

Study on Social, Religious and legal Positions Relating to child custody

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Abstract - This study looks at the topic of child custody from a variety of different angles, including social, religious, and legal. Which In most cases, the decision on who will have custody of children in India is made by a court with appropriate authority There are many different religions prevalent in India; thus, each religion has its own canon of child custody rules that control the process by which a parent can seek custody of their child. This is possible since India is a secular nation. The laws dealing with marriage and personal law always includes provisions for resolving concerns pertaining to child custody. In most cases, the parent who can demonstrate financial stability, positive parenting qualities, and the capacity to cause the least amount of disruption to the child will be awarded physical possession by the court.

Keywords - social, religious, child, custody.

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INTRODUCTION

The terms "child custody" and "guardianship" are legal terms that describe the legal and practical relationship that exists between a parent and his or her child. This relationship includes the parent's responsibility to provide care for the child as well as the parent's authority to make decisions regarding the child's upbringing. Protection of children was never considered an important function of government in any of the ancient civilizations. For instance, in ancient Rome, fathers had an almost unfettered inherent freedom to select what was best for their children in terms of health and safety. It was the family's job to look out for the wellbeing of children, not the government's worry or responsibility. The vast majority of other ancient governments did not impose any limitations on the right of a parent to inflict bodily punishment, including the act of infanticide. Child custody is widely considered to be the most contentious aspect of family law. The most difficult and emotionally exhausting aspect of the divorce process is determining who will have custody of the children. The suffering of children and babies is inflicted upon them despite the fact that they are not responsible for it. Due to the tremendous emotional connection they share with their children, both parents are eager to maintain custody of their children. In India, a court known as the Guardian and Wards Court is the body responsible for resolving cases of this nature.

Custody Arrangements for Children In India

"In India, a court of competent jurisdiction usually awards the custody of children in one of three ways":

1. Physical Custody.

"When one parent is awarded physical custody of a kid, the youngster is put under that parent's guardianship", with the other parent having the opportunity for occasional contact as well as visitation. The purpose of a custody arrangement such as this is to provide the child with a better existence in an environment that is safe and meaningful while also assuring that the child will not be deprived of the affection of the other parent during the years in which the child is developing emotionally.

2. Shared Custody

"Even if Indian courts believe that it is best for a child's welfare, having joint custody of a child does not mean that both parents are required to remain together because of the child". It just means that both parents have the right to make decisions on the child's upbringing. When a child is considered to have joint custody, both of the child's parents share the responsibility of caring for the child while the child stays in their physical possession. It's possible that the kid will spend time with each parent every few days, every week, or perhaps once a month. This is beneficial for the child because, for one thing, the child is able to get the attention of both parents, and for another thing, the parents are able to take an active role in the lives of their child.

3. Legal Possession

Having parental rights over a child does not always entail that the child will physically reside with either parent or vice versa. It only suggests that the parents have legal custody of their children and are able to make all choices pertaining to their children,

including those concerning their education, medical care, and other concerns. In most cases, both parents will be awarded legal custody of their child concurrently. However, if the divorce is contentious and the parents are unable to reach an agreement over any aspect of their child's upbringing, the court may decide to award legal custody to only one of the parents.

How To Know The Type Of Custody Granted?

"The parent who is awarded custody of the child has full legal and physical custody of the child until the court issues a judgement that precisely outlines the criteria described in the previous paragraph. If the court decides to award any other type of custody, it will be detailed in the judgement and communicated to both parties in an understandable manner".

Who Is Entitled to Child Custody?

Either the mother or the father of a kid may file a petition to gain custody of the child. It is possible for a child's maternal or paternal grandparents or other relatives to file a custody claim on their own volition out of compassion for the youngster in the event that either or both of the child's biological parents are unable to care for them due to the operation of other laws or because they have passed away. In many different types of cases, the court will appoint a third person to act as the legal guardian of the kid.

Who Has Priority When It Comes To Child Custody?

