

# Best Interest or Religious Laws: The Paramount while Deciding Child Custody in India

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## Abstract

When a married couple decides to separate, the person who suffers the most is the child/children born out of the marriage. He/she faces the trial before the actual trial begins and witness separation before the real separation is pronounced by the courts.

India is a secular country and people here follow different religions and each religion has a different set of child custody laws through which parents can seek custody. Earlier it was the “Right of the Parent” that held weight but now it is the “Right of the Child” which forms the basis for determining the custody issues.

The main aim of this paper is to emphasize whether the Supreme Court of India has achieved the principles of best interest or the welfare and safekeeping of the child or the personal laws/ religious laws have influenced the decision making therewith. The position of child custody under various religious laws namely Hindu law, Muslim law, Christian law and the Parsi law will also be focused upon with the relevant case laws to explain the issue.

**Keywords:** Best interest, Welfare of the child, religious preference, child custody, judges preference

## Introduction

The concept of custody and guardianships as enshrined in the Indian legal system can be traced to English law, specifically the Guardians and Wards act of 1890, from which the Hindu Guardianship and Minority Act is derived from. When divorce was granted statutory recognition by the Matrimonial Causes Act of 1857 in England, mothers were given independent legal recognition for the first time, as opposed to their earlier legal status being forged with their husbands upon marriage. Consequently, the concept of separated and divorced wives challenging the natural guardianship of their husbands came into public discourse. Courts in England started delivering judgments based on the principle that matrimonial litigation is not to punish the guilty but only to ensure the welfare of the child. This gave way to the concept of "welfare of the child being paramount consideration in custodial matters".<sup>3</sup>

## LEGAL FRAMEWORK GOVERNING CUSTODY AND GUARDIANSHIP IN INDIA

Law governing custody of children is closely linked with that of guardianship. Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while

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custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor. The term 'custody' is not defined in any Indian family law, whether secular or religious. The term 'guardian' is defined by the Guardians and Wards Act, 1890 (hereinafter, GWA) as a "person having the care of the person of a minor or of his property or of both his person and property."<sup>4</sup> Another term used by the law is 'natural guardian,' who is the person legally presumed to be the guardian of a minor and who is presumed to be authorized to take all decisions on behalf of the minor. The legal difference between custody and guardianship (or natural guardianship) can be illustrated by the following example: under some religious personal laws, for very young children, the mother is preferred to be the custodian, but the father always remains the natural guardian.

### **Guardians and Wards Act, 1890**

The GWA is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion. It authorizes the District Courts to appoint guardians of the person or property of a minor, when the natural guardian as per the minor's personal law or the testamentary guardian appointed under a Will fails to discharge his/her duties towards the minor. The Act is a complete code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issues under every religion.<sup>5</sup> Even if the substantive law applied to a certain case is the personal law of the parties, the procedural law applicable is what is laid down in the GWA.<sup>6</sup>

### **Child Custody under Hindu Law**

In Hindu law, the concept of guardianship appears to date back to the time of the Vedic age, when for all practical purposes, the Hindu family was a patriarchal one, with considerable powers resting with the head of the family. Infants were considered as the property of the father. Acquisition or holding of independent separate property was not possible for them and the properties belonged to the father.<sup>7</sup> Gradually, the son's right to separate self-acquired property was recognized by law.

The ancient Hindu Law vested the supreme guardianship of all in the broad principle of the king as *Parens Patriae*.<sup>8</sup> A text of Manu<sup>9</sup> stated:

'The king shall protect the inherited (and other) property of a minor until he has returned (from his teacher's home) or until he has passed his minority.'

Sage Gautama<sup>10</sup> also declared: "The king should protect till he has attained majority or has completed his education."

Narada stated: 'The father has the first claim and after him comes the elder brother. His powers as guardian will be determined as may be deemed justly required for the benefit of the infant.'<sup>11</sup>

It is significant here that the concept of benefit of minor was prevalent even in Narada's text. It is also to

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<sup>4</sup> Section 4(2): GWA.

<sup>5</sup> For instance, Section 2 of the HMGA states that its provisions are 'supplemental' to and 'not in derogation' of the GWA

<sup>6</sup> Guardian and Wards Act, No. 8 of 1890, Section 6 ("In the case of a minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both, which is valid by the law to which the minor is subject.")

