



POST-DIVORCE CHILD CUSTODY COMPLICATIONS (With Special Reference to Hindu Personal Law)

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Chapter 1: Abstract

The primary effect of the breakdown of the marital bond is on the spouses. They go through a complete change and series of challenges. The number of challenges faced is more when the spouses have children. Even though the spouses face the primary challenge, nevertheless, the children's goes through a lot. This Paper will revolve under the various Custodial and Guardianship Laws of the Children, with special regard to Hindu Personal law. Besides this, the Paper also deals with the financial settlements – Maintenance granted to children, the liability and duty of both the spouses to maintain the child even after divorce.

Chapter 2: Research Methodology

This Paper has been made by using methods of doctrinal analysis. The pieces of information basing which this Research Paper has been made include statutes and some secondary sources like, Books, Articles, blogs and other Research Papers.

Chapter 3: Research Questions

This Paper is based on the following Questions: -

1. What are the Custody and Guardianship Laws in India?
2. What are the various types of Custody which the court can settle for?
3. How is the writ of Habeas Corpus used for the restoration of Custody?

4. Can the Financial position of a spouse be a factor to grant them the Custody of the child?
5. What are the various Maintenance provisions, specially in regard to Hindu Personal Law?
6. Can a case be dealt with under two or more different statutes for claiming maintenance?
7. What are the probable effects of divorce of parents that a child – especially a minor can encompass?

Chapter 4: Literature Review

1. Impact of Divorce on Children: A Socio-Economic and Legal Study-

Vijender Kumar discussed the Rights of Parents, Grandparents and Children in Custody Cases. According to him, A divorce is frequently followed by protracted battles over minor child custody. As a result, it is needed to look at the problem of child custody and how the custody arrangements affect the children. He also cited cases such as V. Meenapushpa v. Vs Ananthan Jayakumar, in which grandparents were granted Custody of their grandchildren based on the wishes of a mature child. He also clarified India's custody and guardianship laws.

2. In his research paper, writ of Habeas Corpus in Child Custody Matters-

Shivam Goel discussed how the Writ of Habeas Corpus helps to restore a child's Custody. While discussing this, he stated a few cases and explained this through that. In his Paper, he defined, "The purpose of a habeas corpus proceeding is not to



justify or investigate the legitimacy of a person's detention.” In the latter part of the Paper, he mentioned Habeas corpus procedures are a legal process that allows the court to decide on the Custody of a child.

3. **The Determination of Child Custody** - Joan B. Kelly reviews the history of child custody decision making briefly and describes current custodial arrangements in the United States. It examines both the manner in which parents and courts make decisions regarding Custody and access and the changes in visiting patterns in recent decades. The author discusses the impact of reforms in the law and the implementation of newer dispute resolution and educational interventions and then makes recommendations for policy and practice.
4. **Eliminating Consider Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes** - Carolyn J. Frantz, in the Paper, mainly talks about the relevance of wealth in connection to the rule of the best interest of children to settle post-divorce custodial matters.

Chapter 5: Introduction

Marriage, a sacred bond, sometimes breaks due to some uncertain events or difficulty in a relationship. Although spouses sometimes compromise their happiness and don't end their unhealthy relationship thinking of the

child's wellbeing and mental health. However, at times it is too much to bear on the spouses. When one parent develops any bad habit that may affect the child's mental state of the child, then another parent can file for Custody, keeping in mind the child's welfare. Single-parent and divorced families are growing more common in the lives of both parents and children.

Some children react to divorce in an understandable way, while others are impacted in a variety of ways by divorce and separation. They experience intense changes in emotion. Especially children under four years are sensitive as this is a period when many rapid changes occur mentally, emotionally, and socially¹.

Child custody can be said that it is the obligation to control, care and supervise the child. When it comes to custody matters, a court is not bound by statutes, rigorous rules of evidence or procedure, or precedents. In 1890, it was codified as the Guardians and Wards Act. 3 The court considers legal guardianship of a child under the age of majority, which is 18 years old, to be child custody. At the time of divorce, the child's Custody often becomes the main factor to be resolved by the court.