"Regardless of the claims of the parties to the custody of children, the Honorable Supreme Court and other Indian courts have repeatedly stated that the primary consideration in determining that should have custody of a minor is the minor welfare. This is the case even when the parties have competing claims to the custody of children". Under both Hindu law and common law, the mother is presumed to be legally entitled to custody of a child who has not yet reached the age of five. In the vast majority of cases, mothers are awarded custody of older female children, while fathers are given custody of older male children. In addition, if the kid is older than nine years old, the court will take into consideration the child's choice. When it is established that a mother is abusing or neglecting her child, she loses custody of that child.

When the mother's financial situation is worse than the father's, but the father has remarried and has children from his second marriage, who gets custody of the minor?

Simply because the mother has a lower income than the father does not give her any less responsibility as a guardian in these kinds of situations. In this particular case, the maintenance of the kid is the responsibility of the child's biological father.

Furthermore, the law indicates that a stepmother's primary obligation of care and attention is to her own children, which, given the fact that the biological father is likely to be at work all day, demonstrates that the biological mother is the more suitable guardian for the young child.

OBJECTIVE

1. To research the various types of child custody arrangements in India.
2. Researching the social, religious, and legal aspects of child custody.

Legislations Governing Child Custody under Different Laws in India:

Because India is a secular nation, its citizens practise a variety of religions, and each faith has its own canon of child custody rules that dictate the process by which a parent can petition for custody of their child.

1) Legal custody the processes and requirements for acquiring custody of a child in accordance with Hindu Law are laid out in detail in "Section 26 of the Hindu Marriage Act 1955, Section 38 of the Special Marriage Act 1954, and Section 26 of the Hindu Minority and Guardianship Act 1956".

a) Hindu Marriage Act of 1955, Section 26

It addresses the child's maintenance, care, and education, and the only way for the child's custody to be accepted is if both of the child's parents are Hindu. According to this act, the court has the authority to issue orders, judgments, modifications, and other papers pertaining to child support at any time, and it must make a decision about the current case within sixty days of receiving notice of it.

b) Section 38 of the 1954 Special Marriage Act

"If both parents are of different faiths or have entered into a judicial marriage, this act certifies the child custody. Under this statute, the court may issue orders, judgments, revisions, and" other documents relating to child support at any time and dispose of the pending decision within 60 days after serving of notice.

b) The Hindu Minority Protection and Guardianship Act of 1956

1) If a child is raised Hindu, only the biological parents have the right to seek custody of them when they become an adult.

2) Custody Under Hindu Law In contrast, under Muslim law, only the mother has the legal right to petition for custody of her child until the court

determines that she is not responsible for any wrongdoing. The mother is the legal guardian of her child until the child achieves the age of puberty or the age of majority, which ever comes first for a female. This rule applies to boys until they reach the age of seven. As the natural guardian of the child, the father is the one who maintains custody of the child until the child achieves the age of majority or puberty, whichever comes first: seven years old for a boy or the age of majority for a girl.

3) Christian Law and Custody

The Christian Church is required to abide by the restrictions and changes outlined in Section 41 of the Divorce Act of 1869 with regard to the determination of who gets custody of the children. Additionally, "Sections 42 and 43 of the same Act give the court with the ability to decide on the child's custody after the judgement of separation has been handed down. The child is given to a person who serves better and is demonstrated to be a better guardian for the child, and the claim may even be dropped if the court judges that both of the child parents are unable to provide a healthy environment for the child to grow up in".

4) Parsi Law and Custody

The Guardians and Wards Act of 1890 is the legislation in Parsi jurisdiction that governs child custody issues. It will stop at nothing to assure the child's safety and happiness, as this is its fundamental objective, and it will do everything it takes to achieve this objective.

