



RESEARCH ARTICLE

A COMPARATIVE ANALYSIS OF LAWS ON CHILD CUSTODY UNDER VARIOUS PERSONAL LAWS IN INDIA

*Dr. Kasturi Bhagat

Asst. Prof., KIIT Law School, KIIT University, Bhubaneswar

ARTICLE INFO

Article History:

Received 22nd April, 2017
Received in revised form
19th May, 2017
Accepted 04th June, 2017
Published online 31st July, 2017

Key words:

Best interest, custody,
Guardianship,
Hindu minor.

Copyright©2017, Dr. Kasturi Bhagat. This is an open access article distributed under the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

Citation: Dr. Kasturi Bhagat. 2017. "A comparative analysis of laws on child custody under various personal laws in India", *International Journal of Current Research*, 9, (07), 55213-55215.

ABSTRACT

The aim of this paper is to explore the current statutory law on the matter of custody and analyze the conditions under which the custody can be handed over under various personal law. Furthermore, the judicial response to this issue is evaluated through the help of various decided case laws. In addition to that this paper intends to provide an insight to judiciary's response to the principle of best interest of the child in the realm of deciding the matter of custody.

INTRODUCTION

The care and protection of rights and interest of minor child has been a great concern of civilized system of law. The need for such provision emanates from the immaturity of the minor by the reason of his age and his presumed incapacity to take adequate care for himself.¹ An individual is considered a minor till he or she attains the age of eighteen. A guardian, who is empowered to take decisions on behalf of the minor and remain with the minor till the minor attains majority.² In the Law commission report 'Reforms in Guardianship and Custody Laws in India', which it submitted to the law ministry, the commission says that the child's welfare must be paramount in any decision relating to custody. It also lays out a framework - "unprecedented in India", for awarding joint custody of the child whenever it is possible.³

*Corresponding author: Dr. Kasturi Bhagat,
Asst. Prof., KIIT Law School, KIIT University, Bhubaneswar

The purpose of the study is to find out the brief differences of child custody under various personal laws in India i.e under Hindu Law, Muslim Law and Christian Law. This paper aims at describing the current custodial arrangements under various personal law and the role which the judiciary is playing in deciding the custodial matter.

Custody under Hindu Law

The provisions in the matrimonial Acts can only be invoked when any matter or proceedings pending under the Act. The Hindu Minority and Guardianship Act 1956 (HMGA) is the additional Act for Hindus. There is also the Guardians and Wards Act 1890 (GWA) which applies to Hindus. The Guardians and Wards Act 1890 is a secular law for appointment and declaration of guardians and allied matters, irrespective of caste, community or religion, however, the personal law of the parties are taken as consideration in certain matters, by the court. The provisions of the HMGA and the GWA are complementary and are harmoniously read together by the courts.⁴ The Hindu law of guardianship has been codified and reformed by the Hindu Minority and guardianship

¹Wife's remedies for guardianship and custody of her children, INSTITUTION OF CHILD CUSTODY (Mar 05, 2017), <file:///C:/Users/kiit1/Downloads/childcustody.pdf>.

²Darshana Mitra, *The Changing Face of the Family - Guardianship, Custody and the Law*, ALTERNATIVE LAW FORUM (Mar 05, 2017), <http://altlawforum.org/litigation/the-changing-face-of-the-family-guardianship-custody-and-the-law/>.

³Ayesha Arvind & Charul Shah, *Child Custody Laws in India: A much needed overhaul*, HINDUSTAN TIMES, June 08, 2015.

⁴Mohit Agrawal & Romit Agrawal, *Custody Under Hindu, Muslim, Christian And Parsi Law*, LEGAL SERVICE INDIA (21st April, 2017) <http://www.legal-serviceindia.com/article/134-Custody-Laws.html#sthash.qOR3DaJ.dpuf>.

