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## CUSTODY: RIGHT OF PARENT TO RIGHT OF CHILD

### INTRODUCTION

The divorce rate in India is comparatively low to other countries as per different statistics, yet it cannot only be considered as a positive situation but also as a negative situation because it is not always that the wedlock continuing is as per the wish of the person involved or because of some other circumstances prevailing.

A married couple has lot of responsibilities like maintaining the home, their child, parent etc. especially in India where marriage in Hindus is considered as one of the ten sanskars for the purpose of purifying souls from hereditary traits. The marriage has an important aspect of child, which is both a responsibility and a right of both the parent. But sometimes there are circumstances where parent separate through divorce and the child has to suffer. This is where the child custody comes into the scenario. The child custody can be given to a single parent, grandparent or to any third person whom the court feels competent.

Guardian as under “The Hindu Minority and Guardianship Act, 1956” is defined under section 4 (b) of the Act. This section mentions that “‘guardian’ means a person having the care of the person of a minor or of his property or of both his person and property, and includes—(i) a natural guardian, (ii) a guardian appointed by the will of the minor’s father or mother, (iii) a guardian appointed or declared by a court, and (iv) a person empowered to act as such by or under any enactment relating to any court of wards;”. A property donated to a minor by some person and a guardian is appointed to take care or look after the property, that person would not be included in

the ambit of the word 'guardian' under section 4(b) of the Hindu Minority and Guardianship Act, 1956.<sup>1</sup>

There have been instances where the custody of the child is given not according to the child's wish but as per the aspiration of the parent of the child. The child has to suffer the pain of separation of his parent and in some cases not given a chance to choose as per his choice or attachment towards his parent. This leads to ruining the life of the child if the parent to whom the custody is given is not at all worthy of keeping the child and taking care of him.

The psychological balance is needed to be maintained of child after the divorce and there the court should take decision in favor of the child's welfare. There can be situation where a child's attachment is more towards the parent who is not financially strong, the court must make arrangement for the child's financial maintenance through another parent.

In the present circumstances, the court is trying to take the best interest of the child in scenario and accordingly providing the custody of the child. There has been shift in right of the parent to decide the custody to the right of child to decide his parent, though there is age fixed above which the child is given chance to decide his parent post-divorce, otherwise the court decides the competent person to take the responsibility of the child.

### **CHILD'S INTEREST**

When a couple gets divorced, the child suffers a lot due to breakdown of the wedlock. It becomes very difficult for children to get adapted in the conservative society of ours. The child may go under different emotions because it is a changing point for him also along with the couple.<sup>2</sup> The child has to go with one of them which is a big choice. Therefore, it is very much necessary that whatever decision is taken regarding the custody of the child, it should be done with utmost importance being given to the interest of the child.

When India was ruled by the British, the Privy Council at that time was of the opinion, that, the father of a child has the foremost authority for the custody of the child, until and unless it is proved that he is incompetent for the custody. But, still the utmost importance was given to the welfare of

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<sup>1</sup> Rajalakshmi v. Ramchandran (AIR 1967 Mad 113)

<sup>2</sup> Children and Divorce - Florida Divorce Source, available at <https://www.divorcesource.com/ds/florida/children-and-divorce-3640.shtml> (last visited Oct 2, 2019)

the child. In one of the cases the Privy Council had observed that, the father is considered as the natural guardian of a minor child, among the Hindus in India, he cannot during the lifetime pass on this to someone else.<sup>3</sup>

In the case of “*Subbuswami Goundan v. Hemaksm Ammal*”<sup>4</sup>, the petitioner was husband of a 13 year old minor girl and the respondents were her mother and step-brother. The petitioner had claimed that his wife was wrongfully detained by the respondents in their house and were not letting his wife come back to him. It was mentioned that the girl was not ready to return to her husband because of the fear of harsh treatment of her husband and she was living with the respondents out of her own will, thus there was no detention. Also, the respondents wanted her to be with her husband. The judges were aware that the will of the girl was due to the manipulation of the respondents, still they gave the judgment based on the declaration made by the girl. The court observed that the girl was ready to go anywhere else than her husband, though the consent of the minor girl is immaterial but the decision should be done should be in the welfare of the girl, therefore her preference for not going with the husband was upheld by the court.

