

THE BEST INTEREST OF THE CHILD IN CUSTODY DISPUTES

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Abstract

The “best interest of the child” is a central guiding principle for decisions regarding custody, guardianship, and adoption of children. Laid out in Article 3(1) of the United Nations Convention on the Rights of the Child (CRC), this principle places an obligation to prioritize a child’s interests over parental rights. In India, the discourse around this principle in child custody battles has been shaped by statutes such as the Guardians and Wards Act, 1890 (GWA) and the Hindu Minority & Guardianship Act, 1956 (HMGA) as well as judicial decisions based on the unique facts and circumstances of the case. Earlier, a myopic view focused on discrediting a parent’s fitness was the norm in deciding the best guardian. Now, courts take a much more positive view, focusing instead on finding the best environment for the growth of the child. However, the subjective nature of the application of this principle, existing gaps in rules and regulations, and inadequately trained personnel to handle the lifecycle of custody battles are still areas of concern. Against this backdrop, this article is an earnest attempt to examine the usage and effectiveness of this principle in Indian custody decisions. It advocates for reforms such as introducing trained assessors, fostering mediation, and facilitating formalized joint parenting agreements to resolve the highlighted issues. It espouses that the legal system will be much more successful in defending child rights amid custody disputes if it redirects its attention from short term gratification to long term stability for the child.

Keywords: guardianship, best interest of the child, custody disputes, convention on the rights of the child (CRC)

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Introduction

The “best interest of the child” standard in Article 3(1) of the Convention on the Rights of the Child (CRC) (United Nations General Assembly, 1989) acts as a North Star to uphold child rights by recognizing their inherent vulnerabilities. One such area where this principle is applied in true spirit is in custody and guardianship decisions. As a substantive right, it places an obligation on the State to put the child’s interest in decision-making at the center, as opposed to the exclusive protection of the legal rights of the parents. It is a principle of law that mandates, where there are two different interpretations of the law, the application of that interpretation which best promotes the welfare of the child. It also builds procedural safeguards to hold the state accountable for its decisions and determinations of what is actually in the best interest of the child (Goldstein, 2015). Protection of this principle is essential for two fundamental reasons: it upholds the dignity of the child as a person and is a very significant investment in the future population dividend of the nation (Vivek Singh v. Romani Singh, 2017). In this context, studies on the use of the “best interest of the child” principle in Indian custody proceedings are necessary in order to appreciate its application and its effect on the well-being of children.

India’s Custody Laws and the Best Interest Principle

India’s laws relating to custody have been influenced by the Victorian notion of “*parens patriae*,” under which the state became the residuary guardian. During the colonial era, the Guardian and Wards Act (GWA) of 1890 was enacted, which recognized the father as the natural guardian but allowed for state intervention in the event of his unfitness (Bajpai, 2005). Surprisingly, Sections 17 and 39 of the Hindu Minority and Guardianship Act (1956) had applied elements of the “best interest” doctrine, mandating consideration by courts of the age, sex, religion, and personal wish of the child in appointing or revoking guardians.

Post-independence, the courts started giving significance to the welfare of the child, away from the erstwhile trend towards paternal custody. Even in *Vegesina Venkata Narasiah vs Chintalpati* (1970), where the father was considered suitable, custody went to the mother, on the grounds of placing emphasis on continuity and stability in the rearing of the child. In *L Chandran vs Venkatalakshmi* (1980), custody was granted to the maternal grandparents, with the court categorically enunciating that “children cannot be treated as chattel,”

interpreting Article 21 of the Indian Constitution to place on record the overriding importance of the welfare of the child. For Hindus, the GWA was supplemented by the Hindu Minority & Guardianship Act 1956 (HMGA). Sec 6(a) of Hindu Minority and Guardianship Act (1956) designates the father as the “natural guardian” with the mother assuming the role only “after” the father. However, in *Geeta Hariharan vs Reserve Bank of India* (1999), the court took a wider interpretation of the word “after” allowing the mother to be the natural guardian even during the father’s lifetime if circumstances warranted, such as father’s neglect or lack of competence. While Section 6(a) does not explicitly grant equal status to the mother as a natural guardian compared to the father, courts have consistently interpreted it in conjunction with Section 13, which prioritizes child welfare. This approach allows for a liberal interpretation of custody laws.

