

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 4

2024

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Custody over Child Inclined toward Mothers under Hindu Law

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ABSTRACT

In India, mothers are often more likely to gain custody of children following a divorce due to a combination of legal, cultural, and social factors. Legally, the Indian judiciary tends to prioritize the welfare and best interests of the child, frequently interpreting these as being best served under the care of the mother, especially for young children. This inclination is rooted in the "Tender Years Doctrine," which suggests that children under a certain age are better off with their mothers. Culturally, traditional Indian society views mothers as primary caregivers, reinforcing the belief that children naturally belong with their mothers. Additionally, societal norms and gender roles in India often position women as homemakers and men as breadwinners, further supporting the notion that mothers should take primary responsibility for childcare after divorce. While recent years have had some shifts towards more balanced and gender-neutral custody decisions, these deep-rooted perspectives continue to influence custody decisions, leading to mothers predominantly being awarded custody. This inclination reflects broader societal values and the enduring impact of traditional views on family and child-rearing in India. This article deals basis for granting, the basis for terminating such rights and about the current gender-neutral approach for granting custody.

Keywords: *Child custody, gender neutral approach.*

I. INTRODUCTION

The issue of child custody after divorce is complex and sensitive, heavily influenced by legal framework, cultural norms and social expectations. In India, mothers often want to seek child custody after divorce. A combination of legal considerations, traditional caregiving roles, and cultural assumptions about parenting may drive this tendency. The Indian legal system through laws like the Guardians and Wards Act, 1890, and the Hindu Minority Guardians Act, 1956 tends to satisfy mothers, especially in the care of minor children. This proposition is based on the belief that mothers naturally fit well to meet the emotional and developmental needs of young children.

Furthermore, the "best interests of the child" principle guides judicial decisions in child custody

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cases. In general, this theory is consistent with the idea that mothers, being primary caregivers, provide a stable and nurturing environment for their children. Cultural values in India, which traditionally emphasize the mother's role in child rearing, also play an important role in determining the outcome of childcare. These values reinforce the idea that children, especially those in their formative years, need the constant presence and care of mothers.

However, it is important to recognize that every child custody case is unique, where courts consider a variety of factors to determine the most appropriate arrangement for a child's best interests. Despite the tendency to incline towards giving custody to mothers, fathers also get custody in many cases, especially when it is considered in the welfare of the child.

II. PARENTAL RIGHTS

The parent has the responsibility of guiding, protecting and supporting a child is no longer a minor. During the child's early years being relatively helpless and immature, parents are sensibly entrusted with making decisions for them and safeguarding their well-being. Providing food, clothing, shelter, love, education, values and security are the basic ways a parent demonstrates concern and natural affection for the child.

Both parents have a legal duty to protect and provide for the child and the failure to do so may lead to criminal liability. If parents fail to fulfil their legal obligations, their parental rights may be terminated. The parent's right to companionship, care, custody and management of their children is a firmly rooted, legally protected interest. The parental right to custody is protected against state interference unless the child is being harmed substantially.

(A) Termination of parental rights:

Termination of parental rights is a serious legal action that permanently ends the legal parent-child relationship. In India, these provisions are governed by various laws and judicial precedents and can be initiated for reasons such as neglect, abuse, abandonment or incapacity of a parent.

a. By Neglect and Abuse:

i. Physical Abuse:

If a parent is found to have physically abused the child, resulting in harm or risk of harm, this can be a ground for termination. This includes actions like hitting, beating, or any form of physical violence.

ii. Emotional Abuse:

Emotional abuse, which includes verbal abuse, isolation, and other actions that can harm the child's emotional and psychological well-being, can also be grounds for termination.

iii. Sexual Abuse:

Any form of sexual abuse or exploitation by a parent is a severe ground for terminating parental rights. This is considered one of the most egregious forms of abuse.

iv. Neglect:

