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Child custody in India: when is a father preferred over a mother?

Shruti Sinha^a

^aGovernment Law College, Mumbai, India

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“I don’t have children that I’ve lost in a bitter custody dispute. But I see an enormous wound in kids due to a lack of their dads.”

- Warren Farrell¹

Cracks in a relationship do not just impact the two persons involved in it, but a lot bigger number, especially in a sociable country like that of India where marriages are publicly celebrated as an auspicious union of two whole families. Even if we set the cultural narratives aside, disharmony in a marriage or its breakdown inevitably shakes up the entire world of the child born from it. The cases of matrimonial disputes following the question of child custody hold their roots in the genesis of civil law and have continued to increase exponentially with each passing generation. Correspondingly, the law has evolved itself around it to accommodate contemporary needs and deliver the best solutions possible. This short article aims to touch on one aspect of that evolution and further analyse it.

Keywords: custody, child, father, mother, welfare.

INTRODUCTION

It is a unanimous no-brainer that apart from being a direct tragedy for humankind, the Covid-19 pandemic has also influenced a number of other significant changes to our lifestyle,

¹ Warren Farrell, *Father and Child Reunion: How to Bring the Dads We Need to the Children We Love* (Tarcher 2001)

outlook, and relationships with others. However, since every coin has two opposite sides, staying at home may have had come forth as a bonding experience for many, but the flipside revealing the skyrocketing numbers of lockdown-induced divorce cases shall beg to differ to that. Divorce rates are increasing around the world, and relationship experts warn that the break-up curve may not even have peaked yet.^[2] As every disaster leaves behind collateral casualties in its wake, the unfortunate circumstance of a divorce or a judicial separation raises the issue of raising a child born in wedlock. In either scenario, the child is the one who suffers guiltlessly therefrom, so the least that could be done for its compensation should be to provide it with support, a comfortable lifestyle, education, and security, and an inadequate upbringing thereof would undoubtedly be aggravating. Hence, the decision of custody is of paramount significance in shaping a child's formative years and entire life thereon. Custody, by definition, refers to the physical and/or legal authority to keep and look after a child under the age of 18, or in some cases, 21, including the right to make the legal and financial decisions for and on the behalf of the child.

HISTORY OF CHILD CUSTODY

One of the earliest references to this matter dates as far back as the ancient Roman civilization where a child had been taken as the property of the father who had enjoyed the sole authority to control or sell them while the mother shared no rights with the child even after the father's death. In a similar vein, the 18th century English Common Law had indisputably awarded 'ownership' of the child to the father, which had not only included the unilateral power to make the legal and educational choices for the child but also an entitlement to its earnings, as an excuse for the possessive dominance just by the virtue of finance generation. This prerogative had been extrapolated itself throughout the west, including colonial America where sparks of rebellion had first been discovered, kindling in the form of pioneer feminist revolutions in the 1800s, eventually leading to the Seneca Falls Women's Rights Convention, 1848, popularly hailed as the first distinct step towards changing the mainstream of patriarchal hegemony.

² Maddy Savage, 'Why the pandemic is causing spikes in break-ups and divorces' (*BBC*, 7 December 2020) <<https://www.bbc.com/worklife/article/20201203-why-the-pandemic-is-causing-spikes-in-break-ups-and-divorces>> accessed 05 April 2022

Women had not looked back from that point onwards, and with the gradual awareness of their identity and rights, they had elevated themselves to the roles of ‘domestic caregivers’ and ‘managers of household affairs.’ By the 20th century, this progressing transition had precipitated the new norm, as had been evident from the ‘tender years’ doctrine of the English law which, with a complete change of heart, had now declared the mother as the natural owner of the child. Indeed, women had come a long way for political and legal justice, ironically to the present point sharing the need for another rectification.

