

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 6

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Child Custody

GANISRIKA R.¹ AND SUMAIYAH PARVEEN S.²

ABSTRACT

The Researcher has been interested in researching about child custody since it has been facing challenges since it's evaluation, types, considering the welfare and interest of child and also about it's legal provisions. As per the custody of child in Indian law, interest and welfare of the child is one of the basic elements for a parent to maintain the child under his/her custody. By protecting the child's interest and welfare, safety and protection of child is ensured. Basically, The provision of Hindu Minority and Guardianship act, amended a law where In case of minor boy or unmarried girl, the father shall be responsible for custody of child. The Mother shall be responsible in case the child is below the age of 5 years.

Even though the meaning of the term custody is not mentioned in Indian law it basically means Guardianship which is defined by Guardian and Wards Act,1890. Further, the Researcher would enhance knowledge about the custody of child In case of dissolution of marriage or Judicial seperation, In case of custody of Minor child, In case of legitimate child, In case of Illegitimate child and Adopted children The Researcher wants to critically analyse it's origin, types, legal proceedings and it's case law to get a clear view about child custody in Indian law.

Keywords: *Child custody, welfare of child, guardian, judicial seperation, legitimate child, illegitimate child.*

I. INTRODUCTION

Child custody refers to the legal responsibility of the parents towards their child. The custody of the child is decided by the family court or by the parents themselves based on the best interest and well-being of the child. Child custody occurs when the parents are separated(judicial separation) from the adoption of a child or due to the death of the parents. They have to decide with whom the child has to live, decisions related to education, health care etc. It is important to seek legal advice from a family law attorney for guidance on custody arrangements.

Custody includes physical custody (where the child lives) and legal custody (right to decide on the matters relating to the child's upbringing) custody varies such as sole custody, and joint custody depending on the best interest of the child.

¹ Author is a student in India.

² Author is a student in India.

(A) Types of custody granted by jurisdiction:**1. Physical custody:**

It means the child resides with any one of the parents either mother or father. Which will be decided by the court based on the support and ability of the parents to take care of the child. It is also known as sole custody.

2. Joint custody:

It means the child is taken care of by both the parents (father and mother) parents will not live together but all the decisions regarding the child's matters are taken together.

3. Legal custody:

The physical presence of the child is not necessary all the time. All the major decisions like education, and health care are taken by the parent who has the custody. The custody of the child is based on various factors and circumstances such as age, sex, and other needs of the child.

4. Sole custody:

In sole custody, the custody of child depends upon the right belonging to biological parent. The other spouse is not given any right as the spouse does not hold any biological right. If a parent is given sole custody they get physical and legal custody of the child. It impliedly means that all important decisions of child vest with the biological parent.

These decisions include

- Schooling
- Religion
- Medical care

5. Third party custody:

In certain circumstances the child will not be under custody of natural or biological parent under the order of the court instead the court orders that, the child should be in the custody of Third party which court approves. Third party custody occurs under 2 circumstances

- The biological parents doesn't want the custody of child
- The biological parents are not physically and mentally incapable of maintaining the child.

Reasons that the court would retain authority over the child/children and later award custody to a third adult include:

- Abuse of child
- Substance Abuse
- Inability to provide necessities to the child
- Desertion of child

II. FACTORS AFFECTING CHILD CUSTODY

(A) Wishes of parent

The court takes into account wishes of parent also. In certain cases ,the parent needs full custody of the child or needs some changes in the judgement regarding the custody of the child. Thus it is upon the decision of the court to decide whether the custody of child rests with parent or not

(B) Wishes of children

Although the court puts weight on interest of parent , social worker and professor the court also focuses on the welfare and wishes of children. children are not always the best judges but the court will take their wishes also in consideration.

(C) Mental and physical health of children and parents

If one of the parents is physically or mentally disabled the court will take into consideration with whom the child will be under safe protection and Guardianship. Based on that the court will decide who will have partial custody and who needs to pay maintenance for the child.

(D) The Majority Caregiver Up Until This Point

The court will consider which. parent has given at most care and attention to the child. It includes all types of attention including financial care, transportation, feeding, teaching and parenting. The court will also consider factors such as the household set-up – where one parent works and cannot spend as much time with the children as the parent who is not employed or is only employed part-time.

