

# Child Custody: The Nuances That are Involved

## Srinithi Pothiraj

Srinithi Pothiraj<sup>1</sup>, Smrithi<sup>2</sup>

<sup>1,2</sup>Student, Sastra Deemed University

### ABSTRACT:

Numerous queries may arise in the mind of a child during the process of divorce between its parents. All of a sudden there might be a shift in its environment and would take time to adapt to the new house. But how does the court decide the custody of the child? Do mothers have an upper hand, is one of the questions that is being explored along with various other topics such as the custody rights of a legitimate and illegitimate child, custody of the child when both parents are unfit, custody of a child born out of wedlock, so on and so forth. It is interesting to note that certain differences can be found in the personal laws that govern the custody of a child. The personal laws see the legitimate and illegitimate child and their rights in a different light. The step-parent adoption is a topic that has been discussed in this paper. Isn't it interesting to note that the age under which a child is considered for a guardian differs from country to country? This is so because the laws also are a reflection of the culture that a country has. Father's rights in custody have also been explored as there are not many cases under which the husband receives the custody of a child because in India it is presumed that Mothers are better care-takers. This paper revolves around the custody of a child under distinct personal laws and covers the intrusive questions that one ponders along the way.

**KEYWORDS:** Child custody; Personal laws; Step-parent custody; Welfare of the child

### 1. INTRODUCTION:

It is invariably the child that gets impacted with the breakdown of a relationship. Being at home with constant arguments hinder the child's growth and thus leads to the separation of the parents. Though the child would receive the affection of the parents separately, it would never be the same warmth that it received once as a family. But staying in an abusive environment is no good for the sake of living together and in precedence of being a family. Thus after the process of divorce, the main legal aspect to look into is the custody of the child.

Definition: Custody<sup>1</sup> as per Collins English dictionary is the "legal right to keep and look after a child, especially the right given to a child's mother or father when they get divorced". In India, the welfare of the child is given the most importance to. But before looking into what exactly the welfare of a child means and the laws that govern the custody of a child, it is important to highlight the types of custody given in India.

---

<sup>1</sup> Collins English Dictionary

## 2. TYPES OF CUSTODY:

### Physical custody:

In this type of custody, the child would be under one parents guardianship, while the other has the right to visit the child periodically.

### Joint custody:

In this type of custody, the decision-making rights lie with both the parents and is shared between them.

### Legal custody:

It is usually granted to both the parents, where they have the right to take the decisions for their child on the aspects of medical treatments, education etc. But there are cases when legal custody is guaranteed is granted to only one parent.

In the case of, Rohith Thammana Gowda vs. State of Karnataka & Others<sup>2</sup>, the landmark judgment on child custody emphasizes the need of placing the kid's wellbeing first in custody disputes and respecting foreign court rulings that take the child's best interests into account.

## 3. FACTORS THAT GOVERN THE CUSTODY OF A CHILD:

Moving on to the laws that govern the custody of a child. The laws are the reflection of the culture present in India, which explains why Daughters who are unmarried, though above 18 years are still under the guardianship of their parents. In India, though the personal laws play an important role, the welfare of the child is the most prioritized criteria. When determining child custody, this welfare of the child concept has various objectives. The objectives being from providing it a safe and sound environment till not making the child suffer due the selfishness of the parents. The following historic instances demonstrate how the concept of welfare of the child, varies case by case.

### 3.1 CASE ANALYSIS:

**3.1.1** In the case of, Tejaswini Gaud And Others v. Shekhar Jagdish Prasad Tewari<sup>3</sup>, the court held that ,in a situation where appellants who are also the relatives of the child ,who takes care of the kid for the time being due to the parent's health condition is not entitled to keep the custody of the child.

**3.1.2** Just because of financial upper and doesn't mean the custody is in favour of that parent, this is established in the case of Gaurav Nagpal v. Sumedha Nagpal<sup>4</sup>, This case states that the child 's bodily wellbeing must be considered by the court in addition to the moral and ethical wellbeing. And the term well being is broadly interpreted in Sec13 of the act. Nothing may prevent the Court from exercising its parents patriae jurisdiction in these situations, even though the provisions of the particular legislation governing the rights of the parents or guardians may be taken into account.

**3.1.3** In the case of Lahari Sakhamuri v. Sobhan Kodali<sup>5</sup>, it lists down the factors that must be taken into consideration by the courts while dealing with the issue of custody as:

1. maturity and judgment.

---

<sup>2</sup> Civil Appeal No. 4987 of 2022

<sup>3</sup> 2019 SCC 7 (42)

<sup>4</sup> MANU/SC/8279/2008

<sup>5</sup> (2019) 7 scc 311

2. mental stability.
3. ability to provide access to schools.
4. moral character.
5. ability to provide continuing involvement in the community.
6. financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual."<sup>6</sup>

#### **4. WOULD THE CHILD'S DECISION BE FINAL?**

**4.1** Jumping on to the question, to whether the child's decision would be final, It is often difficult for a child to choose one parent, because though they might be unfit for a marital relationship between each other, their affection towards their child might be legit. And there is also an involvement of psychological factors to look into, as one parent might influence the child in the decision taken. Recently in the high court of Karnataka, a PIL had been initiated to seek proper guidelines for the involvement of the psychologists in the matter of custody.