There is no arbitrary right with any person to take the possession of the child immaterial of the fact that he is legal or a natural guardian, on the point that he has the authority of doing so because he is the child’s guardian. The state has all the responsibility to work for welfare of the minors who are not so mentally developed to decide what is right for them and what is not. The court has all the judicial power of the state and thus should always give decisions in welfare of the minor which involves decision regarding the life of the minor. The custody should always be given to the person whom the court seems fit to be the guardian of the child. In this case, there were two children of age 4 and 5, their mother had died. The custody thereafter was given to their grandparents and children’s father. The father appealed contending that he was the natural guardian of the child and thus should the custody of his children. The court observed that, the grand-parents financial condition and the environment in their house was better than that of father. Therefore, the custody physically was given to the grand-parents, but father was given right to meet the children every day and could take them to his home on holidays and leave them back to the legal guardian’s home

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<sup>3</sup> Annie Besant v. Narayaniah, (AIR 1914 PC 41)

<sup>4</sup> (1929) 57 M.L.J. 642

before the end of holidays, also he was given right to decide which school the children would study etc., the court believed that this was for the best interest of the children.<sup>5</sup>

It is mentioned in Mayne's Hindu Laws, that, any infant's possession is by default right of the natural parents which arises out of the responsibility of the infant on the parents. Even if the child does not want to live with the guardian, his wish stands immaterial and cannot stop the parent from having the custody, though with some exceptions. The custody of any material thing cannot match the pride of having the custody of the own child. If a parent entrusts the custody of child to someone else for child's betterment, if at some point he wished to take it back, he can do so without any restriction, however if revocation of such custody happens to create some problem, then the court has authority to interfere.<sup>6</sup>

In the case of "*Chander Prabha vs Prem Nath Kapur*<sup>7</sup>", the custody of a three year old minor child was in question. The child was living with his father who had given him the proper conditions and friendly environment in home. The mother approached court to apply for the custody of the child. The lower had asked the child whether he was happy with his father, to which the child agreed. The decision was given in favor of the father. The mother appealed in High Court. It was held that according to section 6(a) of "The Hindu Minority and Guardianship Act, 1956", a child below five years of age has to stay with his mother only being her as the natural guardian of the child. Thus, the custody was given to the mother of minor.

In the case of "*Gurmeet Kaur Batth vs State Of Punjab*", a minor child was brought to India by his grandparents while they went to visit the child and his parents in Canada. The mother of minor filed a case in Canada court for the custody of the minor from the grandmother, and it was ordered to bring back the child to Canada and give his custody to his mother. The grandmother in India filed a suit for declaring her as the guardian of the child. But, this was not allowed by the court and it was ordered to give back the custody of the child to his mother as she was his natural guardian and it was stated that "*mother's lap is the best cradle for a child*", therefore it is best for the child to be with his mother as she had sufficient income to take care of herself and her child.

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<sup>5</sup> Baby Sarojam vs S. Vijaykrishnan Nair (AIR 1992 Ker 277)

<sup>6</sup> Ibid.

<sup>7</sup> AIR 1969 Delhi 283

In “*Kirtikumar Maheshanker Joshi vs Pradip Kumar Karunashanker Joshi*”<sup>8</sup>, the custody of two minor children was in question. Their father was charged under IPC for the unnatural death of his wife. The custody was thus given to maternal uncle of the children, considering the status of the children and their preference towards their maternal uncle. Also, it was observed by the court that though father being a natural guardian is to be preferred above, but the welfare and interest of children is of the utmost importance for the court.

### **CONDITIONS CONSIDERED BY COURT**

Conditions set by the court are not yet properly discussed, but can be conferred through various case-laws. Some of the conditions are: “Child’s age, gender, mental and physical maturity; Parent’s age, gender, mental and physical maturity; Relationship and emotional ties between the parent and the child; Parent’s ability to provide the child with basic necessities of life and Child’s established living pattern.”<sup>9</sup> These are some basic conditions, but actual conditions that are considered are just the facts of a case which portray the situation of the child and the parties fighting for the custody. Every case has its own problems and circumstances, thus it is difficult to comprise all situations in some particular provision, and thus all the power lies with court to analyze the case and provide the best for the child.

The financial status of the parent is mostly considered while deciding the custody of the child, it is however estimated that approx. 35% of divorced parent live in poverty. Thus, the better one is given custody so that there are no problems faced when there is need of money at least for the daily necessities of the child.<sup>10</sup> Some people may refer to financial condition as an unimportant factor for the development of the child, also some researches have brought up the point that the being wealthy and showing that off for the custody may act as a negative point in getting the custody.<sup>11</sup> Money alone cannot contribute in development of a child as a responsible person, therefore it is not the sole requirement that can be considered while deciding the custody. It was observed in “*Munnodiyl Peravakutty v. Kuniyedath Chalil Velayudhan*”<sup>12</sup>, the welfare of the child cannot be decided only through the financial or emotional condition. There should presence

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<sup>8</sup> (1992) 3 SCC 573

<sup>9</sup> Vijender Kumar, IMPACT OF DIVORCE ON CHILDREN : A SOCIO- ECONOMIC AND LEGAL STUDY, 15

<sup>10</sup> Ibid

<sup>11</sup> Carolyn J. Frantz, Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes, 99 Michigan Law Review 216–237 (2000), available at <https://www.jstor.org/stable/1290330> (last visited Oct 2, 2019)

<sup>12</sup> AIR 1992 Ker 290

of balance between all the conditions that are required for the betterment of total well-being of the child. In this case the father was in Indian Army had presented the will to get posted in the city where his child lived and his lifestyle also showed that the man had good flow of income and a disciplined life, also his parents who were grandparents of the minor were in condition to take care of the minor and provide him with good friendly environment unlike the parents of the mother (who was deceased) of minor who were quite old and had a son to take care of whose mental condition was not well. Therefore, the custody was given to father of the minor considering the welfare of the child.