<sup>7</sup> A.N.Saha, Guardian and Wards Act, Eastern Law House, 13<sup>th</sup> edition, 1998

<sup>8</sup> Manu Smriti, VII 27, Gautama 10, 48

<sup>9</sup> Manu Smriti, VII, 27

<sup>10</sup> Gautama Smriti, 10, 48

<sup>11</sup> Narada Smriti, XIII, 28-9

be noted that with the exception of Narada, who alone mentions the father and the elder brother as guardians, all other sages merely declare the king to be the guardian of minor's property. But none of them have spoken of the guardianship of the person of the minor. It seems that the guru of the teacher was the guardian of his pupil and because of the joint family system the children in the family were under the protection of the Karta or the head of the joint family property. Under Hindu law, since the joint family was like a perpetual corporation, after the death of the father or Karta the issue of guardianship did not arise at all.<sup>12</sup> Till the passing of the Hindu Minority and Guardianship Act 1956, the traditional Hindu Law remained in force throughout British India and most of the Indian states.<sup>13</sup>

### **Hindu Minority and Guardianship Act, 1956**

Classical Hindu law did not contain principles dealing with guardianship and custody of children. In the Joint Hindu Family, the *Karta* was responsible for the overall control of all dependents and management of their property, and therefore specific legal rules dealing with guardianship and custody were not thought to be necessary.<sup>14</sup> However, in modern statutory Hindu law, the Hindu Minority and Guardianship Act, 1956 (hereinafter, HMGA) provides that the father is the natural guardian of a minor, and after him, it is the mother. Section 6(a) of the HMGA provides that:

- (1) In case of a minor boy or unmarried minor girl, the natural guardian is the father, and 'after' him, the mother; and
- (2) The custody of a minor who has not completed the age of five years shall 'ordinarily' be with the mother (emphasis added).

In *Gita Hariharan v. Reserve Bank of India*,<sup>15</sup> the constitutional validity of Section 6(a) was challenged as violating the guarantee of equality of sexes under the Article 14 of the Constitution of India. The Court observed that the term 'after' must be interpreted in light of the principle that the welfare of the minor is the paramount consideration and the constitutional mandate of equality between men and women. The Court held the term 'after' in Section 6(a) should not be interpreted to mean 'after the lifetime of the father,' but rather that it should be taken to mean 'in the absence of the father.' The Court further specified that 'absence' could be understood as temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise.

Therefore, in the above specific situations, the mother could be the natural guardian even during the lifetime of the father.

Section 13 of the HMGA declares that, in deciding the guardianship of a Hindu minor, the welfare of the minor shall be the 'paramount consideration' and that no person can be appointed as guardian of a Hindu minor if the court is of the opinion that it will not be for the 'welfare' of the minor.<sup>16</sup>

The following can be concluded with respect to guardianship under the HMGA. First, the father continues to have a preferential position when it comes to natural guardianship and the mother becomes a natural guardian only in exceptional circumstances, as the Supreme Court explained in *Gita Hariharan*. Thus, even if a mother has custody of the minor since birth and has been exclusively responsible for the care of the minor, the father can, at any time, claim custody on the basis of his superior guardianship rights.

<sup>12</sup> Diwan Paras, Law of Adoption, Minority, Guardianship of Custody, Universal Law Publishing Co. Pvt. Ltd., Delhi, 2000

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> *Gita Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228, ¶ 25

<sup>16</sup> Hindu Minority and Guardianship Act, No. 32 of 1956, Section 13

Second, all statutory guardianship arrangements are ultimately subject to the principle contained in Section 13, that the welfare of the minor is the ‘paramount consideration.’ In response to the stronger guardianship rights of the father, this is the only provision that a mother may use to argue for custody/guardianship in case of a dispute.

The point of difference between the GWA and the HMGA lies in the emphasis placed on the welfare principle. Under the GWA, parental authority supersedes the welfare principle, while under the HMGA; the welfare principle is of paramount consideration in determining guardianship. Thus, for deciding questions of guardianship for Hindu children, their welfare is of paramount interest, which will override parental authority.

