



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Analyzing Custodial Rights from the Lens of a Single Father

Stuti Upadhyay^a

^aNirma University, Ahmedabad, India

Received 09 February 2023; *Accepted* 01 March 2023; *Published* 03 March 2023

Mother is a natural provider and should be provided with the right to raise a child, everyone knows this. But seldom do we try to look at it and understand it from a father's point of view and rarely do we recognize the fact that there are exceptions that exist. And in light of the same, we fail to understand that this has made it extremely difficult for fathers to try and take custody of children that are also his, solely in the children's interest. The article, hence, takes its distinct view in analyzing custodial rights in-depth and the laws that govern a child's custody post-separation or divorce. It goes on to analyze the various ways through which fathers can reclaim the custody of their children, both in sharing with the mother as well as sole custody. In addition to that, it tries to point out the societal and legal drawbacks that result from the former and tries to suggest some suitable measures to combat the same.

Keywords: *single fathers, child's custody, legal custody, father's rights, parental rights.*

INTRODUCTION: THE NATURAL PROVIDER

Parenthood is something that has always been a very subjective topic for everyone, even though a lot of people still disagree to a great extent. Every child is different and so is every parent. However, there is still that one thing that everyone can agree upon. That is the natural provider, the mother. It shouldn't even be the topic of discussion that a mother, from the inception of the

embryo in her uterus till the moment she breathes her last, will remain a basic necessity in a child's life. Not to say that all mothers are of such divine nature, of course, it is subject to its respective exceptions.

What a lot of people do not realize is that as much as a mother is important for cherishing and raising a child, a father plays an equally important role in the lives of the children. And ironically, it's not just the people, it's the law that tries to positively discriminate amongst single mothers and single fathers, for that matter. But as an important repercussion of that, the fathers that struggle for the full custody of their children are left vulnerable and it becomes nearly impossible, even a far cry for them to even get to have full custody. And it is usually in the cases of the exceptions that I mentioned above that, the mother proves herself to be not fit for the proper raising of the child, and the sufferer, in the end, is the child and its future. It is important to recognize that we are, herein, deciding for the lives of multiple people and that we must not do that simply by what appears on the surface, we must apply our rationale to the situation, and try to get to the roots of the matter while deciding for the same. The custody of the child is a long and exhaustive process, some may call it ugly as well. This poses before us another very important reason for the courts to make sure that the deserving parent gets custody and that the protection of the children is ensured.

CHILD'S CUSTODY: AS A CONCEPT

If we look to have a deep understanding of why and how single fathers are at a disadvantage here, we must take a thorough look at the entire concept of the Child Concept in India. "Child Custody" as a term, defines the guardianship and the kind of relationship that the child would be having with his/her/their parents, individually. The legal custody of a child is defined as custody of the child that is given to either of the parents¹. There can be two possible cases of this:-

¹ Aryan Chandra, 'Child Custody' (*Legal Services India*) <<https://legalserviceindia.com/legal/article-6505-child-custody.html>> accessed 07 February 2023

When the child is a major: In this case, the child, who is an adult now is assumed to have the ability to take care of and maintain himself or herself and due to the same the question of custody does not even arise. The child is assumed to have the mental capacity to decide for themselves by and in correspondence to their best interests. It should also be noted that one of the important requirements to file for custody is that the child should be below 18 years of age².

When the child is a minor: This raises a question. And usually, the fights and struggles for the custody of children take place in this case itself. The court gets a say as to who would be getting custody of the minor child in correspondence to the law that governs the matter. However, before we get into all of that, it should be noted that there still exists a situation wherein the minor gets the right to show his/her preference as to which parent he/she wants to live with. According to the Guardians and Wards Act, of 1890, a child above the age of 9 years can choose custody, according to himself/herself. Different sets of laws of different religions apply to minors, including some specific laws that deal with the subject of their custody. For example, under Hindu law, custody is dealt with by the Hindu Minority and Guardianship Act, of 1956, and the Hindu Marriage Act, of 1955. Similarly, under Muslim Personal Law, different provisions are provided for the same. However, the Guardians and Wards Act, of 1890 for minors applies to everyone irrespective of their caste, creed, gender etcetera. In addition to this, two points are to be noted herein:-

- Even though it has been out rightly mentioned in the act itself that the act is in addition to, and not in contradiction to, the personal laws of religions, in case there is a conflict between personal laws and the Guardians and Wards Act, the latter would prevail over the former.
- There is no specific law under the Christian and Parsi laws that deals with the custody of a child, therefore it is the Guardians and Wards Act, of 1890, and the Indian Divorce Act, of 1869 (that applies to all religions) that generally apply to them.

