that So, as far as the dispute between parties to an erstwhile marriage regarding guardianship of the person, or the custody of, or access to their minor child, the Bench held that the jurisdiction of the District Court is taken away by the Family Court.

# The meaning of “Ordinarily resident”

## Used in Section 9 of G&W Act 1890

It means something more than a temporary residence as held in the case of Ruchi Majoo Vs. Sanjeev Majoo Judgment dated 13-05-2011

- The expression “Ordinarily resides” is not interchangeable with the expression “Resident at the time of the application.”
- Merely because a party had removed the minor from a place, can not oust the jurisdiction of the Court of that place from where the minor is removed.
- In the case of Nithya Anand Raghavan Vs. State (NCT of Delhi) AIR 2017 SC 3137 It is held that the predominant criterion of the best interest and welfare of the minor outweighs or offsets the principle of comity of courts.

# Custody of Child

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# THE HINDU MARRIAGE ACT, 1955

**26. Custody of children.**—*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.*

*[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.]*

# THE SPECIAL MARRIAGE ACT, 1954

**38. 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, 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.

[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.]

# THE DIVORCE ACT, 1869

42. Power to make such orders after decree.—The court, after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to time, all such orders and provisions, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.

43. Power to make orders as to custody of children in suits for dissolution or nullity.—3[In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in a District Court, the Court may from time to time before making its decree, make such interim orders as it may deem proper] with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the court.

# The Hindu Minority and Guardianship Act, 1956

**6. Natural guardians of a Hindu minor.**—The natural guardian of a Hindu minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are-

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  - (a) if he has ceased to be a Hindu, or
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**Thank you**