In most cases, the child's Custody is legally to be shared by both the parents, like joint Custody but gained by one parent in the case of physical Custody of the child. The decisions are made in the child's best interests, and the court must determine how much weight to give to the child's custodial preference, rather than what each parent says. While parents have the right to Custody of

¹ Wanda M. Williams-Owens, The Behavioural Effects Divorce can have on Children, The Graduate Centre, the City University of New York, 2017, |Page

1,3| The Behavioral Effects Divorce Can Have on Children (cuny.edu), last seen on 13/12/2021.



their children, the child's welfare is the most crucial factor to consider when deciding who gets custody of a minor child. Moral and ethical ideals, however, must take precedence above. They are just as required, if not more so, as fundamental and indispensable considerations.

However, to whomever the Custody goes, it does not end the obligation of either of the spouses to maintain the child/children financially. The child has a right to be maintained under almost all the personal laws, and besides that, the secular code – Code of Criminal Procedure, 1973 provides for the same.

Chapter 6: Guardianship And Custody Law In India

The legislation governing child custody and guardianship are inextricably interwoven. Guardianship refers to an adult's rights and powers over a minor's person and property. In contrast, Custody is a narrower concept relating to the minor's upbringing and day-to-day care and control. The term custody is not defined either as secular or religious. The Guardians and Wards Act of 1890 (GWA) defines a guardian as a person who has the authority to care for a minor's person, property, or both.

A natural guardian is another term used by the law to describe someone legally the guardian of a minor and is responsible for making all decisions on the minor's behalf. Natural guardians are of three types, but only two of them are discussed below: -

- i. **Father**- The first category of natural guardian that a minor has is their father. It is irrespective of the fact whether the child is adopted or natural-born. A father cannot be

destitute from the natural guardianship of his minor children unless he has been found unfit. If the father lacks the capacity, is unwilling, or unable to perform the tasks, the mother can act as the natural guardian.

- ii. **Mother** - Even if the father is alive, the mother is the guardian of the minor illegitimate children. Even if she has converted her religion, a mother's claim to guardianship remains. The guardianship also remains the same even if the child is an adopted child and not a natural-born child. A mother is often regarded as a custodial parent for very young children though the father is always the natural guardian. Custody arrangements for children are evolving. Recently sole custody arrangements for child custody after divorce have been noticed. However, such shared custody preferences are frequently regarded as being in the best interests of the child. The family court must consider the child's well-being. Over time, the non-negotiable concept on which child custody disputes are resolved has been the child's best interest and welfare, which looks at each child's ability to survive and reach their full potential.

[6.1] GUARDIANS AND WARDS ACT, 1890

"All prior legislation on the issue was repealed by the Guardians and Wards Act of 1890." Except for the state of Jammu & Kashmir, it became the world's only non-religious statute controlling children's guardianship. This law is especially important for Muslims, Christians, Parsis,



and Jews, as their laws only allow for guardianship rather than complete adoption. It is applicable to all children regardless of their caste and creed. By seeing the act, it was stated that any child who had not completed 18 years of age is considered a minor. The guardian of that child will be appointed by the court or any other appointed authority. Under guardianship, an act is necessary for the court to consider the interests of the minor. The child's age, sex, religion, mental health, well-fare, etc., must be taken into consideration. It is also possible to consider the minor's preferences. It can also request the District Courts to appoint guardians of a minor's person or property if the natural guardian appointed under personal law fails to perform Parental duties towards the minor. It is seen that Section 7² of the Guardianship and Wards Act authorizes the court to appoint a guardian for the person or property or both of a minor if it is found necessary for the welfare of the minor. Section 17³ outlines the factors that the court must consider when appointing guardians. Section 17(1) states

that courts must be guided by the minor's personal law and what appears to be in the best interests of the minor in the circumstances of the case. Section 17(2) states that when determining what constitutes the minor's welfare, courts must consider the minor's age, gender, religion, the guardian's character, and how closely related the guardian is to the minor. Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court may consider the minor child's preference. Section 19⁴ of the Guardianship and Wards Act deals with cases where the court may not appoint a guardian. According to Section 19 (b), a court has no authority to appoint a guardian for a minor whose father or mother is still alive and who, in the court's opinion, is not unfit to be a guardian. The earlier Section 19(b) prevented the court from appointing a guardian if the minor's father was alive. The Personal Laws (Amendment) Act, 2010, extended this section to include circumstances where the mother was still alive. Section 25 of the Guardianship and

² Section 7, The Guardians and Wards Act, 1890. (b) declaring a person to be such a guardian the Court may make an order accordingly. (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

³ Section 17, The Guardians and Wards Act, 1890 matters to be considered by the Court in appointing guardian.— 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 considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin 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 minor is old enough to form an intelligent preference, the Court may consider that preference, The Court shall not appoint or declare any person to be a guardian against his will.