For Muslims, while the father’s natural guardianship is officially recognized, the laws of *Hizanat* give priority to the child’s welfare and deem the mother best fit to take care of the child in the tender years (*Mumtaz Begum vs Mubarak Hussain*, 1986). Also, all the marriage or matrimonial laws in India, except the Dissolution of Muslim Marriages Act, 1939, have provisions regarding the allocation of the custody of children in a matrimonial dispute. Additionally, India is bound by its obligations under the U.N. Convention on the Rights of the Child (CRC) to ensure that the child’s best interest is a primary consideration in guardianship and custody matters.

To summarize, while India’s custody laws initially prioritized the father as the natural guardian, judicial interpretations have evolved to emphasize the welfare of the child. Despite the presence of gendered provisions, courts have increasingly applied the best interest principle to override statutory constraints in individual cases.

Application of the Best Interest Principle in Indian Jurisprudence

In the leading case of *Nil Ratan Kundu vs Abhijit Kundu* (2008), the Supreme Court of India (SC) recognized that “custody is a human problem that must be solved with a human touch.” It highlighted the need to provide proper care to a child’s comfort, happiness, health, education, and mental growth while ensuring that they are left in stable, loving, and morally healthy surroundings. In deciding which of the guardians is best situated to satisfy these basic needs, it involves an examination of a plethora of factors.

Financial stability is very much preferred, but what it means can vary greatly. In *Gaurav Nagpal vs Sumedha Nagpal* (2008), custody went to the mother even though she had very limited finances. In *K Narayanna Rao vs Bhagyalakshmi* (1983) and *Manjit Singh vs Jaswant Kaur* (2017), custody went to the father because the mother was supported by her elderly parents financially. These decisions raise questions about whether the courts view financially dependent mothers as good parents only until a child is in his or her young adult years, and why it appears better to upend a young person's already established family life with his or her mother than to require the father to become financially accountable.

Parental availability and work commitments also affect custody decisions. In *Suresh Babu vs Madhu* (1984), the father's demanding schedule led the court to award the custody to the mother. However, in *Thrity Hoshie Dolikuka vs H.S. Dolikuka* (1982), the SC overruled a decision that penalized the mother for being a working woman wanting to send her daughter to boarding school. The ruling rejects traditional parental roles based on employment status, asserting that a woman's working status is irrelevant in determining her ability to raise a child. However, it sets different standards for working fathers and mothers when determining the best-fit guardian.

Legal conflicts involving a parent or guardian also impact custody decisions. In cases of abduction or kidnapping of the child (mostly by the father), as seen in *Elizabeth Dinshaw v. Arvand Dinshaw* (1987) and *Chandrakala Menon v. Capt. Vipin Menon* (1993), courts have often expected the left-behind parent to forgive such an offense with the rationale that the child needs the love and attention of both parents. In both cases, the child's custody was given to the aggrieved mother, and visitation rights were given to the offending father. Where there have been allegations of domestic violence sometimes even leading to the mother's death, courts have taken a stricter view that superseded the father's rights as a natural guardian. In *Kirtikumar Maheshankar Joshi vs Pradipkymar Karunashankar Joshi* (2022) and *Shakuntala Sonawane vs Narendra Khaire* (2003), the courts awarded the custody to the maternal uncle and grandmother respectively, deeming them fitter guardians. In cases of proven child sexual abuse by the father, courts grant exclusive custody to the mother and may permanently bar the father. If the risk comes from a parent's relative, supervised access is allowed to that parent. Non-compliance of maintenance awards is

another area of conflict with the law that courts have taken into consideration. In *Mohd Ayub Khan v. Saira Begum* (2002), the husband sought custody of his seven-year-old son under Shariat law. But the court observed that he couldn't have had the best interests of his child since he kept dragging his wife through litigation while refusing to pay maintenance for child support.

