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Custody of child in Indian law: issues and responses

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Abstract

The best interest of a child is the most important consideration in judging custody and guardianship matters. The main importance in welfare of child in proceedings will help to ensure that child's future is safe and protected. We generally use custody and guardianship interchangeably but in legal terms there is a difference between them. For instance, in simple terminology, custody in this context means protective care of a child and guardianship means non-parental care of child. There is no automatic transfer of custody within the event of a divorce; in spite of faith, custody affairs are decided by the court. The Supreme Court in *ABC v/s. The State (NCT of Delhi)* gave a judgement on gender equality and ruled that even an unwed mother must be recognised as legal guardian of her child without forcing her to disclose the name of child's biological father.² Manu clearly says "custody of children vested in all children within the realm in the king as the *parens partice*".

Key words: Guardianship and Custody law, Welfare of the Child, Judicial interpretation.

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² Sonali Abhang, "Guardianship and Custody Laws in India- Suggested Reforms from Global Angle", 20 Journal of Humanities and Social Science 39(2015).

INTRODUCTION

*“A child cannot be tossed like a shuttle cock between the parents”.*³

-Justice R M Lodha and Rohinton Nariman

The law governing custody of child is closely related to that of guardianship. The term ‘Custody’ is nowhere defined in Indian family law, whether non religious or religious.⁴ Black’s Law dictionary defines custody as immediate keeping, guarding, care, watch, inspection, preservation, or securing of a thing being in a personal care of the person who is its custodian.⁵ The term ‘Guardian’ is defined by Guardian and Wards Act, 1890 as a “person having the care of the person of a minor or of his property or of both his person and property”.⁶ The GWA was brought into force by the British under the colonial era and it was greatly influenced by common law system. The Hindu Minority and Guardianship Act, 1956 came into existence after independence. India being a secular country, there exists two sets of law, one being secular law which applied on Hindu Minority and Guardianship Act, 1956 and other being personal law which applied on Guardian and Wards Act, 1890.

In the classic Hindu law, Karta was the unquestioned custodian and guardian of the dependants of the family so the need for a separate statute or clause for a custody or guardianship was not given enough emphasis.⁷ With the growth of time and change in the society, women got their own independent identity and separation of spouses came into picture and the need for the law on custody arose. The Hindu Minority and Guardianship Act, 1956 provide father to be the natural guardian and after him the mother. The act provided that:⁸

- (1) In case of minor boy or unmarried minor girl, the natural guardian is the father, And ‘after’ him, the mother; and
- (2) The custody of a minor who has not completed the age of five years shall ‘Ordinarily’ be with the mother.

³ N. Sivaraman, “Court trends in child custody”, volume 2 issue 8, Journal on contemporary issues of law, 1.

⁴ *Id* at 2

⁵ *Id* at 3

⁶ Guardian and Wards Act, No. 8 of 1890] S. 4(2).

⁷ Paras Diwan, *Law of Adoption, Minority, Guardianship & Custody* 15 (Universal Law Publishing Co.: New Delhi, 2012).

⁸ Hindu Marriage and Guardianship Act, 1956, s. 6(a).

The constitutional validity of the above section was challenged in the case of *Gita Hariharan v. Reserve Bank of India*.⁹ It was contended that giving father preference over mother was discrimination on the basis of sex under Article 14 of the Indian Constitution. The Supreme Court stated that the term ‘after’ does not mean lifetime of a father but in the presence of father. The court further held that; the word absence can be understood as total apathy or negligence by the father towards the child.¹⁰ And the welfare of the child should be of supreme importance. Under the GWA, the parental authority supersedes the welfare principle, while under HGMA the welfare principle is of most important consideration in determining guardianship.

BODY

The father and mother, as a natural guardian of their minor child, are duty-bound and entitled to keep children in their custody and company. It is settled law that a child should not miss out on the love and affection of both the parents as a result of breakdown of marriage.¹¹ Hindus are governed by Hindu Minority and Guardianship Act, 1956 and it provides father to be a natural guardian of the child. If a marriage ends up in separation of couples, child or children are bound to suffer a lot. There are many factors which broadly include the welfare of a child, factors include: safe keeping of the child, ethical upbringing of the child, good education to be imparted, economic well being of the guardian.¹² The custody of a minor child is given to one parent, which does not mean that the other parent cannot see or to be in contact of the child.¹³ All the conditions are determined by the court so that other parent get the visiting right.

