

A Critical Study on Custody of Minors to Grandparents in India

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Abstract

The paramount consideration in allotting child custody is by considering the best interest of the child. Custody is generally granted to either of the parents. Under special circumstances it is awarded to a third party with emphasis on grandparents. As a saying goes, "If you spoil your children, you have to bring up your grandchildren." Consequently, the safekeeping of grandchildren is passed on to their grandparents. The paper throws light on the psychological effects on the child's brain and effectiveness of awarding such custody considering the best interest of the child. This paper examines the role of grandparents in child custody by adopting the mode of empirical research. It will examine the cases decided in India in the last decade with the help of various legislations like The Hindu Marriage Act, 1955, The Special Marriage Act, 1954, Guardians and Wards Act, 1890. It further draws a comparison of how this issue is dealt in other countries and its efficacy in those countries.

Keywords: Grandparents, Third party, welfare, India, Psychology, Divorce, custody, grandchildren, parents, legislations

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INTRODUCTION

Marriage is an institution or a social ritual recognizing the union of two individuals, generally a man and woman who come together to establish rights and obligations between them. They support each other physically, emotionally, mentally, sexually and spiritually. One of the main features of marriage is procreation. Procreation is most of the times forced on the married couples by the society. As a result, they end up having children even when they are not comfortable with the arrangement. Marriage is a bond that is to last until death, however due to various factors like adultery, cruelty, renunciation of the world, presumption of death of the partner, ceasing to be a Hindu, suffering from a mental disorder etc. married couple choose divorce [1, 2].

In cases of divorce where a child is present out of the relationship, the court will allot custody of children as it deems just and proper. The wellbeing of the child is its top priority [3]. The court can grant custody to either parents or a third person or an institution [4].

The court determines custody applying the following principles –

1. Considers benefit of the child
2. Grants custody to the innocent party
3. Refuses custody to guilty parent
4. If the parent entrusted with custody is found to be leading an unfit life, the court will resend custody to the other parent or third party [5].

Custody to a third party is allotted only in certain special circumstances. This paper will examine the cases in which custody is allotted to third party, specifically to grandparents.

LEGAL FRAMEWORK

Personal Laws Governing Custody of Children

Section 26 of the Hindu Marriage Act, 1955 speaks about custody of children born to Hindu parents and the marriage is recognized under this Act. Section 38 of the Special Marriage Act, 1954, is substantially the same as Section 26 of the Hindu Marriage Act. Section 49 of the Parsi Marriage and Divorce Act 1936 addresses the same subject. The

Indian Divorce Act, 1860, for Christians, deals with the subject in Part XI (Sections 41 to 44) under the title Custody of Children. In Islamic law, the father is the natural guardian, but custody vests with the mother until the son reaches the age of seven and the daughter reaches puberty. Islamic law is the earliest legal system to provide for a clear distinction between guardianship and custody, and also for explicit recognition of the right of the mother to custody [6].

Hindu Minority and Guardianship Act, 1956

Section 6 of this Act places importance in father as the natural guardian followed by mother in case of a boy or an unmarried girl. In case of an illegitimate child, first the mother then the father is considered as the natural guardian for person as well as his/her property.

Gita Hariharan v. Reserve Bank of India challenged the validity of Section 6 (a) on the basis of violation of Right to Equality under Article 14 of the Indian Constitution. The Court observed that the term ‘after’ 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.

Section 13 places emphasis on the welfare of the minor child to be the paramount consideration.

Secular Laws Governing Children

Guardians and Wards Act, 1890 supplants the Hindu Minority and Guardianship Act, 1956 that is a personal law [7]. Whereas Guardians and Wards Act is a secular law applying to all religions. Section 7 of this Act authorizes the court to appoint a guardian of his person or property, or both. Section 17 lists the matters that are to be considered while deciding custody of minors. The Act mandates the court to appoint guardians considering the welfare of the child, age and sex of the child, and may consider the preference made by the child if he/she is intelligently mature to make an informed decision. The court further cannot allot custody to any person who is against the child’s will. Section 19 says that the court is

not authorizes to appoint a guardian if either of the parents are alive and is not unfit to take care and control of the child.

All legal provision explicitly gives custody of children to either of their parents. It is only in certain circumstances where the court feels that the parents won’t serve in the best interest of the child; grandparents are given custodial rights.

