

## An overview of child custody laws in India

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### Abstract

If a marriage breaks down or if the divorce between a couple is inevitable, the person who suffers the most is the child or the children born out of the marriage. Over the years, the concept of child custody has shifted from “right of the parent” to the “right of the child” which becomes the very base on which the custody is decided. The Supreme Court of India upholds that the welfare and safe keeping of the child is the utmost parameter of deciding the custody, thus no preferential right holds any importance. The main aim of this paper is to emphasis on the current status of law on the matters of custody and under what circumstances can the custody be handed to the father and the mother.

India being a secular country, practices different religions, thus every religion has a different set of child custody laws which lays down certain provisions which determines the process through which parents can seek the custody of their child. By the way of this paper, I will be focusing on the different types of child custody and examine the position of child custody under various religious law, i.e. Hindu, Muslim, Christian and Parsi Law. In addition to this, the judicial response to the issues has been explained through the way of various decided case laws.

**Keywords:** Welfare, best interest, Hindu minor, custody, guardianship, Indian judiciary

### Introduction

In the recent times, due to socio-economic factors increasing number of married couples are facing incompatibilities and problems which results in divorce or breakdown of marriages. The couple may decide to move on separately, but it is the child who suffers the most, emotionally and mentally. Bitter battles or fights is not an option of settling the issues of child custody or child access after divorce, thus child custody laws and court becomes involved. Child custody includes legal custody which refers to the duty of taking important life decisions of the child’s life and physical custody which refers to the duty of providing shelter, care and comfort for the child. After divorce, both the parents continue to be guardians, but custody implies as to who the child will physically reside with. The most important underlying principle of child custody lies on the best interest and welfare of the child. The financial stability or the earning capacity does not always prove as a criterion for determining custody but the ability to provide a safe homely environment does. The court grants the custody to the parent who has adequate nurturing, upbringing skills, financial ability and is capable of providing a safe and secure environment for the child to grow up in. The court is considered as the “Parens Patriae” or the ultimate guardian to the child and his/her property. No legal right, property right or any preferential right will hold more importance than the safe keeping and well-being of the child.

#### ▪ Factors Constituting Child Custody

1. Financial condition and background of the custodian parent.
2. Mental and physical well-being of the said parent.
3. Level of comfort and homely environment for the child.
4. Safe keeping and best interest of welfare.
5. Ethical upbringing, nurturing of the child. Good education to be provided.
6. History or allegations of alcohol abuse, drug abuse or

domestic violence by either parent.

7. Relationship of the child with that parent and the level of interaction.
8. Both the genders should have an equal and fair right over the child.
9. The court ensures that the child is not being used for any kind of monetary profit or to inherit property.
10. The distance between the houses of both the parties and the amount of travel required.

#### ▪ Types of child custody

**Physical Custody:** Physical custody is the type of custody where the parent has the right to keep the child with him/her. It means that the child will primarily live or reside with that parent in his/her residence.

**Joint Physical Custody:** This type of an arrangement is made when the couple does not live together. Joint physical custody is often granted by the courts so that the child gets to spend equal and significant amount of time with both the parents depending on their work schedules. If the parents cannot agree on a same schedule, the court imposes an agreement which they are bound to follow. The parent with whom the child primarily resides becomes the custodian parent while the other becomes the non-custodial parent. The non-custodian parent is usually granted a right to visitation and a visiting schedule to ensure frequent and continuing contact between the child and the parent.

**Sole Custody:** Sole custody is awarded by the court in cases where it believes that one parent is unable to provide a healthy and secure living environment for the child. This may happen when one parent is deemed unfit due to drug abuse, alcohol dependency, violent, abusive nature, allegations of child abuse and child neglect or has a lifestyle which is not suitable for the upbringing of the child. In such cases, the sole physical custody goes to the other parent and the child primarily resides with that parent. However, the

non-custodian parent enjoys a generous visitation schedule under a parenting schedule.

**Legal Custody:** Legal custody refers to having the right of taking important life decisions regarding the child's care and upbringing. It can be defined as the duty and obligation of a parent of taking important long-term life decisions collectively and mutually. For example, schooling, health care, religious instruction, day-day routine etc. In most of the cases, both the parents are awarded legal custody, which means they are bound to consult one another before taking important and major decisions regarding the child's future. When the court believes that somehow one parent is mentally unfit or incapable of taking long term decisions (drug or alcohol abuse domestic violence or child neglect) then the sole legal custody is granted to the other parent who seems to be more reasonable and capable of making right decisions.