Act, 1956.⁵ The subject matters can be well discussed under the following sub-headings.⁶

- Guardianship of person of minors
- Guardianship of the property of minors.
- *De-facto* guardians
- Guardians by affinity

Guardianship of person of minors

Under the Hindu Minority and Guardianship Act, 1956, minor means a person who has not completed the age of eighteen years.⁷ In other word, a minor is refer to be a person who is physically and intellectually imperfect and immature and needed to be under someone's protection.⁸ The Guardianship under the Hindu Minority and Guardianship Act, are Classified into the following categories:- (i) Natural guardians (ii) Testamentary guardians (iii) Guardians appointed or declared by the court. Further Natural guardians is divided into three types⁹:-

- **Father**:- A father is the natural guardian in case of a boy and unmarried girl.¹⁰ Section 19 of Guardianship and Ward Act, 1890 lays down unless the father is found unfit, no person can deprive him from natural guardian. Under Section 7 of The Hindu Minority and Guardianship Act, 1956, the position of adopted children is at par with that of born children.¹¹ In *Essakkayal nadder v. Sreedharan Babu*,¹² the mother of the minor was dead, but the father was not residing with his children, he is still alive, has not ceased to be a Hindu or renounced the world and has not been declared unfit. This does not authorize any other person to assume the role of natural guardian and alienate the minor's property.
- **Mother**:- The mother is the guardian of the minor illegitimate boy and an illegitimate unmarried girl, even if the father is alive and after her, the father.¹³ If the mother ceases to be a Hindu, her rights of natural guardianship remains the same. The position also remains the same in case of an adopted child and not a natural born child. In another case, where a mother and father had fallen out and were living separately and the minor daughter was under the care and protection of her mother, the mother could be considered as the natural guardian of minor girl.¹⁴
- **Husband** is the guardian of his minor wife.

A Hindu father may, by will appoint a guardian for his minor legitimate children in respect of minor's person or in respect of

minor's property or in respect of both.¹⁵ Under the Guardians and Wards Act, 1980, the district court on its own discretion appoints any person whenever it thinks it to be better for the welfare of the child.¹⁶

Guardianship Of Minors Property

The natural guardian of a child is also be considered as the guardian of the property belonging to such child. But a natural guardian is not the guardian of the minor's undivided interest in the joint family property. Neither the natural guardian nor the court can appoint a guardian of the minor's undivided interest in the joint property.¹⁷

De-Facto Guardian

The term '*de-facto* guardian' has neither been mentioned in any texts nor has the existence been denied in Hindu law. It refers to the continuous interest in the welfare of the minor's person or in the management and administration of his property by a person without any authority of law.¹⁸ He is not a legal guardian or testamentary guardian or a guardian appointed by the court, yet he himself has taken over the management of the affairs of the minor, as if he were a natural guardian. In case of emergency, he can dispose of the property without lawful authority.¹⁹ Old Hindu law recognized this type of guardian in practice. The Privy Council in *Hanuman Prasad Singh and Ors v. Bhaguati Prasad Singh and Ors*,²⁰ observed that under Hindu law, the right of a bonafide incumbrancer is not affected by the union of the *de facto* with the *de jure* title i.e. if someone has taken from a *de facto* guardian a charge of land for the benefit of the estate or for the purpose of saving the estate, which has been created honestly. With this judgment a silent recognition was extended to the status of *de facto* guardian. Further, in *Kandamundi* case, Justice Kania observed that Hindu law tried to find a solution out of two difficult situations: Firstly, without a legal guardian of a Hindu child, it would be difficult for the child to receive income from his property as there would not be anyone to handle or manage his estate in law. Secondly, a person having no title could not be permitted to inter-meddle with the child's estate so as to cause loss to him. A solution to this problem was by granting legal status to *de facto* guardians under Hindu law. In *Arvindo Society* case, the Madras High Court observed that *de facto* guardian is in juxtaposition to *de jure* guardian. In normal course, both are related to the minor. But the *de facto* guardian has no legal authority to meddle with the property of the minor in any way whereas the *de jure* guardian has all such powers to his credit. But Section 11 of the Hindu Minority and Guardianship Act, 1956, abolished the power of *de facto* guardian to deal with minor's property. Section 11 of the Act expressly negates the power of *de facto* guardian to alienate or deal with the property of a Hindu minor. It provides that: "After the commencement of the Act, no person shall be entitled to dispose of, or deal with the property of Hindu minor merely on the ground of his or her being the *de facto* guardian."

