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## **CUSTODY OF A CHILD OR VISITATION RIGHT OF A CHILD-AN UNGODLY STEP IN INDIA**

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### **Exordium:**

In Universe, every human being according to their age has to adapt to the lifestyle from which they were before. The point at this juncture is custody of child or Visitation right is in every corner of the globe more precisely in India the said issue intensifying year by year. The people who tend to secure divorce and get separate from his/her partner for a moment they have to think about the welfare of the child. As we all know that Child is not a property or commodity to act in hasty manner, the child is regarded as god's gift, for such precious gift at present moment is not availing value due to societal change. As child learns good habits like how to behave, how to learn something new, how to act with others, etc from their parents. The word "Child" and the word "Infant" both are same connotation and there is no separate meaning for it, as general parlance Infant is synonyms of Child. In this piece of Article, the writer would like to delve the societal assumption about having a child as soon as getting married and what happens when the differences arouse between wife and husband after the procreation of child. The begetting of child being the one of the priority after the marriage applies to irrespective of the religion. The author is also intended to elucidate the laws or legislations pertaining to custody of child such as Hindu Marriage Act,1955, Hindu Minority and Guardianship Act,1956 and Guardianship and Wards Act,1890 and with the aid of precedents of the Summit Court of India and High Courts. Atlast, the author would like make a suggestion how to curtail the cases of custody of child.

### **Prologue:**

In Universe, every human being according to their age has to adapt to the lifestyle from which they were before. Irrespective of their religion, marriage shall be performed at a certain age but the age factor might vary from one religion to the other. One of the motto behind marriage is to procreation of the children so as to extend their family and religion. At present mindset of

the people in society is that once the marriage is completed the next would be for the procreation of children. None will think about the financial status of the newly married couple or custody and well being of newly born babies or children. If there is no procreation of children for a few years, people will start assuming that something is fishy for either husband or wife and will suggest to newly married couples to consult a doctor. By hearing all this poor newly married tend to procreate children by keeping aside their notions or plans to procreate the children. The procreation of children is not a matter in this universe but they survive after we leave them such as by taking divorce, the act of god incident, etc. Then the children have to lead a life more miserable than before. For instance, if one of the parents is the victim in an act of god, the other parent will be there to safeguard to children but there will be hurdles and another instance where the parents intend to procure a divorce, how about the custody of the children? Whether the children have to be under the custody of the father or the custody of the mother? Posing the same question to the children is making them unpleasant.

When the question of custody of children comes, all have to take very cautious steps keeping in mind the welfare of the child, the financial status of the parent who is willingly to take the custody of the children, his/her behavior towards children and society, etc factors. By and large, after the procreation of child differences between wife and husband will occur in worst cases, If the difference reaches the Court. If the wife or the husband files a divorce case immediately either of the parents will also file a Guardian and Wards Original Petition (G.W.O.P) before the appropriate jurisdictional Hon'ble Courts for custody of the child. The Courts will tend to decide first the divorce proceedings and then step into deciding the Custody of children. At present trend is that obtaining divorce is easy than getting married, child is not a property and commodity to leave child in that manner. In *Nil Ratan Kundu Vs Abhjit Kundu*<sup>1</sup> stated that Child is not "property or commodity". As the word "Child" and "Infant" are not different and it has not have separate connotation. It means a person who has not attained majority and the same stated in *Sanjib Saha Vs Smt.Bidisha Sana (Nee Roy)*<sup>2</sup>

### **Provisions pertaining to the Custody of Child:**

The author will try to explain sections in a simplified manner so that non-law students will also grab them easily.

