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## Revisiting the ‘Best Interests of the Child’ Principle in Indian Custody Jurisprudence: A Critical Analysis

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*Marital disputes are rising at a disturbing rate, with children often becoming the victims of parental discord. While parents may be mindful of the impact, the judiciary has prioritised the ‘best interests and welfare of the child’ as the paramount consideration in custody cases. This research paper examines the concept of custody, its historical evolution and legal framework in India. It examines the application of the ‘best interests of the child’ principle in custody jurisprudence. The paper highlights how judicial interpretations have shifted focus, moving away from rigid parental rights towards a child-centric welfare standard that can override statutory provisions. It further analyses the role of courts in balancing statutory rights with the welfare of the child. A comparative analysis of the UK and the USA reveals that they have codified welfare checklists and shared parenting, whereas India continues to grapple with an indeterminate welfare standard. This paper concludes with a comprehensive way forward advocating legislative reforms to formally recognise shared parenting and joint custody.*

**Keywords:** *child, welfare of child, child custody.*

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### INTRODUCTION

The relationship between a parent and child is a vital human bond with far-reaching implications for growth. During marital discord, this relationship becomes a matter of legal

dispute. Custody disputes place children within adversarial proceedings despite their lack of involvement. Children are the most adversely affected parties in matrimonial disputes.<sup>1</sup>

Custody refers to the immediate supervision, control and duty of care towards a child.<sup>2</sup> In India, the matters relating to the custody of children have been recognised since time immemorial, evolving from the Hindu Law concept of the King as *parens patriae* to the codified statutes of today.<sup>3</sup> Traditionally, guardianship followed a hierarchical structure, with the father as the primary guardian, followed by the mother. After the codification of laws relating to Hindus, the father is recognised as the natural guardian of his minor child, and after him, the mother is the natural guardian.<sup>4</sup> However, the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. The necessary implication of this provision is that the mother cannot be the natural guardian of the child during the lifetime of the father. However, judicial interpretation has shifted the focus towards the welfare of the child as the paramount consideration. Courts have clarified that even during the father's lifetime, the mother may act as the natural guardian in circumstances where the father is absent or neglectful.<sup>5</sup> Under the codified Hindu law, the welfare of the child overrides all other considerations in matters of custody and guardianship.<sup>6</sup> The courts are required to prioritise the best interests over the legal rights of the parents, and any deviation from natural guardianship must be justified on welfare grounds.<sup>7</sup>

Historically, similar developments occurred in the Western legal system. Early doctrines, such as the Roman concept of *patria potestas*, granted absolute authority to the father.<sup>8</sup> Over a period of time, this evolved into the doctrine of *parens patriae*, empowering the State to act in the best interests of the child.<sup>9</sup> Judicial and legislative developments in England and the United States gradually displaced paternal supremacy and established the 'paramountcy

<sup>1</sup> Herma Hill Kay and Irving Philips, 'Poverty and the Law of Child Custody' (1966) 54(2) California Law Review 717 <<https://doi.org/10.2307/3479422>> accessed 30 March 2026

<sup>2</sup> Roscoe Pound, 'Individual Interests Involved in Domestic Relations' (1916) 14(3) Michigan Law Review 177 <<https://repository.law.umich.edu/mlr/vol14/iss3/1/>> accessed 30 March 2026

<sup>3</sup> *Budhkarani Chaukhani v Thakur Prosad Shah* AIR 1942 Cal 311

<sup>4</sup> Hindu Minority & Guardianship Act 1956, s 6

<sup>5</sup> *Jijabai Vithalrao Gajre v Pathankhan and Ors* AIR 1971 SC 315

<sup>6</sup> Hindu Minority and Guardianship Act 1956, s 13

<sup>7</sup> *Smt Surinder Kaur Sandhu v Harbax Singh Sandhu and Anr* AIR 1984 SC 1224

<sup>8</sup> J Dennis Semler, 'A Child's Emotional Health--The Need for Legal Protection' (1979) 15(2) Tulsa Law Review 299 <<https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1514&context=tlr>> accessed 30 March 2026

<sup>9</sup> *In re O'Hara* [1900] 2 IR 232

principle’ under which the welfare of the child became the paramount consideration.<sup>10</sup> Today, custody jurisprudence across jurisdictions prioritises the ‘best interests of the child’ standard, reflecting a shift from parental rights to child-centric decision-making. This approach is grounded in the State’s responsibility to protect children and ensure their development into responsible members of society.

Indian courts have relied on the principle of the ‘best interests of the child’ and held that custody decisions must be based on what best serves the welfare of the child. However, the application of this principle grants wide discretion to the courts, leading to inconsistent decisions. Moreover, the existence of multiple laws governing custody in India complicates the uniform application of the welfare standard. In this paper, the authors critically examine the application of the ‘best interests of the child’ principle in custody jurisprudence. The paper traces international recognition of the principle and analyses its judicial application in India. It highlights the need for reform and proposes the development of a more coherent, child-centric and rights-based approach by drawing comparative insights from other jurisdictions.

## **INTERNATIONAL RECOGNITION OF CHILD CUSTODY**

According to the Committee on the Rights of the Child, the right of the child to have his best interests taken into account as a primary consideration is ‘a substantive right, an interpretative legal principle and a rule of procedure’. It expresses one of the fundamental values of the Convention on the Rights of the Child and is one of its general principles. According to article 3(1), the best interest principle applies in “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.”<sup>11</sup> The Committee on the Rights of the Child has explained that the states must ‘take all necessary, deliberate and concrete measures for the full implementation of the right’.