### Child Custody and Guardianship Laws in India

#### ▪ Under the Hindu Law

**The Guardians and Wards Act, 1890:** The Guardian and Wards Act, 1890 is a secular law which establishes and regulates the questions of guardianship and custody for all the children such as rights and duties of the guardian, procedure for the removal etc. residing within the territory of India, irrespective of their religion.

**Section 7** of the act talks about the appointment of a guardian for a minor. When the court is satisfied that for the welfare and safe keeping of the minor, a guardian should be appointed, it makes an order for the same. The guardian is appointed for the person, property or both of the minor <sup>[1]</sup>.

**Section 17** lays down the factors considered by the court while appointing a guardian for a minor. Section 17(1) says that the court is guided by the personal law of the minor while appointing a guardian and what in the given circumstances appears to the welfare of the minor <sup>[2]</sup>. Section 17(2) says that the court while determining the grounds of welfare of the minor shall consider the age, sex and religion of the minor, the character and capacity of the guardian to be and how closely the guardian is related to the minor. The court shall also consider the wishes of the deceased parents if there are any and if there exists any relation of the guardian with the minor or his property <sup>[3]</sup>.

**Section 19** lays down the cases when the court may not appoint a guardian for the minor. Section 19(a) says that the court is not authorized to appoint a guardian to a minor who is a married female and in the opinion of the court whose husband is not unfit to be the guardian of her person <sup>[4]</sup>. Section 19(b) says that the court is not authorized to appoint a guardian for a minor whose father is living and who, in the opinion of the court is not unfit to be the guardian of the minor <sup>[5]</sup>. Later, this section was amended by Personal Laws Amendment Act (2010) and the section was applicable to cases where even the mother was alive, thus removing the preferential position of the father <sup>[6]</sup>.

**Section 24** lays down the duties of the guardian. It specifies that the guardian is entrusted with the custody of the minor and it is the duty to look after the minor's health, education

and provide support and care <sup>[7]</sup>.

**Section 25** lays down the authority of a guardian over the custody of the ward. Section 25(1) says that if the ward leaves or if the ward is removed from the custody of the guardian and the court is of the opinion that, for the best welfare of the ward, it must return to the guardian, it may issue an order for the same. Enforcing the order may cause the ward to be arrested and delivered to the custody of the guardian <sup>[8]</sup>.

From the above given provisions, it is clear that, in appointing a guardian to a minor or his property or both, "welfare of the minor" is the utmost important parameter. Also, the court is not empowered to appoint anyone else as the guardian unless and until it finds the mother or father to be particularly unfit, as per section 19(b).

#### Case law: Saraswati Shripad Ved vs. Shripad Vasanji Ved <sup>[9]</sup>

In this case, the parents of the minor got married in February, 1936 and a son was born to them in October, 1938. Unfortunately, soon after the birth, the mother contracted Tuberculosis and she had to leave for treatment. The son was taken care by the father and resided at his mother's house. At the end of May, 1940, the mother returned back to Mumbai after completing her course of treatment. The fact being, since the end of May, the son has been in the custody of the mother and the father wants the son to be returned back to him.

The paramount consideration in this case was the best interest and welfare of the child rather than the rights of the parents. The court was of the opinion that the mother is the most suitable person to take care of a child of such a tender age and it is nearly impossible to find a substitute for a mother.

It was held by the father that the mother might not have recovered fully and it can be harmful for their son to be in the custody of the mother who was previously a patient of tuberculosis. But the evidence before the court stated that the mother was discharged in a healthy condition and there were absolutely no signs of tuberculosis anymore. Therefore, there was no reason the health of the child would suffer if the custody is handed over to the mother.

The court held that for the best interest and welfare of the child, the son should live with his mother. A child of a tender age requires the love, affection, care and sympathy of a mother for a proper upbringing and nurturing. No person can substitute the warm affection and care given by a mother. Thus, in the eyes of the court it is neither the welfare of the father nor the welfare of the mother which is of the paramount consideration. It is the welfare of the minor and minor alone.

#### The Hindu Minority and Guardianship Act, 1956

**Section 2** of the act says that the provisions of this act will be read along with the provisions of The Guardians and Ward Act, 1890 (secular law) <sup>[10]</sup>.

**Section 6** talks about the natural guardianship of a Hindu minor or the property or both. Section 6(a) says that in case of a minor boy or an unmarried girl, the father shall act as

<sup>1</sup> The Guardians and Ward Act, 1890. Section 7 (India).