This includes failure to provide adequate food, shelter, clothing, medical care, or education. Chronic neglect or abandonment where the parent fails to perform their parental duties can lead to termination.

b. By Abandonment:

i. Intentional Abandonment:

If a parent has intentionally abandoned the child, meaning they have left the child without any intention of returning or without making adequate provision for the child's care, this can be grounds for termination.

ii. Failure to Maintain Contact:

If a parent fails to maintain contact with the child or fails to provide financial support for a significant period, typically six months or more, it can be considered abandonment.

iii. Leaving the Child in Unsafe Conditions:

If a parent leaves the child in unsafe or unsuitable conditions without proper care or supervision, it can be considered abandonment.

c. By Incapacity:

i. Mental Illness:

If a parent is suffering from a severe mental illness that impairs their ability to care for the child, the court may consider terminating their parental rights. The illness must be such that it renders the parent incapable of fulfilling parental responsibilities.

ii. Substance Abuse:

Chronic substance abuse that affects the parent's ability to care for the child can be a ground for termination. This includes addiction to drugs or alcohol that leads to neglect or abuse of the child.

iii. Physical Incapacity:

In some cases, severe physical disabilities that prevent a parent from providing adequate care can be grounds for termination, especially if no suitable arrangements can be made to ensure the child's welfare.

d. By Voluntary Relinquishment of Consent:

i. Consent to Adoption:

A parent may voluntarily relinquish their parental rights, often in cases of adoption. This is done through a legal process where the parent consents to the termination of their rights to allow another individual or family to adopt the child.

ii. Irrevocable Consent:

Once given, the consent to terminate parental rights for adoption is typically irrevocable, meaning the parent cannot change their mind after the court has approved the termination.

e. Failure to Comply with Court Orders:

i. Non-compliance with Court-Orders:

If a parent fails to comply with court-ordered reunification plans or treatment programs designed to correct issues of abuse, neglect, or incapacity, the court may terminate their parental rights.

ii. Violation of Custody Orders:

Persistent violation of custody or visitation orders, demonstrating a disregard for the legal process and the child's welfare, can lead to termination.

(B) Types of custody:

a. Physical care of children:

Physical care involves the living arrangements of the child and the parents with whom the child lives most of the time.

i. Sole Physical Custody:

One parent has primary physical custody of the child, and the child resides with that parent. The non-custodial parent may have the opportunity to visit.

ii. Joint Physical Custody:

The child shares life with both parents. This arrangement is intended to ensure maximum and frequent contact between the child and both parents, although the exact allocation of time may

vary.

b. Legal custody of children;

Legal custody gives the child the opportunity to make important decisions about his or her life, including education, health care, religion, and the general welfare.

i. Sole Legal Custody:

Only one parent has the right to make major decisions about a child's upbringing. The non-custodial parents may still have their say, but the custodial parents have the final say.

ii. Joint Legal Custody:

Parents share responsibility for making significant decisions about a child's life. This requires parental cooperation and communication.

iii. Bird Nest Custody

Bird Nest Custody is a unique arrangement where the child remains in the family home, and the parents take turns living with the child in that home. This minimizes disruption to the child but requires significant parental cooperation and flexibility.

iv. Split Custody

Split Custody occurs when there are many children, and each parent takes care of different children. For example, one parent has custody of one child, while the other parent has custody of the other. This arrangement is rare and is generally considered when it is best for individual children.

v. Third-Party Custody

In some cases, neither parent is deemed suitable to have custody, and a third party, such as a grandparent or other relative, is awarded custody of the child. This arrangement is considered when both parents are unable to provide a stable and safe environment for the child.

III. LEGAL FRAMEWORK IN INDIA

(A) Hindu Minority and Guardianship Act, 1956

Section 6 of the act identifies the natural guardians of a Hindu minor child. The father is the natural guardian of the legitimate child or unmarried girl, followed by the mother. In the case of an illegitimate boy or an unmarried girl, the mother is the natural guardian, followed by the father. The mother is given priority to be the natural guardian of the child under five years of age. This arrangement is based on the presumption that young children often need the care and

training of their mothers.

