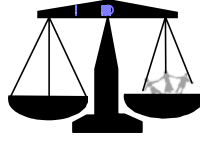


JUSTICE FOR CHILDREN TRUST



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Difference between custody and guardianship

Guardianship and custody are closely related aspects of a child's life. Guardianship is the less popular of these two terms. When the parents of children separate, they commonly fight for custody of the children concerned as opposed to the guardianship rights over them. It is only when certain unforeseen issues arise like the need to apply for a passport or to sign for medical surgery for the children that most parents realize the difference between the two aspects.

Guardianship is the capacity of a person to administer property and assets of a minor, to look after his financial affairs, to conclude contracts on the minor's behalf and assist in performing other legal acts. Custody refers to the physical care and control of the child that is physical possession of the minor, to live with and to assist him in his daily life.

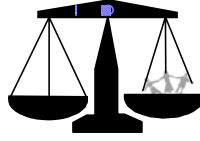
The guardian of a child is entitled to enter into legal transactions like buying, selling and investing property in the interests of the minor. On the other hand the custodian decides on the child's education, religion, accommodation, sports, recreation, entertainment and all other matters affecting the child's daily living.

For children born in wedlock, the father is the guardian and exercises these rights in consultation with the mother. Upon separation or divorce where the court has not decided on the issue of guardianship, the father still remains guardian of the children. If the mother is awarded custody of the children, when it comes to performing legal acts, she still has to seek consent of the guardian of the children namely their father.

For children born out of wedlock, the mother is both the custodian and guardian of the children. This gives her the right to perform legal acts on behalf of the children concerned.

In reality, it is very difficult for parents to continue consulting each other over guardianship issues after divorce because of various factors like migration. "Sole guardianship" can be awarded to one parent if it is in the best interests of the child and the parent will exercise the rights without consulting the other parent. We therefore urge all parents to ensure that before migrating, they communicate and transfer guardianship rights to the custodian parent so that they can be able to exercise sole guardianship in their absence. A sole guardian can appoint another person in his/her will to be guardian of the concerned child to avoid problems after their death. We also urge guardians to appoint capable persons to be guardians of their children when they pass away.

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Transferring guardianship of children to relatives in the diaspora

“I didn’t know that life was so unfair. I thought that by coming overseas my life would improve and I will be able to look after my younger brother and sister. If I had stayed in Zimbabwe I would have been able to continue with my education. My uncle said he would get me a job but all I am doing is looking after his children without being paid but there is nothing I can do because he is my guardian”.

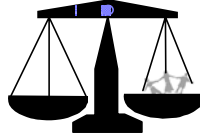
This case scenario represents real life experiences of some children who have found themselves in difficult circumstances after their relatives had applied for guardianship then and took the children to the diaspora but life has turned out to be worse for these children than it was here in Zimbabwe.

An analysis of cases brought to JCT has shown an increase in the number of guardianship cases dealt with this year. After a further study of the underlying causes, it has emerged that besides divorce, separation or death of parents, many people prefer to have guardianship granted to their relatives who are staying in the Diaspora with the intention of facilitating the children’s relocation to those countries. In some cases both parents will be alive but they would rather surrender the guardianship to their relative in the hope that this will benefit their children.

However, there would have been no prior investigations or verification of the conditions in which the child will be going to live. Such scenarios may not be in the best interest of the child in terms of growth and development. One also wonders why these caring relatives prefer to have the child come to stay with them instead of simply sending the money to the child’s caregivers who can use it for the child’s upkeep.

In the event that the parents of a child are alive and they wish to transfer their guardianship to a relative who is in the diaspora, it is advisable that they get confirmation from the relevant social authorities in the diaspora to the effect that the proposed living environment is not detrimental to the growth and welfare of the child and that the person applying for guardianship is a fit and proper person. Once the parents receive this confirmation from the social authorities at the country of destination and after considering the best interests of the child, the parents can then proceed to assist the relative applying for guardianship rights. Justice for Children Trust urges all parents wishing to transfer their guardianship rights to consider this approach to safeguard their child from abuse.

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The Aids pandemic and the guardianship of orphaned children

Guardianship refers to the capacity of a person to administer the property and assets (estate) of a child and looking after his or her financial affairs and assist the child in the performance of other legal acts. This also involves concluding or assisting the minor to conclude a contract. Guardianship should be distinguished from custody which refers to the exercise of physical care and having control of a child in one's possession in the day to day life.

