



Study of Custody of Children: Legislative Developments in India and England

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Abstract

A parent's legal and practical connection with his or her kid is sometimes referred to as "child custody," "guardianship," or "custody," and these phrases are often used to characterise this relationship. Children's welfare wasn't seen as a government role in any ancient civilisation. Fathers in ancient Rome, for example, had an almost unrestricted inherent right to make decisions about their children's well-being. The well-being of children was primarily a concern of their families, not one that fell within the purview of the state. In the ancient world, fathers were free to punish their children in any way they saw fit, even killing their infants.

Key Words: Child, Custody, Legislative, Development, India, England etc.

Introduction

The most controversial issue of family law is child custody. Child custody is the most difficult and emotionally draining issue in divorce proceedings. For no fault of their own, children and infants are forced to face the anguish. Both parents wish to retain custody of their children because of their strong emotional ties. This is a matter that is determined by the court of Guardians and Wards in the Indian system.

Genesis of guardian and wards act, 1980 and Hindu

Minority and guardianship act, 1956: in India

Guardian and Wards Act 1890 was enacted because of a lack of confidence in women's ability to intervene in legal and social concerns pertaining to children's care. Priority is given to father's rights under Act of 1890. Section 17, Section 19, and Section 25 of this Act deal with the care of young children. This section states that (1) while making a decision to appoint or declare someone as a guardian or ward of an individual under the age of 18, a court must take into consideration what seems to be in their best interests, as defined by applicable law. It is important to remember that in order to determine what is best for the minor's welfare, the court must take into account factors such as whether the



minor is a sex minor or a man; whether the minor is male or female; his age, gender, or religion; his character and capacity; and his proximity to the minor or his property.

“Because the 1890 law was incomplete, the establishment of the Hindu Minority and the Guardianship Act of 1956 was influenced by a number of circumstances. Indian law was not uniform, (ii) there were discrepancies between various schools of Hindu law, all founded in historic diverse norms, and the government thus chose to codify Hindu law. Consequently, the Act of 1956 codified The Act's goal was to update and codify existing Hindu legislation on minorities and guardianship. It becomes effective on August 25, 1956. It covers the whole country, except Jammu and Kashmir. Anyone who is not a Muslim, Christian, Parsi, or Jew by religion is covered by this law. Non-Hindus who don't adhere to any of the aforementioned religions are also included in this section. In this way, the law does not leave anybody without religion. Rather than relying on any book, rule, or interpretation, or any custom or usages with the power of law, this decree overturns the traditional Hindu law of guardianship”. So both Dharam Sastras and judicial precedent have been overturned for the sake of consistency and a more progressive outlook. Consequently, while the 1956 Act is silent, the 1890 Act is in effect.

Genesis of English common law:

The modern family law context's coercive character of parenting plans and child custody and visitation decrees is better understood in light of the historical history of child custody law. As a result, the equity system of jurisprudence, which originated in the English Chancellor's court and has evolved through time with the courts of law in both England and America, has survived to this day.

Children's property and guardianship decisions are made by chancery courts in addition to the individual case-by-case rulings. 1601's Poor Law Act, among other things, gave the government the authority to remove children from their destitute parents and put them in apprenticeships until they reached the age of 18 years old (21 for males and 16 for females). Abolition of the Court of Wards and Court of Chancery, which had previously overseen the custody of children's inheritance and property interests, was foreshadowed by Parliament's passage of the Tenures Abolition Act in 1660. It was common practise in mediaeval times for a landowner to retain authority over the inheritance of a minor heir who had been left behind by a tenant who had died before he or she reached the age



of adulthood.) Since feudal inheritance rules prohibited fathers from appointing guardians for their children, the Tenures Abolition Act made it possible for fathers to name guardians for their children.

Disputes involving testamentary guardianships were heard by the Court of Chancery from 1660 until 1873, when equity jurisdiction was abolished. “Court of Chancery expanded the scope of child protection during these equity determinations, which included concerns over a ward's right to marry, to attend a particular type of school or university, to the choice of religious training, and to child custody arrangements in addition to inheritance and property. The Custody of Infants Act, passed by Parliament in 1839, significantly broadened the court's authority to decide what is in the best interests of children by allowing it to override a father's parental rights, including those to custody and visitation. History experts believe that parental patriae, rather than legal battles over property and guardianships”, were the primary means by which governments sought to protect children's best interests in the 19th century.