² Advocate Chikirsha Mohanty, 'Child Custody Laws After Divorce in India' (*Law Rato*, 20 August 2022) <<https://lawrato.com/indian-kanoon/child-custody-law/child-custody-laws-in-india-2691>> accessed 07 February 2023

TYPES OF CHILD CUSTODY IN INDIA

In furtherance to the explanation provided above, it can be understood that the very concept of it holds a lot of responsibility and weight and the repercussions that might result from making a mistake in that. Taking note of the same, the concept, over time has been diversely divided into 3 different types. They are:-

Legal Custody: This type does not necessarily require the physical custody of the child to be with either of the parents, it may be with any of the guardians. The main essence of legal custody is that of the right to decide for the child including the school the kid goes to, the child's healthcare, and the child's education etcetera. It includes, in its ambit, the basic decision-making right which is transferred and given to either or both the parents. More often than not, legal custody is shared by both parents of the child. It is only in the case where the divorce is utterly ugly/messy or that one of the parents is unfit for the proper raising and such is proven by the other parent that the legal custody of the child is granted to one of the parents.

Physical Custody: Unlike the custody talked about above, this type allows the child (minor) to stay under the guardianship of one of the parents with the interaction and visitation rights of the other (subject to exceptions). All the business of the child is dealt with by the parent the child is residing with.

However, it is to be noted that there are as many as 6 types of physical custody:

Sole Custody: This includes a situation where full custody of the child (full physical and legal custody) is granted to one of the parents. As an implication of that, the other parent is ripped off of all the rights (except for visitation rights) that might have been extended to him if such a parent had legal custody of the child. This is done, usually, in cases wherein one of the parents is deemed unfit for parenting (including cases of domestic abuse and violence) making way for ensuring the best interests of the child.

Joint Physical Custody: Also known as the sharing parental system, this refers to a system wherein both the parents share custody of the child and have equal stakes when it comes to

deciding the child's healthcare, religion, and education, among other things. This is the most preferred kind of shared custody.

Bird's Nest Custody: This is based on the concept/logic that just like the baby birds reside in their nests until they are ready to take flight and leave the nest, the children, in this rather unusual arrangement are made to stay in their original homes. Whereas, the parents are made to adopt a system where they can decide on the timings during which one of the parents is going to visit the kid.

Split Custody: This type of arrangement, for the divorced or the separated couple, involves a system wherein one of the parents has the custody of one of the kids and the other parent has the custody of the other kid(s). The premise of this type of arrangement is that the kid is not a single child and that there is more than 1 kid. This is also considered rotating custody, for that matter.

Alternative Custody: This involves a system wherein the custody resides with one of the parents, however, after a certain period the custody is taken over by the other parent for a certain duration. It should be noted that whichever parent has custody of the child during a particular point in time, they have sole custody for that particular duration.

Third-party Custody: Hereunder, the custody of the child is granted to a third person. This could be done under 2 scenarios:

- The biological parents relinquished their parental rights.
- The biological parents are unfit for parenting and taking care of the child.

Joint Custody: Joint legal custody is typically meant when the term "joint custody" is used. Shared parenting is the cornerstone of a joint legal custody agreement, which means that both parents are equally responsible for making decisions. Unless both parents agree, one parent cannot make significant changes or significant life decisions for the child. Important issues like education, healthcare, and extracurricular activities must be agreed upon by both parents.

RELATED LAWS AND GUIDING PRINCIPLES

It is pretty apparent from what we have seen so far, that the subject is pretty complex and requires a deep study if we want to look at it from one of the perspectives. It is going to give all of us the wrong understanding of it if we look at it without getting familiar with the whole concept, thoroughly. One other reason for being that very complex, unlike the other countries is the very diverse nature of the Indian society consisting of different religions and the subsequent different personal laws governing each of them. The study would be very much incomplete without taking a brief look at the same.

The Hindu Law: Hindu law covers the subject of custody through the following sections:

Section 26, Hindu Marriage Act, 1955³: The section deals with the maintenance, education, and well-being of the child, with a premise that both the parents of the child must follow Hinduism, if that is so, the custody of the child gets validated. In furtherance to this, the court may pass any decree, judgment, or order, as it may deem fit, for the best interests of the child regarding the maintenance of the child and dispose of the decree within 60 days from the date of service of notice.

Section 38, Special Marriage Act, 1955⁴: This section deals with the maintenance of children of couples who belong to different religions or whose marriages have taken place in the courts. It also allows the district court to pass the relevant decrees, orders, and judgments as may seem necessary, although, again, within 60 days of service of the notice.

Hindu Minority and Guardianship Act 1956: The act was introduced in addition to the Guardians and Wards Act, of 1890, subject to the fact that it does not, in any way, override the provisions of the existing act. Some important provisions in the act need to be taken note of that influence the conditions for the entire struggle for the custody of the child.