‘Best Interest of the Child’ in International Human Rights Law

While the “welfare of the child” principle dominates the domestic legal framework, a comparable legal standard is found in international human rights law. According to the United Nations Convention on the Rights of the Child (hereinafter, CRC), “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration [8]. The Convention directs the State Parties to ensure that “both parents have common responsibilities for the upbringing and development of the child” [9]. The CRC provides that a child should be separated from his or her parents if there is “abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child’s place of residence” Welfare of the child, as a criterion for decision, is generally flexible, adaptable and reflective of contemporary attitudes regarding family within society [10].

The Committee on the Rights of the Child has suggested that the following considerations can be relevant: the child’s views; the child’s identity (such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, and personality); preservation of the family environment and maintaining relations (including, where appropriate, extended family or community); the care, protection and safety of the child; any situation of vulnerability (disability, minority status, homelessness, victim of abuse, etc.); and the child’s right to health and right to education [11].

Bronfenbrenner Center for Translational Research is researching on the wellbeing of children who live with their grandparents. (In the context of USA)

Children raised by grandparents are more likely to experience challenges as well. Because they are often living in an unofficial arrangement, they are less likely to qualify for social services. And they are more likely to experience emotional and behavioral problems.

Grandparents in these families are less likely to be employed, less likely to receive help with childcare and more like to suffer from physical disabilities and chronic health problems. These grandparents experience higher levels of stress compared with other grandparents and are more likely to face mental health and financial problems [12].

A child's grandparent may apply to the court for custody under one or more of the following circumstances, namely -

- a. The parents of the child are divorced or have separated, or proceedings for divorce or separation are pending before the court; or
- b. The child 's parent, who is the daughter or son of the grandparent, is deceased; or
- c. The grandparent has, in the past, provided an established custodial environment for the child, whether or not the grandparent had custody under a court order. (When child is living with grandparents in a joint family)
- d. Sexual abuse or exploitation of child
- e. Substance abuse on behalf of the parent
- f. Incarceration of the parent
- g. Teen pregnancy of parents

An order for grand parenting time may be issued only after giving due notice, and an opportunity of being heard, to both the parents.

Before issuing an order for grandparent custody, the court shall determine whether such an order is required for the welfare of the child [13].

In determining the welfare of the child under this part, the court shall consider the following, namely -

- a. The love, affection, and other emotional ties existing between the grandparent and the child;
- b. The grandparent's mental and physical health;
- c. The child's intelligent preference;
- d. The willingness of the grandparent, except in the case of abuse or neglect, to encourage a close relationship between the child and the parent or parents of the child;
- e. Child's adjustment to home, school, or community
- f. Safety
- g. Welfare

ANALYSIS OF INDIAN CASES

This section will give an insight into a variety of cases, which involve custody of child to grandparents. In some cases, the court has awarded custody to grandparents and denied custody in some cases.

Jwala vs. Bachi Lal [14]

The grandparents were caretakers of the child since its birth. When the child turned 8 years, the father claimed custody over his child. The court denied custody as removal of child from grandparent's custody and awarding custody to the father would hamper the child's health and make the child uncomfortable in an unfamiliar environment.

The courts have granted access to non-custodial parents considering the best interest of the child in mind.

Chandrakala Menon and Ors. vs. Vipin Menon and Ors. [15]

In this case, the appellant was wife of respondent. They had a child who was staying with her maternal grandparents. The marriage between appellant and respondent were broken down irretrievably and so got divorced. Respondent took the child from her maternal grandparents. Hence, present appeal - The custody of child has to be decided on sole and predominant criterion of what would best serve the interest of minor. Facts revealed that

child had ample love for both her parents. Held, appellant entitled to custody of child, as it would be interest and welfare of girl child. In this case we can observe that custody of child was awarded to the mother after her separation and the child stayed with her grandparents previously.

R. V. Srinath Prasad vs. Nandamuri Jayakrishna and Ors. [16]

After the mother passed away, the interim custody of two minor children was granted to maternal grandparents. The interim order stated that interim custody of the children is to be given to their maternal grandparents for their better welfare and also to perform the rituals/karma of their deceased mother.

Niranjan Singh Huda and Anr. Vs. Tavinder Pal Singh Bhatia and Anr. [17]

The court rejected the custody of child to grandparents (maternal). The child was happy with her father and had no issues regarding studies. The child failed to recognize her grandparents lived or seen them. The court considered the best interest of the child and granted custody to the father in this case.

The fact that her father was convicted and presently his appeal was pending before High Court would not dis-entitle him to keep his daughter with him, if otherwise welfare of daughter lied in residing with her father

As held in Mohan Kumar Rayana v. Komal Mohan Rayana, welfare of the child is the sole and single yardstick to assess comparative merit of the parties contesting for guardianship, the court has taken a decision awarding the custody to the father in this case.