THE SCENARIO IN INDIA

In India, the laws regarding the custody of children come under the following:

- Section 7³ of the Guardian and Wards Act, 1890
- Section 26⁴ of the Hindu Marriage Act, 1955
- The Hindu Minority and Guardianship Act, 1956⁵
- Section 38⁶ of the Special Marriage Act, 1954
- Section 40⁷ of the Juvenile Justice (Care and Protection of Children) Act, 2015
- Section 12 and 21⁸ of the Temporary Child Custody under the Protection of Women from Domestic Violence Act, 2005
- Section 125⁹ of the CrPC
- Section 49¹⁰ of the Parsi Marriage and Divorce Act, 1936
- Section 41¹¹ of the Divorce Act, 1869
- Muslim personal laws

³ Guardian and Wards Act, 1890, s 7

⁴ Hindu Marriage Act, 1955, s 26

⁵ Hindu Minority and Guardianship Act, 1956

⁶ Special Marriage Act, 1954, s 38

⁷ Juvenile Justice (Care and Protection of Children) Act, 2015, s 40

⁸ Domestic Violence Act, 2005, ss 12, 21

⁹ Code of Criminal Procedure, 1973, s 125

¹⁰ Parsi Marriage and Divorce Act, 1936, s 49

¹¹ Divorce Act, 1869, s 41

In the above provisions, the law axiomatically presumes the mother to be the natural caretaker of a child below the age of 5, and the Muslim law, as per the Right of Hazanat, extends this right to a boy till the age of 7 and a girl till she reaches her puberty. This is a reiteration of the later societal narrative where the father is now the incompetent one in the parenting of the child. This belief had derived itself from scientific as well as sociological factors. Empirical research evidence upholds the relationship of the child with its mother, right from its foetal stage where an unborn baby forms the bond, then after its birth, the innate dependence on its mother for food and care, to lifelong psychological dependency for softer support. After all, a child spends more time with its mother who stays at home to look after it than the father who goes outside to work and brings bread to the table. For generations, child-rearing had always been a mother's exclusive job; it had never been expected of a man to learn the art of parenting, and now, he is deemed to be incapable of it.

Other factors also play a role in inducing this favourite is the mother. More often than not when a marriage dissolves, it may be because of an unsafe environment, domestic abuse, harassment, and cases of addiction – vices that are typically more associated with the male partner of a relationship than his female counterpart. Moreover, considering the prevalent gender prejudices, in many cases, it may also be held that a father demands custody only to avoid paying the financial maintenance to the mother or to create psychological pressure on her. Accordingly, the law has biased between the mother and the father. An RTI response had shown that out of the total 83 child custody matters that went to court in a year, only in two cases was the custody awarded to the father.^[12]

PROVISIONS OF CUSTODY TO THE FATHER

However, established notions may not hold to be true for all cases and exceptions do exist. Recently, in October 2021, the Delhi High Court had, in a rare but noteworthy stance, granted the interim custody of two infants, a 4.5-year-old and an 18-month-old, to their father in the view that the mother had unethically ignored the wellbeing of her children for her personal

¹² Nainshree Goyal, 'Mother or Father, Who Gets Custody of Child After Divorce and Why?' (*The Better India*, 23 September 2019) <<https://www.thebetterindia.com/195917/supreme-court-child-custody-law-mother-father-divorce-case-legal-india/>> accessed 05 April 2022

relationship.^[13] The rationale behind such a verdict had been that the mother shall be entitled to her personal decisions but any adverse impact on the children cannot be overlooked. Previously, in *Sanju v Shobhanath, 1994*^[14], the Allahabad High Court had granted the custody to the father because he could financially support the children better than their mother. On a similar note, the judgement of *Shaleen Kabra v Shiwani Kabra, 2012*^[15] had allowed the custody to the father adhering to the child's desire to stay with him.

