*Page 424 - 434* **DOI:** *https://doij.org/10.10000/IJLMH.117055*

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

**Volume 7 | Issue 2**

**2024**

# Navigating the Cradle: The Changing Dynamics of Parentage, Custody and Guardianship in India

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## ABSTRACT

*Ancient religious texts have offered varying perspectives on the concepts of custody and guardianship. However, upon closer examination of these texts, a recurring theme of paternalistic values becomes apparent, further reinforced by the application of the Parens Patriae principle. The dawn of the 18th century, while changing the aspects of human rights consequently started reshaping global theories of parentage. New societal and cultural norms, along with a heightened emphasis on gender equality and empowerment, ushered in the era of evolution of family structure. Now, at the crux of this transformation lies the paramount concern for the welfare of the child and the recognition of equal parental responsibility.*

*These shifts have had profound and far-reaching implications for family laws worldwide and India is no stranger to the same. This study seeks to explore the historical and contemporary dimensions of custody and guardianship, with a special focus on India. It aims to delve into the historical roots of parentage, custody, and guardianship in India, tracing the trajectory of legal provisions and societal perceptions. This paper also attempts to shed light on the nuances and complexities of Indian courts in such family matters. The paper concludes by emphasizing the critical need for ongoing legal reforms and societal dialogue to harmonize custody and guardianship laws with the evolving realities of Indian families. It is imperative to navigate the cradle of family law with the sensitivity to the diverse needs of all involved parties, especially the children at its heart.*

***Keywords:*** *Minors, Custody, Guardianship, Welfare, Parent Patriae.*

## I. INTRODUCTION

In the heart of India's rich cultural tapestry lies a realm of evolving dynamics in the intricate web of parentage, custody, and guardianship. The landscape of family structures and legal paradigms is undergoing a profound transformation, reflecting the intricate interplay of societal shifts, legal reforms, and changing perspectives on parenthood.

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 [ISSN 2581-5369]

India's family structures and legal frameworks have long been guided by tradition, faith, and cultural diversity. Yet, as society evolves, so too do the expectations and dynamics surrounding the roles and responsibilities of parents and guardians. The traditional norms that once rigidly defined familial hierarchies are adapting to accommodate an ever-shifting socio-economic landscape. As women's participation in the workforce increases, urbanization spreads, and individualism gains prominence, questions about custody and guardianship become more pressing, and the conventional ideals of parenthood are redefined.

It is presumed for a child to have no competence, whether physical, mental, or legal, to safeguard his/er own personal interests and welfare. The law, henceforth, necessitates the presence of an adult to protect the child or minor's person or property.

There is a lack of specific text regulating or even mentioning the concept of guardianship in early Vedas and Upanishads. It is only from Dharma shastras that the concept of families where the parents had the responsibility to look after the children and their interest in property arose. In Hindu law, a fundamental principle has its roots in the historical concept of kingship, where it was established that the king served as the ultimate guardian, acting as "parens patriae," for all minors within the state[3]. It's noteworthy that, with the exception of Narada, who acknowledged parents (both mother and father) as guardians[4], this aspect was relatively underdeveloped in the early legal framework. This limited progress in the law of guardianship could be attributed to the prevailing joint family structure, where the family's head (Karta) held guardianship over the minors.

Additionally, as children attended schools or ashrams for their education, their Gurus assumed the role of guardians during their educational phase until they completed their studies. Such concepts in Dharma shastras along with the ideological interference caused by the British invasion led to the formation of Hindu personal laws as we see them today.

It is to be remembered that India maintains a system of legal pluralism, according to which the different religious communities are governed by their respective laws[5]. Therefore, when one attempts to do a study on personal laws in India, one needs to look at the legislation governing other religious communities as well.

[3] VIII. MANU, MANUSMRITI 27, Gautama, 10, 48.
[4] XIII. NARADA, 28-29.
[5] BAJPAI, A., *Custody and Guardianship of Children in India*, *39*(2), Family Law Quarterly, 441–457, (2005).

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## II. GUARDIANSHIP AND MUSLIM LAW

Under Muslim law, guardianship is known as *Hizanat*[6]. Though in some other texts guardianship and custody might be used interchangeably, but under Muslim texts these concepts are overseen by different laws. Guardianship here means the complete supervision of the child throughout the period of minority of the child, on the other hand, custody simply refers a physical possession of the child upon a specific age. Here, only the father or the paternal grandfather is considered as the natural guardian of the child and hence have complete control of the child's development throughout minority. Even though mother is not considered as the natural guardian, she can still have custody of the child till the attainment of a certain age by the child. The idea behind such grant of custody is the fact that only a mother can nurse a child during the early ages.