A child's choice has a great bearing on custody battle outcomes. In *Smriti Madan Kansagra v. Perry Kansagra* (2021), a child's favorable perception of his father influenced the court's decision to grant custody to him. In *Savitha Seetharam v. Rajiv Vijayasaathy Rathnam* (2020), the court took special cognizance of the child's wish to be jointly parented since he didn't want to miss out on either the affection of his paternal grand-parents or his younger siblings. Noting the maturity of each parent to support the child's relationship with the other parent, the court ruled in favor of "shared parenting" in the best interest of the child.

Among the acrimonious custody battles, courts take the negative behavior exhibited by parents as a significant deterrent. In the case of *Kumar V. Jahgirdar vs. Chethana Ramatheertha* (2004), the Karnataka High Court overturned a Bangalore family court order giving custody to the father on the premise that the mother's remarriage to a celebrity sportsman was erroneously described as unbecoming of the child's upbringing. Similarly, in the case of *Vivek Singh vs. Romani Singh* (2017), the court took into consideration "parental alienation syndrome," wherein the child was smartly manipulated to prefer one parent over the other, ultimately causing severe emotional distress to the child.

Overall, the jurisprudence is one of subtlety, weighing legislative provisions against the shifting needs of society and specific case considerations. But those subtleties create openings for inconsistencies, and the necessity for that reason of more specific procedural rules.

Challenges In the Implementation of the Best Interest Principle

Applying the best interest rule in custody cases is not without challenges either. First, the subjective nature of what is "best interest" tends to slow down the judicial process, especially in family courts. Such delays can end up leaving children in the care of guardians who are "not the best fit" in the interim (Charlow, 1986). Second, the judicial system is beset by gross skill deficits required to work effectively with families and children. There's an urgent need

to induct trained evaluators who possess sensitivity toward the impact of divorce on children of different age groups, are familiar with the success of custody and visitation arrangements on a child's development, and have experience of using interview, observation, and play methods to understand a child's preferences. Third, with the myriad of subjective considerations that must be weighed, little exists in the way of procedural safeguards against judges' own biases influencing the final custody determination. Any documentation of a child's development milestones, their coping mechanisms of separation from either parent, parents' parenting philosophies, their method of handling conflict with an ex-partner, and psychological history – all of which could reduce subjectivity – is grossly inadequate (Clark, 1995). Fourth, while courts do recommend mediation to prevent the chaos of a parental conflict from muffling the interest of the child, it often fails amid existing hostility between parties (Law Commission of India, 2015). This leaves much to be desired to achieve a genuine expression of the “best interest of the child” principle in custody conflicts. Considering how far we have already come, to give it our best shot now at the last mile is not just a legal obligation but an ethical imperative.

Conclusion

The solution is to bring in comprehensive reforms across the custody conflict lifecycle. First, mediation between competing guardians should be encouraged. Moving beyond the traditional method of conflict resolution, courts need to put more emphasis on parent collaboration. Perhaps, parents who have the maturity to set aside their egos to meet the developmental needs of the child should be viewed more favorably by the courts in deciding custody. To allow joint parenting plans to be considered viable, the legislature needs to lay down guidelines on how access and responsibility (especially sharing expenses of the child) are to be shared. Second, the true voice of the child needs to be recognized. It is important to induct trained assessors who can help children articulate their genuine opinions without fearing repercussions. Finally, keeping in mind the debilitating impact that custody wars have on children, the object of best interests would be served if the lens of the system could change towards preempting conflict around a child. That demands a cultural acceptance of seeing co-parenting by estranged spouses or their family members as a healthy option. Thus, by adopting a holistic approach that integrates legal, psychological, and social perspectives, India can move closer to a future where every child caught in a custody crossfire is empowered to thrive.

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