The principle of the "tender years" doctrine embedded within these laws implies that children, particularly those below five years, are presumed to benefit more from maternal care. This legal presumption often results in mothers being favoured in custody battles, especially when the children are very young. In the case of *Roxann Sharma v. Arun Sharma (2015)*², the Supreme Court ruled that in cases involving children below the age of five, the custody should ordinarily be with the mother unless the father can prove that the mother is unfit to take care of the child. This case reinforced the "tender years" doctrine, emphasizing that young children need maternal care for their overall well-being.

Section 13 of the Act emphasizes that the welfare of the minor is the paramount consideration in the appointment or declaration of any person as the guardian of a Hindu minor. The court is guided by the best interests of the child, considering factors such as the child's age, sex, and the need for a stable and loving environment.

(B) The Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955, primarily deals with the conditions for a Hindu marriage, the processes for divorce, and other matrimonial issues. Though not directly involved in child custody issues, this act is linked to matrimonial disputes, which are often concurrently dealt with in divorce proceedings. The Act interacts with the Hindu Minority Guardians Act, 1956, and the Guardianship Act, 1890 to handle child custody issues in divorce proceedings.

Section 26 of the Act allows the court to issue interim and final orders regarding the custody, maintenance, and education of minor children during or after matrimonial proceedings. The court has the discretion to pass orders as it deems just and proper, taking into consideration the needs and welfare of the child. The court has the power to revoke, suspend, or vary any custody order passed under this section, reflecting the need to adapt to changing circumstances and the evolving needs of the child.

(C) Guardians and Wards Act, 1890

Under this act, any person interested in the welfare of a minor can apply for guardianship. The court considers the application based on the child's welfare. This act grants wide discretionary powers to the court to appoint a guardian based on what it deems to be in the best interests of the child. This includes considering the age, sex, and religion of the minor, the character and capacity of the proposed guardian, and the minor's existing or previous relationships. While

² *Roxann Sharma v. Arun Sharma*, (2015) 8 SCC 318.

parents are usually preferred as guardians, the court may override this preference if it is deemed that the parents are unfit or if appointing them as guardians is not in the best interests of the child.

IV. ROLE AND RESPONSIBILITY

(A) Primary caregiver role and emotional bonding

In many Indian households, the mother is the primary caregiver, playing a crucial role in the day-to-day nurturing and upbringing of the children. This traditional division of responsibility often results in mothers assuming a greater share of childcare work, which courts take into account when determining custody arrangements.

a. Continuity of Care:

Courts often emphasize the importance of continuous care in the custody care environment. Continuity of care is a crucial principle in child custody decisions in India, emphasizing the importance of maintaining stable and consistent caregiving arrangements for the child. Courts prioritize the child's emotional and psychological well-being by ensuring minimal disruption to their daily routine and environment. Continuity in familiar caregiving practices is seen as beneficial for the child's development. The idea is that maintaining existing bonds and routines helps provide the child with a sense of security and stability during the riotous period of parental separation.

By focusing on continuity of care, Indian courts aim to safeguard the child's best interests, ensuring that their emotional and developmental needs are met in a stable and nurturing environment. This approach underscores the importance of the child's well-being over other considerations, striving to create a supportive and consistent upbringing despite the challenges of divorce. The disruption of a child's structure, emotional well-being, and overall stability reduces the likelihood that custody will be awarded to the parent who was the primary caregiver, which is typically the mother.

b. Emotional Bonding:

The emotional bond between child and parent is an important factor in custody decisions. Given the time and emotional investment that mothers make in their children's lives, the mother-child bond is often perceived as strong, which gives mothers preferred custody. Courts prioritize continuity of care and emotional stability, considering the deep-rooted connection nurtured through daily interactions, caregiving, and emotional support. This bonding is crucial for a child's psychological development, providing a sense of security and stability during the

upheaval of divorce.