All schools of Muslim law[7] deem the father to be the guardian of the minor, here the term guardian refers to natural guardian. Not one school of Muslim law allow the mother to be recognized as the guardian, natural or otherwise, of the child even after the death of the father or desertion by him. Among the Sunnis, father is the sole natural guardian and after him the executor appointed by the father is the considered to be the guardian, whereas among the Shias, the guardianship naturally passes on the grandfather (paternal) of the child, notwithstanding the presence of any executor selected by the father. Such right of guardianship of the father exists irrespective of any right of custody of the mother or any other women.

Though such right of complete guardianship only extends to the legitimate children of the father, that is to say, the father is neither entitled to the guardianship nor custody of minor illegitimate children. Further, the mother is only entitled to the custody of such minor illegitimate children[8]. In such a scenario, who is then considered as the guardian of the illegitimate child?

Under Muslim law, and illegitimate child is in every sense of the word *filius nullius* as it belongs to neither of the parents. Though such child is to be left with under the care and nurture of the mother, ensuring the child's welfare till the child reaches the age of 7 years.

The mother is entitled-

i) According to Sunni customs, to the custody of the male child until he attains the age of 7, and the custody of female child till puberty

[6] Child Custody
[7] 23rd Edition, DINSHAW FARDUNJI MULLA, PRINCIPLES OF MOHAMMEDAN LAW, 2017
[8] Gohar Begum v Suggi, AIR 1960 SC 63

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ii) According to Shia laws, to the custody of female and male child till the age of 7 and 2 years respectively.

Such right of custody of a mother is valid even after divorce but upon re-marriage the right ceases to be.

## III. GUARDIANSHIP AND CUSTODY UNDER OTHER PERSONAL LAW

Christianity, on the other hand, during its early days, did not delve much into the concept of custody or guardianship whatsoever as the idea of divorce did not have any seed in the religion yet. Guardianship later came to be in the sense that the lord of the land would have the guardianship over the person and the property of the land. Now, in India, Christians, devoid of any personal law on guardianship and custody, are governed by Guardians and Wards Act of 1890.

According to early Jewish law, the dominant practice was to deem the authority of father over other members of the family[9]. The idea that both parents had natural responsibility towards their child was less apparent during those times. The need here was not necessarily the nurture of the child but rather the exercise of the right of the father over his family. Further, the conceptual basis for legislative policy with regards to custody was somewhat vague during this period. During the second stage of development of Jewish law, the idea of father's right to authority over his family members was effectively replaced by the concept of best interest of the child, which was further reinforced in the third stage of Jewish law development. In a similar sense as Christians, Parsees and Jews also do not have any separate personal law on the topic of our concern in the present-day India.

In a manner akin to Section 26 of the Hindu Marriage Act, 1955, both Section 4923 of the Parsi Marriage and Divorce Act, 1936, and Section 41 of the Indian Divorce Act, 1869, empower the courts to issue temporary orders concerning the custody, financial support, and education of minor children during legal proceedings under these respective Acts. It's worth noting that the Guardians and Wards Act, 1890, presides over matters related to the guardianship of Parsi and Christian children.

From the study of the ancient legal systems, it becomes apparent that most of these systems focused largely upon the parent's legal right over their child and less emphasis was given to the developmental needs of the child. In all systems the child is supposed to respect the authority of the parent, especially the father, and submit to the same. The authority of the father is to be

[9] Kaplan, Y. S., *Child Custody in Jewish Law: From Authority of the Father to the Best Interest of the Child*, *24*(1), Journal of Law and Religion, 89–122, (2008).

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practiced by him determining the fate of his family members and the family members, in return, having full faith and submission to his decisions.

## IV. THE ROOTS OF THE LEGISLATION

Roman law used the word *tutela* to signify "an authority and power over a free person given and permitted by the civil law in order to protect one whose tender years prevent him defending himself"[10]. In the same course, the word *tuitores* was used for those were acting as protectors of such persons in the sense that the tutor did not confer any rights on the ward, rather, the tutor's authority only supplied for the deficiency for exercise of rights that the ward already possessed. Such tutorship of a male ceased when he reached 14th year and of the female ended when she reached the age of 12 years, but such a minor was still not considered to be *perfectae aetatis* (of full age) and as a result was not deemed fit to protect their own interest till the 25th year of age. On that notion, while the tutor was discharged, a *curator* was appointed for the rest of the years.