⁴ Section 19, in The Guardians and Wards Act, 1890 , Guardian not to be appointed by the Court in certain cases, Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person—of a minor who is married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person; or of a minor whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of the minor; or of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.



Wards Act deals with the guardian's jurisdiction over the child's care. Section 25(1) states that if a child leaves or is removed from the guardian's Custody, the court may issue an order for the child's return if the court believes it is in the child's best interests. The Guardianship and Wards Act requires courts to appoint a guardian; therefore, the conclusion is supported by the text of Sections 7 and 17. At the same time, Section 19(b) implies that any third party cannot be recognized as a guardian unless the court judges the father or mother to be severely unfit.

[6.2] CUSTODY UNDER HINDU LAW

Under Hindu Law, child custody is mentioned under Section 26 of Hindu Marriage Act 1955, Section 38 of Special Marriage Act 1954, and Hindu Minority and Guardianship Act 1956. These are discussed below in detail:

[6.2.1] Section 26 Of Hindu Marriage Act 1955

It interacts with the court regularly in any process under this Act, passing interim orders and making provisions in the decree as it sees fit just and proper concerning the Custody, maintenance, and education of minor children, consistent with their wishes, where possible, and may, after the decree, upon petition for the purpose, modify the decree, make all such orders and provisions concerning the Custody, education, and maintenance of such children as such decree

⁵Vijender Kumar, Impact of Divorce on Children: A Socio-Economic and Legal Study, Volume 6, No- 1. [NALSAR Law Review] Page- 125,138| (2011), available at <http://www.commonlii.org/in/journals/NALSARLawRw/2011/9.pdf>, last seen on 12/12/2021.

or interim orders might have made if the proceeding for obtaining such decree was still pending. The court may also revoke, suspend, or vary any such orders and provisions previously made. The first part of this section, which deals with interim maintenance, does not require submitting an application. The second section, which deals with child support orders at the end of the case, does necessitate an application⁵.

[6.2.2] Section 38 Of Special Marriage Act 1954

In any suit filed under Chapter V or Chapter VI, the district court may, from time to time, issue interim orders and make decree provisions concerning the Custody, maintenance, and education of minor children, consistent with their wishes where possible, and may, after the decree, modify those orders and provisions, upon application by petition for the purpose, make, revoke, suspend, or vary, from time to time, all such orders and provisions concerning the education, custody, and maintenance of such children as might have been made by decree or interim orders in case the proceeding for obtaining such decree was still pending⁶.

[6.2.3] Hindu Minority And Guardianship Act 1956

The Hindu Minority and Guardianship Act, 1956 (known as the HMGA) states that the father is the natural guardian of a minor,

⁶Vijender Kumar, Impact of Divorce on Children: A Socio-Economic and Legal Study, Volume 6, No- 1. [NALSAR Law Review] Page- 125,138| (2011), available at <http://www.commonlii.org/in/journals/NALSARLawRw/2011/9.pdf>, last seen on 12/12/2021.



followed by the mother. The Hindu Minority and Guardianship Act, Section 6(a), states:

1. In the case of a minor boy or unmarried minor girl, the natural guardian is the father and, after him, the mother.

2. A child who has not reached the age of five years is usually in the Custody of their mother. In *Mrs. Githa Hariharan & Anr v. Reserve Bank of India & Anr*⁷, the constitutional validity of Section 6(a) was challenged on the grounds that it violated Article 14 of the Indian Constitution's provision of gender equality⁸. The Supreme Court considered how the word "after" was utilized in the statute and whether the mother was banned from acting as a natural guardian during the father's lifetime. According to the Court, the phrase "after" must be read in light of the premise that the welfare of the minor is an essential factor to consider, as well as the equality of men and women. According to the Court, the term "after" in Section 6(a) should not be interpreted to mean "after the father's lifetime," but rather "in the absence of the father." The Court continued by stating that the absence may be regarded as temporary. As a result, under the conditions outlined above, the mother could be the natural guardian even during the father's lifetime.

