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NUANCES OF INDIA'S CHILD CUSTODY LAWS

Authored By- Shweta Yadav

&

Kanishka Shankar

Abstract

Divorce is the unfortunate result of strained relationships. The next issue that arises is that of Child Custody. This paper aims to discuss the various issues that arise in custody matters and the court's approach to dealing with them. In spite of being the most affected in a custody suit, the child has no representation in court. Hence, judges ensure that the voices of the children are heard in the court and given due consideration to ensure justice. Along with this, the paper discusses Gender Inequality as fathers are given an unfair advantage under personal laws and other legislations. Lastly, the issue of joint custody is discussed. Various countries now prefer joint custody over sole custody as researches show that it is in the favour of the child. However, from an Indian perspective, this seems quite unachievable at the moment as divorces are still looked down upon in India. Couples find it hard to maintain a civilized relationship and wish to avoid any sort of interaction. In such scenarios, Joint custody seems like a dream. However, to ensure that the child does not miss the love of any parent, while the custody is granted to one, visitation rights are granted to the other one.

Introduction

Divorce is among the few unfortunate circumstances that the family courts have to deal with on a daily basis. As the global divorce rate rise, India stays at the lowest with a less than one percent divorce rate.¹ Despite the low divorce rate custody battles are quite common. In divorce proceedings, the matter of custody is the most complex and drenching issue which creates social, religious, economic, educational, and legal problems in society.² Indian Courts believe that the interest of the child shall supersede that of the parents in case of custody suit. However, no fixed guidelines have been issued in this regard and courts deal with it on case-to-case basis which is ought to bring confusion and obscurity. The law commission report 'Reforms in Guardianship and Custody Laws in India', which was submitted to the law ministry also supports the same.³ It also lays out a framework - "unprecedented in India", for awarding joint custody of the child whenever it is possible.⁴

When deciding who gets custody of a kid, the United States likewise adheres to the same best interest of the child principle. No priority is given to either parent based on their gender because the law mandates that both parents be treated equally. The "Tender Years Doctrine," which provided the mother an unfair advantage as long as she was healthy, was in effect in the majority of U.S. states until the 1960s or 1970s. The state now chooses between solitary custody with visitation rights or joint/shared custody. A child is best served by having two actively participating parents, according to research done by social scientists and mental health specialists in the United States.⁵

On the other hand, in the event of a divorce between parents, the United Kingdom uses a residency system (which designates the child's primary abode) as opposed to custody. In the UK, parents often apply for joint residency and make decisions together; only if they are unable to do so, will the courts decide on their behalf. Even if dual residency is thought to be the ideal option and is in the child's best interest, there is no law or legal right that dictates this.

¹ Does India's low rank on global divorce rate indexes mean happy marriages or social pressure? THE PRINT (July 21st 2022, 8:45PM), <https://theprint.in/talk-point/does-indias-low-rank-on-global-divorce-rate-indexes-mean-happy-marriages-or-social-pressure/187180/>.

² Tabassum Jahan, *Custody of Children Under Different Legal Systems: A Comparative Study* in Department of Law Aligarh Muslim University Aligarh - 202002 (India), (2013).

³ Dr. Kasturi Bhagat, *A comparative analysis of laws on child custody under various personal laws in India Current Research*, 9, (07), 55213-55215 (2017).

⁴ Ayesha Arvind & Charul Shah, *Child Custody Laws in India: A much-needed overhaul*, Hindustan Times, June 08, 2015.

⁵ Jeff Atkinson, *United States law regarding custody of children following divorce*, U.S. EMBASSY JAPAN (Official Magazine) (June 5th 2022, 03:58 PM) <https://amview.japan.usembassy.gov/en/children-and-divorce/>.