The roots of modern common law can be clearly traced back to the ancient roman law as also can be seen from the resemblance in the laws made for custody and guardianship. Much like the modern common law classification the ancient law also had 3 category classification for the type of tutor that can be appointed for the child, i.e., *testamentaria, legitima, or dativa*[11]. Tutela testamentaria meant the testamentary appointment of tutor or guardian by way of will of the parent. In the instance where no tutor was appointed by the paren's will, law prescribed the guardian from the relations on that child, as in the relatives were considered as potential guardians. In a case no guardian what so ever existed, certain magistrate had the power to assign a guardian to such minors termed as *tutor dativus*.

It is apparent from the above that roman law and English common law has threads connecting each other. Though one interesting thing to note here is that there is no mention of the mother and father of the child when it comes to signifying the guardianship or tutorship as they called it. The Romans did not, in fact, considered biological parents as guardians, the reason for the same could be hidden in their use of the word "tutor" for the guardian. While using the term *tuitores*[12] they seem to be referring to the custodian of the child rather than someone tasked with giving care and nurture to the child. They might have believed it to be the duty of the parents to provide such nurture to the child and hence did not give them a separate status.

[10] The Institutes of Justinian" tr. Sanders, L. I, T. XIII, 1, Chicago, 1876
[11] *Id.* at 5, L. I. T. XIII, 2
[12] *Id.* at 5

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English common law, building upon the idea as established earlier by roman law, recognized father as the "natural" guardian of the child, and after him the mother was considered to hold that position. Beyond the above, the lord of the land was to be the guardian of minors and such guardianship was to be repaid by "doing deeds of arms"[13]. Such was the case for male minors having any interest in land. Though such law was abolished in 1660 by an English statute that finally recognized a father's right to assign a testamentary guardian. Still, the sovereign was still deemed to be the protector of all infants and their interests as *Parens Patriae*, and by what may be assumed to be delegation of royal authority, it came upon Court of Chancery to exercise such universal guardianship. In such exercise of power, the court in many aspects followed the Roman Code.

The reason for delving into the vast history is to understand the actual roots of the legislation of guardians and custodians as we are subjected to in India today. It is clear from the above discussion that the Roman law had a significant influence on the English law of guardianship which in turn was brought into the Indian system of law by the British rule of Bharat.

### (A) Developments in legislation

Foreign principals and ideologies have had a heavy hand of influence in the development of custody and guardianship laws in India. It is during the British rule of India that the first law giving general framework on guardianship and custody was introduced in the state known as the Guardians and Wards Act in 1890[14]. It was enforced in India as a secular law, meant to govern all such personal matters in the same light irrespective of caste, community and religion. The legacy of Common law is carried in the Guardians and Wards Act, 1890 in the way that it promoted the supremacy of parental right in regards to custody and guardianship. The provisions under section 7 and section 17 of the present act are in furtherance of the concept of welfare of the child, the original act, on the other hand, subordinates such welfare while giving supremacy to the authority of the father.

The Hindu Minority and Guardianship Act of 1956 was one of the first comprehensive legislation on guardianship and custody and the allied matters concerning Hindu minors. The provisions of this act are not in derogation of the Guardians and Wards Act, 1890 but rather are complementary to the Act in a harmonious way. Section 8 of the act allows for the appointment of a guardian for a minor under certain conditions. It is to of note that such appointments are to be done keeping the welfare of the minor as paramount consideration. The consideration factors

[13] 2nd ed., De Laudibus legum Angliae, XLIV, 1741.
[14] BAJPAI, *supra* note 3, at 1.

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are age, sex, wishes of the minor and the character and capacity of the proposed guardian. Section 13 builds upon the above and expressly mentions the use of welfare of the child as a deciding factor in custody cases. Further mentions of the welfare of the child/minor can be seen in sections 19, 25 and 26 of the Act. Both Hindu Marriage Act[15] and Special Marriage Act[16] empowers courts to make necessary provisions regarding the custody, maintenance and education of the minor child, consistent with the wishes of the child whenever possible and wherever required[17]. In case of any conflict between the wishes of the child and his/her best interest comes to surface, it is general practice to give more importance to the welfare of the child. The ultimate choice is for the court to make, and while it might seem like blatant ignorance towards the minor's wishes, such discretion is given to the court to protect the minor from his own immaturity.

Supreme Court's guidelines in the case of **Gaurav Jain v. Union of India[18]** are also of relevance. In this landmark case, the Supreme Court issued guidelines for determining the custody matters involving children of sex workers. It was noted by the Apex court that equally to adults, the minors also have the right to equality of opportunity, dignity and care, and protection and rehabilitation by the society. Further, such right shall not be prejudiced based on the character or nature of work done by the parent.