³ Hindu Marriage Act 1955, s 26

⁴ Special Marriage Act 1955, s 38

Custody of the child at a tender age - The act makes it compulsory for any child below the age of 5 to stay with the mother, taking into consideration, the best interests of the child and the fact that the care that is granted by the mother to the child can hardly be replaced easily, which was also reiterated in *Roxann Sharma v Arun Sharma* (2015)⁵. In addition to that, Section 6 of the act implies that in case of the death of the father the custody of the child automatically gets transferred to the mother⁶.

Custody to a third party - In some cases the custody is also granted to a third party, like in *Kirtikumar Maheshankar Joshi v Pradipkumar Karunashanker Joshi* (1992)⁷, the honorable court, taking into consideration the demise of the mother and the abusive behavior the father showed towards the children, the court granted the custody of the children to the maternal uncle.

The Muslim Law: The Muslim law extends a preferential right towards the mothers when it comes to the question of custody which cannot be taken away at any costs unless she is disqualified. When it comes to a daughter, under the Hanafi School of Mohammadan Law mother is entitled to the custody of a female child till the age of puberty. Under Shaffii and Maliki Law, the mother is entitled to the custody of a female child until her marriage⁸.

When it comes to a son, Shia law allows the custody to be with the mother until the son is 2 years old, Hanafi law allows it to be till the age of 7 years and Maliki laws allow it to be until the son hits puberty. In both cases, if the mother has passed away, the rights are passed on to the next nearest female relative, if not that then to the father, and if not even that, to the nearest male relative.

Christian And Parsi Law: As already mentioned above there is no specific personal law for Christianity that governs or supervises the issue of custody. The cases are decided after taking

⁵ *Roxann Sharma v Arun Sharma* Civ App No 1966/2015

⁶ Akansha Upreti, 'Child Custody - Read Before You Leap' (*Legal Services India*)

<<https://www.legalserviceindia.com/legal/article-5163-child-custody-read-before-you-leap.html>> accessed 07 February 2023

⁷ *Kirtikumar Maheshankar Joshi v Pradipkumar Karunashanker Joshi* AIR (1992) SC 1447

⁸ *Suharabi v D. Muhammed* AIR (1988) Ker 30

assistance from the Guardians and Wards Act, of 1890 in addition to the Indian Divorce Act, of 1969. Although as also laid down in *Rosy Jacob v Jacob A. Chakramakkal* (1973), the decisions of the cases are subject to the circumstances and the facts of each case. As for Parsis, the custody of children is dealt with by chapter V of The Parsi Marriage and Divorce Act, of 1936 in addition to the Guardians and Wards Act, of 1890.

FATHERS' PATERNAL RIGHTS

The provisions (both personal laws and general laws applicable to all religions alike) mentioned and talked about above make it enough apparent that the fact that others have been entrusted with these many rights, even though is logical and acceptable to some extent, makes it utterly difficult for the fathers who are fighting for the custody of the children. The repercussion of the same is not just on the father in the form of emotional distress but more on the children who are made to reside with the mother with the blatant assumption that it stands in the 'best interests of the children'. This further results in the emotional, and physical abuse of the children that remain with them throughout their lives in the form of some or other trauma. Even though the courts, while deciding on custody try their best to grant shared custody to both parents so that the children can get equal love and affection from both parents, in extreme cases wherein the courts have to decide on granting the custody to one of the parents, more often than not, the courts go with granting the custody to the mother, sometimes influenced by the societal bias and more from the constitutional provisions, making it even more difficult for the fathers to aim for even shared custody or joint custody, let alone full sole custody. However, there are some issues still with that being said, it is now time for us to move on to another very important part of the study: the minimal mechanism that single fathers are provided with to fight for the custody of the kids.

- In case the mother relinquishes the custody of her child, the custody automatically gets transferred to the father.
- If it is shown that the mother is unable to take proper care of the kid, the father would be granted full custody of the child. However, it is to be noted that the burden of proof lies on the father.

