

Evolution of Child Custody Laws from 'Parens Patriae' to the 'Welfare of the Child'

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Abstract

Divorce is a process in which the actual victim is neither husband nor wife, but the children born out of the wedlock. The children of a divorced parents endure psychological or mental disturbance. Studies show that majority of the children of divorced parents shows deviant behaviour, prone to abuse due to lack of emotional support that need to be given in the particular age group. The custody rights during the ancient period was under the state i.e. 'Parens Patriae', thereafter the custody rights shifted to the natural guardians' rights. However, now the focus is on the 'Welfare of the Child' while granting custody. In custody cases normally the best interest of the child will be taken into consideration. It means that all custody and visitation discussions and decisions are made with the ultimate goal of fostering and encouraging the child's happiness, security, mental health and emotional development into young adulthood. The shift in custody law not only grants security to the child's interest but it is a mark that our society is progressing towards a better future. As the children are the future of our society and each and every child should be protected.

Key words: Custody, Divorce, Guardian, Parens Patriae, Welfare.

I. Introduction

Divorce is the termination of marriage. Over one and a half million children every year experience the divorce of their parents. Through divorce, the marriage gets annulled.

The husband and the wife takes their own path. In a society, family is the most crucial unit. It is the most fundamental form of society. A child is exposed to a family and it is the closest social environment. Family is the main group, as, it is the family that develops child basic attitudes.² Therefore, the struggle lies with

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²C.N. SHANKAR RAO, PRINCIPLES OF SOCIOLOGY WITH AN INTRODUCTION TO SOCIOLOGICAL THOUGHT 348 (S Chand and Company Limited, 2018).

the children of divorced parents. As they have no path to follow. They are eventually forced to follow the decision of the court. Divorce is the foundation of irrevocable damage to all involved, but utmost harm is caused to the children. The onus to nurture the child rests with the parents. With divorce rates touching a new high, the position of the child becomes one of concern. The term custody in the material sense has been used to refer to the care and keeping of a thing. It has been defined to include legal custody and physical custody. Legal custody refers to custody under the orders of the court or under the personal law to which the children are subject while physical custody or de facto custody refers to subjecting the child to the physical care and control of a person. The natural guardian of the child is the parents. It is always believed that it is best for the child to be raised by his parents. However, after divorce the custody of the child is given to the mother if the child is young. Different personal laws have different child custody provisions. According to the Hindu Minority and guardianship Act, 1956 the custody of the children who is below five years of age is vested to the mother.³ In Muslim law, after divorce the custody of infant child rests with the mother. While granting custody of the child by the court the main aim should always be the welfare of the child. Several factors like the age of the child, wishes of the parent, wishes of the child, sex of the child is taken into account by the court while dealing with custody issues. In *Roxanna Sharma v. Arun Sharma*,⁴ supreme court awarded custody of a minor child in the light of welfare of the minor.

II. Child Custody Laws and International Instruments: Evolution

Custody rights during the ancient period was under the state i.e., 'Parens Patriae'. Parens Patriae is a Latin term meaning 'parent of his or her country'. Parens Patriae is a doctrine that permits the state, power and authority to protect individuals who are deemed legally unable to act on their own behalf. According to P.V. Kane "as in Western Jurisprudence, so in India the king was looked upon as parens patriae, the protector or guardian of all minors. Gaut X 48-49 and Manu VIII 27 prescribe that the king shall protect the property of a

³ The Hindu Minority and Guardianship Act, 1956, Section 6(a).

⁴ Civil Appeal No. 1966 of 2015.

minor until he attains majority or until he returns from his teacher's home".⁵

In ancient period, as the society was usually run by the paternalistic values as such child custody and guardianship was given to the father only. But from the dawn of the 18th Century, the issue of their political rights and the equivocation of equality changed the socio-economic environment giving them the new domain of women empowerment which can be seen in the present context where the mother is given the responsibility of child custody and guardianship.

Under the Hindu law, the term custody is not defined in the Hindu Minority and Guardianship Act, 1956. Under the provisions of the Act, when a child has not completed the age of five years, the mother will be given custody of a minor child.⁶

According to Muslim law, after the dissolution of the marriage, the custody of infant child rests with the mother. Child custody cases under Muslim law vary according to the different schools of Muslim law. Under Hanafischool, custody of a male child remains with the mother till he attains the age of 7 years and female child till she attains the age of puberty. Under IthnaAshari school, custody of the male child is given to the mother till he attains the age of 2 years, and female child till she attains the age of 7 years.⁷

In child custody cases, there was a shift from the rights of the parents towards the "welfare of the child". The United Nations Convention on the Rights of the Child states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁸ Further Article 18(1) of the United Nations Convention on the Rights of the Child makes it clear that the "best interests of the child" will be the main concern.⁹

⁵3 PANDUGANG VAMAN KANE, HISTORY OF DHARMASASTRA 165 (Bhandarkar Oriental Research Institute, 1941).

⁶ Supra note 3.

⁷ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW, 161 (Oxford University Press, 2008).

⁸ The United Nations Convention on the Rights of the Child, 1989, Article 3(1).