Usually, couples try to resolve their differences on their own. If they are unsuccessful, they turn to mediation. Only if that fails, do they turn to the courts.⁶

This paper attempts to find answers to the following questions: —

1. Is the principle of “Best Interest of Child” followed or just theoretical in nature?
2. Are Gender Stereotypes still steering Child Custody matters?
3. Need to frame not only guidelines but new child-friendly legislation for child custody.
4. Physical Custody to one parent and mere visitation or no rights at all to the other parent, is against the principle of “Welfare of Child”.

The welfare of Child or Best Interest of Child

"A child is not a pawn in the game of litigation between parents to be tossed from one side to another like a chattel."⁷ The parents' rights cannot undermine that of the child.

In India, there are two types of custody—

- (1) Legal custody,
- (2) Physical custody.

Legal custody means that either parent can make decisions that affect the welfare of the child, such as medical treatments, religious practices, and insurance claims. Physical custody means that one parent is held primarily responsible for the child's housing, educational needs, and food.⁸

According to Section 24 of the Guardianship and Wards Act, “A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health, and education, and such other matters as the law to which the ward is subject requires.” A parent is regarded as a child's natural guardian. The issue of custody typically comes up in divorce cases. To guarantee stability in the kid's life, physical custody is awarded to the parent who seems better prepared to raise the child, while the other parent is given visiting privileges to ensure that the kid receives the affection of both parents.

⁶ Anna Martin, *Child custody rights*, CHILD SUPPORT LAWS (June 5th, 2022, 03:35 PM) <http://www.childsupportlaws.co.uk/child-custody-rights.html>.

⁷ Om Parkash vs. Pushpa, 1975 RLRter 29(1)

⁸ Tabassum Jahan, *Custody of Children Under Different Legal Systems: A Comparative Study* in Department of Law Aligarh Muslim University Aligarh - 202002 (India), (2013).

The law is abundantly clear on the point that child's welfare is a paramount consideration when deciding the issue of custody of a child.⁹ The reason behind this is that it is the child who becomes the victim in divorce cases. However, the child does not have any representative in the court of law which might be disadvantageous to the child. To tackle this issue, judges take the effort to consider the preference of the child, like in the case of Meenakshi Khandelwal v. Shailesh Khandelwal¹⁰ wherein their 9-year-old daughter expressed grievance against her mother and preferred to remain in the custody of the father. Taking into consideration the paramount interest of the child, the court forwarded the case to the mediation center to analyze the relationship between the mother and the child before taking any further decision. A similar decision was taken in Jitender Arora v Sukriti Arora¹¹ wherein the custody of their 15-year-old daughter was given to the father as the girl expressed her desire to continue living with her father and not her mother. This decision was taken after giving the mother ample time to gain Vaishali's (the daughter) trust. Apart from these, there have been a number of cases where the main factor considered by the courts while granting custody has been the child's preference.

The legal guidelines governing a minor child's custody are widely established. It is trite to say that the welfare and interest of the kid, not the parent's legal rights, should come first and foremost when deciding whose parent, a child should be committed to for care and control.¹² In the case of Kala Aggarwal v. Suraj Prakash Aggarwal¹³, the custody of the children was given to the father who was residing in India despite the fact that the US Court had granted the custody to the mother who is still residing in the US. Both the parents and children are American Citizens but after the children came to spend the summer vacation with their Paternal Grandparents, they refused to go back to the US to their mother. After a number of sessions with the kids, the judges ensured that the kids in no circumstances wanted to back to their mother. It is necessary for the courts to consider the opinion of kids in custody matters as only then can they do justice to young minds.

It's vital to keep in mind that parents with temporary custody have the ability to easily poison a child's developing mind because children are so readily misled. They must therefore spend time with the other parent in order for them to communicate, feel loved, and receive care.

⁹ Ashwin Chaudhry v. Kiran Chaudhry, AIR (2016) Utr 73.

¹⁰ Meenakshi Khandelwal v. Shailesh Khandelwal, 2012 (92) ALR 912.

¹¹ Jitender Arora v. Sukriti Arora, AIR (2017) SC 957.