Articles 9 and 18 of the UN Convention on the Rights of the Child emphasise that both parents share primary responsibility for the upbringing and development of the child, with the best interests of the child as their fundamental concern. While children have the right to

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<sup>10</sup> Guardianship of Infants Act 1925 (UK); Guardianship of Minors Act 1973 (UK)

<sup>11</sup> Convention on the Rights of the Child 1990

maintain relationships with their parents, separation is permitted only when it is necessary for the welfare of the child, such as in cases of abuse, neglect or parental separation. The Committee on the Rights of the Child has provided a framework for assessing the best interests of the child to operationalise this principle. It identified several factors, including the views of the child, identity, family relationships, safety, vulnerability, health and education, which must be considered and balanced in light of the specific circumstances of each case.

Critiques of the 'best interests of the child' principle primarily focus on its indeterminacy in decisions directly concerning children, such as custody disputes. While the UN Committee on the Rights of the Child has attempted to address this by proposing a flexible, two-step assessment framework of identifying relevant factors and balancing them, it provides only a broad, non-exhaustive list without clear guidance on how these factors should be weighed. This lack of specificity leaves significant room for subjectivity, making it difficult to resolve conflicts, such as those between parents or between a child's preferences and welfare considerations. Critics argue that the principle often operates as a proxy for the interests of others and relies on speculative judgments about a child's future. Although the principle does not require perfectly objective determinations in every case, it necessitates a structured decision-making process to minimise arbitrariness. However, the current framework remains insufficiently precise to fully address concerns of inconsistency and misuse. The UN Convention on the Rights of the Child reflect the balance by emphasising both parental responsibilities and the child's right to maintain relationships with parents, unless contrary to their best interests. Ultimately, the principle requires continuous reflection by the decision makers to ensure that actions respect children's rights and perspectives.<sup>12</sup> The greatest virtue of the welfare principle is not necessarily that it leads to the best possible outcome, but that it makes people think about the child. A parent is allowed to discuss the importance of their rights, their wishes, or their interests, but all such discussions have to be focused on the child.<sup>13</sup>

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<sup>12</sup> John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 106

<sup>13</sup> Dr. Rob George, *Ideas and Debates in Family Law* (Hart Publishing 2012) 127

## INDIAN LEGAL FRAMEWORK

The Indian law on custody of children is interlinked with the law of guardianship. The Guardians and Wards Act, 1890, is the primary legislation governing custody matters irrespective of religion. The Act empowers courts to appoint guardians for the person of a minor if such appointment is necessary for the 'welfare of the minor'.<sup>14</sup> In determining what constitutes the welfare of the minor, the court is required to consider factors such as "age, sex and religion of the minor, the character and capacity of the proposed guardian, degree of kinship between the guardian and the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property".<sup>15</sup> The court may also take into consideration "the preference of the minor, provided the minor is old enough to form an intelligent opinion".<sup>16</sup> Moreover, if a ward leaves or is removed from the custody of a guardian, "the court may order the return of the child, and for the purpose of enforcing the order, may direct the ward to be arrested and restored to the custody of guardian, provided such action is considered to be in the welfare of the child".<sup>17</sup> Thus, under the Guardianship and Wards Act, 1890, the guiding principle for courts in matters of guardianship and custody is the 'welfare of the child'.

The Special Marriage Act 1954 empowers the court 'to pass such interim orders and to make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, in accordance with their wishes wherever possible', in any proceeding relating to restitution of conjugal rights, judicial separation, nullity of marriage and divorce.<sup>18</sup>

Modern Hindu law, under the Hindu Minority and Guardianship Act, 1956, provides for the custody of a Hindu minor child. It provides that, 'in case of a boy or an unmarried girl, the father is the natural guardian of such Hindu minor, and after him, the mother.'<sup>19</sup> However, 'the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.' In *Githa Hariharan v Reserve Bank of India*,<sup>20</sup> the Supreme Court held that 'after',

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<sup>14</sup> Guardians and Wards Act 1890, s 7

<sup>15</sup> Guardians and Wards Act 1890, s 17(2)

<sup>16</sup> Guardians and Wards Act 1890, s 17(3)

<sup>17</sup> Guardians and Wards Act 1890, s 25

<sup>18</sup> Special Marriage Act 1954, s 38

<sup>19</sup> Hindu Minority and Guardianship Act 1956, s 6

<sup>20</sup> *Githa Hariharan and Anr v Reserve Bank of India and Anr* (1999) 2 SCC 228

as used in section 6 of the Hindu Minority and Guardianship Act, 1956, 'must be interpreted in the light of the principle that the welfare of the minor is the paramount consideration and the constitutional mandate of equality between men and women.' The court held that 'it should be taken to mean 'in the absence of the father.'" The court further stated that 'absence' should be understood as 'temporary or otherwise, or total apathy of the father towards the child, or even inability of the father by reason of ailment or otherwise. Thus, the mother can be the natural guardian during the lifetime of the father in exceptional cases.

