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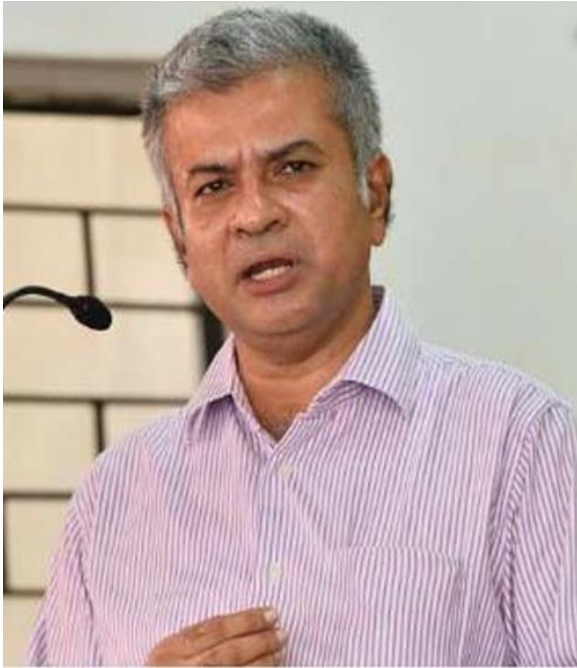
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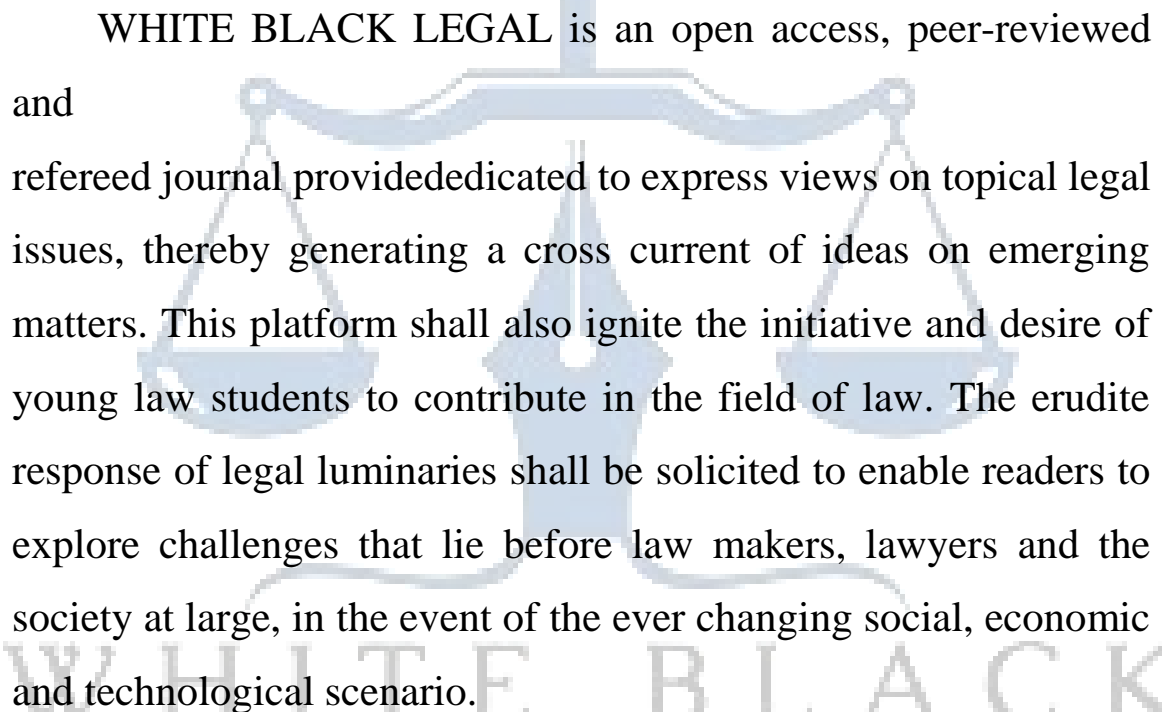


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ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CUSTODY OF A CHILD AT THE TIME OF DIVORCE

AUTHORED BY - ISHANN CHOPRA

Research Questions

1. What factors are generally considered while deciding to whom the custody of a child should be given at the time of divorce?
2. How does the concept of "best interests of the child" evolve across jurisdictions?

