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CUSTODY OF CHILD – RIGHTS OF FATHER AND MOTHER

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Abstract

Marriage is the sacred union of both male and female, it has a significant place in the society of India. However, it cannot be said that all marriages will last forever. Both husband and wife can approach the court for divorce, or judicial separation on the grounds which were mentioned in the respective Acts. Divorce not only involves separation of husband and wife but also, it separates children from parents. The concept of custody comes after the separation of parents. If the parents are not willing to stay together then it causes more effect on the child, who is below 18 years. Children are sensitive and they are the main victims of divorce of their parents. If the custody of the child is given to one of the parents, then it does not mean the other parent lost all rights over the child. The main objective of the concept of custody is to protect the children. The custodial parent has the responsibility for the “best interest of the child”. This article mainly consists of the concept of custody, its effect on the child, types of custody, rights of the father, and rights of the mother over the custody of the child. Factors that will be taken into consideration while granting custody, can custody be given to a third party other than the parents of the child and the case laws relating to custody of the child in India. It helps us to understand the significant concept of custody and the laws which safeguard the rights of the child. “Guardian and Wards Act, 1890, Hindu Marriage Act, 1955, Hindu Adoption & Maintenance Act, 1956, Special Marriage Act, 1958 Hindu Minority and Guardianship Act, 1956.”

KEYWORDS – Custody, Child, “Guardian and Wards Act, 1890, Hindu Marriage Act, 1955, Hindu Adoption & Maintenance Act, 1956, Special Marriage Act, 1958 Hindu Minority and Guardianship Act, 1956”

I. Introduction

Custody means giving the responsibility of the child to a parent. Normally child lives with his or her parents, but if the parents are no longer together then the concept of custody arises. In most of the cases the custody of the child, who is below 18 years will be given to the mother. However, it does not happen in all cases. There are few circumstances where the custody will be given to the father. Several aspects such as the financial capacity, mental condition, and environment of the house will be considered while granting the custody of the child. The judicial process of custody will have more effect on the child. If custody is given to one of the parents, it does not mean the other parent has

lost all rights over the child. The parent still has all the rights over the child but the responsibility of the child will be allotted to one of the parents if they decided to separate. This article is important because, it helps us to understand the concept of custody in India, the rights of mother and father over custody of their child. It helps us to analyze the case laws relating to the custody of children.

This article contains the importance of custody of the child, the importance of recognizing the rights of mother and father, the Acts, “Guardian and Wards Act, 1890, Hindu Marriage Act, 1955, Hindu Adoption & Maintenance Act, 1956, Special Marriage Act, 1958 Hindu Minority and Guardianship Act, 1956” which deals with the

custody. I have chosen these topics because it helps us to understand the concept of custody in India, the types of custody.

II. Custody of the child

In India, custody means only physical custody of the child. If the court grants custody of the child to one of the parents, that does not mean the other parent has lost all his or her rights over the child. Both parents are natural guardians of the child and will continue to be the guardians, even if there are separated. Both will have equal rights over the child, but “legal custody of the child” will be given to one of the parents. In most cases, the custody of a child below 5 years will be given to the mother. Only 2 out of 100, fathers will get custody of the child. But this does not mean the custody will not be given to fathers. There are cases where the custody of a child has been given to the father. If the child is above 9 years, then the child will be asked about his or her will. The child’s opinion will also be taken into consideration. In India, both parents have a significant role in the lives of their children. If they decide to separate, then in such cases the court will decide to whom, it should grant the custody. As both parents have an equal role in the upbringing of the child, the court will consider certain factors while granting custody of the child. Normally the custody will be given to mothers as the courts believe that the mothers will provide all the care, love, and attention to the child that he needed.