Juvenile Justice (Care and Protection of Children) Act, 2000, is an important piece of legislation in India that focuses on the care, protection, and rehabilitation of children in conflict with the law as well as children in need of care and protection. While the primary emphasis of this Act in on the juvenile justice system, it also contains provisions related to custody and guardianship of children. Section 4 of the Act sets the tone of the entire legislation by putting paramount consideration on the best interest of the child. Section 7 of the Act furthers the theme and allows for the appointment of guardians for children who do not have parents, family members, or suitable persons to take care of them. The appointment of guardians is made with the child's best interest in mind. The act also provides for remedies like Sponsorship and Foster care, Child Welfare Committee, and Institutional care for the orphan minors under sections 34 and 29.

[15] **Section 26** of the Hindu Marriage Act allows courts to issue temporary orders during any proceedings under the Act. These orders can pertain to matters involving the custody, financial support, and education of minor children, and the court should consider the children's preferences. Furthermore, this section empowers the court to alter, suspend, or cancel any interim orders that were previously issued.
[16] **Section 38** of the Act has provisions similar to section 26 of Hindu Marriage Act.
[17] 2012 Edition, DR PARAS DIWAN, LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY, Universal Law Publishing Co. New Delhi,
[18] 1997 (8) SCC 114

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## V. COMPLEXITY AND NUANCES IN JUDICIAL SYSTEM

### (A) The perceived notion

Courts tend to have preconceived notions regarding legislative topics whether by way of precedents or by way of societal norms, morals and good conscience. In the same sense, certain preconceived notions are also present when it comes to allotting custody for minors. Deep influence of the Tender year's doctrine of the west is quite apparent from the judgements of various courts across India which tend advocate for the mothers having custody of the child during the early years of and infant's development[19]. Such notions are often supported by the legislation, but even then, such preferential right to custody is not absolute in nature and is rebuttable on the ability, or lack thereof, of the mother to care for the child.

Another such notion is mothers' getting preferential custody of a female minor[20]. Though it might seem discriminatory, such notion actually stems from the societal fear of men mishandling the opposite gender. On top of that, the cultural system of giving more importance to the mothers in matter of care and nurture give her superior position over fathers in matters of custody.

A form of socio-statutory conflict seems to arise in cases of guardianship, specially under Hindu Minority and Guardianship Act. The society, more or less, have a clear preference of mothers over fathers in matters concerning nurture and care of the minor, but when we look at the statutory side of things, the father continues to have preferential position over the mother, as it is only in exceptional circumstances that the mother becomes the first natural guardian[21]. While section 13[22] is ultimately subject to the welfare principle, in response to the stronger rights of the father, the welfare principle is the only provision that mother may use to argue for guardianship in case of disputes.

Preconceived notions often lead to prejudices harmful to both parents as well as the minor. The beauty of law is that where it does not possess the necessary instruments to decide on contemporary issues, it borrows from other disciplines all the while maintaining its own interpretation of knowledge. An attempt at a similar remedy, as mentioned above, is being made by the western states by inclusion of a professional psychologists in the custody and guardianship trials. The effectiveness of such practices has also been questioned as the courts

[19] Till the minor attains the age of 5 years as given by the judgement of K.S. Mohan v. Sandhya Mohan, AIR 1993 Mad 59.
[20] 10th edition, DR. PARAS DIWAN, FAMILY LAW, Pg. 256, Allahabad law agency, 2013
[21] Gita Hariharan v Reserve Bank of India, (1999) 2 SCC 228.
[22] Hindu Minority and Guardianship Act, 1956, § 13, No. 32, Acts of Parliament, 1956 (India)

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are at the discretion to selectively choose the information to give supremacy to. As a result, it is almost impossible to remove the aspect of preconceived notion. But there is still a remedy to the above situation.

As discussed in the previous sections of this paper, the early norms considered it to be the right of the parents to have custody of the child and no regards to the child's own wishes were present. This initial err in their decision has thankfully been replaced by giving importance, proportional to his age[23], to the child's desires and wishes. Slowly, but steadily, and with the increased understanding of the complexity of childhood development, the notion of welfare of child became the norm. The court while referring to the Guardians and Wards act, held in the case of **Satyanarayana and Ors. V. Bihari Lal and Ors.[24]**, that in matters of child custody and guardianship the minor's welfare and the minor's wish is of utmost importance.