In light of the above, we may infer that there are several provisions through which a father may win the custody, like in the cases where:

- If the mother willingly forfeits the custody
- If the mother is mentally unsound and/or incapable of looking after the child
- If the child is above the age of 12 years and explicitly expresses the desire to stay with its father
- If the mother is of immoral character to the point that such casts a negative influence on the child
- If the mother's economic condition is unstable to the point that it would be damaging to the future of the child, and in her stead, the father proves himself to be financially capable of adequately providing for the same
- If the background of the mother is hazardous to the child's safety and wellbeing
- If the mother herself is convicted of a crime

THE CONTEMPORARY CHANGES

With the development of society, the gap between the gender roles is bridging fast – women are no longer confined to the boundaries of the kitchen and are out and about, busily taking up financial responsibilities while men are actively investing their time in the family as well as

¹³ Usha Das, 'Father gets custody of children, Delhi court says their welfare priority' (*Times of India*, 12 October 2021) <<https://timesofindia.indiatimes.com/city/delhi/father-gets-custody-of-children-court-says-their-welfare-priority/articleshow/86949746.cms>> accessed 05 April 2022

¹⁴ *Sanju and Ors. v Shobhanath and Ors.* AIR 1995, All 90

¹⁵ *Shaleen Kabra v Shiwani Kabra* (2012) 5 SCC 355

handling the household. In that view, the Courts are also leaving the bygone bias behind and approaching the cases with a fresh and fairer perspective.

The law has evolved from accounting for a child as a mere asset of the father to addressing the best interests of the child foremost of all in the adjudication of its custody. These days, doctors and even psychologists are hired to examine the physical as well as the mental health of the child, and the factors regarding it, like the opinions, feelings, and choices of the child are given prime importance. The ability of the parent to emotionally bond with and provide intuitive support to the child is also assessed, including the criteria like gender compatibility and psychological disposition. Comfort and security, educational and financial future, health, and lifestyle are among the various other factors taken into account, hence the capability to provide material necessities and social status are also considered. Aside from these, custody is preferred to be given to the party that is more willing to maintain harmony and connection with the child and the other parent. Even background inspections may be conducted on the guardian to check for any suspicious history and determine if he/she is aptly suitable for ethically raising the child. Only after evaluating all these points does the Court grant different types of custody:

1. **Physical Custody-** The child lives with and performs its day-to-day activities under the caretaking of one parent while getting periodic visits from the other.
2. **Joint Custody-** This does not necessarily mean that both the parents physically live together with the child, but instead, they both have split their responsibilities and take turns in providing care.
3. **Sole Custody-** Only one parent is allowed access to the child and all the rights belong to that parent only. This is generally the case where the other parent is proven to be unfit or detrimental to the child.
4. **Legal Custody-** This gives the right to make legal decisions for and on the behalf of the child. Unless specifically mentioned otherwise, the parent having the physical custody of the child assumes its legal responsibility as well.

CONCLUSION

The presence of both parents is essential in the life of a child, especially in the sensitive years of its childhood. Hence, the Court, taking cognizance of this fact, tries to facilitate a compromise between the two parties and allows both of them the access to contribute to the upbringing. Despite the apparent flaws in the social fabric of our country, the legal authorities still ensure that impartial and just decisions are adhering to the best interests of the child. Indeed, it cannot be refuted that there had once been gender bias, not just in India but in other countries as well, but things are changing and no preferential right shall be prioritized over justice. If a father proves himself to be a better candidate, worthier for the custody than the mother, he should get it. In *Saraswatibai Shripad Ved v Shripad VasANJI Ved, 1941*^[16], the High Court of Bombay had stated that it is not the welfare of the mother or the father but that of the minor and the minor alone which is taken into paramount consideration. This was again emphasized by the judgement of *Sheoli Hati v Somnath Das, 2019*^[17] where the Court of law had held that it considers the “welfare of a child”, above all the legal parameters, to be the prime criteria for determining its custody.

It is unfortunate that people may have to compromise the juvenescence of their child because of their personal inabilities and conflicts. The presence of a wholesome family is an indispensable element of human childhood, but in the unlucky cases of its absence, the serious responsibility of parenthood shall nevertheless be undertaken with utmost sincerity and accountability. The idea of family breakdown and separation is already a traumatic and exhausting experience for the child. Hence, the main goal of the parents and the Court should be to ease their guiltless suffering as much as possible and ensure that they provide the child with a good and happy life.

¹⁶ *Saraswatibai Shripad Ved v Shripad VasANJI Ved* (1941) 43 BOMLR 79

¹⁷ *Sheoli Hati v Somnath Das* (2019) 7 SCC 490