In some cases it may happen that the parents after getting divorce and getting the custody of the child, may remarry. It then becomes difficult for the child to adjust and may lead to adverse situations. It is duty of the family to be strong and make the relation work normally. In some situations youth may even leave their home due to some conflict with parent post-divorce, may leave the house and go for cohabiting with someone else before getting married, which may lead to consequences which are not much appreciated.<sup>13</sup>

There are certain provisions in the constitution which mention about the child rights, and which puts the burden on courts to do and decide best for the child. Article 39 (f)<sup>14</sup>, mentions that every child should be provided liberal and respectful conditions along with a suitable platform to build them in a healthy way, every child should be protected from any situation which may affect him adversely like desertion, exploitation etc. Article 15 (3)<sup>15</sup> gives authority to the state to make special provisions for children. The 86<sup>th</sup> amendment made it a mandate for the parents and guardians to provide their children of age between 6 to 14 years with education, under Article 51-A (k)<sup>16</sup>. This shows that there is necessity for the guardian or parent of any minor child to be competent enough to provide him or her with education, thus the court in a case while deciding the custody of the child, must keep in mind the situation of both the parties and ascertain which party will be more competent in providing the child with better education.

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<sup>13</sup> (PDF) Edgar F. Borgatta, Rhonda J. V. Montgomery-Encyclopedia of sociology. Volume 1-Macmillan Reference USA (2000).pdf | Nizam Azhari - Academia.edu, (Pg No, 707) available at [https://www.academia.edu/36354244/Edgar\\_F.\\_Borgatta\\_Rhonda\\_J.\\_V.\\_Montgomery-Encyclopedia\\_of\\_sociology\\_Volume\\_1-Macmillan\\_Reference\\_USA\\_2000\\_.pdf](https://www.academia.edu/36354244/Edgar_F._Borgatta_Rhonda_J._V._Montgomery-Encyclopedia_of_sociology_Volume_1-Macmillan_Reference_USA_2000_.pdf) (last visited Oct 2, 2019)

<sup>14</sup> The Constitution of India, 1950

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

Section 26 of “The Hindu Marriage Act, 1955” provides the court right to decide and pass interim orders or make provisions in the decree regarding the custody, education and maintenance of a minor child. Such orders or provisions can be made even after some decree had already been passed or during the proceeding as it may seem right to the court. Also, the court can suspend, revoke or change any provisions or orders passed before. All this can be done by an application by petition in the court. This gives an absolute right to the courts to take in consideration the welfare of the child and make changes accordingly time to time.

Section 13 of “The Hindu Minority and Guardianship Act, 1956”, mentions about the welfare of the child be given the utmost importance whenever court appoints a guardian for a Hindu minor child.

In “*Amit Beri v. Sheetal Beri*”<sup>17</sup>, the petitioner was father of the minor child and respondent was mother. It was contended that the respondent was of a bad character and had a habit of staying out of the house till late in night and the child had to be put in care home all the time, which was not good for him as he might get in bad influence there and which may affect his future. Also, the petitioners claimed to be one of the richest family of the town but were unable to produce the any proof for the same. It was proved that mother stayed out of the house late in night. Therefore, the custody was given to father of the minor, considering it the best for the child.

In “*Gohar Begum v. Suggi*”<sup>18</sup>, a dancing girl’s minor child, whose parentage was not known was being taken care by some other dancing girl. The mother of minor filed application for the custody of the minor. The lady who was taking care of the child mentioned that mother of the minor had the child to her to take care of him when he was born as she was not willing to do it herself. Though, it was found that the minor child was put in very friendly environment and there was no problem faced by him, the apex court held that keeping away the child from his mother amounted to illegal detention, and the custody was given to the mother.

The provisions and precedents outsource that, the prime and paramount consideration while deciding a case of custody is solely the welfare of the child, under what circumstances the child will blossom more and efficiently, though the preference of child after attaining an age where he

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<sup>17</sup> AIR 2003 All 18

<sup>18</sup> AIR 1960 SC93

is mature enough to choose his guardian is considered, but even then if the preference of child is does not seem right to the court, it can intervene in can choose the best for the child.