<sup>2</sup> The Guardians and Ward Act, 1890. Section 17(1) (India).

<sup>3</sup> The Guardians and Ward Act, 1890. Section 17(2) (India).

<sup>4</sup> The Guardians and Ward Act, 1890. Section 19(a) (India).

<sup>5</sup> The Guardians and Ward Act, 1890. Section 19(b) (India).

<sup>6</sup> Personal Laws Amendment Act, 2010. Section 2 (India).

<sup>7</sup> The Guardians and Wards Act, 1890. Section 24 (India).

<sup>8</sup> The Guardians and Wards Act, 1890. Section 25(1) (India).

<sup>9</sup> Saraswati Shripad Ved Vs Shripad Vasanji Ved AIR (1941) BOM 103 (India).

<sup>10</sup> The Hindu Minority and Guardianship Act, 1956. Section 2 (India).

the natural guardian and after him, the mother. In case of a minor, who has not completed the age of 5 years, the custody shall remain the mother<sup>[11]</sup>. Section 6(b) says in case of an illegitimate boy or an illegitimate unmarried girl, the mother shall act as the natural guardian and after her, the father<sup>[12]</sup>. Section 6(c) says that in case of a married girl, the husband shall be the guardian<sup>[13]</sup>. No person is authorized to act as a natural guardian if he ceases to be a Hindu or if he has completely renounced the worldly life.

**Section 7** talks about the natural guardianship of an adopted son. The adoptive father shall act as the natural guardian of the adopted son, after him, the adoptive mother<sup>[14]</sup>.

**Section 13(1)** lays down that welfare and best interest of the minor shall be of paramount consideration while deciding the natural guardianship of the minor<sup>[15]</sup>. Section 13(2) lays down that no person shall be authorized to act as a natural guardian if the court is of the opinion that, the guardianship will not be suitable for the welfare of the minor<sup>[16]</sup>.

#### **Case Law: Gita Hariharan VS. Reserve Bank of India**<sup>[17]</sup>

In this case, Gita Hariharan had challenged the constitutional validity of section 6(a) of the HMGA, 1956 on the ground of violating Article 14 of the Constitution which ensures equality before law of both the sexes. Gita Hariharan, the petitioner got married to Mohan Ram in 1982 and in 1984 a son was born out of the wedlock, named Rishabh Bailey. Gita Hariharan, being the mother of the child applied to be the natural guardian of her son in relation to money held by RBI for investment purposes. RBI returned the application form to Gita Hariharan, asking her to disclose the name of the father and produce the application form with the father as the domestic guardian of the child. In response to this, the petitioner filed a petition to have section 6(a) of HMGA, 1956 declared unconstitutional on the grounds that it violated Article 14 of the Constitution. The RBI held that the word “after” in section 6(a) of HMGA could only mean after the lifetime of the father or after the father is dead. However, the court was of the opinion that section 6(a) did seem to interrupt article 14 of the Constitution on the account of being discriminatory against the women. Since the welfare of the child is of the paramount consideration, the word “after” will cease to have any effect in such circumstances. The court upheld that the word “after” should not necessarily be interpreted as “after the lifetime” of the father but as the “absence” of the father due to whatsoever reason. Further, “absence” could mean temporary unavailability or total state of apathy towards the child or any inability of the father due to ailment, disorder or otherwise. Thus, section 6(a) is not violative of Article 14 of the constitution and the mother has equal guardianship rights even during the lifetime of the father. This ruling gave the single mothers a legal status and safeguarded the rights of unwed mothers.

#### **Case Law: Jijabhai vs. Pathankhan**<sup>[18]</sup>

In this case, the mother and father of the child had fallen apart and were living separately for over 20 years. The mother was single handedly taking care of the child and managing all her affairs. The court was of the opinion that in the present scenario, although the father was alive, he was not taking any interest in the well-being and affairs of the child, therefore he should be treated as non-existent. Hence, the court upheld that the mother should act as the rightful natural guardian of the minor’s person as well as the property.

Therefore, by reading the above case laws together, it is very clear that the HMGA, 1956 has improved the status of the mother as the natural guardian. Mother is considered a natural guardian either after the lifetime of the father or even during the absence of the father.