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<sup>1</sup> Nil Ratan Kundu Vs Abhjit Kundu, (2008) 9 SCC 413

<sup>2</sup> Sanjib Saha Vs Smt.Bidisha Sana(Nee Roy), 2006 SCC Online Cal 175

The Convention on the Rights of the Child which is adopted 20<sup>th</sup> Novemeber, 1989 by General Assembly resolution 44/25. One of the intent of this Convention which is stated in the preamble is that, recognize that the child for the full and harmonious development of his/her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. Article 3 of the said Conventions state as follows, In all actions concerning children, whether undertaken by the public or private social welfare institutions, Court of Law, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration<sup>3</sup>. The provisions related to custody of child and their property are enumerated in the legislation i.e., Hindu Marriage Act-1955, Hindu Minority and Guardianship Act-1956, and Guardian and Wards Act, 1890 and furthermore the provisions of the above Acts has applied the doctrine of “Best Interest” of the Child to decide the guardianship with respect to custody and to protect the property of minor child. The said “Best Interest” doctrine has also applied in various judgments of the Summit Court of India and High Courts of India, one of such case is *Kiran.V.Bhaskar Vs State of Haryana and Ors*<sup>4</sup> where it opined that while connecting both best interest of the child and welfare of the child, the welfare of the child is not to be measured by money only nor merely physical comfort, the word “welfare” has to give widest sense so as to include moral and religious welfare of child. In *Nil Ratan Kundu Vs Abhjit Kundu*<sup>5</sup> the Apex Court of India has cited American Jurisprudence with respect to custody of child and said that in selection of guardianship of a minor, the best interest of the child has to be paramount consideration by doing that even rights of parents sometimes yields.

#### **A-The Hindu Marriage Act, 1955:**

Section 26 of the Hindu Marriage Act, 1955 dealt with custody of children, the bare reading as follows: In any proceedings 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 by such decree or interim orders in case the proceedings 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:

<sup>3</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

<sup>4</sup> *Kiran.V.Bhaskar Vs State of Haryana and Ors*, 2021 SCCOnline P&H 1699

<sup>5</sup> *Nil Ratan Kundu Vs Abhjit Kundu*, (2008) 9 SCC 413

The application made with respect to the maintenance and education of the minor children shall be disposed of within 60 days from the date of service of notice on the respondent<sup>6</sup>.

In *Puja Bhattacharya Vs Subir Acharya*<sup>7</sup>, this case is interesting is that, the petitioner Puja Bhattacharya herein has filed Divorce petitioner against the respondent in the Family Court and respondent filed Restitution of Conjugal Rights. During this proceedings, the respondent herein as filed to grant visitation rights to him to see his minor sons who are 5 years and 3 years respectively, he filed under Section 12 of Guardianship and Wards Act, 1890 and petitioner herein opposed the same. After that, the respondent withdrawl the petitioner and filed under Section 26 of Hindu Marriage Act, 1955. The question arouse is that whether we can file a petitioner to grant Vistation Rights under Section 26 of Hindu Marriage Act. 1955. In the present case, the trial Court and Hon'ble High Court affirmed positively invoking provision Section 26 of Hindu Marriage Act, 1955 to grant Visitation rights. The visitation rights to the respondent was granted between 7pm to 9pm in School holidays and the Hon'ble High Court went ahead opined that the Family Court with its discretion can depute on Para legal volunteer on the dates of visitation rights to ensure visitation time shall go in peaceful manner.

In *Amrita Roy Vs Soumen Chaki*<sup>8</sup> in this case, the girl child is with the father. The father of the girl child who is at the age of 13 years, filed Custody of Child under Section 26 of the Hindu Marriage Act, 1955 which was granted to the father till she attains majority by the Trial Court after interacting with girl child. The girl child is very well comfortable with the father but not with the mother, because mother is with his male acquittance who made discomfortable to the girl child. The mother of the girl child seek visitation rights to the girl child but the trial Court denied the same to the mother. The order of the trial Court has also affirmed by the High Court and opined though she is girl child, she is very well conformtable with his father, welfare of the child paramount consideration whilst granting custody or visitation rights of the child.