### **CUSTODY TO THIRD PARTY**

Third party is a party other than the natural guardian of a child i.e. parents of the child. Sometimes the situation arises where the parent of the minor child are insufficient to take care of the child, in that the case the custody can be given to any third party other than the parents. In some instances where one of the parent has deceased, then the custody cannot be necessarily be given to the other parent, it can be given to some other person also whom the court feels competent.

In “*Anjali Kapoor vs. Rajiv Baijal*”<sup>19</sup>, the appellant was the grandmother of the minor girl and the respondent was the father of the minor. The child had been with her grandmother since she was born and her mother had passed away in some tragic incident. The minor was studying in one of the reputed schools of the city and was very comfortable with her grandmother. The respondent did not show up for the proceedings and it was found out that he was re-married and had children out of that wedlock. Therefore, the court observed that there would be no sense of disturbing the child’s environment at this stage and thus the custody was given to the appellant, on the grounds that being a lady she can understand the condition of the girl minor better, also she had sufficient capacity to provide the minor with a nice environment and her father despite being the natural guardian was denied to get the custody.

In “*Nil Ratan Kundu vs Abhijit Kundu*”<sup>20</sup>, the father of minor child was convicted under IPC for dowry death, at that time the custody of the child was given to his father’s in-laws. When father got out of the jail on bail, he claimed for the guardianship of his minor son from his in laws. The lower court and High Court gave the judgment in favor of the father on the grounds that he was the natural guardian of the child. The appellants went to the apex court, wherein it was decided that both the lower courts were not right in doing so and it was for the welfare of the child that the custody should be given to grandparents of the child. The court considered the point that the child was admitted in one of the best schools in Kolkata and was provided with a very friendly and comfortable environment by the appellants. The court observed that the cases of custody should not only be decided on the basis of legal provisions, but also keeping in mind the ethics and morals

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<sup>19</sup> 2009 (3) AWC 2679

<sup>20</sup> 2009 (1) AWC 377 (SC)



that required for the child's development, thus should give the custody to the party which would be the best in providing so. Though the preferences of the child are important but the final decision still lies with the court and it should not waste such authority, therefore give the judgment for the welfare of the child.

In the case of "*Venkatarama Ayyangar vs Thulasi Ammal*"<sup>21</sup>, the mother of a 13 year old minor girl, filed petition for getting her custody from the child's aunt and uncle. The girl did not wanted to stay with her mother because she was told by her aunt and uncle that, her mother had poisoned her father and can even poison her. The girl under this belief hated her mother. The girl wanted to marry the son of her uncle and aunt and both of them had arranged the marriage a year or so before this case was filed, which was stopped by her mother through Child Marriage Restraint Act, this was also mentioned by the girl herself. The court held that the girl's preference of not staying with her mother cannot be ignored and thus, her mother was not custody of her own child, though the court was aware about how the uncle and aunt had poisoned the mind of the child.

In "*Muthuswami Chettiar and Anr. v. K.M. Chinna Muthuswami Moopnar*"<sup>22</sup>, the custody of a minor girl child was in question whose mother had died and father had re-married. The custody fight was between father of the minor and the maternal grandfather and uncle of the minor. It was contended that the father never took a step to meet his daughter even the house of his second wife was near to where the minor was living with her maternal grandfather. The father even failed to pay the maintenance amount for his daughter. The court observed that the minor was quite comfortable in the environment provided to her in her maternal grandfather's home. Therefore, the custody was given to minor's maternal grandfather and uncle not her natural guardian.

The above case laws provide some light on the grounds on which a third party can get the custody of a child. It shows that when the parent is incompetent to provide the care and affection which the child needs or is not that financially stable to provide the child with the daily or basic needs of life, then the court can give the custody of the to some other person. The child's preference may also play a good role in deciding the custody of the child. The child may prefer his relative whom he is comfortable to live his life. The court usually prefers some near relative to be the guardian of

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<sup>21</sup> (1949) 2 MLJ 802

<sup>22</sup> AIR 1935 Mad 195

the child, so that the child is also familiar with the guardian before giving the custody, and of course the most essential point to be considered is the interest and welfare of the child.

## **CONCLUSION**

The cases in India for deciding the custody of a child are in good number which means there is need for the court to be more efficient in deciding such cases. The court should not give a decision which may hamper the life or future of the child. The facts and the circumstances should be well analyzed by the court before arriving to any decision. Any child will grow the way he has his surroundings, he will learn what he will watch, that is why it is very much important to keep his surroundings as friendly and as comfortable as possible. There are very few provisions which mention about the custody, most of the provisions mention about guardianship and maintenance. There is mention about welfare of the child and the interest of the child. But there is need of some grounds to be specified which are necessary for a child to be present while deciding the custody of a child, merely circumstances in all the cases cannot be considered for deciding the custody of a child. Thus, there should be some initiative to be taken by the legislature in specifying the grounds for better future and of a child, whose custody comes in question in the court.