**4.2** The age of the child is also considered while taking the decision because children at tender ages might easily be manipulated and thus their choice cannot be completely relied upon. It is also one of the reason that if chosen, the more liberal and fun-loving parent would be chosen by the kid to avoid the strict rules that the other parent might impose to inculcate discipline.

#### **5. HINDU LAW ON CUSTODY RIGHTS:**

The custody of a child, are governed by the following acts, mainly being the Hindu marriage , Hindu minority and guardianship act, guardians and wards act.

- Under sec26 of the Hindu Marriage Act, it is stipulated as, when it comes to child custody, guardianship, maintenance, and education of minor children, the court can impose interim orders and decree provisions that it believes are fair and right, as long as they are as close to the children's wishes as possible
- Under the Hindu minority and guardian act, according to sec 6, in case of a boy, mother is a natural guardian after father, with further proviso that custody of a minor, who has not completed age of 5 years shall ordinarily be with the mother. In the case of Geetha hariharan v. RBI<sup>7</sup>, in this case it was decided, Contrary to the objective of HMGA,1956 which states that the mother is the child's natural guardian only after the father passed away, instead of stating that both the parents are the natural guardians of the child. According to the guardians and wards act, also have laws that comes under the ambit of custodial rights.

The subtle difference that can be noted in the appointment of the guardians as per Hindu law and Muslim law is that for both legitimate and illegitimate, irrespective the mother holds the custody, but it differs according to the school of thought. But as per Hindu law, under the Hindu Minority and Guardianship act, 1956, as per sec6, the mother is the guardian of the illegitimate child and the guardianship of the legitimate child is with the father.

---

<sup>6</sup> Article: Welfare of the child after parents' divorce or separation – key analysis by Hardik Batra and Tanish Arora in Manupatra

## **6. INTERIM CUSTODY:**

The interim custody that is the temporary custody that is given as per sec12 of the Guardians and wards act, the welfare of the child is taken into account while giving interim custody too. But it does not have any effect on the custody matter. In the case of ROSHAN LAL & ANR. VERSUS GAUTAM KHANNA & ORS<sup>8</sup>, the court held that in the interim the custody of the children will be with the Maternal Grandparents till the trial is concluded. The welfare of the child is what prioritized the most.

## **7. CUSTODY OF A CHILD BORN OUT OF WEDLOCK:**

### **7.1 WHEN FATHER DESERTS:**

This situation arises, where the partners are not legally married. The child is primarily in the custody of the mother, if the father deserts the child. This is clearly observed in the case of ABC v. State (NCT of Delhi)<sup>9</sup>, According to the ruling of the court, an unmarried mother can now request interim custody of her kid, provided that the child's biological father does not oppose. This ruling has eliminated social injustice, as Christian moms faced a disadvantage when it came to minor child guardianship when compared to their Hindu counterparts.

### **7.2 WHEN MOTHER DESERTS:**

But what so happens if the mother of the child deserts the child. Does the biological father get the custody of the child? In the case that was observed in the Bombay high court by the Justice Mohite-Dere as "that If the mother abandons the child, who will the custody go to? Why are you anxious to go and give to somebody else other than the biological father?... The manner in which the child is handed from one person to another. See the trauma the child will undergo,"

## **8. STEP PARENTS AND CUSTODY:**

To get the custody of a child when, both the biological parent consent to the custody. If suppose one parent refuses to give their consent to the step parent adoption, the biological parent who has the custody of the child can move on with the termination of the parental rights with the use of the criteria of abandonment but the same has to be proved in front of the court.

Step-parent adoption, the couple along with the biological parent has to register with the Child Adoption resource Information and Guidance system.

## **9. CUSTODY OF A CHILD WHEN PARENTS ARE DECLARED UNFIT:**

If both parents are declared unfit by the court, or both are deceased, the custody of the child can be claimed by any of the grandparents. A third party would also be appointed as the guardian.

Smriti Madan Kansagra v. Perry Kansagra<sup>10</sup>:

As per the court, all considerations must yield to the welfare of the child. The Supreme Court also laid emphasis on the fact that whenever a question with regards to custody comes to the court, it must not be determined upon the legal rights of the parties but the "sole and predominant criterion of what would serve the best interest of the minor."

---

<sup>8</sup> CA No. 3559/2020]

<sup>9</sup> 2015 SC 609

<sup>10</sup> CA No. 3559/2020]

It is also to be observed that the custody rights are given to a major sibling, if the both the parents are unfit, but the same has to be established in front of the court.

#### **10. CUSTODY OF A CHILD; IF ONE PARENT RE-MARRIES:**

The custodial rights of a person does not get affected if one parent re-marries. The remarriage of the custodial parent brings a lot of changes in the child's world and can have both positive and negative impact. If the child is more adversely negatively impacted, the non-custodial parent can demand for custody modification. On the other hand, if the non-custodial parent remarries, it does not create an adverse effect. But if it is observed that the position of the non-custodial parent has been improved on the re-marriage, they might also be allowed for more visitation rights.