¹² Mausami Moitra Ganguli v. Jayant Ganguli, (2008) 7 SCC 673.

¹³ Kala Aggarwal v. Suraj Prakash Aggarwal, 48 (1992) DLT 218.

While the parents try to minimize the impact on the child, there will inevitably be some ambiguity about the child's development until the new routine becomes second nature. Children's psychological, emotional, and in some cases physical reactions to a parent's separation can range from minor to substantial, or from hardly perceptible to notably detrimental. Additionally, it can have more rapid, transient, or long-lasting consequences that would greatly hinder the child's development.¹⁴ As mentioned in *Vivek Singh v. Romani Singh*¹⁵, "In cases of this nature, where a child feels tormented because of the strained relations between her parents and ideally needs the company of both of them, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given. No doubt, the paramount consideration is the welfare of the child. However, at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts."

The Supreme Court has reaffirmed that the wellbeing of the minor child is the most important factor and that the rights of the parties engaged in the custody dispute are immaterial in the recent case of *Vasudha Sethi vs. Kiran V. Bhaskar*.¹⁶ After establishing the fundamentals in the matter of *Nithya*,¹⁷ the Court made it clear that the Court's determination in each instance must take into account all of the relevant facts and circumstances. The objective standard of the principle of the minor child's welfare must be used to evaluate the factual components.

If we analyze the above provisions, one thing is clear in a matter of custody of a minor child, the paramount consideration is the "welfare of the minor" and not the rights of the parents or relatives under a statute which are in force.¹⁸ The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being.¹⁹ While not the only deciding element, a child's wish is one of the most crucial and significant factors that the Court must assess when deciding a case's welfare. A child's request must be carried out for their overall satisfaction and for their healthy mental and physical development if they are

¹⁴ *Jitender Arora v. Sukriti Arora*, AIR (2017) SC 957.

¹⁵ *Vivek Singh v. Romani Singh*, AIR (2017) SC 929.

¹⁶ *Vasudha Sethi and Ors. vs. Kiran V. Bhaskar and Ors.* MANU/SC/0041/2022.

¹⁷ *Nithya Anand Raghavan vs State of NCT Of Delhi*, (2017) 8 SCC 454.

¹⁸ *Shyamrao Maroti Korwate vs. Deepak Kisanrao Tekam*, (2010) 10 SCC 314.

¹⁹ *Gaurav Nagpal vs. Sumedha Nagpal*, (2009) 1 SCC 42.

able to express it freely and it does not conflict with any other important welfare considerations.²⁰

Gender Stereotyping

It is not the welfare of the father, nor the welfare of the mother that is the paramount consideration for the Court but of the minor and the minor.²¹ Both mothers and fathers have a prominent role to play in supporting the growth and development of their children.²² However, even then there are various stereotypes such as the mother being more caring and the father more capable of taking care of a child's financial needs.

Article 14 of the Indian Constitution states that;

*“Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth.”*²³

However, the Hindu Minority and Guardianship Act, 1956²⁴, states that *“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;”* Hence it is clear that the Hindu Law favours the father. Under Muslim law, too similar conditions exist. According to Shiah Ithna Ashari Law, the mother has the right to the custody of a male child until he attains the age of two years and of a female child until she attains the age of seven years. Once the child attains the age prescribed, the father has the right to custody of the child.²⁵

The Guardians and Wards Act 1890 also has given superiority to the father in matters of guardianship and custody.²⁶ According to section 19 (b) of the act, *“Nothing in this chapter i.e.*

²⁰ Doli Banerjee v. Prabir Banerjee, II (1997) DMC352.

²¹ Saraswathibai Shripad v. Shripad Vasanji, AIR (1941) Bom 103.

²² Tabassum Jahan, *Custody of Children Under Different Legal Systems: A Comparative Study* in Department of Law Aligarh Muslim University Aligarh - 202002 (India), (2013).

²³ The Indian Constitution Art. 14 (1950).