### **B-The Hindu Minority and Guardianship Act, 1956**

Section 6 of the The Hindu Minority and Guardianship Act, 1956 talks about Natural guardians of a Hindu minor, minor's property and exclusively his or her undivided<sup>9</sup>. This Act and section exclusively applicable for Hindus. Through this section we can get enlight that who are

<sup>6</sup> <https://indiankanoon.org/doc/972693/>, Section 26 of Hindu Marriage Act,1955

<sup>7</sup> Puja Bhattacharya Vs Subir Acharya, 2024 SCC Online Tri 883

<sup>8</sup> Amrita Roy Vs Soumen Chaki, 2024 SCC Online Cal 8477

<sup>9</sup> <https://indiankanoon.org/doc/39958047/>, Section 6 of Hindu Minority and Guardiaship Act, 1956.

eligible for guardian of minor and who are not. At first instance, we can state who are eligible to act as a guardian to a minor and his/her property. Usually the mother's need for a born baby is vital so that, the section also highlighted that if a boy or girl who has not completed the age of 5 years, he/she shall be with the mother as otherwise. In that instance also, if the mother remarried or she is not fit for custody of the child at that moment welfare of child should take paramount consideration. If the child is illegitimate child or illegitimate unmarried girl at the time mother will be act as a guardian or after that father can ask as a guardian. If the child is a married girl then her husband shall act as a guardian. If a person is Non Hindu or ceased to be a Hindu or if such person has renounced the world by becoming a hermit or ascetic, he is not entitled to act as natural guardian to a minor or his/her property. In *Sumedha Nagpal Vs State of Delhi*<sup>10</sup> the Apex Court of India has said that in deciding a case under the provision to Section 6(a) of the Hindu Minority and Guardianship Act, 1956 what has to be borne to mind is the welfare of the child and not decide such a question merely based upon the rights of the parties under the law. In *Roxann Sharma Vs Arun Sharma*<sup>11</sup> held that in para no.13 as follows that the Hindu Minority and Guardianship Act,1956 postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and passage the likelihood of the welfare and interest of the child being undermined or jeopardized if the custody is retained by the mother and in recent case of *Parvati Vs Vyankat*<sup>12</sup> opined that in para no.7 that legally speaking Section 6 of the Hindu Minority and Guardianship Act, 1956 that the minor girl child should be given custody of mother unless it is established that she adverse interest or incapacity to secure welfare of minor.

### **C-The Guardianship and Wards Act, 1890**

The Guardianship and Wards Act, 1890, Act No.8 of 1890 came into force on 21<sup>st</sup> March 1890. This Act consists of 4 Chapters and a total of 53 Sections. This Act's main motto is to consolidate and amend the law relating to Guardian and Wards when required according to changing circumstances in society. The Guradianship and Wards Act, 1890 herein after reffered as G&W Act, 1890. This Act applicable to all religion except Hindu. The said Act is supplemented by the Hindu Minority and Guardianship Act, 1956. As Section 3 of the Act said that this Act shall be read subject to every enactment hereinbefore or hereinafter passed relating to any Court of Law by any competent legislature, authority or any person of any state in which

<sup>10</sup> Sumedha Nagpal Vs State of Delhi,(2000) 9 SCC 745

<sup>11</sup> Roxann Sharma Vs Arun Sharma,(2015) 8 SCC 318

<sup>12</sup> Parvati Vs Vyankat- 2025 SCC Online Bom 2671

this Act extends.

Section 4 of the G&W Act, of 1890<sup>13</sup> prescribed the definitions.

Under Section 4 of the G&W Act, 1890 we will see definitions one by one as ordered.

Section 4(1): defines the word “Minor” as it states that according to the Indian Majority Act, 1875 who is not a major, he/she is a minor. As we are all very aware a fact that a minor girl is a person who is below the age of 18 years and a minor boy is a person who is below the age of 21 according to the Indian Majority Act, of 1875 also but it differs from one situation to other situations. Say, for instance, to cast a vote both boy and girl should have completed the age of 18 years, whereas to contest in elections as a Member of the Legislative Assembly or Member of Parliament it differs. If the boy or girl commits the crime, the age also differs.