Furthermore, the Act provides that 'in the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration. It also provides that no person shall be entitled to guardianship by virtue of the provisions of the Hindu Minority and Guardianship Act or of any law relating to guardianship in marriage among Hindus, if the court is of the opinion that his or her guardianship will not be for the welfare of the minor.'<sup>21</sup> This provision is used in most cases for the custody of a Hindu minor child in the event of disputes. This is a salutary rule and is evidently intended to emphasise the importance of that general rule, which is the keystone of the whole law on the subject.<sup>22</sup>

Under the Hindu Marriage Act 1955, the courts have been empowered 'to pass interim orders in any proceeding under the Act and to make such provisions in the decree as they may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible.'<sup>23</sup>

Muslim law is considered one of the earliest legal systems to recognise the right of the mother to custody of the child.<sup>24</sup> Under Muslim law, the mother has custody of the child, in the case of a son, until he reaches the age of seven years, and in the case of a daughter, until she reaches puberty. However, the father is recognised under Muslim law as the natural guardian of the child. A mother cannot be deprived of the right to custody of the child under Muslim law unless she has been disqualified on the ground of apostasy or misconduct and her custody is found to be unfavourable to the welfare of the child.

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<sup>21</sup> Hindu Minority and Guardianship Act 1956, s 13

<sup>22</sup> Sir Dinshaw Fardunji Mulla and Satyajeet A Desai, *Mulla Hindu Law* (21st edn, LexisNexis 2013)

<sup>23</sup> Hindu Marriage Act 1955, s 26

<sup>24</sup> Paras Diwan, *Law of Adoption, Minority, Guardianship & Custody* (5th edn, Universal Law Publishing 2012)

There is no separate legislation governing the custody of a Christian child. Such matters are governed by the Indian Divorce Act 1869 and the Guardians and Wards Act 1890. The Indian Divorce Act 1869 has authorised the courts to make orders with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children of the marriage, or of both children and parents, as the court deems fit. However, the court shall not make any order for the benefit of the parents or either of them, at the expense of the children.<sup>25</sup>

The Law Commission of India, in its 257<sup>th</sup> report, has recommended a paradigm shift in child custody jurisprudence by establishing the welfare of the child as the non-negotiable paramount consideration in all custody proceedings. The Commission has recommended that both mother and father should be recognised as simultaneous natural guardians with equal legal status. The Commission has proposed the introduction of joint custody as a statutory option, allowing both parents to share physical custody and decision-making authority when it serves the best interest of the child. The Commission has emphasised the use of time-bound mediation and submission of detailed parenting plans that outline day-to-day care and long-term responsibilities in order to minimise the parental conflict and protect children from the trauma of litigation. Further, the recommendations include comprehensive guidelines for courts to determine ‘best interests’ covering factors like the preference of the child, grand-parenting time and relocation protocols. The report seeks to modernise child support by ensuring that it covers holistic living expenses and can extend beyond the age of majority to account for education or disabilities.

### **BEST INTEREST AND WELFARE OF THE CHILD**

The concept of the ‘best interests of the child’ has evolved as the guiding principle in the custody jurisprudence, reflecting a gradual shift from a parent-centric to a child-centric approach in family law. Early 20<sup>th</sup>-century research in divorce law highlighted concerns regarding the adversarial nature of proceedings and their detrimental impact on family relationships. Custody disputes often signify the breakdown of the family as a social institution, and courts increasingly recognise that such proceedings should prioritise the welfare of the child rather than merely adjudicating competing parental claims. Earlier, the

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<sup>25</sup> Indian Divorce Act 1869, s 40

right to custody of the child was determined by comparing the fitness of the parents, but later, the scope of custody proceedings has expanded to include the best interests of the child.

Under the early common law, the father had exclusive custody of the child.<sup>26</sup> However, the courts could intervene where the father's conduct or circumstances were harmful to the development of the child,<sup>27</sup> although factors such as poverty or the degraded nature of the father's own life were not considered sufficient grounds for removing custody.<sup>28</sup> Gradually, the courts began to recognise the right of the mother to the custody of the child on the death of the father,<sup>29</sup> and subsequently, statutes were passed allowing joint custody to the father and mother.<sup>30</sup> The courts began to adopt a presumption in favour of the right to custody of the child, which could not be displaced except where it was necessary in the best interests of the child.<sup>31</sup> Under this presumption, the father was preferred over the mother in ordinary circumstances, and either parent was given preference over any other person, except where such other person was in a better position to assume custody of the child. However, the courts applied the test of the welfare of the child in all cases, notwithstanding the rights of the person claiming custody.<sup>32</sup> Usually, the courts adopted presumptions depending on the facts of each case, and in some cases, they were also of the opinion that the best interests of the child alone were not sufficient to deprive a parent of custody, keeping in mind the presumption in favour of the parent.<sup>33</sup>

With the passage of time and changes in laws and societal structure, the court's opinion with respect to custody changed. The 'best interests of the child' emerged as the true test for determining and awarding custody of the child. This shift marked a move away from rigid presumptions and towards a more flexible, sensitive approach that prioritises the overall well-being of the child.