As a result, guardianship under the Hindu Minority and Guardianship Act can be concluded. Initially, the father retains a preferable position in terms of natural guardianship, and the woman only becomes a natural guardian in extraordinary circumstances. Even if a woman has had Custody of a child since birth and has been entirely responsible for the minor's care, the

father has superior guardianship rights and can claim Custody at any time. Second, all statutory guardianship arrangements are based on the premise outlined in Section 13 that the minor's best interests are valued. This is the only provision that a woman can use to seek Custody or guardianship following divorce due to the father's superior guardianship rights.

[6.3] TYPES OF CHILD CUSTODY IN INDIA

In India, the court orders the Custody of a child in the following three forms:

[6.3.1] Physical Custody

A parent's right to have their child live with them is known as physical Custody. It's rare for a parent to be granted sole physical Custody of a child unless the situation is so compelling the other parent is deemed unfit by the court. Physical Custody may be shared equally between the parents, or the child may spend the majority of their time with one parent. If a child spends greater time with one parent than the other, the child's principal residence is determined by the parent with whom the child spends the most time. When a parent is given physical Custody, it means the youngster will be under that parent's care, with visitation and occasional interaction with the other parent. The fundamental goal of such Custody is to ensure that the child lives in a safe and pleasant environment and receives the attention of both parents. When deciding which parent should be granted physical Custody of a child, the court considers various considerations, including

⁷ Mrs. Githa Hariharan & Anr v. Reserve Bank of India & Anr, AIR 1999 2 SCC 228

⁸ Vijender Kumar, Impact of Divorce on Children: A Socio-Economic and Legal Study, Volume 6, No- 1. [NALSAR Law Review] Page- 125,138| (2011),

available at <http://www.commonlii.org/in/journals/NALSAR/LawRw/2011/9.pdf>, last seen on 12/12/2021.



which parent has primarily cared for the child and which parent has the resources and support to best meet the child's physical and emotional requirements in the future. If the child is of an age at which the court considers they can make a reasoned decision, the child's preference as to which parent they live with may also be considered. The court's primary consideration is the child's best interests.

[6.3.2] Joint Custody

Joint Custody refers to that situation in which both parents share responsibility for critical decisions affecting their child's well-being, whether long- or short-term. Even if Indian courts believe that living together is beneficial for a minor's welfare, it does not entail the parents living together because of the child. It means that the child will be kept in the Custody of both parents alternately. The custody rotation of a kid between parents might last anything from a few days to a week or even a month. This is beneficial not only to the child but also to the parent. This can also improve their parent-child relationship after divorce. Therefore, Joint Custody is a sharing of power or control throughout a child's physical and emotional life. The most necessary is to make a joint custody arrangement work and be willing to compromise and cooperate. In a joint custody arrangement, each parent should trust the other and not make biased decisions.

[6.3.3] Legal Custody

A parent's right to make key choices on behalf of their child is known as "legal custody." A parent with legal Custody has the

supremacy to decide where a child should attend school, what religion they should practice, and whether or not the child should undergo certain medical treatments. Parents will share legal Custody in most circumstances unless it is not in the child's best interests. Legal Custody of a child is different from physical Custody in many ways, but the most crucial distinction is that legal Custody does not always imply that one should be with their child at all times. In many circumstances, the courts award joint legal Custody to both parents, but if the parents cannot agree on anything, the court will award sole legal Custody to one parent. Many times, a judge will give one parent sole legal custody. This means that only one parent has authority over how the child is reared and where the child attends school. Regardless to whom the physical or legal Custody of a child, both parents have a right to access the child's medical and school records.

Chapter 7: Writ Of Habeas Corpus And Custody

When a custody of a child is wrongfully denied to the parent, they can file a writ petition of habeas corpus to bring back the child in their Custody. The Jurisdiction of the court can be territorial jurisdiction and not necessarily the stated jurisdiction under Section 9⁹ of Guardians and Wards Act, 1890¹⁰.

In *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari*¹¹, detention of a minor by someone who is not legally entitled to his

⁹ Section 9, Guardians and Wards Act, 1890 - Court having jurisdiction to entertain application. —

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court

having jurisdiction in the place where the minor ordinarily resides.