In the context of family law, "child custody" refers to the legal guardianship of a child under the age of 18 that is assigned by the courts. In cases involving divorce or the annulment of a marriage, the question of who will have custody of the children is frequently brought before the court. In the majority of cases, both parents are awarded legal custody of their children; however, only one parent is granted physical custody of the children. Family law courts frequently give greater weight to what is in the child's or children's best interests than they do to the strongest reasons presented by either parent. In most cases, the parent who can demonstrate financial stability, positive parenting qualities, and the capacity to cause the least amount of disruption to the child will be awarded physical possession by the court. Both parents have equal rights and responsibilities with regard to the legal custody of their children until the kid reaches the age of 18 or becomes legally independent. Any choice a parent makes about a child's medical care, religious upbringing, or insurance coverage, for instance, has the potential to have an effect on that child's overall health. When one parent has custody of their child's physical belongings, that parent is exclusively responsible for the child's housing, education, and nutrition. In most cases, the non-custodial parent is

allowed to continue to have visitation rights. There are a variety of religions that are followed by people in India, and each of these religions has its own specific norms and ideas on custody. The totality of personal law according to the Hindu Law on Custody The issue of parental responsibility is tackled head-on by laws pertaining to marriage. However, in order to make advantage of the provisions of the marital Acts, there must first be an active procedure being conducted in accordance with the Act. The Hindu Minority and Guardianship Act, which was passed in 1956, affords further protection for Hindus (HMGA). Additionally, there was a law passed in 1890 called the Guardians and Wards Act. (GWA). This is a secular law that applies to the appointment and declaration of guardians and other related concerns, regardless of caste, community, or religion; however, the court will consider the parties' personal law in certain cases. This law applies to the appointment and declaration of guardians and other related concerns. The HMGA (and other personal laws) and the GWA are complementary to one another rather than incompatible, and it is necessary of judges that they interpret both of them in a way that is harmonious with one another. When it comes to making a decision about custody and guardianship of a child, the child's health and happiness should take precedence over all other considerations. The concept of "welfare" needs to be understood in a wide sense so that it may include not only the child's physical but also their emotional and moral well-being, as well as their interactions with other people.

The decisions made in both English and Indian courts are replete with statements such as the following: (i) younger children ought to be placed under their mother's care; (ii) older boys ought to be placed in their father's custody; and (iii) older females ought to be placed in their mother's custody. However, these are only general statements made by the judiciary, and there is no one rule that always applies. Since the father is unable to provide the essential level of maternal connection for the young kid's healthy growth, it is generally agreed upon that the mother should have custody of the child while they are still small. It is now also required for the healthy psychological development of children and adolescents during their formative years.

"The Hindu Minority and Guardianship Act of 1956 has a provision that specifies that primary physical custody of a child who has not yet reached the age of five shall be with the kid's mother". Indian courts have, for the most part, retained this approach, despite the fact that other personal laws do not have a clause similar to this one. According to the author of the cited passage, CJ Beaumont, "If mother is a competent person to assume responsibility of the youngster, it is very difficult to

identify an adequate substitute for her for the child."

Muslim Law on Custody:

It is impossible to deny a mother the right to main and primary custody of her children as long as she cannot be shown to be guilty of improper behaviour. This right belongs to the mother. As long as the mother does not violate any rules, she is eligible to have custody of her child. This legal provision, which is referred to as the *hizanat* right, can be invoked against the father or anybody else. The right of the mother to *hizanat* was first and foremost created for the benefit of the mother's offspring; as a result, it is not an unqualified right. ' ' \s'Son—" The right of *hizanat* that a mother has over her son is considered by Hanafis to be terminated when the child reaches the age of seven, according to a law that is widely accepted in their community. According to the beliefs of Shias, a woman has the legal right to custody of her infant until the kid is old enough to be weaned. The Malikis are of the opinion that a woman retains the right of *hizanat* (guardianship) over her son until the child reaches the age of puberty. The Hanabalīs and the Shafiīs both adhere to the same set of norms. "Daughter- Among the Malilikis, Shafiīs, and Handballs, the mother keeps care of her daughters until they marry. However, among the Hanafis, the mother has custody of her daughters until they reach puberty. According to the laws of Ithon Ashari, the mother retains custody of her daughters up to the age of seven, even if she remarries. The mother has the legal right to custody of her children up until the age that is required by the educational institution in which the child is enrolled, regardless of whether or not the child is legitimate. A mother has no obligation to cede her rights to anybody, not even to the man who is the biological father of her child. In the Shia religious tradition, the role of *hizanat* is passed down from the mother to the father. In the event when both biological parents are unable to care for the child or are unwilling to do so, the grandpa has the right to exercise custody. Among the Manikins, unmarried women have the right to exercise custody.