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<sup>26</sup> 'Reciprocity of Rights and Duties between Parent and Child' (1928) 42(1) Harvard Law Review 112 <<https://doi.org/10.2307/1330013>> accessed 30 March 2026

<sup>27</sup> Paul Sayre, 'Awarding Custody of Children' (1942) 9(4) University of Chicago Law Review 674 <<https://chicagounbound.uchicago.edu/uclrev/vol9/iss4/7/>> accessed 30 March 2026

<sup>28</sup> *Vercer v Ford et al* [1881] 37 Ark 27

<sup>29</sup> *Ex Parte Badger* [1920] 226 SW 936

<sup>30</sup> Chester Garfield Vernier, *American Family Laws* (Stanford University Press 1936) 18

<sup>31</sup> Robert C Brown, 'The Custody of Children' (1927) 2(4) Indiana Law Journal 325 <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1723&context=ilj>> accessed 30 March 2026

<sup>32</sup> *Lancey v Shelley* [1942] 2 NW 2d 781

<sup>33</sup> *United States v Green* [1824] 26 Fed Cas 30, no 15,256 (CCDRI 1824)

The landmark judgment of *Chapsky v Wood*<sup>34</sup> established the principle of the ‘best interests of the child’. The court rejected the rule that prioritised the right of the parent to custody and emphasised that custody decisions must be guided by the welfare of the child. The judgment underscored the importance of emotional bonds, particularly the nurturing relationship developed through care and affection, and highlighted that such considerations may outweigh biological or legal claims.

This perspective was reinforced by scholars by emphasising that even where a parent is otherwise fit and without fault, the welfare of the child may necessitate denying that parent custody. The role of maternal care, especially in the early years of a child’s life, has often been recognised as a critical factor in ensuring the welfare of the child.<sup>35</sup> The law relating to the welfare of the child as paramount consideration is succinctly stated in *Halsbury’s Laws of England*. It firmly establishes that the welfare of the child is the ‘first and paramount consideration’ in all matters relating to custody, upbringing and guardianship. This principle applies irrespective of the legal rights of parents and extends even to cases involving foreign nationals. Welfare is interpreted as encompassing not only physical and financial well-being but also moral, emotional and social development as well as the preservation of meaningful relationships and bonds of affection.<sup>36</sup>

In the United States, the principle of the best interests of the child as paramount consideration governs custody and guardianship decisions. The courts recognise that parental rights may be overridden where necessary to protect the best interests of the child. Moreover, where a child has sufficient judgment, courts may consult the child while determining custody.<sup>37</sup> The courts have reiterated, in habeas corpus proceedings to determine child custody, that judicial discretion has to be exercised to determine what is best for the welfare of the child. In doing so, courts balance competing considerations but allow the interests of the child to prevail over all other legal claims.<sup>38</sup> The determination of the best interests of the child generally involves a two-step process. First, the court determines what is in the best interests of the

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<sup>34</sup> *Chapsky v Wood* [1881] 26 Kan 650

<sup>35</sup> William Francis Bailey, *A Treatise on the Law of Habeas Corpus and Special Remedies: Including Mandamus, Certiorari, Quo Warranto and Prohibition, and Also the Subject of Contempts* (vol 1, Gale, Making of Modern Law 1913) 581

<sup>36</sup> *Halsbury’s Laws of England*, vol 24 (4th edn, LexisNexis 2008)

<sup>37</sup> *American Jurisprudence*, vol 39 (2nd edn, Lawyers Cooperative Publishing 1986)

<sup>38</sup> *Phyllis E. Howarth v Thomas G. Northcott* [1965] 152 Conn 460

child. Second, the court assesses whether those interests are outweighed by any countervailing factor.<sup>39</sup>

## JUDICIAL APPROACH TO CUSTODY OF A CHILD IN INDIA

The approach adopted by Indian courts in deciding questions of custody has undergone a drastic change over the past century. Earlier, courts were reluctant to deprive the father of custody unless he was found unfit for custody. However, over time, the courts have recognised that the fitness of a parent alone cannot determine the custody of a child and that the welfare of the child must be assessed independently. A plethora of decisions by the Supreme Court and various High Courts supported and firmly established the principle that the welfare of the child is the paramount consideration in matters relating to the custody of a child, even overriding statutory provisions and personal law where necessary. Custody disputes in India usually arise in cases of matrimonial discord between parents.

One of the early decisions on this principle was the judgment of the Madras High Court in *Samuel Richard v Stella Richard*,<sup>40</sup> where the court held that the welfare of the minor is the paramount consideration and the status of the father as natural guardian does not automatically entitle him to the custody. The court emphasised the onerous duties imposed on judges in such matters, comparing their role to that of a 'wise father' who must carefully evaluate circumstances, ensuring the welfare of the ward. The court also recognised the special role of the mother, particularly in the case of young children, whose needs for care, affection and guidance often make maternal custody preferable.

This approach was reinforced by the Supreme Court in *Rosy Jacob v Jacob Chakramakkal*,<sup>41</sup> wherein the court clarified that the objective of custody laws is not merely to determine the physical custody of the minor but to ensure the holistic development of the child, including health, education and maintenance. The court held that parental rights must yield to the welfare of the child. Even where both parents are loving and capable, the court must

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<sup>39</sup> Jason M Pobjoy, 'The best interests of the child principle as an independent source of international protection' (2015) 64(2) *International Comparative Law Quarterly* 346

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2679568](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2679568)> accessed 30 March 2026

<sup>40</sup> *Samuel Stephen Richard v Stella Richard* AIR 1955 Mad 451

<sup>41</sup> *Rosy Jacob v Jacob A Chakramakkal* AIR 1973 SC 2090

undertake a comprehensive evaluation of all circumstances to determine which arrangement best serves the interests of the child.