¹⁰ Ruchi Majoo v. Sanjeev Majoo, (2011) 6 SCC 479.

¹¹ Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42.



Custody is considered unlawful detention to obtain a writ directing Custody of the minor child. The writ court can restore a minor's Custody from a person who is not his legal or natural guardian under personal law in acceptable circumstances. The Hindu Minority and Guardianship Act, or the Guardians and Wards Act, as the case may be, is the only available remedy. Only in unusual circumstances may the parties' rights to the minor's Custody be considered in the exercise of extraordinary jurisdiction on a habeas corpus petition.

A habeas corpus proceeding is not intended to justify or explore the legality of a person's detention. In the case of *Sarita Sharma vs. Sushil Sharma*¹², the separated mother and father battled for Custody of two minor children. The Family Court granted the father custody rights. After the mother and children flew to India, the father filed a habeas corpus petition with the High Court. The High Court ordered the mother to relinquish Custody to the father. However, in its appeal, the Supreme Court stated that instead of accepting the habeas corpus petition, the High Court should have required both parties to hold adequate hearings and investigate where the public interest is at stake. In child custody cases, it is most important to consider the child's welfare and give importance to the child's ordinary comfort, contentment, health, education, intellectual development, and favourable surroundings.

The verdict in the case *Rosy Jacob v. Jacob A. Chakramakkal*¹³ stated, "... The children are not simply chattels: nor are they mere playthings for their parents. In modern changed social conditions, the absolute right

of parents over their children's destinies and lives has yielded to considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of society. The guardian court, in the event of a dispute between the mother and the father, is expected to strike a just and proper balance between the needs of minor children's wellbeing and the rights of their respective parents over them..."

As a result, the child's welfare must be evaluated based on the facts of each case, and the court cannot make a rushed decision, even if there is an allegation of illegal detention is made.

Chapter 8: Financial Considerations As A Factor To Determine Custody

The fact that wealth is an inseparable aspect of the theory of the best interest of the child to decide the Custody of a child is undeniable. Generally, a sufficient amount of wealth leads to a good life in the sense that one does not have to struggle for money to get opportunities, like high education, hunger, medical treatment, and such aspects. That is, the struggle or stress to get through the socio-economic condition is not there in case of sufficient wealth. However, the question that arises is that if wealth is so important and an inseparable aspect to decide a child's Custody, can it be said that Custody should be granted to the wealthier spouse?

In *Dhanwanti Joshi v. Madhav Unde*¹⁴, the permanent Custody of the child was granted to the mother; subsequently, the father initiated a proceeding claiming the Custody on the ground that he had a superior financial

¹² *Sarita Sharma v. Sushil Sharma*, (2000) 3 SCC 14.

¹³ *Rosy Jacob v. Jacob A. Chakramakkal*, (1973) 1 SCC 840.

¹⁴ *Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112.



condition that could support the education of the child in abroad. However, Supreme Court denied the fact that superior financial conditions cannot be a ground for a change of Custody.

In *Gaurav Nagpal v. Sumedha Nagpal*¹⁵, the custody was granted to mother. Nevertheless, the father did not comply with the Court's decision and illegally detained the child. Therefore, the visitation rights of the father were denied. The Father subsequently pleaded that he loved his child and there was no defect on his side in bringing up the child. He also invested a huge amount of money for the child's education. Instead of the pleadings by the father, the Supreme Court, did not grant him Custody or visitation rights since he cannot take advantage of his own wrong but ordered him to continue to pay for his child's education.

If the position of the foreign courts is observed on this point, then it can be seen that California Courts have often argued that wealth has nothing to do with the best interests of the child. That such rulings are discriminatory towards women because, in many cases, they were just house-wife before getting divorced.

It might also happen that a wealthy parent does not give much attention and care to the child if it is observed by the court that the behaviour of such parent tends to amass personal wealth.

Further, wealth does not stand as a factor to decide custodial matters because a child is entitled to be maintained financially by the parents, even though Custody is granted to

one parent – this was also seen in *Gaurav Nagpal v. Sumedha Nagpal*¹⁶. This aspect shall be further discussed in detail in the Paper.