1. maternal grandmother
2. maternal great grandmother
3. maternal aunt and great aunt
4. full sister
5. uterine sister
6. consanguine sister
7. paternal aunt

Father's right of *hizanat*-

The right of the father to *hizanat* is recognised by every school of Muslim law, provided that two conditions are met. First, the child must have reached the age at which the mother or other females are entitled to custody, and second, the kid must have reached the age at which the mother or other females are entitled to custody. In the event that there is no mother present or any other adult

female who is authorised to *hizanat* little children. Unquestionably, it is up to the father to choose a testamentary guardian for his children and to entrust that individual with the responsibility of taking care of his offspring. The following are examples of other male relatives that are eligible for *hizanat*:

1. nearest paternal grandfather
2. full brother
3. consanguine brother
4. full brother's son
5. consanguine brother's father
6. full brother of the father
7. consanguine brother of the father
8. father's full brother's son
9. father's consanguine brother's son

In the absence of the father, *hizanat* goes to the grandfather among Shias."

Custody under Christian Law:

The Indian Divorce Act, which applies to people of all religions in India, effectively solves the issue of child custody, despite the fact that Christian law does not have a special provision for it. The Indian Divorce Act of 1869 includes provisions for the regulation of child custody arrangements. In accordance with the aforementioned Act, Section 41 confers upon courts the ability to determine child custody arrangements for families going through the divorce process. Regarding the custody, maintenance, and education of minor children whose parents' marriage is the subject of any suit for judicial separation, the Court may, from time to time, make interim orders and make such provisions in the decree as it deems appropriate. Additionally, the Court may, if it thinks it is appropriate to do so, direct proceedings to be taken to place such children under the protection of the said Court.

In the case of *Rosy Jacob v. Jacob A. Chakramakkal*, the Supreme Court came to the following conclusion: "All orders connected to the custody of minor wards must be viewed as transitory orders created in the existing circumstances by their very nature." If it is judged that such a revision would be in the best interests of the wards, the court has the right to change such orders in light of new facts and circumstances, including the passage of time. At the bar, some of the settled cases that dealt with estoppel based on consent decrees were cited. Some of these cases are unnecessary. ' After a decree of judicial separation has been issued, the court has the authority to make, on an as-needed basis, any and all "orders and provisions necessary with regard to the custody, maintenance, and education of any minor children whose parents' marriage is the subject of the decree, or for placing such children in the care of third parties. In any suit for obtaining a dissolution of marriage or a decree of nullity of

marriage instituted in, or removed to, a High Court, the Court may make interim orders and make such provisions in the decree absolute or decree, and in any such suit instituted in a District Court, the Court may make interim orders and make such provisions in the decree absolute or decree. In any such suit instituted in a District Court, the Court may make interim orders and make such provisions in the decree absolute”

Parsi Law and Custody

The Guardians and Wards Act of 1890 addresses the issue of custody, and it is a well-established notion that the child's welfare is paramount - that is, the most essential factor considered by the Guardian Court when choosing custody of the child. This is because the Guardians and Wards Act of 1890 mandates that the court make its decision based on the best interests of the child. "Regardless of the parents' group or sect's customs or personal law restrictions concerning custody, every parent who seeks custody but does not already have custody must seek custody from the Guardian Court. This is the case even if the parent does not already have custody. To put it another way, the custody of a kid is never just handed over to one of the parents automatically.