Subsequent decisions have reaffirmed this principle. In *Thirty Hoshie Dolikuka v Hoshiam Shavaksha Dolikuka*,<sup>42</sup> the Supreme Court reiterated that the welfare of the child is the only consideration in deciding the question of custody. The court emphasised the special responsibility of the courts in such matters, noting that it must act to protect the interests of minor. Similarly, in *K.M.Vinaya v B.R. Srinivas*,<sup>43</sup> the court stressed that parents must prioritise the growth and development of the child and refrain from conduct prejudicial to the interest of the child.

In the landmark judgment in *Gaurav Nagpal v Sumedha Nagpal*,<sup>44</sup> the Supreme Court held that the term ‘welfare’ must be interpreted in its widest sense. This includes not only physical well-being but also the moral and ethical welfare of the child. The court emphasised that the *parens patriae* jurisdiction of the court cannot be restricted even by the statutory provisions governing parental rights. The scope of judicial discretion in custody matters was further expanded by the Supreme Court in *Nil Ratan Kundu v Abhijit Kundu*.<sup>45</sup> The court held that courts are not bound by statutory provisions, procedural rules, or even precedents. The paramount consideration in selecting a proper guardian of a minor should be the welfare and well-being of the child. The principle was reiterated in *Mausami Moitra Ganguli v Jayant Ganguli*,<sup>46</sup> where the Supreme Court emphasised that the welfare of the child takes precedence over the parental rights under any statute. The court observed that while factors such as better financial resources and love for the child may be relevant considerations, they cannot be the sole determining factor for the custody of the child. A heavy duty is cast on the court to exercise discretion judiciously, keeping in mind the welfare of the child as the paramount consideration in the background of all relevant facts and circumstances. In *Lekha v P. Anil Kumar*,<sup>47</sup> the Supreme Court held that the remarriage of a mother is not a valid ground for denying custody when the remarriage is proved to be beneficial to the child and the child expresses his preference to reside with the mother. Similarly, in *Kumar V. Jahgirdar*

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<sup>42</sup> *Thirty Hoshie Dolikuka v Hoshiam Shavaksha Dolikuka B* AIR 1982 SC 1276

<sup>43</sup> *K M Vinaya v B R Srinivas* (2013) SCC OnLine Kar 8269

<sup>44</sup> *Gaurav Nagpal v Sumedha Nagpal* AIR 2009 SC 557

<sup>45</sup> *Nil Ratan Kundu and Anr v Abhijit Kundu* (2008) 9 SCC 413

<sup>46</sup> *Mausami Moitra Ganguli v Jayant Ganguli* AIR 2008 SC 2262

<sup>47</sup> *Lekha v P Anil Kumar* (2006) 13 SCC 555

*v Chethana Ramatheertha*,<sup>48</sup> the Supreme Court recognised the importance of maternal care for a female child approaching puberty and awarded custody to the mother despite her remarriage, as it was in the best interest of the minor. In *Athar Hussain v Syed Siraj Ahmed*,<sup>49</sup> the Supreme Court recognised that the preferences of a child have to be given due consideration in appropriate cases. The court held that the preference for a child, if found to be in her best interests, cannot be disregarded.

In *Mt. Siddiquunnisa Bibi v Nizamuddin Khan*,<sup>50</sup> the Allahabad High Court held that the right to the custody of a minor girl is vested in the mother under Muslim law, and despite this, the supervision of the child by the father continues. In *Hassan Bhatt v Ghulam Mohamad Bhat*,<sup>51</sup> the Jammu and Kashmir High Court held that the welfare of the minor should be the paramount factor in determining custody and cannot be subordinated to the personal law of the minor. The Andhra Pradesh High Court, in *L. Chandran v Venkatalakshmi*,<sup>52</sup> observed that a child cannot be treated as a chattel and that the right of the father to custody of the child may be denied if it is not in the best interests of the child. In addition to the best interests and welfare of the child, the courts also consider the preference of the child, the relationship of the child with family members, the role of the parent and the impact of relocation to determine matters relating to custody of the child.

The concept of visitation rights has also gained importance, and it ensures that non-custodial parents have access to the child. In *Roxann Sharma v Arun Sharma*,<sup>53</sup> the Supreme Court held that the visitation right means a non-custodial parent's court-ordered privilege of spending time with a child who is living with another person, usually the custodial parent.

The judgment, in *ABC v The State (NCT of Delhi)*,<sup>54</sup> is a significant development in Indian custody jurisprudence. In this case, the Supreme Court reiterated that the welfare of the child is the paramount consideration, overriding the procedural requirements. The Supreme Court held that an unwed mother, who is the sole caregiver of a child born out of wedlock, can be appointed as the guardian of the child without being compelled to disclose the putative

<sup>48</sup> *Kumar V Jahgirdar v Chethana Ramatheertha* AIR 2004 SC 1525

<sup>49</sup> *Athar Hussain v Syed Siraj Ahmed and Ors* AIR 2010 SC 1417

<sup>50</sup> *Mt Siddiquunnisa Bibi v Nizamuddin Khan and Ors* AIR 1932 All 215

<sup>51</sup> *Hassan Bhatt v Ghulam Mohamad Bhat* AIR 1961 J&K 5

<sup>52</sup> *L Chandran v Venkatalakshmi and Anr* AIR 1981 AP 1

<sup>53</sup> *Roxann Sharma v Arun Sharma* AIR 2015 SC 2232

<sup>54</sup> *ABC v The State (NCT of Delhi)* AIR 2015 SC 2569

father. The procedural rules may be relaxed to serve the best interests of the child. The court emphasised that the mother is the natural and primary custodian in such cases where the father has shown no involvement in the upbringing of the child. It further emphasised that compelling disclosure of the father's identity could expose the child to social stigma and infringe the mother's right to privacy. To maintain a balance, the court noted that custody and guardianship orders may be revisited at any time if the father later seeks involvement and establishes that such participation would advance the welfare of the child.