⁹ The United Nations Convention on the Rights of the Child, 1989, Article 18(1).

The future of our society is in the hands of the children. The children who represents the future needs guidance as they belong to the vulnerable section of our society.¹⁰ Although the child is young and cannot express verbally what is happening in his life, the child will still be feeling the impact. Once the parents separate, the court decides with which parent the child is going to stay, the visitation rights of the other parent. In most of the Jurisdiction the “best interest” principle regulates the child custody disputes while making custody orders.¹¹ While judging any family issues the utmost consideration should always be the ‘welfare of the child’.¹² The welfare of the child includes a better health of the child, best educational attainment, proper mental and emotional behaviour, bond with the family and financial status.¹³ It means complete security, comfort, happiness and safety of the child. It refers to the growth of a child’s physical, psychological, emotional and social abilities.¹⁴ The ‘welfare of the child’ should be the foundation for determining custody orders rather than the parent’s ego and their rights. It is in the ‘welfare of the child’ to keep an intimate bond with both the mother and the father.¹⁵ Certain fundamental things need to be considered while determining the welfare of the child. These are “the wishes of the parents; the wishes of the child; the interactions of the child with the parents, siblings and other relevant individuals; the mental and physical health of all relevant individuals”.¹⁶

Custody and visitation order lays down with which parent the child is going to live with and how often the child is going to be with the other parent. The Judges must consider the love, affection and emotional relation between the child and each parent while making custody and visitation orders. While

¹⁰Kerin S. Bischoff, *The Voice of a Child: Independent Legal Representation of Children in Private Custody Disputes when Sexual Abuses is Alleged*, 138 University of Pennsylvania Law Review 1383 (1990).

¹¹Ibid. p. 1384.

¹²PAUL MILLAR, *THE BEST INTERESTS OF CHILDREN: AN EVIDENCE-BASED APPROACH* 3 (University of Toronto press, 2009).

¹³PAUL R. AMATO & ROSS A. THOMPSON, *THE POSTDIVORCE FAMILY: CHILDREN, PARENTING AND SOCIETY* 3 (Sage Publication, 1999).

¹⁴S.N. JAIN, *CHILD AND THE LAW* 41 (N.M Tripathi Pvt. Ltd., 1stedn., 1979).

¹⁵ Paul, *supra* note 13, at 52.

¹⁶DANIEL J. HYNAN, *CHILD CUSTODY EVALUATION: A NEW THEORETICAL APPLICATIONS AND RESEARCH ACCOUNT* 8 (Charles C. Thomas publisher Ltd., 2014).

granting custody, the court must consider the parent's plan for child's care and rearing. Children need stability in order to grow adequately. The court needs to scrutinise the constancy of the family in which the child is going to live. Child-care abilities of the parents must be considered while granting custody by the court. A parent must have the ability to nurture a child properly. The parent must be able to feed the child, provide the child with adequate amount of sleep, to take the child to school, to provide proper health care etc. After divorce the parental decisions for the child to cope up with the changes with proper care is important for the 'welfare of the child'.¹⁷

If the child is adept at developing an independent opinion, the child's wishes need to be taken into consideration by the court.¹⁸ However, the wishes of the child must be reasonable. The court will not ponder upon an unreasonable wish of the child.¹⁹

The environment in which the child lives should be healthy for his normal and healthy growth. An unhealthy environment where there are constant fights between the parents causes stress in the tender minds of the children. In the interest of the child, the child must be removed from an unhealthy environment as it hinders the children.²⁰

III. Legal Provisions for Child Custody in India

Under the Hindu Minority and Guardianship Act, 1956, Section 13(1) states that when the court appoints or declares a guardian the supreme factor shall be the "welfare of the child".²¹ Section 13(2) states that a guardian will not be appointed by the court if it's for the "welfare of the child".²² Section 7(1) of the Guardian

¹⁷ Paul, *supra* note 13, at 218.

¹⁸ The Guardians and Wards Act, 1890, Section 17(3).

¹⁹ Law Commission of India, Report No. 257, Reforms in Guardianship and Custody Laws in India, May 2015, available at:

<http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf> (Visited on June 8, 2019) p.42.

²⁰ *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*, AIR 1982 SC 1276 (India).

²¹ The Hindu Minority and Guardianship Act, 1956, Section 13(1).

²² *ibid.*

and Wards Act, lays down that for the “welfare of a minor” the court can make an order for the appointment of a guardian.²³ Section 17(1) states that the court while appointing a guardian needs to be guided by the personal laws of the minor for the “welfare of the minor”.²⁴ Section 17(2) of the Act lays down the factors (i.e., “age, sex and religion of the minor, the character and capacity of the purposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the purposed guardian with the minor or his property”) which needs to be considered by the court while determining the “welfare of the minor”.²⁵ Section 17(5) of the Act clearly subordinates the welfare of the child as a paramount consideration. As the Act lays down that the welfare of the minor should conform to the personal law of the minor and the willingness of the guardian.²⁶

Therefore, Section 7(1) and Section 17 of the Guardians and Wards Act, makes it clear that the welfare of the child is a paramount consideration has not been precisely stated. The welfare of the child principle has not been actually laid down.