If the nationality of the custody parent is different as that of the child, it has to be adhered as stated in the case of Navtej Singh v. State of NCT of Delhi.

#### **11. MOTHER : A BETTER CARE-TAKER; IS IT A MYTH?**

In India, it is always presumed that mothers are better care-takers, but it is not the case every-time. Fathers also have equal interest in the custody of the child but there are cases where the mothers are given priority. Certain statutes such as sec6 of the Hindu Minority and guardianship Act 1956, support the same.

But with cases coming up and the recent judgement by the Bombay High court on September14,2023, breaks this myth. The judgment clearly stating that “the best interest of child cannot be solely based on Mother’s affection and care.”

#### **12. CUSTODY RIGHTS IN CASE OF TWINS OR SIBLINGS:**

Though the basic principle applies in the circumstance where there is an involvement of two children or more in the process of custody. It is often advised and also looked onto by the court that the twins are not separated in the case of physical custody. This is so to avoid further emotional scares that might occur due to the separation. One of the factors that is looked on to and evaluated while giving the custody is the relationship that exist between the siblings. As if there is a rift between the siblings and if the court finds that it is best for the children to live apart, the same verdict is delivered. The sex of the child is also one factor that is taken into consideration when giving the custody decision to the parents.

#### **13. SUGGESTIONS:**

The concept of shared parenting is yet not been discussed or brought up in India. Majority of the cases have physical custody, where one parent has the sole custody, whereas the other has just the visiting rights. This in turn brings up many issues, thus the recognition of joint custody is a must. And it is also important to take the psychological aspect into account because parents have the ability to easily influence their children's thoughts. And parents frequently use this to their advantage, which eventually causes anguish for their kids.

The frequent switching of parents, particularly in the early years, before the age of five, causes a severe psychological wound. Guidelines with respect to the step-parents custody must be properly framed. This is to avoid complexities in the future and for the smooth process.

The stand of transgender people in the aspect of custody: It is to be noted that the marriage between transgenders have been legalized in India and they have the capacity to adopt a child under Sec41(6) of the Juvenile Justice Act. Thus, there is a need for the legislation to take action regarding the custody of

the child if the transgender couple get divorced, as there is no laws currently that govern the same. The laws must be made in a detailed manner including all the nuances as to the custody of the child below 5 years and all the scenarios that has been considered between a normal couple.

#### 14. CONCLUSION:

Home, in the perspective of a child is one where it could feel safe. And it should not be the one that is quoted by Clementine von Radics - " What is a home if not the first place you learn to run from?"

The constant tension in the house, create a major block for it to not feel safe, fearing the constant arguments this affecting the child psychologically at various levels. Thus while granting custody of the child, along with the welfare of the child, the psychological factor should also to be considered.

#### REFERENCES:

1. <https://www.sconline.com/blog/post/2019/11/25/custody-of-children/>
2. <https://www.legalserviceindia.com/article/l34-Custody-Laws.html>
3. <https://gsbagga.com/blog/does-remarriage-affect-child-custody-in-india/#:~:text=Remarriage%20of%20non%2Dcustodial%20parent,happy%20kinship%20with%20the%20child.>
4. [https://www.legalserviceindia.com/article/l34-Custody-Laws.html#google\\_vignette](https://www.legalserviceindia.com/article/l34-Custody-Laws.html#google_vignette)
5. <https://pinklegal.in/topics/marriage-and-divorce/hindu-custody.html#:~:text=In%20divorce%2Fseparation%2C%20which%20parent,the%20father%20or%20another%20person.>
6. [https://lawnotes.co/custody-of-the-children-sec-26-of-hindu-marriage-act-1955/#:~:text=a\)%20Third%2Dparty%20custody%3A,as%20grandparents%20or%20a%20relative.](https://lawnotes.co/custody-of-the-children-sec-26-of-hindu-marriage-act-1955/#:~:text=a)%20Third%2Dparty%20custody%3A,as%20grandparents%20or%20a%20relative.)
7. <https://economictimes.indiatimes.com/wealth/legal/will/who-gets-childs-custody-after-a-divorce/under-hindu-law/slideshow/92761565.cms>
8. <https://timesofindia.indiatimes.com/readersblog/legal-writing/custodial-rights-of-fathers-in-india-34808/>
9. <https://www.hindustantimes.com/india/child-custody-laws-in-india-a-much-needed-overhaul/story-AXv1OA2WRqGLSQwM2Add9O.html>
10. [https://www.google.co.in/books/edition/Family\\_Law\\_A\\_Husband\\_s\\_Guide\\_to\\_Matrimon/NxlrDwAAQBAJ?hl=en&gbpv=1&dq=child+custody+during+divorce+proceedings+india&printsec=frontcover](https://www.google.co.in/books/edition/Family_Law_A_Husband_s_Guide_to_Matrimon/NxlrDwAAQBAJ?hl=en&gbpv=1&dq=child+custody+during+divorce+proceedings+india&printsec=frontcover)