III. Factors that will be considered while granting the custody of the child

1. Economic well-being of the guardian

The economic well-being or financial capacity of the guardian plays an important role while granting custody of the child. It is one of the important factors, but not the sole factor in determining the custody of the child. Economic well-being will help the guardian to make sure that all necessities of, good education is being provided to the child. Normally, both parents have equal responsibility over the child. The maintenance of the child can be claimed which

helps the parent to whom the custody is granted to reach all the necessities of the child. Economic well-being can be defined as the financial capacity of the parent to whom the custody is granted to make sure that he or she meets all the necessities of the child and provide a good lifestyle for the child. Not only the parent to whom the custody is granted has the responsibility towards the child, but the other parent also had equal responsibility in the upbringing of the child. Maintenance of the child and maintenance of the wife or husband should also be provided. All these will help to develop the economic well-being of the guardian.

2. Safekeeping of the child

Protection and safekeeping are the two factors that the court will consider while granting custody. The environment will be taken into consideration. If there are any instances of child abuse or domestic violence then the court can refuse to grant the custody of the child to the particular parent. The court will look into the background and enquiry will also be conducted by the child welfare committee. Based on all the information collected, the court will decide, whether it is safe for the child to grant custody or not.

3. Upbringing of the child

It is another factor that has major importance. The court will consider, whether the environment in the house is good for a child or not. It is important to consider because it will affect children in the future. If the upbringing of the child is bad, then after growing up he or she will attract to bad things. so, the upbringing of the child has a major impact on the character of the child. It is one of the reasons to consider the upbringing of the child as one of the factors while granting custody.

4. Education of the child

The above-mentioned three factors are interlinked with the education of the child. Education makes the person wiser and helps to

become independent. So, the court will make sure that the child is being educated by the parent.

These are the few factors that the courts may take into consideration while granting custody. The main concern is the safety of the child and all the decisions of the court will depend upon the best interests of the child.

IV. Types of custody

1. Physical custody

Physical custody means granting the guardianship of the child to one of the parents. The other parent will have visitation rights over the child. The responsibility lies in both parents, but the legal guardianship will be within one of the parents. The custody will be granted by the court based on the best interest of the child. To make sure the child should get the care and affection of both parents, the other parent will also have the responsibility and visitation rights over the child.

2. Joint custody

Joint custody means both parents will be given custody of the child. "Parents will take care of the child turn by turn keeping the child in their custody, The rotation of the child among the parents may vary from certain days or a week or even for a month, These benefits the child as on one hand the child gets the attention of both the parents and on the other hand parents get to be a part of their child's life."²¹

3. Legal custody

Legal custody means providing power to the parent to make decisions for the child concerning the child's education, place of living, etc. In most cases, legal custody will be given to both parents. But if both parents do not agree with each other, custody will be given to one of the parents. All these custodians will be granted by the court having competent jurisdiction.

4. Third-party custody

In certain cases, the "custody of the child can be granted to a third party". When both biological parents are unfit to have the custody of child, then the custody can be given to a third party. The third party is someone who is related to the parents. Generally, grandparents and relatives of the father and mother are third parties to whom custody will be granted.

V. Rights of Mother and Father

As mentioned earlier, both parents have equal rights over the custody of the child. In India, both parents are important for the welfare of the child. The main objective is the child should not be deprived of the care, love, or affection of any of his or her parents. It is one of the reasons for having joint custody of both parents. Supreme Court on many occasions has mentioned that both the parents have equal rights over the children and based on the "welfare of the child and best interests of the child", the custody will be granted. The child will be the priority of the court, and to make sure the child has the best upbringing the concept of custody was made as introduced. Both mother and father have equal rights over the child. If the "child is below 5 years then custody will be given to the mother. If the child is an older girl then the custody will be given to the mother, in the case of older boys the custody will be given to the father". If the child is above 9 years, then the opinion of the child will be asked.

1. Hindu Marriage Act, 1955

Section 26 of the Act deals with the custodial rights of the child. It deals with the education and maintenance of the child. It is only applicable when both parents are Hindu as mentioned in the Act. It states, "The court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper concerning the custody, maintenance, and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make

²¹ VidhiKarya, Child Custody Laws in India, LegalserviceIndia, <https://www.legalserviceindia.com/legal/article-710-child-custody-laws-in-india.html> (Last accessed 26 June 2023).

from time to time, all such orders and provisions concerning the custody, maintenance, and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.” The application must be disposed of within 60 days from the date of service of notice to the respondent.