The HMGA, 1956 confers the guardianship rights of the legitimate child on the father. A mother could only be a guardian after the death of the father or if the father ceases to be a Hindu or if the father has renounced the worldly affairs. However, the Indian Judiciary upheld the constitutional validity of Article 14 which guarantees the equality of both the sexes. In the above cases of Gita Hariharan and Jijabhai, the court ruled that the mother cannot be said to be the natural guardian only after the death of the father, as that would not only be pure discrimination, but it would go against the best interest and welfare of the child which is of the paramount consideration of HMGA and GWA. In the Indian patriarchal society, men have a dominant position in all aspects and thus they have a preferential right over women. However, the Indian law keeping in mind the best interest of the child made sure that this is not the case when it comes to the issue of guardianship and custody. Mother and father are equal partners in parenthood and they need to have an equal say in the matters of child’s upbringing and welfare. Thus, by giving mothers the right of being the natural guardian in the absence of the father or even during the life time of the father, the court removed the superiority of one parent over the other.

#### **The Hindu Marriage Act, 1955**

**Section 26** talks about the custody of the children. The court is authorized to pass interim orders from time to time and make provisions under the act with regard to the custody, maintenance and education of minor children in accordance with their wishes<sup>[19]</sup>.

##### ▪ **Under the Islamic Law**

In Islamic Law, the custody of a child (Hizanat) is governed by the personal law and read with The Guardians and Wards Act, 1890. Under Shia law, the custody of a minor vests with the mother until the son reaches the age of 2 years and the daughter reaches the age of 7 years. Under Hanafi law, the custody of a minor vests with the mother until the son reaches the age of 7 years and the daughter attains puberty. The mother cannot be deprived of this right unless and until she is disqualified because of misconduct or has married within prohibited relationship or her custody is found to be unfit for the best interest and welfare of the child. Just like in Hinduism, father is considered to be the natural guardian of the child. A person who possess a bad character, ceases to

<sup>11</sup> The Hindu Minority and Guardianship Act, 1956. Section 6(a) (India).

<sup>12</sup> The Hindu Minority and Guardianship Act, 1956. Section 6(b) (India).

<sup>13</sup> The Hindu Minority and Guardianship Act, 1956. Section 6(c) (India).

<sup>14</sup> The Hindu Minority and Guardianship Act, 1956. Section 7 (India).

<sup>15</sup> The Hindu Minority and Guardianship Act, 1956. Section 13(1) (India).

<sup>16</sup> The Hindu Minority and Guardianship Act, 1956. Section 13(2) (India).

<sup>17</sup> Gita Hariharan Vs. Reserve of India AIR (1999) SC 1149 2SCC (228) (India).

<sup>18</sup> Jijabhai Vs. Pathankhan AIR (1971) SC (315) (India).

<sup>19</sup> The Hindu Marriage Act, 1955. Section 26 (India).

be a Muslim or converts to any other religion or is of unsound mind and is found unfavorable for the welfare of the child cannot be entitled to the custody.

▪ **Under the Parsi and Christian Law**

**Section 49 of The Parsi Marriage and Divorce Act, 1936<sup>[20]</sup> and Section 41 of The Indian Divorce Act, 1869<sup>[21]</sup>**

lays down that the court is authorized to pass interim orders from time to time in any proceedings under the act with respect to the custody, maintenance and education of minor children. (under the age of 18). The fundamental underlying principle is the best interest and welfare of the child.

The issue of custody and guardianship for the Parsi children are governed by the GWA, 1890 and for the Christian children, governed by the GWA, 1890 read with the Indian Divorce Act, 1869.

**Judicial Response to the Custody Issues**

**Father's Right To custody**

The GWA 1890, unambiguously holds that father can only be deprived of his right as a natural guardian only if he is found unfit for the best interest of the child, however, there are cases where the judiciary has made exceptions to this notion. In the case of *Vegesina Venkata Narasia Vs. Chintalpati*<sup>[22]</sup>, the courts have ruled the judgement that while deciding the custody of the child, he/she should not be uprooted from their family surroundings just to give effect to the father's right of natural guardianship. Likewise, in the case of *L. Chandran Vs. Venkata Lakshmi*<sup>[23]</sup>, the minor was brought up and taken care by the maternal grandparents after the death of the mother. Hence, the Andhra Pradesh court upheld that in the light of Article 21 of the Constitution, children cannot be treated as chattel or mere possession of property and the father's right of natural guardianship over children and their property cannot be enforced even if the father was not unfit to act as the natural guardian. In the case of, *Essakayal Nadder Vs. Shreedhan Babu*<sup>[24]</sup>, the mother of the minor was dead and the father was not living with the minor. The court upheld that since the father is alive, has not ceased to be a Hindu or renounced the world and is not unfit to be declared as a guardian, no other person is authorized to replace his position of natural guardian and alienate the minor's property. In the case of, *Gaurav Nagpal Vs. Sumedha Nagpal*<sup>[25]</sup>, the Supreme court held that the father should not be deprived of his visitation rights, even if the custody of the minor is granted to the mother. In the case of, *Jameel Ahmed Ansari Vs. Ishrath Sajeeda*<sup>[26]</sup>, the Andhra Pradesh court granted the custody of the minor boy to the father, on the ground that according to Muslim Law, a mother is allowed to have the custody of a male child until he reaches the age of 7 years and there were no grounds to prove that the father was unfit for the best interest of the child.