Mothers are presumed to have a stronger emotional bond due to their role in the child's upbringing. This emotional connection is a decisive factor in custody disputes, guiding courts to prioritize the child's best interests by maintaining familiar and nurturing environments. While fathers also foster emotional bonds with their children, societal norms and legal precedents in India often side with custody decisions towards mothers, reinforcing the belief that maternal care is pivotal for a child's emotional well-being and overall development.

(B) Best interests of the child:

The "best interests of the child" is the utmost important factor while considering custody cases. This principle includes such factors as the child's emotional, educational, social, and moral well-being. The purpose of the courts is to secure a secure and stable future for the child, often favouring mothers who make custody decisions.

In the case of *Chapsky v. Wood*³, the judge observed that although the grandparents of the child promised a governess, higher education and superior opportunities for cultural enrichment, he recognised the bond of love between the child and her maternal aunt and uncle who cared for the child for over 5 years and wanted her to be part of their family. Therefore, basing it on the best interest of the child, the judge determined that the girl was doing where she was and should remain in that loving home.

a. Emotional stability:

Emotional stability is crucial for a child's development. Courts often find that mothers are better equipped to provide the necessary emotional support, training and comfort that children need, especially during and after the trauma of parental separation. The assumption is that mothers, by virtue of their close involvement in daily caregiving, are better equipped to ensure emotional stability and address the psychological needs of the child. However, Indian courts are increasingly recognizing the role fathers can play in providing emotional support, leading to more balanced custody decisions.

In the case of *Dhanwanti Joshi v. Madhav Unde* (1998)⁴, the Supreme Court awarded custody to the father, focusing on the welfare of the child. The court took into consideration that the child had been living with the father for a considerable time, and disrupting this arrangement could negatively affect the child's emotional stability. Shared parenting arrangements are gaining acceptance, reflecting a growing understanding that both parents contribute to a child's

³ *Chapsky v. Wood*, 26 Kan. SC 650 (1881).

⁴ *Dhanwanti Joshi v. Madhav Unde* 1998 (1) SCC 112.

emotional well-being.

b. Educational and Social Needs:

Courts strive to ensure that the custodial parent can provide a stable and supportive environment conducive to the child's academic and social development. Mothers are often seen as more involved in their children's daily educational and social activities. This involvement can range from attending school meetings, assisting with homework, ensuring regular attendance and participation in extracurricular activities. Their role in nurturing social skills through participation in extracurricular activities, maintaining peer relationships, and fostering a positive home environment is also considered crucial. Continued involvement in this is often viewed as beneficial for the child's development.

c. Moral and Ethical Guidance:

Mothers are often seen as the primary source of moral and ethical guidance in a child's life. This perspective, which is based on traditional cultural beliefs, influences court decisions in favour of mothers, on the assumption that it is more appropriate to promote moral values. The mother's role in instilling values, ethics, and discipline, lead to a judicial bias towards maternal custody. The belief that mothers are inherently better equipped to impart these essential life lessons influences custody rulings. But both parents are capable to offer a supportive and value-driven upbringing.

(C) Cultural norms and societal expectations:

Cultural values and social expectations play an important role in child custody decisions in India. The judicial mindset is heavily influenced by traditional views of family roles and responsibilities. In the landmark case of *Githa Hariharan vs. Reserve Bank of India* (1999)⁵, the Supreme Court emphasized the welfare of the child as the primary consideration, indirectly supporting the notion that mothers are often more suited for custody.

a. Role of mother in raising children:

In Indian culture, the role of the mother in raising children is highly valued. The mother is often seen as the heart of the family, responsible for the emotional and moral upbringing of the children. This cultural expectation reinforces the belief that mothers are best suited to parent young children. Traditional gender roles in India give women the responsibility of nurturing and nurturing. These roles are deeply embedded in social norms and may influence judgmental behaviour, making mothers willing to care for children.