Abstract

Child Custody at Time of Divorce An Issue Where Courts Aim the Welfare of the Child over Parental Rights. This paper delves into the legal framework for custody in India, especially under the Hindu Minority and Guardianship Act, 1956, and the Guardians and Wards Act, 1890. Case laws, such as Archana Barthakur v. Dr. Ranjit Barthakur and Dhanwanti Joshi v. Madhav Unde, reflect the child's best interest, even where there is remarriage. Custody arrangements are essentially for the stability, security, and all-round development of the child.

Introduction

What do we mean by Child Custody?

Child custody is the legal and practical bond between a parent and a child and mainly concerns the right of the parent to provide for the child, make choices about the child, and exercise bodily control over the child. It usually occurs in situations where court cases have come out involving divorce, separation, or annulment, as decisions have to be made regarding the living situation and the children's upbringing.

There are essentially 2 kinds of child custody:

1. Legal Custody: The right to make significant decisions in the life of the child such as his education, medical treatment, and religious teaching.
2. Physical custody: it refers to the living right with one's parent or a guardian, which involves actual hands-on childcare responsibilities. Some countries use the term for custody arrangements:

Sole Custody: one parent is fully in physical and/or legal custody.

Joint Custody: Either equally or proportionately, the parents share the responsibility of the

child.

Legal Significance of Child Custody

Child custody legal relevance it affects the child's growth, stability, and well-being.

When making custody judgments, courts weigh the needs of the child against the rights of the parents, giving the kid's best interests top priority. The following are some reasons why child custody is important:

1. Preserving the welfare of the kid
After a dissolution of marriage, custody of the minor determines the care of the minor, emotional wellbeing, and financial security. In determining custody, the courts consider factors such as continuity in education and the child's mental health to minimize the disruption in the child's life.
2. Upholding the Rights of Parents
In addition to guaranteeing legal recognition and enforcement, custody proceedings set each parent's rights and obligations and shield parents from unjustly being denied access to their children.
3. Respecting the Law
Social principles like gender equality and non discrimination in parental responsibilities are reflected in child custody legislation. And in order to promote a well-rounded upbringing, joint parenting is emphasized in contemporary custody rulings.
4. Avoiding Disagreements
By offering legal enforcement and clarity, custody orders lessen the likelihood of parent-child conflict. Also they contain clauses pertaining to decision-making power, visitation privileges, and conflict resolution procedures.

Analysis

When we talk about Hindu law.

The concerned act would be

Hindu Minority and Guardianship Act, 1956

Governs guardianship and custody and is applicable on all Hindus, Buddhists, Jains, and Sikhs

S.6 (a) of the Act provides that:

a) Where the minor is a boy and the girl is an unmarried woman – the father first and then the mother. However, it is well settled that this Section recognises the established

principle that welfare of the child is paramount and hence it is provided that the custody of the child who has not attained the age of 5 years is to be with the mother.

Not even that, but even Section 13 of the Act states that, while determining the guardianship of a Hindu child, the welfare of the child should be the 'paramount consideration' and no person can be appointed as guardian of a Hindu minor if the court is of the opinion that it will not be of the 'welfare' of the child.

In case of dissolution of marriage or judicial separation, the most important question is of the custody of a child. Custody refers to the maintenance and proper care of a child or a minor (below the age of 18 years). The Courts, while judging the question of custody, it gives utmost importance to the 'welfare' of the minor and not to the 'rights' of the parents.¹

When we talk about whom should we give the child custody to then the primary objective and aim is the welfare of the child and also the preference of the child is taken into consideration in the case ²

Archana Barthakur v. Dr. Ranjit Barthakur, AIR 1985

In this case, the major question was of the custody of a 7 years old girl was presented in front of hon'ble court.