### **Hindu Marriage Act, 1955**

Section 26 of the Hindu Marriage Act authorizes courts to pass interim orders in any proceeding under the Act, with respect to custody, maintenance and education of minor children, in consonance with their wishes. The Section also authorizes courts to revoke, suspend or vary such interim orders passed previously. It needs to dispose of the pending decree within the 60 days from the date of service of notice

### **Child Custody under Islamic Law**

Before proceeding with the discussions on child custody under Islam, we first need to understand the difference between guardianship and custody as at times these words are used interchangeably. In Arabic language guardianship is termed as ‘Wilayat’ and custody as ‘Hizanat’. Custody means physical or material possession of the children, whereas its Arabic equivalent Hidhanat literally means ‘training’ or ‘upbringing of the child’. The term guardianship means the constructive possession of the child which deals with care of his or her person as well as property and its Arabic equivalent ‘Wilayat’ literally means to ‘protect’ or to defend.

According to the principles of established Muslim jurisprudence, father is the natural guardian (*Wali*) of the person and property of the minor child whereas custody (*hizanat*) is a right of the child and not of either of the parents, or any other person claiming through them. The basic consideration always is to provide to the child the most natural, most considerate and most compassionate atmosphere to grow up as a better member of the society. Rights and duties of the spouses have been prescribed in a manner to keep an ideal balance. While it is the man’s job to earn livelihood and provide sustenance to the family, the wife’s duty is to give birth to the children, to bring them up and to groom them. She is not required to work for her family or earn a living.

Law of hizanat in Shariah has been framed keeping in view the roles of both parents. That is why mothers are given preference while deciding custody of the children born out of the wedlock during child’s initial years (till 7 years). There is a consensus of all *sunni* schools of thought on this. Schools of *fiqh* differ in custody laws for boys and girls after 7 years of age. It has been observed in the recorded cases of classical Islamic era that the judges took into consideration the wishes and welfare of the minors while deciding their custody. It must be remembered here that wish of the ward is subject to the following two considerations:

- Welfare of the child
- Reasons of disqualifications of the mother and father to seek further custody.

Under Islamic law even if the mother has the physical custody of her children, father continues to be the guardian of the child as he is supposed to support the child financially. However it should be noted that under the prevailing social setup where the father is not the sole financial contributor and the mother shares financial responsibility and in most cases is the main contributor to the financial need of the family then the privilege of ‘guardianship of person and property’ should vest in her as well. An in depth study of Islamic law reveals that there is no verse in Quran on custody of minors but the classical Muslim jurists have referred to the verse of fosterage<sup>17</sup> (*Ayat al Radha’at*) which says that the mother should breast feed their infants for two complete years. Therefore through *Iqtada al Nass* it is inferred that in the years of infancy the right of upbringing and fostering the child remains with mother.

In the light of hadith literature available and the decisions of Prophet Mohammad (pbuh) on the cases brought before him on child custody, three principals have been laid down while deciding the custody of a child. Firstly, the mother possesses priority right of child custody so long as she does not remarry<sup>18</sup>. Secondly in a situation where both parents profess different religions, custody of the child should go to that parent who follows the religion of Islam<sup>19</sup> and lastly when the child has gone past the years of minority (7 years) he will be given an option to choose between both parents<sup>20</sup>. An analysis of the opinions/ decisions of the Companions of the Prophet (pbuh) seem to be in complete harmony with the decisions of Prophet Mohammad (pbuh). Decisions of the companions of the Prophet show that priority right of the child custody in the years of infancy goes to the mother<sup>21</sup>. When the child reaches the age when he is in a position to decide right from wrong, his wish is taken into consideration<sup>22</sup> and mother has a superior right of custody as long as she does not remarry<sup>23</sup>. In addition when the child is in mother’s custody, the father is responsible for his nafaqah.<sup>24</sup>

Up till the era of companions we do not find much discrepancy on the principles laid down while deciding child custody between the decisions of Prophet Mohammad (pbuh) and those of the companions, neither do we find a decision in which child custody gets automatically transferred to the father when child attains certain age. The under lying principles while deciding the child custody cases remain that the child in his early years must not be deprived of the warmth, affection and full time attention that he needs in his growing years, which he/she can experience with his/her mother better than his/her father. Once a child reaches a mature age, three considerations have to be kept in mind, the religion of the parents, the choice of the child and welfare of the child. A deviation from the above principles is observed during the time when *fiqh* was codified and we come across the rulings of the masters of five leading schools of thought. According to Abu Hanifa, custody transfers to the father when the boy reaches the age of 7 years and the girl when she attains puberty.<sup>25</sup> In Imam Maliki’s