A minor having attained the age of discretion may change his guardian or the person who has his custody under the present notions. But such discretion is to be practiced under the supervision of the court. The courts here decide the 'age of discretion', as there is a lack of any statutory direction on the same. In general, the age of discretion is considered to be 16 for male minors and 14 for female minors, but it also varies from court to court and situation to situation. It is important to reiterate here that the objective of such notions or provisions is to protect the minor from his own immaturity.

**(B) Minor's welfare and right of the parent**

The archaic view of custody as a right of parent was broken by the English doctrine of 'Tender Years' which was introduced in 1839 and which proposed for the first right of custody to the mother till the minor attained the age of 7 years. From the British route the doctrine came to us and is something that has crystallized in our personal law by way of precedents supporting the doctrine. When deciding custody disputes, it's crucial to focus on the "positive test," which involves identifying the factors that serve the child's best interests, rather than the "negative test," which revolves around proving the inadequacy of the applicant[25].

By now we have indeed taken note of the phrase 'welfare of the minor', but what does this 'welfare' actually mean, does it signify the love and affection given by the parents, or it is more material in nature as to taking care of the basic needs of the child? Several courts have made an attempt at answering the above question. In the case of **Tejaswini Gaud v. Shekhar Jagdish**

[23] Hewer v Barayant (1969) 3 All ER 578.
[24] RLW2003 (1) Raj 406
[25] 4th Edition, KUSUM, CASES AND MATERIALS ON FAMILY LAW, 316, Universal Law Publishing Co. Pvt. Ltd., 2015

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**Prasad Tewari**[26], the welfare of the child was said to include various factors such as health, education, ethical upbringing, economic wellbeing of the custodian or guardian, child's comfort, etc. A more comprehensive judgement was given in the case of **Lahari Sakhamuri v. Sobhan Kodali**[27], where certain crucial factors to be kept in mind while determining the welfare of the minor was delineated as, (1) maturity and judgement; (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 (7) factors involving relationship with the child.

While dealing with custody cases, a court in neither bound by strict rules and procedures of statutes nor by precedents. Therefore, while judgements in cases like **D. Rajaiah v. Dhanpal and Anr**.[28], support the idea of first right of custody of the minor being with the natural parents, there are indeed exceptions to the norm. In the case of **Mohan Kumar Rayana v. Komal Mohan Rayana**[29], it was held that the right of parents will be considered only in the light of the welfare of the child. This stance of Indian Judiciary was further stated in **Rozy Jacob v. Jacob A Chakramakal**[30], where further importance was given to the welfare of the child over the right of custody or persons.

Custody now has become more of a right of the minor to access his own welfare. By way of precedents, such right is no longer limited to the care giving ability of the parents. Other persons, interested in taking care of the child, other than the biological parents, are being considered for custody and guardianship as well. But where the issue of custody is between the parents, the rights of the other parent, the parent not having the custody, is to be clearly defined and such right has to consider the needs of the minor. Denial of visitation rights to the other parent would result to gross prejudice, unless valid reasons for such denial of rights exists. Similar was the conclusion in the case of Jwala v. Bachu, where the court gave a judgement against such prejudice of the father's rights to visitation.

## VI. CONCLUSION

The journey through the evolving landscape of parentage, custody, and guardianship in India reveals a tapestry of intricate transformations that reflect the nation's shifting social, cultural, and legal paradigms.

Throughout this research, we have witnessed how legal reforms have played a pivotal role in

[26] (2019) 7 SCC 42
[27] (2019) 7 SCC 311
[28] AIR 1986 Mad 99
[29] (2009) 3 Bom CR 308
[30] (1973) 1 SCC 840

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redefining family dynamics in India. From laws empowering women and protecting their rights to the reevaluation of custody and guardianship principles, these reforms have paved the way for more equitable, child-centered, and inclusive family structures.

The implications of these changes are far-reaching, resonating through the heart of Indian society. The transformation of parental roles, the recognition of diverse family structures, and the ever-increasing focus on the welfare of the child have redefined how family's function and interact. The evolving cultural landscape is a testament to the resilience and adaptability of Indian society, as it navigates the delicate balance between tradition and modernity.

As we conclude our exploration of this dynamic terrain, it is evident that the evolving dynamics of parentage, custody, and guardianship in India are a testament to the nation's commitment to safeguarding the rights and well-being of its youngest citizens. It is a reflection of the changing aspirations and values of its people, and it exemplifies the nation's journey towards a more inclusive and equitable society.

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 [ISSN 2581-5369]