¹⁵Section 9, The Hindu Minority and Guardianship Act, 1956(3 of 1956).

¹⁶Section 7: Power of the Court to make order as to guardianship; The Guardians and Wards Act, 1890(13 of 1874).

¹⁷ PARAS DIWAN, FAMILY LAW 291(8th ed.).

¹⁸PARAS DIWAN, FAMILY LAW 295(8th ed.).

¹⁹Akshay Koundal, *What is the role of 'de facto' guardian under Hindu Law?*, SHARE YOUR EASSY (22nd April, 2017) <http://www.shareyouressays.com/117786/what-is-the-role-of-de-facto-guardian-under-hindu-law>

²⁰(1897) ILR 19 All 357.

⁵PARAS DIWAN, FAMILY LAW 287 (8th ed.).

⁶Pushkar Thakur, *Child Custody & Guardianship: Indian Scenario Compared to the West*, LEGAL SERVICE INDIA(21st April, 2017) <http://www.legalservicesindia.com/article/article/child-custody-&-guardianship-204-1.html>.

⁷Section 4(a), The Hindu Minority and Guardianship Act, 1956(3 of 1956).

⁸*The Different Types of Child Custody: Learn the difference between legal custody, physical custody, sole custody and joint custody*, NOLO (16th April, 2017) <http://www.nolo.com/legal-encyclopedia/types-of-child-custody-29667.html>.

⁹Section 6, The Hindu Minority and Guardianship Act, 1956(3 of 1956).

¹⁰Section 6(a), The Hindu Minority and Guardianship Act, 1956(3 of 1956).

¹¹PARAS DIWAN, FAMILY LAW 288 (8th ed.).

¹²AIR 1992 Ker 200.

¹³Section 6(b), The Hindu Minority and Guardianship Act, 1956.

¹⁴*Jababhai v. Pathankhan*, AIR 1971 SC 315; (1970) 2 SCC 717.

Guardianship by Affinity

Prior to 1956, there existed a guardian called guardians by affinity under Hindu law. Such guardian is the guardian of a minor widow. According to Mayne, "the husband's relation, if there exists any, within the degree of *sapinda*, are the guardian of a minor widow in preference to her father and his relation."²¹ The guardianship by affinity was taken to its logical end by the High Court in *Paras Ram v State*,²² where the father-in-law of minor widow forcibly took away the widow from her mother's house and married her for money to an unsuitable person against her wishes. The question before the court was whether the father-in-law was guilty of removing the girl forcibly. The Allahabad High Court held that he was not, since he was the lawful guardian of the widow.

Custody under Islamic Law

In Islamic law, there has been a clear distinction between guardianship and custody, and also provide for absolute recognition of the right of the mother to custody. Islamic law is a earlier legal system where the father is the natural guardian and custody vests with the mother until the son reaches the age of seven and the daughter reaches puberty.²³ Under the Guardian and Wards Act of 1890, Court has the power to appoint a guardian for the welfare of the minor. The concept of *Hizanat* provides that, of all persons, the first and foremost right to have custody of a minor child belongs to the mother up to a certain age. Unless the mother is not found to be guilty of misconduct or the custody is unfavorable to the welfare of the child, she cannot be deprived of her rights.²⁴ Under Sunni law, the mother is entitled to the custody of a male child up to seven years and a female child till she attains puberty.

Table 1.