(E) Allegations & Actual Instances of Abuse or Neglect

The court will not only consider abuse or neglect of child while rewarding Custody but also the allegations and actual instances of abuse or neglect. If either party has made false allegations regarding the abuse or neglect ,it will be taken into consideration seriously while deciding the custody of child.

Some general rules of child custody applicable on Hindus are:

- Custody of child should rest with mother since the child seeks love and affection from mother
- According to the customary practice of Hindu law father is the natural Guardian which is also provided in sec 6 of Hindu Minority and Guardianship act .
- The custody of child should be under best interest of child
- If the parents are unwilling to take custody of the child the court will appoint close relatives to be the guardian of the child.

The other relations apart from the parents who can claim the custody of a child are:

- Paternal Grandparents
- Full brother
- Consanguine Brother
- Full Brother's Son
- Consanguine Brother's Son
- Full Of The Father
- Consanguine Of The Father
- Father's Full Brother's Son
- Maternal Grandmother
- Maternal Great-Grandmother
- Maternal Aunt And Great Aunt
- Full Sister
- Consanguine Sister
- Uterine Sister
- Paternal Aunt

Who can claim for custody of the child?

Custody of the child is claimed by either mother or father. If it's a case of deceased parents, maternal or paternal grandparents can claim custody of the child.

III. CUSTODY OF CHILDREN

(A) In case of judicial separation

In India, in most divorce cases child custody is decided by the parents themselves when it's not able to be decided by themselves they will approach the family court.

(B) Welfare interest of the child

The welfare interest of the child is the most important consideration. It is met by various factors like the physical needs of the child, connection with both the parents and siblings, and so on.

According to "The United Nations Human Rights Commission" the best interest of a child is the responsibility of the person to take care of the child and the well-being of the child. Welfare interest doesn't mean consent. Consent of the child in child custody and guardianship is not necessary. In the case of *Surya Vadanam vs St of Tamil Nadu* The Hon'ble Supreme Court held that the welfare interest of the child is of paramount importance

(C) Legal provisions

Indian law is highly concerned about the custody of the child where many laws & amendments has been passed based on it. such as

- Indian Divorce Act, 1869
- Parsi Marriage and Divorce Act, 1936
- Hindu Marriage Act, 1955
- Guardianship and Wards Act, 1956
- Hindu Minority and Guardianship Act, 1956
- Court can also declare a Guardian in exceptional cases.

1. Indian Divorce Act, 1896

This Act is specially meant for Christians which came into existence on April 1, 1879. This act applies to the whole of India, except Jammu & Kashmir.

Section 41 and 43 deals about the custody of children during/after divorce.

Sec 41 grants power to court to provide interim for custody of children while the case is on proceedings. The court can grant custodian to any specific party even after the final decree is declared.

Sec 43 is dealt under chapter 11 Of Indian Divorce Act which grants Power to make orders as to custody of children in suits for dissolution or nullity.

If any suit is filled for obtaining dissolution of marriage or nullity of marriage, which is filled in district court, the court can grant interim for custody, maintenance, education of minor child.

2. Parsi Marriage and Divorce Act, 1936

This is dealt under chapter 5, sec 49 of Parsi Marriage and divorce act.

It deals about the custody of children. The court may grant interim from Time to time and make final decree while the judgement is declared regarding the custody, maintenance ,education of the child, who is below the age of 18 years .The parent who was subject to provide custody, maintenance, education can't revoke from their liability once the interim is passed.

3. Hindu Marriage Act,1955

This act came into force in 1955. Sec 26 of Hindu Marriage Act deals about custody of child. The child shall be in the custody of mother father according to the child's wish.

The court may grant interim, maintenance, education of the child as interim and may revoke at any time before passing of the final decree.

From this it can be observed that the child's interest is priotised by the court also.

4. Hindu Minority And Guardianship Act

Hindu law did not define about the term custody or guardian. Here, Father was given special privilege on guiding the child regarding education and other maintenance. He is responsible for other legal proceedings in court.

5. Particular marriage act, 1964

Sec 38 of particular marriage act deals with, with whom the child should be in custody when both parents belong to different religions

6. Muslim law

Under Muslim law, the mother is the natural Guardian of the child. the mother is responsible for the custody of the child. In case any misconduct is found in part of the mother the court will declare the father to be the natural Guardian of the child. In case the father has remarried the natural Guardianship rests with the mother. The court will not grant the custody of child to step mother or remarried father due to specific reasons of love and affection towards the child.