Section 4(2) defines the term “Guardian” as a person who takes care of the minor or his property or of both minor and property.

Example No.1: If “A” is a person who takes care of minor “B” for his/her welfare in the sense of shelter, education, etc., either “A” can be a father or mother or a grandparent or friend and is considered as Guardian to the minor only.

Example No.2: If “A” is a person taking care of the property of minor “B” alone. The property is of 2 acres of land. There will be some instances where the minor will have a property but there is no proper guardian for the property to save. In those circumstances, the guardian will be appointed to take care of the minor’s property.

Example No.3: If “A” is a person taking care of both Minor “B” and his property is of 3 acres of land. Say for instance the minor has a property but he/she lost parents or the parents obtained a divorce and secluded the minor by then Minor’s grandparents or friends can act as a guardian for both minor and property.

Section 4(3) defines the word “Ward” as also known child or minor to whom there will be a guardian to take care of him and his property.

Section 4(4) “District Court” which expression has given in Code of Civil Procedure, 1882,

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<sup>13</sup> <https://indiankanoon.org/doc/1941531/>, Section 4 of Guardian and Wards Act, 1890.

and its functions defined under Section 4(5) of this Act. Which states that the District Court has jurisdiction to entertain an application under this Act to appoint or to declare a person as a guardian. The same power can also be exercised by the High Court having jurisdiction of Ordinary Original Civil Jurisdiction.

### **Jurisdiction to file a Petition and who can file a Petition**

Section 9 of the Act says which Court has jurisdiction to entertain an application for the appointment of a Guardian<sup>14</sup>.

1. If the application or petition with respect to the guardianship of the minor, the application or petition has to be filed where the minor resides.

For Ex: "A" is a father or grandfather or friend, and "B" is a minor. Where "A" is residing at Ananthapuram. "B" minor is residing at Chittoor with her mother. Now, "A" has to file a petition at Chittoor but not Ananthapuram.

2. If the application or petition is the acting guardian of the property of the minor. Here there are choices two available, either the application has to file where the minor resides or where the property is situated which is in the name of the minor.

For Ex. "A" is a father, he gifted the property to the minor "B" and kept guardian to the mother "C". "A" father is residing at Guntur, property of the minor is at Kurnool but the minor is residing at Kadapa. So here "A" can file a petition at Kadapa where a minor is residing or at Kurnool where the minor's property is situated.

Section 8 of the Act says about Who can apply to act as Guardian to the Child<sup>15</sup>.

- a) The person desirous of being it means maybe the mother or father to be guardian to the minor or
- b) any relative or friend of the minor or
- c) the collector.

The writer has dealt one of his case on Custody of Child under Gaurdian and Wards Act. Here for better understanding, interest of public and interest of the parties involved, the writer will not mention the names of the parties instead will make to identify by alphabets as follows: A- Father of the child, B-Child's mother who has died, C-Child, D-Child's Maternal Grand Father. The case is that A and B got married in the year 2018 and out of their wedlock a girl child born i.e., C herein. Subsequently "A" who has notorious habits and leaded to kill his wife i.e., "B".

<sup>14</sup> <https://indiankanoon.org/doc/1192053/>, Section 9 of Gurdians and Wards Act, 1890.

<sup>15</sup> <https://indiankanoon.org/doc/400656/>, Section 8 of Guardians and Wards Act, 1890.