**Mother's Right to Custody**

In the case of *Radha Bai Vs. Surendra K. Mudaliar*<sup>[27]</sup>, the father on the pretext of taking the three and half years old

daughter for a day or two, took her away from the mother and did not send her back for one and half years. Hence, the mother very affectionately brought the child from the kindergarten school, where she was put by her father and retained the custody of her daughter with her. Therefore, the husband filed an application of custody of his daughter. According to section 26 of the HMA 1955, the court is empowered to pass interim orders with respect to the proceedings of custody, maintenance and education of the minor child. The primary and the paramount consideration should be the best interest of the minor, while taking such decisions. As per section 6 of HMGA 1956, the custody of a minor who has not completed the age of five years shall ordinarily be vested with the mother. The daughter had positively desired to stay with her mother and had refused to stay with the father. Hence, the court upheld that the best interest and welfare of the child will be served by granting the custody to the mother. In the case of *Padmaja Sharma Vs. Ratan Lal Sharma*<sup>[28]</sup>, the Supreme Court while pursuing the goal of equality, upheld an ironic decision, i.e. the mother is not deemed a natural guardian of the child, hence does not have a say in decisions affecting the life of the child. Although, the mother does have an equal financial responsibility as the father towards the maintenance of the child. In the case of *Sheela Vs. Jeevanlal*<sup>[29]</sup>, the court granted the custody of the children to the mother, although she had remarried to one William, who was Christian. The mother had accused the father of coming home in a drunken state and often abusing her and the children. She claimed that the father was not capable of providing a safe, secure and homely environment for the children, thus, the court upheld that it is only the welfare of the children which is of paramount consideration as per section 13 of HMGA, 1956. It was also seen that the mother was better employed and drawing a higher salary than the father and that the children themselves wished to continue living with the mother. It was held that simple conversion of faith will not be held as a ground for disqualification of the custody right of the minor, because although she had married a Christian, she had not changed her religion and still remained a Hindu.

**Conclusion**

Children are considered to be innocent and emotional, thus it is the duty and obligation of the Judiciary to protect and safeguard their interests. The judicial decisions of the court have clearly ruled that welfare should not be considered in the terms of monetary and financial benefits only. A child deserves the love, care and affection from both the parents and the issues arising out of divorce should not affect the child, physically and mentally. A child should not be treated as a mere possession of property but as an entity whose welfare should be of utmost priority. The societal bias in granting custody should be removed. Section 6(a) of the Hindu Minority and Guardianship Act, 1956 states that the father is the natural guardian of a Hindu minor, and after him, is the mother. This superiority of a male parent over a female woman should be removed and both of them, should be regarded as the natural guardians, simultaneously. The best interest of the child should be of paramount consideration in every circumstance.

<sup>20</sup> The Parsi Marriage and Divorce Act, 1936. Section 49 (India).

<sup>21</sup> The Indian Divorce Act, 1869. Section 41 (India).

<sup>22</sup> *Vegesina Venkata Narasia Vs. Chintalpati*, AIR (1971) AP (134) (India).

<sup>23</sup> *L. Chandran Vs. Venkata Lakshmi*, AIR (1981) AP (1) (India).

<sup>24</sup> *Essakayal Nadder Vs. Shreedhan Babu*, AIR (1992) Ker (200) (India).

<sup>25</sup> *Gaurav Nagpal Vs. Sumedha Nagpal*, AIR (2009) SCC (557) (India).

<sup>26</sup> *Jameel Ahmed Ansari Vs. Ishrath Sajeeda*, AIR (1938) AP (106) (India).

<sup>27</sup> *Radha Bai Vs. Surendra K. Mudaliar*, AIR (1971) Mys (69) (India).

<sup>28</sup> *Padmaja Sharma Vs. Ratan Lal Sharma* AIR (2000) SC (1398) (India).

<sup>29</sup> *Sheela Vs. Jeevanlal*, AIR (1988) AP (275) (India).

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