- In case the mother, with sufficient medical documents to support, is shown to be mentally unstable, the custodial rights would be passed on to the father.
- If the child under question is beyond 13 years of age, and if he/she/they show the willingness to reside with either of the parents, in the instant case, the father, then the custodial rights would again be transferred to the father with no further objections⁹.
- If the mother is proven to have an immoral character and/or a bad reputation which might be a hindrance in the proper growth and development of the child, the father would be granted custody.
- If the father, supported with enough financial statements can prove the financial inability of the mother to support the children with their education and daily living expenses and at the same time shows his financial stability and ability to support the children to be better than that of the mother's, the rights would be transferred.
- If the mother is a convict of a crime, the father becomes the automatic custody holder.
- In some cases, depending on the subjective circumstances of each case, the bench has even granted the father custodial rights of a minor, below the age of 5 years. In a landmark case of Poonam Khalsi v State of Punjab, the high court bench of Justice Sant Parkash, while granting the legitimate custody of the 3-year-old to the father, held that "custody of a child, even if in the case of fewer than five years of age, to the father can't be termed illegal and unlawful"¹⁰. This was reiterated a month later in another significant case under the same high court by the division bench of Justice Augustine George Masih and Justice Sandeep Moudgil, wherein while delivering the judgment, they held that children under the father's custody cannot be termed as illegal confinement¹¹.

⁹ Shreya Kumari, 'Custodial rights of fathers in India' (*The Times of India*, 07 July 2021) <<https://timesofindia.indiatimes.com/readersblog/legal-writing/custodial-rights-of-fathers-in-india-34808/>> accessed 07 February 2023

¹⁰ Surendar Sharma, 'Minor child's custody to father cannot be termed illegal: HC' (*Hindustan Times*, 21 April 2022) <<https://www.hindustantimes.com/cities/chandigarh-news/minor-child-s-custody-to-father-cannot-be-termed-illegal-hc-101650483348247.html>> accessed 07 February 2023

¹¹ Saurabh Malik, 'Children in father's custody not in illegal confinement, rules Punjab and Haryana High Court' (*The Tribune*, 3 May 2022) <<https://www.tribuneindia.com/news/punjab/children-in-fathers-custody-not-in-illegal-confinement-rules-punjab-and-haryana-high-court-391243>> accessed 07 February 2023

ISSUES FROM A SOCIO-LEGAL VIEWPOINT

We have been living in a paradoxical society for a very long time now and we can safely say that the water is above the head. We love to look at the situation simply based on what we know, ignoring the fact that there's always more to it than meets the eye. When we talk about a situation concerning children's custody, it is criticized from the very inception of it. From the very fact that the couple is not going to stay together anymore and is getting divorced, it all comes under the scrutiny of society. And not to leave out, it has adverse societal repercussions on all the members, including the parents and the children.

I recognize the fact that women are subjected to monstrous activities in a proportion higher in comparison to the men in the country and it is equally true that in cases like this, the mother is usually trying to protect the children. However, in addition to the positive awareness that it has created in society, it has subjected fathers who are looking to have joint custody or in some instances, full custody of their children to serious uncalled-for scrutiny from society and even the judges presiding over the bench.

It has become a lot easier to easily assume that the kids are going to be or are already being subjected to atrocities that, in reality, might not even exist. In addition to this, it becomes further easier for the mothers in instances like these to easily claim that the children are "illegally confined" by the father or that the father is unfit for the proper raising of the children. In addition to this, the stringent provisions of laws make it even more difficult for fathers to claim custody. Nevertheless, it should be taken into consideration that even though the stringent provisions make it difficult, our honorable judges must not come under the influence of societal and legal pressures and look at the situations independently. Failure in doing this would have adverse consequences that I cannot emphasize enough.

CONCLUSION AND WAY FORWARD

The conclusion can be divided broadly into two parts: one for the legal realm and one for the social realm. As for the legal realm, deciding something so grave about someone that it concerns their entire life is a huge responsibility, and taking that upon oneself is in itself a big deal. The

purpose of the entire act is simply to ensure a better life for the children and to put an end to the hindrances that might come their way resulting from usually the separation and/or the divorce of the parents. And the final way to get that done is not to go through the black letter of the law or get the legal and societal pressures to make their way in influencing the final verdict but to take under deep consideration the entire situation and the circumstances with utter honesty, only then can we hope to see a glimpse of justice happening. The difficulty that there is right now for fathers to get custody is not benefitting anyone in any manner and is not helping us get close to what we call justice at all. We must at all costs try and relate law to the social sphere of life, it is only through this that we can get a minimal understanding of what law is and the importance that it holds.

And as for the social realm, anything said or done wouldn't ever be enough for the simple reason that society is that living organism that is constantly evolving. And the society that we have today is not a great example of what it should be it is far away from what society "ought to be." It is utterly easy for us, as people, to be judgemental, see what we want to see, and become like those people, whom we talk ill of. This not only automatically creates deep pressure around the one who is being judged but also results in treating that particular person as an outcast, as if he does not even belong to society. And labeling someone like that could not be more wrong. This is exactly what we do whenever we hear anything even close to 'child custody'. And we think it's okay but it's not and this needs to not be normalized like that. It is our society, we can make it or we can destroy it, it's all in our hands, what do you want to do?