However, the judiciary has tried to safeguard the principle of ‘welfare of the child’. In *Irfan Ahmad Shaikh v. Mumtaz*,²⁷ the Bombay High Court, upheld the principle of ‘welfare of the child’ and granted custody of a minor girl child to the mother even though the mother was remarried. As the child desired to live with the mother. In *Rosy Jacob v. Jacob Charmakkal*,²⁸ the Supreme Court stated that “the children are not mere play things for their parents. Absolute rights of parents over the destinies and lives of their children has, in the modern changed conditions, yield to the consideration of their welfare as human beings.”

²³ The Guardians and Wards Act, 1890, Section 7(1).

²⁴ The Guardians and Wards Act, 1890, Section 17(1).

²⁵ The Guardians and Wards Act, 1890, Section 17(2).

²⁶ The Guardians and Wards Act, 1890, Section 17(5).

²⁷ AIR 1999 Bom 25.

²⁸ AIR 1973 SC 2090.

The paramount consideration should always be the 'welfare of the child' while deciding custody disputes rather than the rights of the parents.²⁹ While determining custody disputes, the "positive test" that is the factors which constitute the 'child's best interest' needs to be determined rather than the "negative test" that is focusing on the incompetence of the applicant.³⁰ In *Nil Ratan Kundu v. Abhijit Kundu*,³¹ the custody of a minor child was given to the maternal grandparents. The father was arrested as the mother of the child 'alleged torture to death by the father' and therefore he was accused under section 498A and 304 of the Indian Penal Code, 1860. The grandparents nurtured the child. Once the father was granted bail, he failed an application requesting for the custody of the child under the Guardians and Wards Act. The Trial Court, approved the father's application and an order was subsequently made to handover the child to the father 'immediately'. The grandparents appealed against the order of the Trial court. The Divisional Bench of the High Court upheld the decision of the Trial court. The appeal made by the grandparents was approved by the Supreme Court and the father's application for the custody of the child was dismissed. The child in question was called upon by the court to find out his wishes. On this account the court found out that the child was happy with the grandparents. The Supreme Court held that the "negative test" whether the father is incompetent, unfit or prohibited to have custody of the child is not significant. It is the "positive test" whether such custody would be in the interest of the child is significant.

When a child is competent to express his opinion, the child's opinion should be taken into consideration while granting custody orders. The court while making custody orders need to consider the wish of the child, favourable environment for upbringing of the child and not better legal rights of either parent.³² In *Gayatri Bajaj v. Jiten Bhalla*,³³ custody of the two daughters granted to the father and the mother was given visitation rights. However, the daughters denied

²⁹KUSUM, CASES AND MATERIALS ON FAMILY LAW 316 (Universal Law Publishing Co. Pvt. Ltd., 4th edn., 2015).

³⁰*Ibid.*

³¹ AIR 2009 SC (Supp) 732.

³² Kusum, *supra* note 27, at 326.

³³ AIR 2013 SC 102.

to meet the mother. When the father and the mediator tried to convince the daughters to meet the mother, they behaved abnormally and declined to take food. The father filed an application requesting for vacation change the previous order. Considering the facts and circumstances of the case, the court withdrew the mother's visitation rights. The primary consideration should always be the 'welfare of the child' even if it abridges the rights of the parent.

Even though the judiciary have in number cases safeguarded the "welfare of the child" but the judiciary lacks precision as what precisely comprises the "welfare of the child". Therefore, in custody disputes there are no ways to safeguard the 'interests of the child'.³⁴ This is mainly because the provisions dealing with the "welfare of the child" is vague.

Joint custody of the child can help to combat the above discussed issues and strive towards the principle of 'best interests of the child'. As both the parent has a vital role in upbringing the child. In India, Joint custody for children is not mentioned in both the personal laws and the Guardians and Wards Act, 1890. While deciding custody and guardianship disputes, utmost importance is given to the "welfare of the child".

A loser is always a child in custody battle, therefore a new concept in child custody has emerged as 'shared parenting', where both the parents have right in nurturing of the child. In order to lessen the impact of divorce on children. In India the concept of shared parenting is new and it is progressively growing. For the full development of the child both the parent's guidance, care is necessary for the child.³⁵

IV. Conclusion

The family is the building block of society, and marriage is its foundation. Divorce has pervasive weakening effects on children. Divorce breaks the child

³⁴ Law Commission of India, Report No. 257, Reforms in Guardianship and Custody Laws in India, May 2015, available at: <http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf> (Visited on June 8, 2019) p.2.

³⁵ Caesar Roy, *Shared parenting system vis-à-vis custody of child- in India in need of legislation for caring children*, 6CNLUJ, 65(2016).

and the growth of the child is hampered. Therefore, the welfare of the child must be a paramount consideration while dealing custody disputes rather than the parents' rights. The child custody laws had a gradual shift from 'parens patriae' to the rights of the parent and then to the 'welfare of the child'. The shift in custody law not only grants security to the child's interest but it is a mark that our society is progressing towards a better future. As the children are the future of our society and each and every child should be protected.