Chapter 9: Provision of Maintenance For Children

[9.1] CODE OF CRIMINAL PROCEDURE, 1973

It's not a new fact that divorce is more troublesome for individuals who have children. Since Children form an integral part of the marriage, Maintenance for them is deemed necessary, so the Act safeguards the interest of every child.

Code of Criminal Procedure or Cr.P.C. is a secular code; that is, any person of any religion can claim maintenance under the same. Chapter IX of the statute deals with Maintenance, that is, from section 125 to section 128. Maintenance under this provision may be ordered to pay from the date of order or from the date of application as the Court feels just. The same was reflected in *Dilip Kumar v. the State of UP*¹⁷. This code ensures that reliefs are granted speedily so that vagrancy is reduced.

Section 125 of Cr.P.C. clause 1 (b) and 1 (c) talks about maintenance to children. After the amendment of 2001, the upper ceiling to claim Maintenance was removed. This amendment made the code more liberal. According to clause 1 (b) of the section, a father must maintain his minor child, irrespective of the fact, whether the minor is legitimate or illegitimate. If they cannot maintain themselves, the father must maintain them, even if they are married.

¹⁵ *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42.

¹⁶ *Ibid*.

¹⁷ *Dilip Kumar v. the State of UP*, AIR 2010 (NOC) 897 (All).



According to this code, a child can get Maintenance only when they are a minor. However, according to Hindu Adoption and Maintenance Act, 1956, a daughter has to be maintained even after attaining majority, till the time she stays unmarried. So, the Court, quite a number of times, to avoid multiplicity of proceedings, granted Maintenance under section 125 of Cr.P.C. to an unmarried daughter who has attained majority. This can be observed in *Jagdish Jugtwat v. Manju Lata*¹⁸ and *Md Shabaz v. Md Saleem*¹⁹.

However, there is little controversy regarding the Maintenance of married daughters. According to some decisions before 1973, as in *Bhajan Lal Banian v. Swarna*²⁰, it was held that the father's liability ceases when the daughter is married off. That is, after marriage, it is the liability of the husband to maintain the wife. Whereas in *Ranchoddas Narottamdas v. Emperor*²¹, it was held that marriage never ceases the father's responsibility to maintain his daughter. In 1973, the amendment clarified that only a minor married daughter is entitled to Maintenance. This is kind of discriminatory, specially after looking at the fact that in certain circumstances, a major married or unmarried son or major unmarried daughter can claim Maintenance, but, in those same circumstances, a major married daughter cannot claim Maintenance from the father.

According to clause 1 (c) of section 125 of Cr.P.C., if a man's legitimate or illegitimate child has any physical or mental abnormality, the father's liability to maintain his child extends even after they have attained

majority, if they are unable to maintain themselves. In *Pathumma v. Cholamarakkar*²², it was held that to be awarded Maintenance, it was essential to establish that because of the mental injury caused, the adult daughter was unable to maintain herself.

In *Bakulabai v. Gangaram*²³, it was held that even if the marriage was void, the children of such marriage are liable to be maintained by their father under section 125 of Cr.P.C. under clauses 1(b) and (c).

Even though the law states that it is the father's responsibility to maintain the children even when the children are in the physical Custody of the mother after the divorce, it is also a moral duty and responsibility of the mother to maintain the children even when they are in the Custody of the father.

[9.2] PROVISION OF MAINTENANCE UNDER HINDU LAW STATUTES

In Hindu Law, the Manu states that the aged parents, a virtuous wife and an infant child must be maintained even after committing hundreds of misdeeds. With time, it became more liberal and granted Maintenance even to Husbands if they were unable to maintain themselves. However, the law faces some lacunae. The Hindu law statutes which have provisions for Maintenance are: -

1. Hindu Marriage Act, 1955;
2. Hindu Adoption and Maintenance Act, 1956.

¹⁸ Jagdish Jugtwat v. Manju Lata, 2002(II) UP Cri R 313 (S.C.)

¹⁹ Md Shabaz v. Md Saleem, ILR 2013 Kar 6009.

²⁰ Bhajan Lal Banian v. Swarna, (1907) 11 Cal WN 99.

²¹ Ranchoddas Narottamdas v. Emperor, AIR 1949 Bom 36.

²² Pathumma v. Cholamarakkar, I (2009) DMC 466 (Ker- D.B.)