7. Other females right of custody

After the mother the below mentioned females are entitled to the right of custody of a minor child in Hanafis

- Mother's mother how high so ever
- Father's mother how high so ever

- Full Sister
- Uterine Sister
- Consanguine sister
- Full sister's daughter
- Uterine sister's daughter
- Consanguine sister's daughter
- Maternal aunts in like order as sisters and
- Paternal aunts, in like order as sisters

8. Father's right of custody

- When Minor child becomes major father can take in custody of the child
- When mother is unwilling or incapable of maintaining the child

(D) Court Appointing A Guardian

If the welfare of the child and his/her property, maintenance is in threat the court may grant a Guardian if necessary.

- Any relative or friend of the minor
- The person desirous of being or claiming to be the guardian of the minor;

Accordingly to section 39, the child may have the right to reject the guardian appointed by court if, The guardian is

- Abuse of his trust
- Incapacity to be a Guardian
- Ill treatment or neglecting his performance/duty as Guardian .
- Unfaithful performance.

IV. CASE LAWS

- **Dhaninder Kumar v/s. Deep Chan**

It was held that the removal of person as a Guardian is left to the discretion of court which is not mandatory. while removing a person as Guardian exercising of paternal jurisdiction is essential. once the child becomes a major Guardianship is automatically removed. Further the Guardianship comes to an end if the child dies. If the Guardian is responsible for financial

obligations the Guardian must submit the amount to the court. Guardianship ends if a child is adopted while the child is adopted through court proceedings.

- **Hoshie Shavaksha Dolikuka v/s Thirty Hoshie Dolikuka Jose**

In this case the court was disinterested in taking the custody of the child. so the court declared the mother to be the natural Guardian.

- **Kurian C. Jose v/s Meena Jose**

The father of minor involved in relationship with another woman. the court declared that the custody of child should be with mother Even though the natural Guardian should have the custody of child. since the father involved in another relationship he is not entitled to guardianship.

- **Chandrakala Menon v/s. Vipin Menon**

The supreme court held that the mother is the basic guardian of the child where there are certain pre-concerned notion and mother will be suitable guardian For girls and for older boys, father will be suitable guardian.

- **K M Vinaya v/s. B. Srinivas**

It was held that both parents are entitled to get sustainable development and growth of the child. According to 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, it was held that mother is also having equal strength to have custody of the child.

- **Bimla and others v/s. Anita**

It was held that Mother was the right person to hold a child under her Guardianship in case of divorce between husband and wife.

- **Gaurav Nagpal v. Sumedha Nagpal, (2009) 1 SCC 42**

Sec 6 of Hindu Minority and Guardianship act states the father is the natural Guardian of minor son. But the provision can't intervene the paramount consideration of welfare of child.

- **Mamta v. Ashok Jagannath Bharuka, (2005) 12 SCC 452**

The principles in Guardian And wards act are equal to the provision of Sec 26 of Hindu Marriage act since in both the situations two things are common: the first, being orders relating to custody of a growing child and secondly, the paramount consideration of the welfare of the

child.

Who Will Get the Custody of a Minor if the Mother is in a Weaker Financial Condition as Compared to the Father but the Father has Remarried and has s Kids?

Since, the financial position of the mother may be week at most cases, the father is responsible for all financial obligations of the child .the father should provide Maintenance to the child. since step mother won't take right care as of her own children, court held that it will be right that a child under her/his mother's Guardianship will be right decision.

Consideration of childs interest

- Interest of the child
- Cultural belief, awareness & understanding of child in case of intercaste marriage
- Co parenting with whom the child feels safe and secured
- Medical resolution
- Financial obligations
- Legal proceedings/ Judicial pronouncements.

V. CONCLUSION

As per the Researchers knowledge of researching, even though there may be several conflict in legal proceedings, the child should get support and care from both the parents as per human psychology. The child should be left to both the parents to know about their culture, religion, in case of intercaste marriage. the child may follow either the mother's or father's will and interest as he/she seeks adequate knowledge about both the castes.

VI. REFERENCES

- Anupam bhandari, child custody with respect to Indian laws, <https://blog.ipleaders.in/child-custody-Respect-indian-laws/>, February 8, 2021.
- By vidhikarya. Child custody laws in India, <http://www.legalserviceindia.com/legal/article-710-child-custody-laws-in-india.html>.
- Sheila B. Das case- <https://indiankanoon.org/doc/1143841/>