The judgment of the Supreme Court in *Poonam Wadhwa v Ajay Wadhwa*<sup>55</sup> provides an important contemporary perspective on the custody of a child by emphasising a holistic and child-centric approach over rigid considerations. In a custody dispute concerning a child who had crossed the five-year mark during the litigation. The court highlighted that in modern socio-economic conditions, both parents are often working and employment patterns cannot be determinative of custody. Instead, greater weight was accorded to factors such as the preference of the child, his emotional comfort, continuity in education and the stability of his existing environment, including the presence of extended family support. Although the child's desire to remain with his sister was acknowledged, it was not treated as a decisive factor. The court held that since the child was well-settled, unwilling to leave his father, and his welfare did not appear compromised, there was no justification to disturb the existing arrangement. The court preserved the visitation rights of the mother and reiterated that custody orders are inherently flexible and subject to modification, thereby reinforcing the principle that the best interests of the child remain paramount and must be assessed dynamically in light of changing circumstances.

In *Tejaswini Gaud v Shekhar Jagdish Prasad Tewari*<sup>56</sup>, the Supreme Court reaffirmed the principles governing custody of a child by upholding the claim of the father as the natural guardian while emphasising the welfare of the minor in deciding the case. The case arose in exceptional circumstances where, due to the serious illnesses of both parents, the minor child was cared for by the maternal relatives, who continued to retain custody even after the death of the mother. The father, upon recovery, sought custody through a writ of habeas corpus, which was granted by the court. The court held that habeas corpus is an appropriate remedy

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<sup>55</sup> *Poonam Wadhwa v Ajay Wadhwa and Ors* (2025) LiveLaw SC 1165

<sup>56</sup> *Tejaswini Gaud and Ors v Shekhar Jagdish Prasad Tewari and Ors* AIR 2019 SC 2318

for a natural guardian to seek the restoration of child custody when wrongfully deprived of it by those without legal authority. While acknowledging that the father is the natural guardian, the court clarified that statutory rights are subordinate to the paramount consideration of the welfare of the child. The court observed that temporary caregiving by relatives does not create a superior custodial right against a fit natural guardian. The court emphasised the importance of restoring the parent-child bond and ruled that the interest of a child of tender age is best served by being raised by their surviving parent rather than being retained by relatives, as denying such custody would unfairly deprive both the father and child of mutual love and affection. The court directed that custody of the child be handed over to the father and granted structured visitation rights to the maternal relatives to preserve familial ties.

In *Yashita Sahu v State of Rajasthan*,<sup>57</sup> the Supreme Court addressed the complexities of international child custody and maintainability of a writ of habeas corpus when a parent removes a child from a foreign jurisdiction in violation of a court order. In this case, the wife brought her minor daughter, a U.S. citizen, to India in breach of a shared custody agreement and a consent order issued by the court in Virginia, USA. The Supreme Court affirmed the maintainability of habeas corpus as a valid remedy to protect the best interests of a child, even if the child is in the custody of a parent. The court emphasised that while the 'comity of courts' warrants respect for foreign judgments, it cannot override the paramount consideration of the welfare of the child. The court held that an adult spouse cannot be compelled by the court to reside in a foreign jurisdiction, and the child should not be deprived of the superior social and educational facilities available in her native country due to the mother's unilateral actions. The court allowed the mother to return voluntarily to the United States with the child under protective conditions ensuring her safety and financial support. Failing her return, the custody was to be handed over to the husband, subject to stringent visitation and video contact rights for the mother.

In *Ramneesh Pal Singh v Sugandhi Aggarwal*,<sup>58</sup> the Supreme Court struck a balance between the expressed preference of the child and 'parental alienation syndrome'. The court clarified that while 'parental alienation syndrome' is a recognised phenomenon, it cannot be invoked

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<sup>57</sup> *Yashita Sahu v State of Rajasthan and Ors* AIR 2020 SC 577

<sup>58</sup> *Col Ramneesh Pal Singh v Sugandhi Aggarwal* (2024) INSC 397

as a 'straitjacket formula' without identifying specific instances of 'alienating behaviour'. The court, finding the minor children to be intelligent and happy in their father's care, granted permanent custody to the father by emphasising that the stability of a child's environment is a crucial welfare consideration. The court subsequently modified its decision and transferred custody to the mother upon learning that the fifteen-year-old daughter had later expressed a clear desire to live with her mother to pursue education in Gurugram and noting the father's non-opposition in the interest of the child's happiness.