The child was residing along her mother and had deep attachment with the mother. where the mother had a suitable income. The minor girl was not willing to go and live with her father, from whom she was not residing with from past 5 years. The court gave the judgement that the child's welfare would be protected if she remains in the custody of the mother. Thus, here the primary consideration was given to the happiness and welfare of the child.³

The case law is an exam where we can depict that the court derived its decision of the child custody from the sole welfare of the child the primary objective and the end premise both revolve around the welfare of the child. Because the preference of the girl child of living with her mother aligns with the interest and welfare of the child.

¹ Mausami Moitra Ganguli vs Jayanti Ganguli, AIR 2008 SC 2262

² Child Custody Laws. <https://www.legalbites.in/topics/articles/child-custody-laws-892271>

³ Archana Barthakur v. Dr. Ranjit Barthakur, AIR 1985

Is remarriage a ground for the transfer is custody of a child?

For an example: If 2 persons Ms. A and Mr B dissolve the marriage and Ms. A gets the custody of the minor child. But if Ms. A marries Mr. X will the custody of the minor child be transferred to Mr. B

The answer to this question is No, the remarriage of the mother is no ground of transfer of custody of the child to the father and this decision is only made for the welfare of the child

Dhanwanti Joshi v. Madhav Unde (1998) [(1998) 1 SCC 112].

This case brings out that the remarriage of the custodial parent (here, mother) does not automatically bestow the custody of the child on the non-custodial parent, here the father. I

Important Points from the Judgment

1. Welfare is Paramount:

The Supreme Court held that the welfare of the child is the dominant consideration in deciding custody. Remarriage of the mother does not affect her capacity to care for the child unless it is shown that the child's welfare is compromised.

2. No Automatic Transfer of Custody:

It is clear that mother's remarriage is not a sufficient ground for transfer of custody to the father. The father should prove that the remarriage of the mother adversely affects the child's best interests.

3. Circumstances Evaluation:

Every case has to be weighed based on the emotional and physical well-being of the child. The factors that are involved are the adjustment of the child towards the new family and the relationship of the child with the stepfather, and preference of the child in case it is mature enough.⁴

In these cases of custody of a child the mothers do get an upper hand as initially mothers get the custody of the child till a certain age so they get a good chance to frame and mold the mentality of the child setting an image of the father so they can always enjoy the support of the child and in most cases the continuation of the custody of the minor till the age of 18 until the child attains the age of majority. As section 6 (a) mandates the court to give the custody of a child to the mother unless the child attains the age of 5

⁴ Dhanwanti Joshi v. Madhav Unde (1998) [(1998) 1 SCC 112].

Which also explains us why the visiting rights of the parents who doesn't have the custody of the child are important! Because of the reason mentioned above the visiting rights of the parent not having the custody of the child gets plays very important role in keeping the child in a touch with the reality and the real circumstances so the minor child does not create any misunderstanding with the other parent or any hate from the other parent under the influence of the parent with whom the minor child resides.

The Guardians and Wards Act, 1890

S17. Matter to be considered by the Court in appointing guardian.- (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. In looking at what will be for the welfare of the child, the Courts shall have regard to the age, sex and religion of the child, the character and capacity of the proposed guardian and his nearness to 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. If the minor is old and mature enough to form an preference, the Court may consider that preference. The Court shall not appoint or declare any person to be a guardian against his will.⁵

Matters Considered by the Court in Appointing Guardian

Section 17 of the Guardians and Wards Act, 1890 prescribes the principle that in questions of custody, the welfare of the child is paramount. It makes it obligatory for the court to regard the welfare of the child as the paramount consideration above all other considerations, including any claims of parents or other guardians.