Welfare interest of a child

Welfare of a child is a paramount consideration and is also met by various other aspects like recognising the changing emotional, intellectual and physical needs of the child, maintaining a healthy and continuing relationship with both to parents, society and siblings and so on. According to *United Nations Human Rights Commission*, the “best interest of child” is a proxy for the well being of a child based on a variety of circumstances laid out by the convention.¹⁴ Welfare of the child does not mean consent of a child is necessary in case of custody and

⁹ (1999) 2 SCC 228

¹⁰ *Ibid*, *Gita Hariharan v. Reserve Bank of India*

¹¹ Parental responsibility, available at: <https://uk.practicallaw.thomsonreuters.com>

¹² Child custody law in India, available at: <http://www.fortunelegal.in/child-custody-laws-in-india>.

¹³ *Ibid*

¹⁴ UNHRC, UNHRC Guidelines on Determining the Best Interests of the Child, (2008)

guardianship. In the case of *Surya Vadanam v/s. State of Tamil Nadu*¹⁵ Hon'ble Supreme Court after discussing various cases it was held that the best interest and welfare of the child are of paramount importance.

Custody of children:-

i). In case of dissolution of marriage or judicial separation

Custody of the child is given either by the reason of divorce or judicial separation. Now a **question arises that who will get the custody right of the child after divorce?** Custody comes into question when two parents who are caring a child get separated or divorced. In India the majority of the divorce cases the child custody was settled by parents themselves and if they are unable to settle themselves, they approach to the family court. There are three types of custody which could be granted by jurisdiction of competent court.¹⁶

1. Physical custody
2. Joint custody
3. Legal custody

Physical custody: Physical custody is the parent's right to have the child to reside with him or her. It may be granted only to one parent. Custody of a child is determined by court that whether which parent has resources and to support for best care for it so that he should live in a safe and fulfilling environment. It is also known as sole custody.

Joint custody: Joint custody simply means both parents are actively participating in the child's upbringing. It can be joint physical custody, joint legal custody or both. In that case both parents will not live together but only decisions can be taken together.

Legal custody: In legal custody, physical presence of child is not necessary all the time. It includes decisions like where will child study or which doctor the child will be treated. It includes major decisions like health, child's education and religious upbringing.

It is all about the competent court that which type of custody should be granted according to circumstances of a case. The question of child's custody is determined by various facts and circumstances including the age, sex and the requirement of the child amongst others.¹⁷

Now another question arise that who can claim custody of the child? The custody of the child is either claim by the mother or father. Or if both are deceased then maternal and paternal

¹⁵ 2015 (2) SCC (CIVIL) 183 (SC)

¹⁶ *Id* at 12

¹⁷ Dhanwanti Joshi v/s. Madhav Unde

grandparents can seek the custody of the child. The court can also appoint a third person as a guardian of the child.¹⁸

ii). Custody of a minor child

Now it is settled law that custody of the child is go either to parents.¹⁹ The custody of a minor child under 7 yrs of age is given to mother. If she is not psychologically fit or not able to provide the parental upbringing then custody of a minor child will be given to father. In *K M Vinaya v/s. B. Srinivas*²⁰ a two judge bench ruled that both parents are entitled to get custody for sustainable growth and development. The Guardianship and Ward Act, 1890 and other provisions of Hindu Minority and Guardianship Act, 1956, as well as the 133rd Report (1989) of the law commission, entitled removal of discrimination against women in matters relating to guardianship and custody of minor children and elaborating of the welfare principles.²¹ In the case of *Bimla and others v/s. Anita*²² it was held that mother is the best person to to effectively take care of child's interest and welfare of the child lies with the mother.

iii. Legitimate children

The custody of legitimate children under section 19 of Guardianship and Wards Act, 1890 and section 6(a) of Hindu Minority and Guardianship Act 1956 speaks about the position of legitimate children.²³ "Father is the natural guardian of his minor legitimate children, sons and daughters". Father's right of guardianship is considered to be subordinate to the welfare of the child.²⁴

iv. Illegitimate children

The mother is the natural guardian of the minor illegitimate children even if the father is alive.²⁵ Under this category the children born in a live in relationship are considered. They only belong to the mother.

v). Adoptive children

According to section 12 of HAMA, the child that was adopted and his adopted father and mother shall be the natural guardian of that child. And the first preference should be given to

¹⁸ *Supra* note 8

¹⁹ <http://www.infochangeindia.org/archives1>.