⁵ *Githa Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228.

In the case of *Lekha v. P. Anil Kumar* (2006)⁶, the Supreme Court granted custody of a minor child to the mother, highlighting that the mother's care is crucial for the child's growth and development. This case highlighted the importance of the emotional and physical well-being provided by the mother, reinforcing her role as the primary caregiver.

b. Social support systems:

Mothers generally have greater support from extended family members, which can provide a more stable and nurturing environment for children. This expanded support system can influence court decisions, improving the quality of the mother's custody.

In the case of *Naveen Kohli v. Neelu Kohli* (2006)⁷, the Supreme Court granted custody to the father, noting that he was in a better position to take care of the child's educational and emotional needs. The court also considered the father's stable job and supportive family environment.

(D) Economic Considerations:

Economic considerations can also influence custody decisions. Mothers may often be financially dependent on their husbands, which affects their ability to access and care for their children. The right to control medical treatment of the child may be limited by economic factors. The parent may want to provide for the child but be unable to afford it.

a. Financial Stability:

Courts consider the financial stability of the parent. However, the primary consideration is the welfare of the child. Even though mothers are financially dependent, they often have access to child care and child support and maintenance programs to ensure the well-being of the child. Working mothers are also viewed favourably if they can demonstrate the ability to balance work and child care. The availability of a reliable childcare arrangement and the mother's ability to provide a stable environment are important factors considered by the court.

In the case of *Anil Kumar v. Maya* (2016)⁸, the Madras High Court awarded custody to the father, taking into account his financial stability and ability to provide a better educational environment for the child. The court emphasized that the father's role and involvement in the child's upbringing were significant factors in its decision.

In the case of *Ramchandra v. Seema* (2017)⁹, the Bombay High Court granted custody to the father, emphasizing the child's welfare. The court considered the father's active role in the

⁶ *Lekha v. P. Anil Kumar*, AIR 2006 SC 2662.

⁷ *Naveen Kohli v. Neelu Kohli*, 2006 (4) SCC 558.

⁸ *Anil Kumar v. Maya*, (2016) Mad HC.

⁹ *Ramchandra v. Seema* (2017), WP 2564/2017, Bom HC

child's education and upbringing, along with his financial stability and ability to provide a supportive environment.

b. Alimony and Child Support:

The legal system provides alimony and child support options to ensure that a child's financial needs are met. These programs help mothers who might otherwise struggle financially after divorce to gain custody of their children.

(E) Gender Neutral Approach:

The gender-neutral approach in child custody decisions in India represents a gradual and progressive shift towards focusing solely on the best interests of the child, without preconceived biases based on traditional gender roles. In this way, the capability, involvement and competence of both parents are valued equally irrespective of gender. It strives to ensure that custody decisions are fair and equitable and to provide the most stable, nurturing and supportive environment for the child.

In the case of *Vikram Vir Vohra v. Shalini Bhalla* (2010)¹⁰, the Supreme Court held that custody should be given to the parent who can ensure the best interest and welfare of the child, irrespective of traditional roles. This case set a precedent for considering the individual circumstances of each case, moving towards a more balanced and equitable approach in custody matters.

Legislative reform and evolving judicial processes increasingly support joint child care and joint parenting arrangements, and recognize that parents play an important role in child development. This pattern shift seeks to balance parental rights and responsibilities, promote the benefits of inclusive and comprehensive assessment of what is in a child's best interests. Focusing on the specific circumstances of each case, a gender-neutral approach requires that the best interests of the child take preference over everything else, yielding decisions that are consistent with contemporary understandings of parental roles and children's perspectives about the corresponding. In the case of *Gaurav Nagpal v. Sumedha Nagpal* (2008)¹¹, the Supreme Court granted custody to the father, emphasizing that the paramount consideration in custody cases is the welfare of the child. The court held that custody decisions should not be influenced by the gender of the parent but by who can better provide for the child's emotional, educational, and social needs.