Indian courts have shown sensitivity to the specific circumstances of individual cases. The decisions reflect a gradual move towards recognising the child as an active participant in custody cases. The courts have harmonised the traditional principles of personal laws with the principle of welfare of the child and interpreted personal laws in a manner consistent with the best interests of the child, often favouring maternal custody where it serves the welfare of the child. The courts have linked the welfare principle to the right to life and dignity under Article 21 of the Constitution. Therefore, the Indian custody jurisprudence has evolved into a robust, welfare-oriented framework that prioritises the holistic development of the child above all else. The judicial interpretation of statutory provisions and personal laws has ensured that the best interests of the child remain the decisive factor in custody cases. The recent decisions reflect a clear and evolving shift in Indian child custody jurisprudence towards a child-centric and welfare-oriented approach that goes beyond strict legal rules. They highlight a consistent judicial philosophy that treats custody not as a matter of parental rights, but as a flexible decision focused on the child's overall well-being, dignity and changing needs.

### **COMPARATIVE ANALYSIS OF CUSTODY JURISPRUDENCE: UK AND USA**

The U.K. and the U.S.A. have developed structured frameworks balancing flexibility with predictability. The child custody jurisprudence in the United Kingdom represents one of the most structured and child-centric approaches in determining the best interests of the child. The Children Act, 1989, is the cornerstone of the modern child welfare legal framework. It was enacted to consolidate child welfare legislation in the UK and to define the specific obligations of parents, carers and local authorities. The Act introduced a fundamental shift by replacing the concept of custody with parental responsibility, granting children greater autonomy and rights relating to their own welfare. The welfare of the child as the paramount

consideration is the core of the Act. While the Act empowers the authorities to intervene in cases where a child is at risk of significant harm, it simultaneously emphasises that the child should remain within their family home whenever possible. Consequently, separation from family or termination of contact is only permitted to prevent exploitation or abuse of the child. Further, the Act requires courts to actively consider the preferences and needs of the child. This is achieved through a comprehensive evaluation of factors, referred to as the welfare checklist, including the child's physical, emotional and educational requirements, their age, sex and background, the risk of harm and the capability of each parent to meet the needs of the child. Further, the Children Act 2004 addressed the systemic gaps by improving inter-agency cooperation. This Act ensured that information sharing and child protection efforts were effectively coordinated across various local authorities. The codification of these factors promotes a more predictable and transparent decision-making process. The U.K. courts have consistently upheld the paramountcy of the principle of the welfare of the child. Courts have recognised the importance of stability and continuity in the life of a child, often making arrangements that minimise disruption. The structured legal framework mitigates the risk of inconsistent outcomes. However, some scholars argue that a degree of subjectivity remains inevitable in balancing competing factors. While shared parenting is encouraged, its practical implementation can be challenging in high-conflict cases.

The best interests of the child serve as the guiding principle across all states in the U.S.A. The modern custody jurisprudence has shifted towards a gender-neutral application of the 'best interests of the child' principles. The US approach is characterised by a strong emphasis on parental autonomy and constitutional rights. The judicial decisions prioritise the welfare of the child over competing parental claims, reflecting a child-centric model influenced by equity and the doctrine of *parens patriae*. Most states have codified the principle of the best interest of the child, providing a list of factors to guide the judicial discretion. These factors include emotional ties between the child and each parent, the capacity of parents to provide care and stability, the child's adjustment to home, school, and community, the mental and physical health of all parties, and, in appropriate cases, the preference of the child. They ensure a holistic assessment of the welfare of the child rather than a narrow focus on parental rights. The US custody jurisprudence lays emphasis on joint custody and shared parenting. It presumes and encourages arrangements that allow both parents to maintain meaningful involvement in the life of the child. This approach is based on the fact that continued contact

with both parents generally promotes the emotional and psychological development of the child. The US courts usually approve joint legal custody, where decision-making authority is shared, even if physical custody is primarily with one parent. The use of detailed parenting plans is another important development. These court-mandated plans outline custody schedules, visitation arrangements, decision-making responsibilities and mechanisms for resolving disputes. The parenting plans aim to reduce ambiguity and conflict, minimising the adversarial impact of custody litigation on children. These plans encourage parental cooperation and accountability with the objective of fostering a stable environment for the child. The courts often rely on child psychologists, social workers and custody evaluators to provide expert assessments of the needs of the child and family dynamics. These mechanisms introduce a professional perspective and ensure that the child's voice is adequately considered. The court has played an important role in the development of the principles of the best interest of the child and consistently held that parental rights are not absolute and may be restricted to safeguard the welfare of the child. The US custody jurisprudence recognises the importance of preserving family autonomy and seeks to balance this with the protective role of the State. The US courts have increasingly addressed 'parental alienation syndrome' and maintained that the 'voice of the child' should be heard. However, the inherent flexibility of the principle of best interest of the child has been criticised for leading to inconsistent outcomes across States. The concerns have been raised about potential biases and the subjective nature of evaluating factors such as parental fitness and the preference of the child.

In a comparative perspective, the UK and the USA models offer valuable lessons for India. The UK provides codified factors for determining the welfare of the child, emphasising parental responsibility and institutional mechanisms for representation of the child, providing a coherent and balanced approach to custody adjudication. UK custody jurisprudence represents a mature legal system that not only prioritises the principle of best interests of the child but also ensures its effective and consistent application in practice. The USA emphasises shared parenting, structured parenting plans and the integration of expert assessments, providing practical tools for the implementation of the principle of welfare of the child more effectively. The overall framework makes an effort to balance flexibility with structured guidance. US custody jurisprudence underscores the importance of adapting legal standards to the complex and evolving needs of children within diverse family contexts.