History of Legislation on Guardianship and Custody in England:

As a result of the Judicature Acts, the courts continued to zealously protect parental rights, particularly those of fathers, to regulate the religious education of their children." A succession of regulations passed by Parliament starting in the second half of the 19th century have weakened fathers' rights and given mothers more control over child custody. The reform movement, which began in 1839, was gaining traction.

(i) Custody of Infants Act, 1873:

“Talford's Act of 1839 was expanded by this Act, which allowed the court to grant custody to the mother until the child reached the age of 16. As a result, it did not repeat the provision regarding her adultery, but Section 2, which is still in effect, introduced a further reform, which had long been overdue, by making it possible for parents who divorce to agree on custody or control of their children, which was previously unenforceable because it was deemed contrary to public policy”.

(ii) Guardianship of Infants Act, 1886:

By allowing the court to grant the mother custody of her children until they were 21 years old, this substantially extended the previous Acts. Since a result of this change, the father was no longer able to use a testamentary guardian to thwart the mother's rights after his



death, as the mother was granted limited authority to make such appointments for the first time.

(iii) Custody of Children Act, 1891:

If a parent has abandoned or deserted his or her kid, the burden of proof shifts to establish that he is suitable to have custody of the child claimed and the court may refuse to award him custody completely if he fails to do so (Section 1). The court may now require a parent who is awarded custody to pay for the kid's upbringing in whole or in part if the child is being raised by someone else at the time of the parent's application for custody.

(iv) Guardianship of Infants Act 1925:

One thing to keep in mind is that the Act of 1925 gives legislative force to the norm that the court must place children's well-being first and foremost in every dispute it hears. By providing the mother equal rights to designate testamentary guardians to the father, the law consolidated parental rights and finished the assimilation process of parent's rights by making it clear that neither parent should be viewed as superior to the other.

(v) The Children Act of 1953:

It stood as follows in 1953: When it comes to parenthood, a dad has a lot less power because of this fundamental concept (the child's well-being), yet this fact doesn't lessen the role of a dad as a parent at all. The infant's mother becomes the single or joint guardian, or the court appoints a guardian if the deed or will of the father fails to do so, on the father's deed. At any time during her husband's life she is entitled to make a court application for any matter involving the child in the same way that her husband is. She is also entitled, along with her husband, to name a guardian to act as joint guardian of the child after she dies, or, in the event of her deceased husband's death, the Guardian appointed by him. If the surviving parent and the guardian chosen by the dead parent have differing views, the court may give exclusive custody of the child to whichever party it deems best for the child's well-being at the time.

(vi) Custody under English Act of 1971:

A set of rules for making decisions about children' care, upbringing and education are put out in the English Act of 1971. A judicial proceeding (whether or not one described in section 15 of this Act) may include the following:



- The care and rearing of a child;
- If the administration or use of property or income belonging to or held in trust for a minor is in question, the court will place the welfare of the minor first and foremost in its consideration and will not consider the claim or any common law right of the father in relation to such custody, upbringing, or other considerations.

Despite this, the law now covers a far broader range and scope. Certain requirements are included in the Children's Act of 1975. A whole new idea If you're a relative or someone else who's taking care of a kid on a long-term basis, Custodianship gives a way to get legal custody of the child. As a result of a Custodianship order issued under the Act, a custodian of the child is granted legal custody. Unlike a parent who has legal custody of their kid, a custodian does not go by the title of "guardian." For example, custodianship may be considered new guardianship, although it has less rights and authorities than guardianship. Custodianship is comparable to custody but not exactly the same.

Conclusion

In India, the status of the father remained dominant until the 1890s, “when the Hindu Minority and Guardianship Act 1956 was passed, allowing the mother to have a role in the custody of her children for the first time. Natural guardian of Hindu minor, both in terms of the minor's person and his or her property, is defined in Section 6(a) as the father and his or her mother. The father's position of authority is preserved by this measure. Many proposals have been made to eliminate gender discrimination in this area by the Law Commission Report on the Guardian and Wards Act 1890”, and guidelines have been issued for the courts as well. As a result of its recommendation, the Personal Law (amendment) Bill was passed in 2010 with certain modifications to the Guardian and Wards Act 1890, according to which section 19 (b) includes mother and father in order to eliminate gender inequality in guardianship and child custody. as well as a law commission report on eliminating gender discrimination in matters of guardianship and custody of minor children and developing the welfare principle.



References

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