¹⁰ *Vikram Vir Vohra v. Shalini Bhalla*, (2010) 4 SCC 409.

¹¹ *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42.

a. Father's rights in custody:

In India, fathers' rights in child custody cases are gaining recognition, reflecting a broader shift towards equitable parenting responsibilities. Historically, custody decisions favoured mothers, especially for young children, based on the presumption that they are the primary caregivers. However, contemporary legal perspectives are evolving, emphasizing the importance of the father's role in a child's development. Courts are increasingly considering fathers' emotional bonds with their children, their ability to provide financial stability, and their involvement in daily activities. This shift is driven by a growing awareness that both parents play crucial roles in a child's life.

Joint custody and shared parenting arrangements are becoming more prevalent, ensuring that children benefit from the presence and care of both parents. Advocacy groups and changing societal attitudes are challenging traditional biases, promoting a more balanced approach to custody that prioritizes the best interests of the child while recognizing the significant contributions fathers can make. This evolution marks a positive step towards ensuring that custody decisions are fair and centered on the child's holistic well-being.

b. Joint custody:

Joint custody in India reflects a shift towards more balanced and child-centric custody arrangements in divorce cases. Contemporary legal and social perspectives increasingly recognize the crucial roles both parents play in a child's life. Joint custody arrangements ensure that both parents remain actively involved in their child's upbringing, sharing responsibilities and major decisions related to the child's education, health, and overall welfare. This approach can vary, including alternating physical custody or shared legal custody, where both parents contribute to important decisions even if the child primarily resides with one parent.

In the case of *Yashita Sahu v. State of Rajasthan (2020)*¹², the Supreme Court emphasized that while the welfare of the child is paramount, both parents should ideally have the right to be involved in the child's upbringing. This case promoted the idea of shared parenting and joint custody, recognizing the significant roles of both parents in a child's life.

The courts prioritize the child's best interests, aiming to maintain stability and continuity in the child's life while fostering strong relationships with both parents. By promoting joint custody, the Indian legal system acknowledges the importance of co-parenting, aiming to provide a supportive and nurturing environment that benefits the child's emotional and psychological

¹² *Yashita Sahu v. State of Rajasthan, (2020) 3 SCC 67.*

development. This modern approach emphasizes a more equitable and holistic approach of parenting post-divorce, recognizing the valuable contributions of both mothers and fathers.

c. Custody of children under 5 years:

In India, custody of children under five years of age tends to favour mothers, reflecting legal rules and cultural norms. The statutory provisions under the Hindu Minority Guardianship Act, 1956, and the Guardianship Act, 1890 operate on the assumption that minor children derive maximum benefit from maternal care the "tender years" principle is fundamental in this approach, which means that mothers raise children in their early, formative years and are best suited to provide the necessary nurturing and stability for the children. This legal inclination is supported by cultural expectations, which traditionally see mothers as the primary caregivers.

The courts, focusing on the best interests of the child, often conclude that the emotional and physical well-being of children under five is best ensured through maternal custody. While there is growing recognition of fathers' roles and the benefits of joint custody, the prevailing practice in India remains to award custody of very young children to mothers, barring exceptional circumstances that would warrant a different arrangement.

V. CONCLUSION

The inclination towards granting custody to mothers after divorce in India is influenced by a complex interplay of legal principles, societal norms, cultural expectations, and judicial precedents. While the legal framework and traditional roles often favour mothers, there is a gradual shift towards more balanced and equitable custody arrangements. The paramount consideration remains the best interests of the child, guiding courts to make decisions that ensure the child's emotional, social, and financial well-being. As societal attitudes evolve and the legal system adapts, it is hoped that custody decisions will increasingly reflect a fair and holistic view of parenting, recognizing the valuable contributions of both mothers and fathers in a child's life.