Under this head, the court considers a number of factors so that the best interest of the minor is taken care of. These include the following:

1. Age, Sex, and Religion: The age and sex of the child determine the nature of the custody as younger children, particularly girls, are always better looked after by mothers
2. Character and Capacity of the Guardian: The judge considers the morals, ability to fulfill financial needs, and mental maturity of proposed guardian.
3. Minor's Preference: If the minor is mature enough to speak to his or her choice, then

⁵ The Guardians and Wards Act, 1890

his or her preference is considered, including the emotional attachment and his or her comfort with it.

4. Relationship with the minor: The judge implies an existing relationship between the guardian and child, including an emotional bond and previous care roles.

S19 states: In some cases, the court will not appoint a guardian. Nothing in this Chapter confers on the Court any power to appoint or constitute a guardians of the property of a minor whose property it is subject to the jurisdiction of a Court of Wards, to appoint a guardian of a minor whose property is subject to the jurisdiction of a Court of Wards empowered to appoint a guardian of the person of the minor, or to appoint or constitute a guardian of the person of a minor whose father is living and the Court is of opinion that the father is not incapable of being a guardian of the person of the minor.⁶

Section 19: Cases in Which the Court Cannot Appoint a Guardian

Section 19 of the Guardians and Wards Act, 1890 safeguards the rights of natural guardians or parents by not allowing the court to appoint a guardian if one of the parents is already acting as a natural guardian. This section indicates that, unless otherwise proven, natural guardians who are connected to the child by both blood and emotions are most suited to fulfill their duties as parents.

The court is restrained from appointing an external guardian if the child is under the care of a natural guardian, namely A father or mother, in the absence of the same, if the guardian appointed is not considered unfit. The reasons for declaring one as unfit include abuse, negligence, failure to provide for primary needs, or immoral issues. The party objecting to the natural guardian has to prove the case.

However, in cases where there are both parents who are alive, and they contest the custody award, the court is bound to intervene. The court subsequently looks at the circumstances, and then it makes decisions on the custody based upon the welfare of the child, which remains the principle consideration. It looks upon such factors as the child's emotional attachment, both parents' ability to gratify the needs of a child, and the overall stability provided by each.

⁶ The Guardians and Wards Act, 1890

In essence, section 19 protects rights in natural guardianship while bringing out the child's best interests in disputes over their custody.

Conclusion

The custody of a child at the time of divorce is a sensitive and complex matter where the courts' primary concern is the welfare of the child. Indian legal systems, such as the Hindu Minority and Guardianship Act, 1956, and the Guardians and Wards Act, 1890, recognize that the rights of parents are important but secondary to the welfare of the child. This allows the decisions regarding custody to be made in a manner that encourages the child's emotional, educational, and psychological well-being.

Section 6 of the Hindu Minority and Guardianship Act reflects traditional views but also adapts to modern principles by granting custody of children below five years of age to the mother, as the mother is typically seen as better equipped to provide nurturing care. Similarly, Section 13 reiterates that welfare that means paramount consideration in deciding guardianship. Moreover, Section 17 again reiterates the important factors as the age, sex, religion, the capacity of guardian, and the wishes of the child. Section 19 provides safeguards to natural guardians, ensuring their rights are respected unless proven unfit.

Case law such as 'Archana Barthakur v. Dr. Ranjit Barthakur' and 'Dhanwanti Joshi v. Madhav Unde' further elucidates how courts apply these principles. In both cases, the courts prioritized the welfare of the minor, alligning with their preferences and emotional well-being, even in cases of remarriage or parental conflict. Such verdicts only strengthen the view that custody is not an issue of parental right but of providing the best future for the child.

Ultimately, the legal system tries to continue the continuity and stability in the child's life. Custody arrangements must protect the child's interests, maintain healthy parental relationships, and minimize disruption. This is a child-centered approach ensuring the child's welfare is always at the heart of every decision.