When B died, C was 6 months baby. Now the big question who will take care of C's welfare. Many mediations were arranged by the maternal grand father of the child i.e., D herein before elders of the village and counselling has happened in Police Station and child welfare committee and atlast the child was in the custody of D. With malafide intention "A" approached the Hon'ble Court to seek custody of the "C". The Hon'ble Court after persuing evidences of both sides, the Hon'ble Court gave custody of C to D. The Hon'ble Court has examined C Incamera and posed the question as like who is father, the child showed the D as her father because D who was taking care of C when she was 6 months. When C was at the age of 4 years, trial has started. The Hon'ble Court has taken into consideration C's was willingly to stay with D because D has sufficient means to take welfare of the C and about his shelter, clothes, education, etc. The writer would like to highlight through this above case that Child's welfare is paramount consideration while granting custody of the child.

In *Rosy Jacob vs Jacob.A.Chakramakkal*<sup>16</sup> the Top Court opined that the object and purpose of the Guardianship and Wards Act is not only physical custody of the child but also to protect the rights of the child such as maintenance, health, education, etc. In *Sheoli Hati vs Somnath Das*<sup>17</sup> the Apex Court held that the Interest of the child depends upon the facts and circumstances of each and it has to be decided on its own merits not merely adhering to any fixed formula or rule. The paramount consideration should be the welfare of the child and In *Tejaswini Gaud vs Shekhar Jagdish Prasad Tewari*<sup>18</sup>, *Lahari Sakhamuri vs Sobhan Kodali*<sup>19</sup> the Supreme Court held that welfare of the child is supreme consideration and capacity and capability of the parent when it comes to the custody of the child and due weight should be given to the child's ordinary comfort, health, education, intellectual development, contentment, moral character, ability to provide access to school, maturity and judgment, mental stability, etc and In *Bimla and others vs Anita*<sup>20</sup> the Punjab and Haryana High Court held that welfare of the child cannot be measured by money or by physical comfort alone. The distinction between Custody and Guardianship was discussed in the case of *Ramesh Tukaram Gadhwe vs Suman Waman Gondkar*<sup>21</sup> the concept of custody pertains to physical control over a person or property and it is for a short duration and specific purpose. Coming to the concept of Guardianship, guardianship is the same as trusteeship and further in *Sudish Prasad Vs Babui*

<sup>16</sup> Rosy Jacob vs Jacob.A.Chakramakkal-(1973) 1 SCC 840

<sup>17</sup> Sheoli Hati vs Somnath Das (2019) 7 SCC 490

<sup>18</sup> Tejaswini Gaud vs Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42

<sup>19</sup> Lahari Sakhamuri vs Sobhan Kodali,(2019) 7 SCC 311

<sup>20</sup> Bimla and others vs Anita, 2015 SCC Online P&H 2469

<sup>21</sup> Ramesh Tukaram Gadhwe vs Suman Waman Gondkar, 2007 SCCOnline Bom 975

*Jonhia*<sup>22</sup> also held that Guardian stands in Fiducary relationship to his ward and act as trustee, the said guardian cannot gain any profit from the minor or minor's property such as sale, mortgage, charge, lease without the permission of the minor, his duty is to protect and make benefit to the minor's property A guardian is a trustee in relation to the person to whom he is so appointed. The husband can act as a guardian for a married girl as stated in *JitenderKumar Sharma Vs State and Anr*<sup>23</sup> and one more settled law is that mother is entitled for the custody of the minor till he attains the age of 7 years and the minor girl till she attains puberty as also opined in *Sivashanmughraja Vs S.Narmathai*<sup>24</sup> The interesting case that need to elucidate is about the conflict of jurisdiction of Indian Courts with jurisdiction of forgein courts pertaining to custody of child has dealt in *Ruchi Majoo vs Sanjeev Majoo*<sup>25</sup> in this case both husband and wife residing happily in United States of America and child was born out of their happy wedlock. The wife is not able to bear addiction of pornographic flims interent sex and adulterous behaviour of her husband. On account of child's welfare, flee from United States of America to India and stayed at Delhi. The husband who was residing at United States of America filed a case against his wife of abducting a minor child without his permission. The United States of America's Interpol issued red corner notice against wife. On contrast the wife approached Delhi District Court seeking for interim custody of child and refugee order. Hence the Delhi District Court affirm wife's pleadings and granted interim custody to minor child to her. After this, the husband filed writ petition in Delhi High Court, the Hon'ble Delhi High Court set aside the order of the Delhi District Court and dismissed the custody case filed by the mother. Atlast, the wife has approached to the Apex Court of India. As this case is peculiar in nature, the prime thing is to prove the ordinary residence as it stated in Section 9 of Guardianship and Wards Act, 1890 and it is considered as a question of fact in every case. The person ordinary resident depends on the intention of the person to make that place as ordinary resident. The Supreme Court has held that the principle of "Comity of Courts" is not good to apply in the present case because interest and welfare of the minor is paramount consideration. In *ABC vs State (NCT of Delhi)*<sup>26</sup> held that Guardianship or custody orders never attain finality, it can be questioned at any time by any person genuinely concerned for the child's welfare and further in this case the significant part is that Hon'ble Court has cited how other countries dealt with custody of the child as follows: In South Africa, according to Children's Act 38 of 2005,