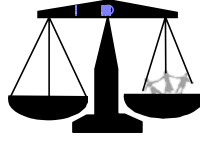
Many young adults are dying mainly due to Aids and this has led to an orphan care crisis as most of them would be the breadwinners. They leave behind orphans usually under the care of elderly grandmothers and these orphans often drop out of school, fail to access food and health as a result of their guardians' lack of financial capacity. Elderly grandmothers are finding it extremely difficult to take care of the orphaned children yet there are legal options that can lessen the financial burden.

If parents die without appointing a guardian through a will, it is important that such grandmothers apply for guardianship in order to access the late parents' funds and this can enable the children to access their rights to food, health care and education. In some instances the grandmothers and even the other family members are not aware of the legal option of obtaining such guardianship for the benefit of the children.

If the grandparents obtain guardianship of these children, they will then be able to access the funds or pensions and this will be used towards the education, food and other needs of the children.

JCT has helped a number of grandmothers to apply for guardianship and this has benefited many children some of whom had dropped out of school. Those in need of assistance in issues of guardianship of orphaned children can contact us.

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Children who are over 18 become guardians of their minor siblings

"I cannot remember when I last spoke with Aunt Mary and Uncle John. My parents' pension is lying idle. My little brothers and sisters have now stopped going to school. I also stopped going to school three years ago to fend for them. I wish I could access our parents' funds so that my siblings can attend school but since Aunt Mary and Uncle John are being reluctant to assist then there is nothing I can do. I am a young man aged nineteen".

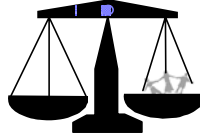
Upon the death of parents, many children face many challenges as is highlighted in the above scenario. Often relatives tend to dissociate with the orphaned children sometimes willingly and sometimes the distance just grows due to other commitments. At the end of the day, some children end up not going to school because no relative would have taken up the responsibility of applying for the children's guardianship.

Once both parents of the children pass away, the children have no natural guardian. If a child has no natural guardian, the Children's Court will appoint a person to be a guardian over that child. A relative or any person who is living with the child can apply to be appointed guardian of the minor child. In the above scenario, it means that the eldest child can apply to be the guardian of the other siblings.

Culturally, when the parent of a child passes away, a relative like an Aunt or an Uncle is appointed "guardian *sarapavana*". The children look up to these people as guardians and they seek their permission before engaging in any act. Usually these relatives will be having families of their own and might find it difficult to take up the role as the orphaned children's legal guardian. In such a scenario, the eldest child can apply to take up guardianship of the minor siblings. When the court receives the application, it will publish a notice in the Government Gazette giving the date of hearing and calling upon interested parties to attend and if they have any objections to the appointment of that particular person to let the court know the reasons why they are objecting.

Justice for Children Trust seeks to inform those major brothers and sisters wishing to assist their minor sisters and brother to access their rights and other social services using deceased parents' funds that they can apply for guardianship. To relatives, let us not let the children suffer if they have majors in the family but let us assist them to use their deceased parents' resources for the betterment of the children.

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GUARDIANSHIP OF MINORS

Selecting an appropriate Guardian

When selecting a guardian, primary consideration shall be given to the best interest of the child. The parents are the preferred guardians but there are situations that a non parent can be awarded the guardianship. This is where the parents are deemed unfit to exercise proper care and control over the child.

The selection of an appropriate guardian is concluded after establishing his or her capacity to take care of the minor, look after the financial affairs as well as undertaking the legal duties assigned to such a task.

Due to the increase in the number of orphans the numbers of cases involving guardianship are also increasing and there is need for people to understand the processes involved in obtaining guardianship. This is important to enable the child to obtain guidance, advice, financial resources as well as care.

When relatives decide who should be the guardian there is need to ascertain that the best interest of the child is considered. There are reported cases where some people have applied for guardianship in order to benefit from the financial gains associated with such a position, especially for orphans whose parents would have left property and financial resources. Some greedy relatives have taken advantage of such guardianship to exploit the orphaned children to the extent of sending their own children to school while the rightful beneficiaries drop out of school.

Those who want advice on the legal procedures for issues of guardianship and custody of minors can contact us.