²⁴ Hindu Minority and Guardianship Act § 6 (1956).

²⁵ Akbal Ahamd vs Jamila Khatoon, (2017) 6 ADJ 521.

²⁶ Tabassum Jahan, *Custody of Children Under Different Legal Systems: A Comparative Study* in Department of Law Aligarh Muslim University Aligarh - 202002 (India), (2013).

appointment and declaration of the guardian shall authorize the court to appoint or to declare a guardian of the property of a minor whose property is under the superintendence of a court of wards or to appoint or to declare a guardian of a minor, whose father is living and is not in the opinion of the court unfit".²⁷

In *Md. Jameel Ahmed Ansari v. Ishrath Sajeeda*,²⁸ the court awarded the custody of an eleven-year-old boy to the father, on the ground that Muslim law allowed the mother to have exclusive custody only until the age of seven in the case of male children, and there was nothing to prove that the father was unfit to be a guardian in this case.

However, more often than not, courts follow the principle of the Welfare of Child. In *Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu*²⁹, the Court held that Section 6 of the act³⁰ constitutes a father as a natural guardian of a minor son. However, that clause cannot take precedence over the crucial consideration of what is best for the minor's welfare. The custody of the minor cannot be given to the father merely because he is the natural guardian under the personal law that applies to him without taking into account overall considerations of his physical and material wellbeing, education, upbringing, happiness, etc. The interest of the minor must take precedence over the claims of the rival parties. The mother is typically the most qualified and eligible person to look out for the interests of the child and ensure his welfare. There is nothing that can compare to a mother's affection and love. The mother's love for her kid is unrivalled, as acknowledged by universal phenomena and human perspectives.³¹ A Bombay High Court Judgement stated that "*The company of a mother is more valuable to a growing child unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother. The company of the mother is always in the welfare of the minor child. A child gets the best protection from the mother. It is a natural thing for any child to grow up in the company of one's mother. Neither the father nor any other person can shower the same kind of love, affection, care, and sympathies to a child as that of a mother.*"³²

²⁷ Guardian and Wards Act, § 19 (1890).

²⁸ *Md. Jameel Ahmed Ansari v. Ishrath Sajeeda*, AIR (1983) AP 106.

²⁹ *Surinder Kaur Sandhu (Smt.) v. Harbax Singh Sandhu*, (1984) 3 SCC 698.

³⁰ Hindu Minority and Guardianship Act § 6 (1956).

³¹ *Mohammed Khalid Vs Smt Zeenat Parveen and ors*, AIR (1988) All 252.

³² *Abdulsattar Hussain Kudachikar v. Shahina Abdulsattar Kudichikar*, AIR (1996) Bom 134.

A parent's duty is not just to provide education or health care but also love, trust, and physical comfort. As observed in Mousami Moitra Ganguli's case³³, the Court has to give due weightage to the child's ordinary contentment, health, education, intellectual development, and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are just as crucial as the others, if not more.

When choosing which parent is entitled to custody, it is not the better right of either parent that would require adjudication. When choosing who will have custody of a minor, the court must consider a number of pertinent considerations, including the kid's wishes, the presence of a supportive and suitable environment for the child's upbringing, and the ability and resources of the concerned parent to care for the child.³⁴ The choice of who will have custody is made after taking into account a series of factors. Women are no longer expected to quit their jobs or pass up career prospects in order to care for their children, as social standing has changed. However, the same is no reason to deny her custody of the children. The same was laid down by the Supreme Court in Vikram Vir Vohra³⁵ wherein the custody of their son was granted to the mother irrespective of the fact that she was moving to Australia as she had better career opportunities there and wanted to take her son with her. The son had stayed with her his entire life and wanted to continue living with her. The mother was asked to bring the child to India twice a year so that he could meet his father.