While India has adopted a welfare-centric approach, its application remains inconsistent due to broad judicial discretion and the coexistence of multiple personal laws. Both the UK and the USA have a structured framework that attempts to balance flexibility with predictability and provide implementation of the welfare of the child principle. Indian courts have upheld the welfare of the child as the paramount consideration and have expanded the scope of welfare, aligning Indian custody jurisprudence with global standards. However, the absence of a uniform statutory framework results in considerable judicial discretion, leading to unpredictability. Another difference lies in the recognition of shared parenting. While the Indian courts have started acknowledging the importance of visitation rights and joint custody, the concept is not yet institutionalised. On the other hand, the UK and the USA actively promote shared parenting as a norm, reflecting the understanding that a child's development benefits from meaningful relationships with parents. The role of the child's voice also varies across jurisdictions. While Indian courts consider the preferences of children who are capable of forming an intelligent opinion, this practice is not consistently applied. Both the UK and the USA, on the other hand, have developed mechanisms to ensure that the child's views are incorporated.

In spite of differences, all three jurisdictions share a common challenge of the inherent uncertainty of the 'best interest' standard. The flexibility of adapting to the unique circumstances of each case opens the door to subjectivity. India continues to rely on judicial interpretation, whereas the UK and the USA address this through systematic frameworks.

## **CHALLENGES AND WAY FORWARD**

Although globally recognised as the cornerstone of child custody jurisprudence, the principle of the best interests of the child faces significant challenges in its application within the Indian legal system. These challenges are caused by legislative gaps, personal laws and systemic inefficiencies. The primary challenge is the indeterminacy of the welfare standard. The legislation mandates that the welfare of the child must be the paramount consideration in custody matters, but they fail to provide a statutory standard for defining what 'welfare' actually means. The lack of a statutory standard gives courts wide discretionary powers, leading to conflicting decisions and unpredictable outcomes for families. The Indian legal system often finds it difficult to identify and mitigate Parental Alienation Syndrome. The courts rely on the preference of the child without psychological evaluations and fail to

distinguish between genuine preference and coached preference. When the courts take an alienated child's preference over investigating the underlying manipulation, they inadvertently validate the alienating behaviour that may cause psychological harm and severance of the child's relationship with a fit parent. Another challenge in Indian child custody jurisprudence is the long-drawn-out custody battles in courts. Child custody proceedings are inherently detrimental to the child as they can span several years during which the child remains in a state of 'custodial limbo'. These delays often lead to the 'status quo' effect, where courts are reluctant to move a child who has become habituated to one environment during the trial, even if the other parent is more suitable. Considering that the time is of the essence in the development of a child, the years spent in adversarial litigation deprive children of stability and can aggravate the trauma of parental separation. The intersection of secular laws and personal laws also complicates the custody jurisprudence, as the court sometimes gives inconsistent decisions in custody matters, strictly following the personal law.

The way forward is to adopt the recommendation of the Law Commission of India in its 257<sup>th</sup> Report. The Commission has proposed a comprehensive overhaul of the statutory framework on child custody, moving toward a structured and child-centric model. As the Commission recommends, there is a need to move away from vague standards by including a set of factors to determine the best interests of the child. The courts will have to evaluate specific factors in custody matters similar to the UK custody jurisprudence. The codification of specific factors will reduce judicial discretion and provide a more predictable framework for dispute resolution. The adversarial nature of custody battles may be reduced by incorporating mandatory pre-trial mediation. There is also a need to give statutory recognition to shared parenting and joint custody. Joint custody should be a viable option when it serves the welfare of the child. It recognises that a child has a right to meaningful involvement of both parents in their life. There is a need to enhance the infrastructure of specialised family courts. It includes the creation of court-annexed mediation centres, implementing time-bound resolutions and developing standardised 'parenting plans'. These measures, once adopted, will ensure that the Indian legal system follows best global practices in child custody jurisprudence.

## CONCLUSION

The principle of the 'best interests of the child' is the cornerstone of custody jurisprudence. The analysis in this research paper reveals that while the Indian judiciary has made significant progress in prioritising the welfare of children over parental rights, there exist substantial legislative gaps. Historically, the Indian custody jurisprudence shifted from the doctrine of the King as *parens patriae* to codified legislation that initially favoured a patriarchal structure. However, the contemporary judicial interpretation has shifted the focus, establishing that the 'welfare of the child' is a paramount consideration that can override statutory provisions. Despite the judicial trend, the practical application of the best interests of the child faces several challenges due to a lack of a clear statutory definition, leading to wide judicial discretion and inconsistent decisions. Furthermore, the procedural delays, complexities of diverse personal laws and rising challenge of Parental Alienation Syndrome continue to harm the very children the legal system seeks to protect. The comparative analysis reveals that there is significant scope for reform in the operational framework in India. India could benefit by drawing on the UK's codified welfare checklist to guide judicial discretion and ensure consistency. On the other hand, the adoption of structured parenting plans and shared parenting from the USA could reduce adversarial conflicts and promote cooperative parenting. Moving forward, India must adopt a more structured and modern framework. As recommended in the 257<sup>th</sup> Law Commission Report, the statutory reforms are essential to formally recognise shared parenting and joint custody, ensuring that the child maintains meaningful bonds with both parents. The 'best interests of the child' must be transformed into a legally defined right that guarantees the holistic growth and emotional stability of the child in custody disputes. The Indian child custody jurisprudence must move towards a more structured, transparent and child-centric system that not only prioritises the principle of the welfare of the child but also ensures its consistent and effective application.