Athar Hussain Vs. Syed Siraj Ahmed and Ors. [18]

The couple was married as per Islamic rites and had two children of this relationship. The mother died when her children were of age 13 years and 5 years. Their father then got remarried.

In the meanwhile, the custody of these children was with their maternal grandparents.

The 2nd wife of their father was claiming custody of the children.

The court held that the Mohammedan law would apply in this case as the parties were Muslims. Considering Section 353 of the said law, the court held that the preferential rights regarding custody of the minor children rests with the maternal grandparents.

The court further gave a list of people having custodial rights of minor girl over the father in the said order.

1. Mother's mother
2. Father's mother
3. Mother's grandmother howsoever high
4. Father's grandmother howsoever high
5. Full sister
6. Uterine sister
7. Daughter of full sister, howsoever low.
8. Daughter of uterine sister, howsoever low.
9. Full maternal aunt, howsoever high.
10. Uterine maternal aunt, howsoever high.
11. Full paternal aunt, howsoever high

These people are third parties who would get custody of a girl child over father. Maternal and paternal grandparents have the first preference. The Delhi High Court in a decision awarded custody of child to grandparents [19].

The duo got married and had a child from that relationship. 4 years after the birth of the child, the couple separated. The mother then left to New Zealand leaving behind her daughter in the care of her parents.

The father claimed for his daughter's custody. The court observed that, right from birth, the child's custody was with her mother and her maternal grandparents. The child does not even recognize her father, who is fighting for custody. Since he [father] is a total stranger to the child, giving him visitation rights would not be in the child's interest at this stage.

The child's best interest will take precedence over the interest of the father.

Vivek Singh vs. Romani Singh [20]

The couple rifted apart and the wife was forced to leave the matrimonial house. She

took the child who was 2 years old along with her. The husband wanted custody of the child.

She stated that she had been in continuous possession, care and protection of the child since her birth and the father had no love and affection for the child.

It is to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the vanguard of family/custody disputes according to the optimal growth and development of the child primacy over other considerations. The child is often left to grapple with the breakdown of an adult institution.

The father was an army officer. During the course of his service he will be also getting non-family stations and it will be difficult for him to keep the child.

He claimed that his parents are looking after the child but when the natural mother is there and has knocked the door of the court without any delay and has all love and affection for the child and is willing to do her duty with all love and affection and since the birth of the child she has been keeping the child.

In these circumstances, she should not be deprived of her right especially considering the tender age and child being a girl child. The grandparents cannot be a substitute for natural mother. There is no substitute for mother's love in this world. The grandparents are old. Old age has its own problems. Considering the totality of facts and circumstances, the welfare of the child lies with the mother who is educated, working and earning a good salary and after school hours has ample time to spend with the child.

Kanika Goel Vs. State of NCT of Delhi and Ors. [21]

Father of the minor child claimed that the custody of his daughter must be awarded to him and would take her to the US to the jurisdiction of the US courts.

The father claimed that the minor daughter must be in his custody as there would be

disruption of her education or being subjected to a foreign system of education is likely to psychologically disturb her. However, he minor child had just entered pre-school in the USA before she came to New Delhi along with her mother.

The court stated that if the child returns to the US, the child will be under the care of a nanny as he will be away during the daytime for work and no one else from the family would be there at home to look after her.

Currently the child in the custody of her mother and her maternal grandmother, which is psychologically better as separation from them, will only disrupt the child's development. It can be observed that in this case the custody of the child was given to her mother and maternal grandmother.

Pundalik S/o Malakappa Gubbyad v State of Karnataka [22]

In this case, it can be observed that custody of children was awarded to their grandparents.

The father was accused of strangling his wife to death after he found out that she had an illicit relationship. He was the prime accused and was in judicial custody.

The couple was married for 8-10 years. They had 3 children. These children were in the care and custody of their grandparents.

CONCLUSION

From the above cases, it can be observed that the court awards custody to grandparents under certain circumstances and deny the same in a few circumstances. The court always considers the best interest of the child. In the above cases we can observe that the court awarded custody only when it is physically and mentally possible for the grandparents to take care of the child.

In most of the circumstances, the court awarded custody to both the mother and the grandparents as in the case of Kanika Goel Vs. State of NCT of Delhi and Ors.

The psychological condition of the grandparents and the child is considered while

awarding custody, as it should serve the best interest of the child.

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