Equality between parents in all aspects is a must. In the iconic judgment, "Padmaja Sharma v. Ratan Lal Sharma"³⁶ Supreme Court held that a mother has an equal responsibility to maintain the child financially. The idea that fathers are the only ones accountable for raising the child was demolished through this decision. It is now necessary to change the personal laws and the Guardianship and Wards Act to give the mother equal rights. For the kid they gave birth to, women should not have to struggle for equal rights. The challenges a woman faces when pregnant are not unheard of. No one has the right to sever a child's bond with their mother since it is exceptional and unadulterated, especially for trivial reasons like poverty, remarriage, or the legal preference given to men. Equal rights, not favoured rights, are what are desired. Just because she is a woman, a mother cannot be denied custody. Guidelines that are gender-

³³ Mousami Moitra Ganguli v. Jayanti Ganguli, AIR (2008) SC 2262.

³⁴ Gaytri Bajaj v. Jiten Bhalla, AIR (2013) SC 102.

³⁵ Vikram Vir Vohra v. Shalini Bhalla, AIR (2010) SC 1675.

³⁶ Padmaja Sharma v. Ratan Lal Sharma, AIR (2000) SC 1398.

neutral must be created. The only question that matters is whether giving the father or the mother custody of the minor child would be better for the child.³⁷

Joint Custody

A child is not a chattel nor is he/she an article of personal property to be shared in equal halves.³⁸ The power and duty of the Court under the Act is the welfare of minors.³⁹ Mature thinking is indeed necessary in such a situation to decide what will ensure the benefit and welfare of the child.⁴⁰

In many nations around the world, shared parentage systems are preferred to sole custody arrangements.⁴¹ This trend has developed partly in response to shifting household dynamics, which have seen more male caregivers take on parental duties, as well as psychological research showing that joint parental responsibility is better than sole custody arrangements.⁴² Such requests for shared custody are, however, frequently weighed against the norm of what is in the best interests of the kid.⁴³ This is the case since it is thought that shared parenting leads to a child's better growth. According to 1989 research on intact families, the same is true. Similarly, a 1991 study proved better behavior on the child's part in the case of joint custody as compared to sole custody.⁴⁴ However, it is important to analyse this from the perspective of India, where divorce is still frowned upon. After a divorce, couples struggle to remain amicable or even courteous. This causes perpetual conflicts and has an enduring impact on the child's thinking. For this reason, the majority of parents choose to have sole custody of the child in order to keep their former partners at a distance. Even young children favour living with only one parent and frequently become antagonistic to the other, as evidenced by the different situations cited above. The welfare of the kid must be taken into account while determining whether or not both parents should have joint custody.

³⁷ Doli Banerjee v. Prabir Banerjee, II (1997) DMC 352.

³⁸ Vikram Vir Vohra v. Shalini Bhalla, AIR (2010) SC 1675.

³⁹ Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840.

⁴⁰ Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544.

⁴¹ Family Law Amendment (Shared Parental Responsibility) Act (Australia) § 61 (2005); Civil Code (Netherlands) Art. 247 (2009).

⁴² Glover, R. & Steel, C., *Comparing the Effects on the Child of Post-Divorce Parenting Arrangements*, Journal of Divorce, Vol. 12 No. 2-3 (1989).

⁴³ Sonali Abhang, *Guardianship and Custody Laws in India- Suggested Reforms from Global Angle*, IOSR Journal of Humanities and Social Science (IOSR-JHSS), Vol. 20, Issue 7, Ver. VI, PP 39-58 (2015).

⁴⁴ Rockwell-Evans and Kim Evonne, *Parental and Children's Experiences and Adjustment in Maternal Versus Joint Custody Families*, Doctoral Dissertation, North Texas State University (1991).

However, it doesn't seem appropriate to give the other parent absolutely no rights at all. Therefore, even though visitation rights belong to the other parent, custody will go to the first. As the child will then have the maturity to adjust to it and at the same time would have the love of both parents, such visitation privileges shall be extended over the term.