<sup>17</sup> Al-Quran 2:233

<sup>18</sup> Al Bahaiqi, *Sunan al Kubra*, Dakkan, Vol8, p.4

<sup>19</sup> Al Bahaiqi, op. cit., vol 8, p.3

<sup>20</sup> Al- Bahaiqi op.,cit., vol 8, p.3

<sup>21</sup> Zaid bin Ishaq bin Jariya narrated that once a child custody case was brought to Abu Bakr who decided in favor of the mother and then said I have heard from Holy Prophet (pbuh) that ‘Do not separate the mother from her child

<sup>22</sup> Narrated by Ibn e Abbas when Hazrat Umar divorced his wife Jamila they disputed on the custody of their son Asim and the dispute was brought before Abu Bakr. Abu Bakr decided in favor of the mother till the child reached such an age when he was in a position to decide right from wrong.

<sup>23</sup> Ibn Qayyam, *Za’ad al Ma’ad*: In another narration of the above mentioned case it is written that Abu Bakr told Umar that mother is more caring and gentle towards her children so she has a superior right of custody till she does not marry.

<sup>24</sup> Al Bahaiqi, *Sunan al Kubra*: In the same case of dispute over Umar’s son Asim, Umar was directed by Abu Bakr to pay *nafaqa* of Asim and he did not argue.

<sup>25</sup> Ibn e Hammam, *Fath al Qadeer*, Egypt 1356H, Vol. 3, p.316



opinion, mother has the right to her son's custody till he is able to speak clearly and the daughter till her marriage.

According to *Shafi'i* and Imam Hanbal, mother has the right of custody or upbringing till 7 years of age for both son and daughter. After this age the option will be granted to the children to choose with whom they wish to live.<sup>26</sup>

In Shi'a *fiqh*, mother has the right to keep her son in her custody till he is two years old and daughter till she is seven. After this, the right of custody is transferred to the father.<sup>27</sup> According to the principles of established Muslim Jurisprudence, father is considered to be the child's natural and legal guardian because upon him is the responsibility of *nafaqa* of his child. Mothers are the custodians till a particular age after which the custody either reverts to the father or the child is given option by the court to choose between both parents, though no such age limit is stated in the texts.

An interesting case has been recorded in *Nayl al Autar*<sup>28</sup> which was brought before Ibn e Taiymiya<sup>29</sup>. In this case, child custody was contested by both parents. Court gave the option to the child for choosing the custodian. He opted for the custody of the father. On it the mother asked the court to inquire from the child why he has preferred the father. On court's inquiry the child said, mother compels me to go to the school where the teacher punishes me every day while the father allows me to play with the children and do whatever I like. On hearing this court gave the custody to the mother.<sup>30</sup> This clearly shows that wishes of the minor while deciding his or her custody has always been subject to the principle of welfare of the minor even in classical Muslim legal tradition. Classical scholars have added that when it is detrimental for the child to live with his or her mother due to her remarriage, profession or religion then the custody will transfer to the father. This further reinforces the principle of welfare of the child.

In *Nayl al Autar* it is stated that,

*'It is essential to look into the interest of the children before they are given the option to choose between the parents for their custody. If it becomes clear about any one of them that he or she would be more beneficial to the children from the point of view of their education and training then there is no need of qur'a or choice of the children.'*<sup>31</sup>

This view was upheld by Allama Ibn Qayyam also. Classical Muslim Scholars agree that subsistence of the child is incumbent upon the father even when he is in mother's custody. Under Islamic law it is not the responsibility of the mother to provide sustenance and protection of progeny. Al Murghanani further adds that if mother refuses to keep the child then there is no constraint upon her as a variety of causes may operate to render her incapable of charge.<sup>32</sup>

Islamic law lays down that as a general rule in initial years child should remain with the mother and a thorough study of Islamic legal literature shows that even if the child custody is contested by the father in the initial years when the child is unable to make a sound judgment, custody has been granted to the mother in majority of the cases. When the child reaches the age whereby he can tell right from wrong, his wish is taken into consideration by the courts which is subject to the welfare of the child.

<sup>26</sup> Ibn Qaddama, *Al Mughni*, Egypt: 1367, vol. 7, p. 614-16 (Hanbali scholar, 541 -573 AH)

<sup>27</sup> Najm ud din Jafar, *Shara'i al Islam*, Tehran, vol. 2, p. 1-2

<sup>28</sup> *ibid*

<sup>29</sup> Taqi ad din Ahmad ibn Taymiyya (1263-1328 CE), born in Harran what is Turkey today near Syrian border, was a Hanbali theologian of 7<sup>th</sup> century AH.