²⁰ MFA No. 1729/ 2011, Karnataka High Court, Judgment dated Sept. 13, 2013.

²¹ Law Commission of India, 133rd Report, August (1989), available at <http://lawcommissionofindia.nic.in>

²² 2015(3) RCR (CIVIL) 153 (SC)

²³ Tabassum Jahan, "custody of children under different legal system: a comparative study", thesis of Aligarh muslim university 40 (2013)

²⁴ *Ibid*

²⁵ *Id* at 23

father. If an unmarried woman adopts a child and after that she gets married, then her husband cannot be considered to be the father of that child and natural guardian of such child will be the mother unless and until her husband adopted that child.

CUSTODY ISSUES

Custody laws are dealt amongst three personal laws, which are Indian Divorce Act, 1869 (section. 41 and 43), the Parsi Marriage and Divorce Act, 1936 (section. 49), and the Hindu Marriage Act, 1955 (section. 26).²⁶ Studies have showed that eighty-five to ninety of children custody are given to the mother.²⁷ The main issue with custody is interference. This occurs when one of both the parents intentionally disobey the visitation schedule or fail to live up to the parental agreement.²⁸ Custody issues include custody disputes, sole v/s. Joint custody, visitation disputes. According to *Law Commission in its 133rd report* made a recommendation on the issue of child custody that mother should have same and equal rights in respect of the custody of minor's persons and property.

STATUTORY LAW

i). GUARDIANSHIP AND WARDS ACT, 1890

It is a law which verifies the appointment and declaration of guardian. According to section 19 of GWA, it says that if father is alive then no other person shall be appointed as guardian unless he is found to be unfit. Section 17 (1) said court shall be guided by what personal of the minor provides and appears to be the "welfare of the child".²⁹ Section 17 (2) clarifies that while determining the welfare of the child the court shall consider the age, sex and religion of the minor.³⁰ According to section 17 (3), it was stated that if a minor is old enough to form a particular opinion then the court may consider his/her preference.³¹

ii). HINDU MINORITY AND GUARDIANSHIP ACT, 1956

²⁶ Law Commission of India, "257th report on reforms in guardianship and custody law in India", 9 (May 2015)

²⁷ L. Weitzman, THE DIVORCE REVOLUTION, 4 *Behavioural Science and Law*. 105, (1986)

²⁸ Child custody issues available at: <https://family.findlaw.com/child-custody/child-custody-laws.html>

²⁹ Guardian and Wards Act, no. 8 of 1890, section 17 (1).

³⁰ Guardian and Wards Act, no. 8 of 1890, section 17 (2).

³¹ Guardian and Wards Act, no. 8 of 1890, section 17 (3).

Classical Hindu law did not contain any principles dealing with guardianship and custody of children.³² In the joint Hindu family, the *karta* was responsible for the overall controls of all dependents and management of their property, and therefore there specific legal rules dealing with guardianship and custody were not thought to be necessary.³³ Father was given preference according to HMGA so this is the only provision that a mother used to argue in dealing with custody of child at court.³⁴

iii). HINDU MARRIAGE ACT, 1955

Under Section 26 of the 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, in consonance with their wishes. The court may also from time to time revoke, suspend or vary any orders and provisions previously passed.³⁵

Guardian declared and appointed by the court

Where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian for the person, property or both, the court may make an order under the guardian of a minor, the welfare of the minor shall be the paramount consideration. The question of appointment by the court of a guardian can be considered on the application of:

- (1) The person desirous of being or claiming to be the guardian of the minor;
- (2) Any relative or friend of the minor;
- (3) The collector of the district or other local area in which:
 - (i) The minor ordinarily resides;
 - (ii) The minor holds property;
- (4) If the minor belongs to a class, the collector who was authority with respect to that class.³⁶

Termination of Guardianship

³² *Supra* note 19

³³ *Supra* note 3

³⁴ *Supra* note 1

³⁵ The Hindu Marriage Act, 1955, section 26.