Sl. No.	Other females who are entitled to <i>hizanat</i>	Other males who are entitled to <i>hizanat</i> (In default of mother and female relatives)
1	Mother's mother, how high soever.	Father
2	Father's mother how highsoever.	Nearest Paternal grandfather.
3	Full sister.	Full brother.
4	Uterine sister.	Consanguine brother.
5	Consanguine sister.	Full brother's son.
6	Full sister's daughter.	Consanguine brother's father.
7	Uterine sister's daughter.	Full brother of the father.
8	Consanguinesister's daughter	Consanguine brother of the father.
9	Maternal aunt in like order as sisters.	Father's full brother's son.
10	Paternal aunt in like order as sisters.	Father's consanguine brother's son

The table above shows the person entitled to custody under Sunni law other than the mother, the female relatives who are entitled to *hizanat* and the other male relatives entitled to *hizanat* :

According to Shia law of custody, the mother has custody of male child till the age of two years and female child till the age of seven years. She is the de facto guardian. Under Shia law the custody goes to the mother. On failingher, goes to the father and failing the father goes to the father's father i.e

²¹PARAS DIWAN, FAMILY LAW 294(8th ed.).

²²AIR 1960 ALL 479.

²³LAW COMMISSION OF INDIA, REPORT NO. 257, REFORMS IN GUARDIANSHIP AND CUSTODY LAWS IN INIDA, MAY 2015, Pg.18.

²⁴PARAS DIWAN, FAMILY LAW 303 (8th ed.).

grandfather.²⁵ The courts in judicial interpretation under the Guardians and Wards Act involving Muslim children, have sometimes upheld the mother's right to custody over children and on other occasions have given custody to the mother out of concern for the welfare of the child only when her rights to custody was supported by Muslim law.²⁶ In *Suharabi v. D. Mohammed*,²⁷ where the father objected to the mother's custody of the one-and-a-half year-old daughter on the ground that she was poor, the Kerala High Court held that the mother was authorized to have custody of a daughter of that age under Islamic law. Similarly, in *Md. Jameel Ahmed Ansari v. Ishrath Sajeeda*,²⁸ the Andhra Pradesh High Court awarded the custody of an eleven-year-old boy to the father, on the ground that Muslim law allowed the mother to have exclusive custody only until the age of seven in case of male children, and there was nothing to prove that the father was unfit to be a guardian in this case. In another case, *Mumtaz Begum v. Mubarak Hussain*,²⁹ the Madhya Pradesh High Court interpreted Mahomedan Law to allow custody for the mother.

Custody under Christian Law

The matter relating to child custody under Christian law is solved under the Indian Divorce Act.³⁰ Section 41 of the Indian Divorce Act, 1869, courts are authorized to issue interim orders for custody, maintenance and education of minor children in any proceeding under these Acts.³¹ The section lays down that, in any suit for obtaining a judicial separation the Court may from time to time, before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the said Court.³² In *Rozy Jacob v. Jacob A Chakramakal*,³³ court held that custody shall be granted only on the basis of welfare of the minor, thereby increasing the importance to be given to the welfare of the minor in deciding custody. The children are not mere chattels, nor are they mere playthings for their parents. Court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents, over them.

Conclusion

A brief perusal through the various personal laws shows the inconsistency in the laws of custody. In a matter where the psychology and future of the child is of concern, the prime importance must be of the best interest of the child. Priority must not be given to the various religious or personal laws but a secular law and uniform law is the need of the hour.

²⁵Pushkar Thakur, Child Custody & Guardianship: Indian Scenario Compared to the West, LEGAL SERVICE INDIA(23rd April, 2017) <http://www.legal-servicesindia.com/article/article/child-custody-&-guardianship-204-1.html>

²⁶PARAS DIWAN, FAMILY LAW 295(8th ed.).

²⁷ AIR 1988 Ker 36.

²⁸ AIR 1983 AP 106.

²⁹ AIR 1986 MP 221.

³⁰Mohit Agrawal & Romit Agrawal, *Custody Under Hindu, Muslim, Christian And Parsi Law*, LEGAL SERVICE INDIA(21st April, 2017) <http://www.legal-serviceindia.com/article/134-Custody-Laws.html#sthash.qOR3DaJ.dpuf>.

³¹The Indian Divorce Act, 1869(4 OF 1869).

³²[1973]3SCR918

³³ [1973]3SCR918.