<sup>30</sup> Imam Shaukani, *Nayl al Autar*, Syria:Dar al Fikr, vol. 7, p.142

<sup>31</sup> Imam Shaukani, *Nayl al Autar*, Syria:Dar al Fikr, vol. 7, p.142

<sup>32</sup> Hedaya, p. 138

After a deliberate study of child custody under Muslim personal law, it is established that the custody of male or female children does not automatically transfer to the father after seven years. The view that the father has a preferential right to boy's custody after seven years of age is only upheld by Abu Hanifa. Other leading jurists disagree with this view and give the boy the option to choose between both parents when he is seven years old and the Qazi/ courts must see the welfare of the minor while deciding custody cases. In case of girls, mother has a preferential right of custody till her marriage and this is upheld by all sunni schools of thought. The stance of various *shia* or *sunni* schools of *fiqh* on fixing an age till which mother can have custody rights does not imply that custody must automatically transfer to the father after this age asserts that in the absence of any impediment to mother's right of child custody such as her remarriage, religion or profession, her right to child custody must not be contested by the father in the initial years. This age is roughly from birth till seven years. In the second phase of the child's life that is from seven years till puberty, when he is able to look after himself/ herself and is able to speak and express himself, fathers can now contest child custody and it is the responsibility of the courts to take into consideration the wishes of the ward and must decide keeping in view the best interests of the ward. Also wishes of the minor must remain subject to the welfare of the minor.

### **Custody under the Christian Law**

Christian law per se doesn't have any provision for custody but the issues are well solved by the Indian Divorce Act which is applicable to all of the religions of the country. The Indian Divorce Act 1869 contains provisions relating to custody of children.

Section 41 of the said Act provides:

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.

In Halsbury's Laws of England, the Law is succinctly in the following terms:-

Section 428: Infant's welfare paramount.

In any proceedings before any court, concerning the custody or upbringing of an infant or the administration of any property belonging to or held on trust for an infant or the application of the income thereof, the court must regard welfare of the infant as the first and paramount consideration, whether from any other point of view, the claim of the father, or any right at common law possessed by the father in respect of such custody, upbringing administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father. This provision applies in cases where both parents are living or where either or both is or are dead.

Even where the infant is a foreign national, the court, while giving weight to the views of the foreign court, is bound to treat the welfare of the infant as being of the first and paramount consideration whatever orders may have been made by the courts of any other country.

### **Child Custody under Parsi Personal Law**

Parsis are the member of a group of followers in India of the Iranian Prophet Zoroaster (or Zarathustra). The Parsis, whose name means "Persians", are descended from Persian Zoroastrians who immigrated to India to avoid religious persecution by Muslims. They live chiefly in Mumbai and in a few towns and

villages mostly to the north of Mumbai, and also at Karachi (Pakistan) and Bengaluru (Karnataka, India). Although they are not, strictly speaking, a caste, since they are not Hindus, they form a well-defined community.

With the establishment of British trading posts at Surat and elsewhere in the early 17<sup>th</sup> century, the Parsis circumstances altered radically, for they were in some ways more receptive of European influence than the Hindus or Muslims and they developed a flair for commerce. Bombay (present day Mumbai) came under the control of the East India Company in 1668, and, since complete religious toleration was decreed soon afterward, the Parsis from Gujarat began to settle there. The expansion of the City in the 18<sup>th</sup> century owed largely to their industry and ability as merchants. By the end of 19<sup>th</sup> century they were manifestly a wealthy community, and from about 1850 onward they had considerable success in heavy industries, particularly those connected with railways and shipbuilding.

Under Parsi Law, there is no personal law that governs the Custody of the Parsi children. However, the Guardianship and Wards Act 1890 is applicable for all the matters that are related to the Parsi children and their Guardianship and Custody.

The Parsis in matters of Marriage, Divorce Custody and Maintenance are also governed by The Parsi Marriage and Divorce Act, 1936.

Section 49 of the Act deals with the Custody of children: It states that,

In any suit under this Act, the Court may from time to time pass such interim orders and make such provisions in the final decree as it may deem just and proper with respect to the custody, maintenance and education of the children under the age of <sup>33</sup>[eighteen years], the marriage of whose parents is the subject of such suit, and may, after the final decree upon application, by petition for this purpose, make, revoke, suspend or vary 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 final decree or by interim orders in case the suit for obtaining such decree were still pending:<sup>34</sup>

[Provided that the application with respect to the maintenance and education of such children during the suit, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.]