²³ Bakulabai v. Gangaram, (1988) SCC 537.



[9.2.1] Hindu Marriage Act, 1955

Section 26²⁴ of the Act, which talks about the Custody of children, also provides for the child's maintenance. Besides this, the Court may also grant Maintenance for the child under sections 24²⁵ and 25²⁶ of the Act. A case on this point is *Medha Ashok Panchabhai v. Ashok Atmaram Panchabhai*²⁷ here, the permanent alimony granted under section 25 of the act to the wife included the child's Maintenance too. Also, in *Narendra Kumar v. Suraj Mehta*²⁸, the child was granted Maintenance under section 25 of the Act. In *Vikrant Arora v. Shruti Mehra*²⁹, it was held that if interim Maintenance under section 24 under the act does not provide Maintenance to the children but to the spouses only, it will stand meaningless.

Under this Act, both the parents are made liable to maintain the child. Even if they get divorced, and only one parent gets Custody, the responsibility to maintain the child rests on both the parents.

However, Maintenance provided to children under this Act faces some lacunae - i) A child can only claim Maintenance while the

parents are litigating under any provision of the Act. ii) There is no specific provision for the Maintenance of an unmarried adult daughter.³⁰

[9.2.2] Hindu Adoption and Maintenance Act, 1956

In the case of providing Maintenance to children, this Act is much more comprehensive than Hindu Marriage Act, 1955. The short-coming of the Hindu Marriage Act, 1955 for safeguarding children's rights observed previously are all met under this Act. Section 20 of this Act sets out the provision about the Maintenance which must be provided to children. Section 20 of the 1956 Act states that a Hindu is bound to maintain their legitimate or illegitimate child during their lifetime. Also, irrespective of being legitimate or illegitimate, the minor child can claim Maintenance from either of the parents. Clause 3 of the provision further states that an unmarried daughter can claim Maintenance if she cannot maintain herself from her own earning. This is enforceable even if the parents are divorced; that is, the daughter can claim Maintenance from the

²⁴ Section 26, Hindu Marriage Act, 1955 - Custody of children. In any proceeding under this Act, 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 with respect to 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 from time to time, all such orders and provisions with respect to 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:⁵⁸ [Provided that the application with respect

to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.]

²⁵ Section 24, Hindu Marriage Act, 1955 – It provides for Maintenance pendente lite and expenses of proceedings.

²⁶ Section 25, Hindu Marriage Act, 1955 – Provides for Permanent alimony and maintenance.

²⁷ *Medha Ashok Panchabhai v. Ashok Atmaram Panchabhai*, (2010) 15 SCC 558.

²⁸ *Narendra Kumar v. Suraj Mehta*, AIR 1982 AP 100.

²⁹ *Vikrant Arora v. Shruti Mehra*, AIR 2014 (NOC) 593 (P&H).

³⁰ Professor Kusum, Family Law Lectures- Family Law I, 315 (5th edition).



parent who does not have her Custody. This was observed in Jasbir Kaur Sehgal v. District Judge Dehradun³¹.

However, a child might be denied Maintenance on the ground that the child has converted to any other religion and ceased to be a Hindu³². Also, the amount awarded as Maintenance might change if the circumstances change³³. The quantum of Maintenance granted to the child will depend on factors mentioned in section 23 of the Act- (a) The position and status of the parties. (b) The reasonable wants of the claimant. (c) If the claimant's lives separately, whether it is justifiable or not (d) Claimant's income or Property or assets, if any. (e) The number of persons entitled to get maintenance under the Act.

CHAPTER 10: Standard Followed To Treat A Case Appealed For Maintenance Under Different Statutes

There is no particular mathematical formula for calculating the quantum of Maintenance. Then what happens to cases where an individual claims maintenance under two different statutes together?

Various judgements allowed Maintenance under two different statutes, but some judgements opposed the same. In Amutha @ Syamaladevi v. Thiromoorthy³⁴, it was held that an application of Maintenance under section 125 of Cr.P.C. stood as no bar in

claiming Maintenance under section 24 of the Hindu Marriage Act, the vice versa was seen in Vallabhaneni Yedukondalu v. Vallabhaneni Nageswaramma³⁵. A similar decision was held in Baby v. Gopinath³⁶, where it was confirmed that a claim of Maintenance under section 125 of Cr.P.C. would stand as no bar to claim Maintenance further under section 25 of the Hindu Marriage Act. In Chhabila Naik v. Kanchani Patel³⁷, the Court further granted maintenance under section 18 of the Hindu Adoption and Maintenance Act after Maintenance was already awarded under section 125 of Cr.P.C. The Court held that the application by the wife was not improper.