2. Special Marriage Act, 1954

Section 38 of the Act deals with the custodial rights of children and it applies to all religions. It states, “The district court may, from time to time, pass such interim orders and make such provisions in the decree as it may seem to it to be just and proper concerning the custody, maintenance, and education of minor children, consistently with their wishes wherever possible, and may, after the decree, upon application by petition for the purpose, make, revoke, suspend or vary, from time to time, all such orders and provisions concerning the custody, maintenance, and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending.”

3. Hindu Minority and Guardianship Act, 1956

This Act deals with custodial rights of biological parents over children, it only considers the biological parents and does not recognize third-party custody.²² It was only applicable to Hindus. It contains the right of the mother, and father over custody and guardianship of the child and it is only applicable when both the parents are Hindu by religion.

4. Muslim Law

Under Muslim law, the concept of custody will be different from Hindu law. The mother will be

recognized as the natural guardian of the child until the child reaches the age of 7 and the custody will be given to the mother if the child is below 7 years. After the completion of 7 years, the father becomes a natural guardian of the child.

5. Guardians and Wards Act, 1890

This Act deals with the custody of the child and prioritizes the welfare of the child. The custody of the child in India will be based on personal laws read with the Guardians and Wards Act.

6. Divorce Act, 1869

Section 41, 42, and 43 of the Act deals with the custody of the child. This Act applies to Christians. It mentions that custody will be granted based on the best interest of the child. The person who is proven to be a better guardian for the child, who makes sure the child will grow up in a good environment will be given custody of the child.

7. Visitation rights

The court will determine the visitation rights of parents based on the age of the child, and the distance between the house of two parents. These rights are granted for the “welfare of the child”. The court has the power to determine the time, place, and manner of visitation of the child. The custodial parent should give the address to the noncustodial parent, if he or she has any problem then they can approach the court.

VI. Case Laws

● Mausami Moitra Ganguli V. Jayant Ganguli²³

In the case, the Supreme Court clarified that the economic conditions of the parent is only one of the relevant factor but not the sole determining factor to grant the custody of the child. The burden lies on the judiciary to take the judicial discretion by considering the facts and circumstances and deciding to whom the

²² Anupam Bhaduri, Child custody with respect to Indian Laws, BlogPleaders, <https://blog.ipleaders.in/child-custody-respect-indian-laws/> (Last accessed on 27 June 2023).

²³ Mausami Moitra Ganguli V. Jayant Ganguli (2008) 7 SCC 673.

custody of the child should be granted. The welfare of the child should be given importance and the court should decide the case.

- **Vivek Singh V. Romani Singh**²⁴

In this case, the welfare principles have been discussed. The main objective is to make sure that the child grows in good surroundings and will be given good and moral upbringing. “Optimal growth and development of the child” have been given primacy over the other considerations. The optimal growth and development not only include individual dignity but it also related to the public interest.

- **Lahari Sakhamuri V. Sobhan Kodali**²⁵

In this case, the court mentions the important points which will be considered while deciding the case relating to custody “(1) maturity and judgment; (2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving a relationship with the child, as opposed to characteristics of the parent as an individual.”²⁶

VII. Conclusion

The concept of custody is a sensitive issue and it should be dealt with with care and attention. The present legislation relating to the custody of children provides the rights of parents over the children’s custody. But some of the Acts do not involve third-party custody. It is important to include third-party custody because there may be cases where both parents are unfit to grant custody of their child. In such cases, it is feasible to grant custody to a third party, who can take care of the child.

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5. Vivek Singh V. Romani Singh (2017) 3 SCC 231.

6. Lahari Sakhamuri V. Sobhan Kodali (2019) 7 SCC 311.

²⁴ Vivek Singh V. Romani Singh (2017) 3 SCC 231.

²⁵ Lahari Sakhamuri V. Sobhan Kodali (2019) 7 SCC 311.

²⁶ Tejaswi Pandit, Custody of children, SSC Online Blog, <https://www.sconline.com/blog/post/2019/11/25/custody-of-children/> (Last Accessed on 28th June 2023).