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<sup>22</sup> Sudish Prasad Vs Babui Jonhia, (2013) 9 SCC 181

<sup>23</sup> JitenderKumar Sharma Vs State and Anr, 2010 SCC Online Del 2707

<sup>24</sup> Sivashanmughraja Vs S.Narmathai, 2006 SCC Online Mad 1031

<sup>25</sup> Ruchi Majoo vs Sanjeev Majoo, (2011) 6 SCC 479

<sup>26</sup> ABC vs State (NCT of Delhi)-(2015) 10 SCC 1

parental responsibility includes the responsibility and the right: a) to care for the child, b) to maintain contact with the child, c) to act as a guardian of the child, d) to contribute to the maintenance of the child and In USA, each state has a different custody laws but the priority is given to the mother as full legal and physical custody once the child is born, In United Kingdom with respect to custody of the child, there rely on Children Act, 1989 where Section 2(2) of the said Act says that parental custody of a child who is born to unwed parent shall lie with the mother unless the father has made a parental responsibility agreement. In yet another country Ireland, Section 6(4) of the Guardianship of Infants Act, 1964 says that the mother of an illegitimate child shall be the guardian of that infant unless she makes a statutory declaration, thus the father can approach to the Court and get an order to become legal guardian of the infant.

### **Epilogue**

At present, the people of India pondering to file Custody of Child or for Visitation Rights of a child is one of the wicked or an evil motive in a great Country like India. It is existed every corner in the world, more particularly in India it is escalating year by year due to the rate of procuring divorce is increasing. At present trend in India is to obtain divorce and get separate from his/her partner without thinking about the child born out of their wedlock. If one parent applied for divorce, another parent will for sure apply for custody of child or for visitation right provided if they have a child during their happy wedlock or it can be like this if one parent wants to resolve the matter amicably but another parent will not strive for that instead he/she will threaten for filling custody of child to linger the divorce proceedings because earlier parent who filed for divorce may seek the marriage expenses and gifts that has been presented during their marriage. As India is one of the great country which is noted for various cultures, traditions, languages, customs and giving respect by one religion to the another religion but on the aspect of marital relationship it is gradually going down its existence. It is high time to all of us to make aware about marital relationship and ramifications of the child if they get divorce once the child is born out of their happy wedlock, this awareness can only be achieved with the aid of Central, State Governments and Non Governmental Organizations so as to reduce the number of divorce proceedings and custody of child. At present, when divorce proceedings are initiated mediation is conducting but it has no fruitful. The supra said institutions should establish centre consisting of Psychologists, Advocates with more than 10 years experience in Family Law or Retired District Judge, and elder of that particular village so as to reduce divorce proceedings, if divorce proceedings came to an end thereafter custody of child can keep full stop to it.