However, in 2014, in Shambhunath Pathak v. Kanti Devi³⁸, Maintenance was denied under two statutes together – under section 25 of The Hindu Marriage Act and section 125 of Cr.P.C.

In 2018, in Sanjay Kumar Sinha v. Asha Kumari³⁹, the Supreme Court denied Maintenance under section 24 of the Hindu Marriage Act as an order of Maintenance under section 125 of Cr.P.C. was already passed. However, the Court said, it would depend on the circumstances of each case whether two statutes will be applicable or not.

In 2021, in Rajnish v Neha⁴⁰, the Supreme Court set out the guidelines pertaining to matrimonial matters. It dealt with the issue of

³¹ Jasbir Kaur Sehgal v. District Judge Dehradun, (1997) 7 SCC 7.

³² Section 24, Hindu Adoption and maintenance Act, 1956.

³³ Section 25, Hindu Adoption and maintenance Act, 1956.

³⁴ Amutha @ Syamaladevi v. Thiromoorthy, AIR 2010 (NOC) 336 (Mad).

³⁵ Vallabhaneni Yedukondalu v. Vallabhaneni Nageswaramma, 2000 Cr. LJ 333(A.P.)

³⁶ Baby v. Gopinath, (1989) 1 KLT 650 (Ker – D.B.)

³⁷ Chhabila Naik v. Kanchani Patel, AIR 2003 Ori 27.

³⁸ Shambhunath Pathak v. Kanti Devi, AIR 2014 Pat 147.

³⁹ Sanjay Kumar Sinha v. Asha Kumari, (2018) 5 SCC 333.

⁴⁰ Rajnish v Neha, (2021) 2 SCC 324.



the overlapping statute and gave a general guideline so that no more conflict arises. It said that there is no bar in seeking Maintenance under more than one statute. Also, just because two proceedings had been initiated for Maintenance would not mean one must be adjourned. The Court set out that it is a legal obligation of the aggrieved party to disclose the Maintenance received due to any other proceeding. The Court also made it clear that for any variation of the order of Maintenance, the aggrieved party must move to that Court which passed the order. The Court made sure that if the aggrieved party receives any previous maintenance, the Court calculating the Maintenance must set off the previously awarded amount and then grant Maintenance over and above it. Also, it was made compulsory to note the reason for such increment.

Chapter 11: Conclusion

Divorce in the *prima facie* aspect causes a drastic change between the spouses. However, that effect does not stay limited when there is a child in that relationship. There is a huge emotional turmoil which the child goes through during and after the separation procedure of the spouses. The child loses the sense of security towards their parents and thereby does not share anything with the custodial parent and feels lonely all the time. This behavioural effect often causes other mental illnesses like depression and anxiety and even suicidal attitudes. In *DSG v. AKG*⁴¹, the order of share parenting was passed instead of the acquisitions placed by either spouse against each other because of two reasons primarily. Firstly, the psychologists appointed by the court observed that the child wanted to live with both and did not have any complaints.

Secondly, the court observed that if at such young age the child is denied access to any of the parents, the child might develop psychological problems – mental illness.

Besides this, the child might face adjustment problems to various circumstances that they may go through. Firstly, because of the low acceptance rate of the concept of divorce in Indian society, the child is exposed to an abusive environment. Secondly, the child's peers may not treat them well because the child's parents are divorced. Thirdly the custodial parent might themselves go through mental trauma and therefore might not behave well with the child or not give enough attention, which the child deserves. These aspects make the child completely anti-social and lonely.

The total effect of divorce is in most cases traumatizing to the child, therefore in many cases, even if the relationship between the spouses become toxic, they try to adjust and not move ahead to dissolve the marriage. However, spouses are humans too, and they too deserve to live happily and peacefully in their lives; therefore, they should not hesitate to move on for separation but has to try their best so that the separation does not affect the child.

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