In *Ruchi Majoo vs. Sanjeev Majoo*⁴⁵, Hon'ble Supreme Court observed:

"68. The order of the Delhi Court granting interim custody of the minor to the appellant did not make any provision for visitation rights of the respondent father of the child. In the ordinary course, the court ought to have done so not only because even an interim order of custody in favor of the parent should not insulate the minor from the parental touch and influence of the other parent which is so very important for the healthy growth of the minor and the development of his personality."

In *Rosy Jacob v. Jacob*⁴⁶, a three-judge Bench of this Court held that all orders relating to custody of minors were considered to be temporary orders. The learned judges made it clear that the Court has the right to alter the order as time goes on in the minor child's best interests. The court even went so far as to state that even though orders are based on consent, they can still be changed if the child's wellbeing requires it. As a result, the court has the authority to modify its rulings in light of evolving social demands and conditions.

Suggestions

The following suggestions are made after considering various aspects discussed in this paper, various other research papers, and judgments.

1. We humbly suggest that child custody is a very important issue. Even if personal laws do not conflict with the best interests of the child or violate Articles 14 and 15 of the Indian Constitution, which discriminate against women by denying them equal rights, religion should not be taken into account when addressing such issues.
2. Custody orders, particularly those including visitation rights, must be regarded as temporary decrees. The child should be given the freedom to choose who he wants to live with once he is

⁴⁵ *Ruchi Majoo vs. Sanjeev Majoo*, (2011) 6 SCC 479.

⁴⁶ *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840.

3. old enough to understand things and make his own decisions. The only time the court will get involved and issue a contracting order is if his will conflicts with his interests.
4. Visitation rights shall be increased over time. This would ensure that the child had enough time to adjust to the surroundings and living arrangements.
5. An amendment shall be made to the existing personal laws and legislation and equal rights shall be granted to both parents.
6. The Supreme Court shall lay down certain guidelines relating to issues like
 - a. Maintenance of a child
 - b. Visitation Rights both to the other parent and his family- Grandparents love their grandchildren. Denying them a right to meet their grandchildren is against the welfare of both. Children shall not be denied the right to have a complete family because of disputes between their parents.
 - c. Compulsory physiatrist consultancy for both the child and parents- Both divorce and child custody are difficult matters that significantly affect a child. Being in vulnerable situations themselves, parents frequently overlook this. The child must therefore receive some outside assistance in order for him to open up about his issues and avoid losing himself. Additionally, by doing this, the courts may make sure that the parent who has temporary custody of the child doesn't make the child resentful of the other parent.
 - d. Grant of Child Support to the parent with Child Custody and inadequate means to support the child. When custody is granted to a parent because he or she appeared more capable of taking care of the child, the other parent shall also bear the expenses equally.

Conclusion

It has been emphasized in *Bandhua Mukti Morcha v. Union of India and Ors.*⁴⁷, “*The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social and physical health is assured to him. Every nation, developed or developing, links its future with the status of the child. Childhood holds the potential and also sets the limit to the future development of society. The Founding Fathers of the Constitution, therefore, have emphasized the importance of the role of the child and the need for its best development.*”

While children are the jewels of their parents, they are also the assets who will be in charge of leading the country in the future. The present of the child is linked to the future of the country.

⁴⁷ *Bandhua Mukti Morcha v. Union of India and Ors.*, (1997) 10 SCC 549

The child is shaped by the tools of education, environment, skill, and health, which shapes the nation since the child is prepared to do his part in the various realms, assisting the public and advancing the economy.⁴⁸

Therefore, it may be said that the Indian courts have tried their best, and to some extent, succeeded, in ensuring that the wellbeing of the kid is given first priority in decisions regarding custody. In addition to this, the court has made decisions that recognise the value of mothers, marking a significant step toward gender equality. Improvements will be made to the current visiting rights while more time and attention are given to the issue of joint custody. Parental or religious preferences have no bearing on child custody. All that should be taken into account is that it is about the child.



⁴⁸ Jitender Arora v. Sukriti Arora, AIR (2017) SC 95