Child custody in different laws

The factors which are used to determine in Custody Case:

1. In a custody case, there are a few major considerations to consider. These considerations aid the judge in making final decisions:
2. The age of little children. Typically, the age restriction is 18 to 21 years old. While the custody dispute is ongoing, the court will examine any alternate arrangements as the children grow older.
3. At the time of the case, the court needs to know both parents' financial situation as well as their desire to retain their children with them. It indicates that the court will take both parents' desires into account while making a judgement.
4. The bond between the young children and each parent will be taken into consideration by the court.
5. Each parent's emotional and physical health will be considered throughout the case duration.
6. The court will want to know whether each parent helps or supports the other parent's connection with the children.
7. If both parents have a history of neglect, abuse, or violence, tell us about it..

Most Important Factors in Child Custody

Other variables are also taken into account when it comes to child custody..

The parents' desires are as follows:

Following the conclusion of the divorce proceedings, the court will interrogate both parents who are seeking sole custody of their young children. If just one parent is granted custody of the child, however, the court's decision-making process will be far less complicated. On the other hand, if both parents want custody of the child, the court may have a difficult time deciding. As a consequence of this, the court's focus in this case will be entirely on the preferences expressed by the parents.

The children's aspirations

Even while the court does not put a lot of pressure on small children, they always want to give attention to the kid's choices and who they want to live with. This is because the court is concerned about the best interests of the child. However, if the court determines that the children would be happier with a parent who is more inclined to coddle them, then it will devise a different plan for the custody of the children while they are still young. In a nutshell, while making judgments, the court will take into account the ages of the children and will also listen to what the youngsters want.

Each Parent's Relationship with Their Children

The relationship that exists between the children and both of their parents will be the primary focus of the court's attention. If the court concludes that the young children are more likely to get along with one parent and that they have a strong attachment with that parent, then the court will grant complete custody of the children to that parent. The other parent will not be awarded custody of the kid but will instead be granted visitation rights and will be required to make child support payments. In a manner such as this, the court will place significance on the child's connection with both of their parents.

Children's and parents' mental and physical well-being

If one parent is physically incapacitated and unable to care for the kid, the court will make a different decision. The handicapped parent, partial custody, visitation, and child support will all be factors in the court's judgement. If one parent is mentally impaired, the court will grant the other parent full custody with child support consideration.

The needed modification

The court will decide how much of a shift the child must make in their life following the divorce of their

parents, as well as with whom they feel comfortable living and what they want to do following the divorce of their parents. This determination will be made by the court based on the aforementioned method for adjustment.

Neglect or accusations

If the court observes any negligence on either parent's part, the court will reassess child custody. If any of the child's or parent's allegations are shown to be genuine, the court will determine how to divide custody..

CONCLUSION

In India, the custody of a child is decided not only by personal laws but also by a statute that was passed in 1890 called The Guardians and Wards Act. The assignment of legal custody of a child for the purpose of pursuing the child's welfare is the most critical step to take; all other personal law conventions and rituals can be ignored if doing so is required. The child and the parents' wishes are taken into consideration, but the decision on the child's custody ultimately rests with the court. After doing some research and thinking about it, it's clear that child custody is one of the most contentious issues that arises from the divorce of the child's parents. Both the mother and the father are able to take care of the kid's personal hygiene and other aspects of their upbringing, such as their child's education and extracurricular activities, which makes it difficult for the court to decide which parent should be awarded custody of the child. Additionally, mothers are more likely to take custody of their children when the children are still young, allowing them to give more age-appropriate care. However, in the long run, the health and happiness of the kid is more important than who is awarded custody of the child. In most cases, the parent who can demonstrate financial stability, positive parenting qualities, and the capacity to cause the least amount of disruption to the child will be awarded physical possession by the court. Both parents have equal rights and responsibilities with regard to the legal custody of their children until the kid reaches the age of 18 or becomes legally independent. Both the mother and the father are able to take care of the kid's personal hygiene and other aspects of their upbringing, such as their child's education and extracurricular activities, which makes it difficult for the court to decide which parent, should be awarded custody of the child.

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