³⁶ Jayashree. V. Doddawadmath, personal law relating to women, 145 (Allahabad law agency, 1st edition, 2011).

The court may accord to Section 39,³⁷ on the application of any person interested, or of its own motion, in order to remove a guardian appointed or declared by the court, for any of the following causes, namely :-

- (a) For abuse of his trust;
- (b) For incapacity to perform the duties of his trust;
- (c) For ill- treatment or neglect to take proper care of his ward;
- (d) For having an adverse to the faithful performance of his duties etc.³⁸

In *Dhaninder Kumar v/s. Deep Chand*,³⁹ it was held that the power of removal of a guardian is discretionary and not mandatory. The court has been empowered to regulate the conduct of a guardian through exercising the paternal jurisdiction.

Once the child attained the age of majority i.e. 18 years of age, they are considered to be adult, and guardianship automatically comes to an end.

The guardianship comes to an end if the child dies. The guardian of that child if was in charge of finance in child's behalf then they need to give accounting in the court.

Once the child is adopted, then the new parents are responsible for his/her well being and legal guardianship ended. If they want to become guardian of that child after giving in adoption then they can do it by applying in court with relevant reason.

RESPONSES TO INDIAN JUDICIARY TO GUARDIANSHIP AND CUSTODY ACT

The court had given various interpretations to welfare of child theory. In some cases court has given preference to the social factor, legal factor, economic factor, and religious factor. But the main guiding principle is the welfare of the child and its protection.

(a) Legal interest: In 1981, the A.P. High Court gave important judgement regarding the authority of father over the custody of the child. It was held that the child must be regarded as 'person' who has right to life according to Article 21 as guaranteed by the constitution of India.⁴⁰

³⁷ The Guardian and Wards Act, 1980

³⁸ *Supra* note 31

³⁹ 1991 (1) Civil LJ 8(All.).

⁴⁰ *Supra* note 19

(b) Physical well being: In *Chandrakala Menon v/s. Vipin Menon*,⁴¹ the Hon'ble Supreme Court held that the question regarding the custody of a minor child cannot be decided on the basis of legal aspects.

There are certain preconceived notion which was held by the court that mother is being most suited to hold custody of girl child, unless it is proven that she is unfit to take care of her.⁴² The father is considered to be the best custodian for older boys.⁴³

CONCLUDED REMARK

The best interest of child doctrine has dramatically influenced family law jurisprudence globally and had that effect on family. Custody means that one parents is held responsible for all basic need or requirement of child and although other non-custodian parent have visitation right. In the starting of all child custody issues it was presumed by the court that parents have equal shared percentage, unless either parent can prove to be unfit otherwise.⁴⁴ The legislature has also introduced the GWA in order to provide remedy to those whose personal law do not provided provisions dealing with custody and guardianship. Depending on the facts and circumstances of the case, the court may provide sole custody to one parent or joint custody to both parents. However, welfare is objectively decided by the court and may not always be in accordance to the wishes of the child.

Generally in India it was seen that custody of tender aged children was given to mothers because at that age they want maternal affection. But there is no hard and fast rule.⁴⁵ Family is being called a unit of socialization, the impact of society and culture are clearly felt in these court decisions.⁴⁶ The same impact is projected as the welfare of the child. In matters where the future of the child is concerned, importance must be given to the welfare interest of the child. There have been various Law Commission reports which talks about child custody and guardianship their reform, and dealing with discrimination against women. They have taken various initiatives for shared parenting/ joint custody in the larger interest and welfare of the

⁴¹ (1993) 2 SCC 6

⁴² DR. PARAS DIWAN, FAMILY LAW, Pg. 256 (Allahabad law agency, 10th ed 2013).

⁴³ Paras Diwan, *Ibid*

⁴⁴ Child custody law in India, available at:
<https://www.womensweb.in/articles/child-custody-law-for-the-layperson/>

⁴⁵ *Ibid*

⁴⁶ *Supra* note 3

children to ensure them love and affection of both the parents. But at the end it was all about at the discretion of the court that on whom the child welfare interest and protection will be best suited.