Any parent who wants to have the custody has to seek it from the Guardian court. In other words, there is never any automatic transfer of a child's custody to a particular parent. The main aim is the welfare of the child and anything can be put at stake to make sure that the welfare of the child is confirmed. Also the Act mandates the courts to pass an order of Parsi custody ship within 60 days.

Going through the major religious laws regarding child custody in the Indian Territory, we can conclude that all the religions (though they specify certain criterion on which the child custody is decided) keep the welfare of the child at fore. No such act is entertained that tries to compromise with the welfare or the interests of the child.

**Article 3** of the United Convention on the Rights of the Child provides that the best interest principle should be the overriding factor in all matters concerning children. This principle should be applied by all decision-makers, whether public or private, when acting in any matter concerning children. It is a guiding principle in the implementation of the Convention. India has ratified the Convention on December 11, 1992, and should ensure that the rights enshrined under the Convention are protected in our country. Any international Convention not inconsistent with the fundamental rights and in harmony

<sup>33</sup> Subs. by s. 20: "sixteen years" (w.e.f. 15-4-1988).

<sup>34</sup> Ins. by Act 49 of 2001, s. 4 (w.e.f. 24-9-2001)



with its spirit can be read into them to enlarge the meaning and content thereof, to promote the object of the Constitutional guarantee. This is implicit from Article 51(C) and the enabling power of the Parliament to enact laws for implementing the international on Seventh Schedule of the Constitution of India.

### **Judicial Intervention and the best interest**

Though India ratified the ICCR in 1992 but the courts here stood for the welfare principle as early as 1969 when it decided the case of **Chander Prabha v Prem**<sup>35</sup> in which the court held;

Mother is entitled to the custody of her child below 5 years unless the welfare of the minor requires otherwise. Where the father has failed to exercise his powers and functions as a natural guardian, the mother would be appointed as the natural guardian of the child.

### **In Athar Hussain v Syed Siraj Ahmed & others**<sup>36</sup>

It was held that in case of custody of a minor if personal law overrides the statute, then the personal law would have to yield to the yardstick of the welfare of minor paramount consideration principle. A hazin who is a minor or of unsound mind or is leading an immoral life or is a profligate- has no right to the custody of the child.

### **In Ashish Ranjan v Anupama Tandon**<sup>37</sup> it was held

The statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact no statute on the subject can ignore, eschew or obliterate the vital factor of welfare of the minor.

### **In Feroza Popere v Mrs Usha Dhananjayan**<sup>38</sup> it was held

Religion cannot be the sole criteria to decide the welfare of the child. Though it is to be taken into account by the court while deciding custody and guardianship, it can't be the sole determinant which should cloud all other aspects.

### **In a recent development the Supreme Court in Shazia Aman Khan & others v the state of Orissa & others**<sup>39</sup>

The child is not a chattel or a ball that is bounced to and fro. Welfare of the child is the focal point. The statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor.

In this case the honourable Supreme Court granted custody of the minor child to her aunt with whom she was living from the tender age of 3-4 months, countering the biological father's opposition, who initially felt overwhelmed by the responsibility of caring for twins.

This principle reinforces that in the domain of child custody, legal statutes and personal laws must bow to the best interests of the child.

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<sup>35</sup> AIR 1969 Delhi 283

<sup>36</sup> SCC 654,2010

<sup>37</sup> (2010) 14 SCC 274

<sup>38</sup> 15 Nov 2017 BOM HC

<sup>39</sup> MANU/SC/0160/2024

## **Conclusion**

The issuance of legal custody of a child for the purpose of pursuing the child's welfare is the most pivotal. After deliberating upon the issue and doing some research it's clear that child custody is one of the most contentious issues that arise from the divorce of the spouses.

In India, the custody of a child depends upon the personal laws read with The Guardianship and Wards Act, 1890. Throughout the case the child and the parents' wishes are taken into account, but the decision ultimately rests with the court deciding the matter and it is seen that courts time and again have advocated for the welfare and the best interest of the child as it is of paramount importance and cannot be over-ruled by the personal law. A child deserves the love, care and affection from both the parents and the issues arising out of divorce should not affect the child, physically and mentally. A child should not be treated as a mere possession of property but as an entity whose welfare should be of utmost priority.