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Impact of Divorce on Children: A Critical Analysis

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ABSTRACT

Modernization has made the unbreakable bond of sacred marriage open for divorce, leaving plenty of adverse effects on children. The research paper discovers impact of divorce on children, with special emphasis of psychological and social problems faced by them. Reasons for divorce largely affect the future life of children, which is analyzed in the research work. Most of the parents' divorce because of their personal reasons, disregarding interest of their children who have to suffer for rest of their lives. The research paper revolves around children, whose parents are divorced and are living apart. Divorce of parents is the most heartbreaking situation for the child. The court of law has attempted to help such children, by developing new doctrines and implementing rules, which either reduce chances of divorce or ensure that child gets proper care and protection by both parents. Judgements by the Supreme Court and various High Courts are analyzed by the researcher, giving special notice towards the issue of custody of child. The research paper analyses the 'doctrine of best interest of child' and suggests for shared parental responsibility. The researcher concludes by suggesting increased application of alternate dispute resolution mechanisms in family matters, so that parties have a win-win situation in the judgement and preserving happy memories in life of children.

I. INTRODUCTION

Parents are the most important person in life of any person. Every child needs protection under the parents. They are responsible, not only for birth of the child, but also for future care. When parents get divorced, the child gets deprived of any one of the parent. It is the child who gets pessimistic and has most detrimental effects. The child needs to suffer the most, socially, economically, culturally and emotionally. Even after enactment of many statutory provisions, the children after divorce of parents continue to suffer the most. Psychological, cultural, social, educational and many dimensions of life get affected negatively because of divorce of parents. In many cases it has been seen that children are reluctant to socialize, blame themselves for divorce of parents, indulge in malpractices, and become violent. This spoils future of a developing nation like India. As judiciary is aware of

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these facts, the child is given under custody of a parent who can contribute most for welfare of the child. The doctrine of best interest of the child is followed by the judiciary in custodial cases. A new concept of shared parental responsibility is developing in India where both the parents work for best interest of the child together even after divorce. The impact of divorce on children is very crucial and needs to be handled with care.

II. DEFINITION OF A CHILD

- UN Convention on the Rights of the Child 1989.

*“every human being below the age of 18 years unless under the relevant law applicable to the child, majority is reached earlier.”*²

- Section 82, Indian Penal Code 1860.

*“nothing is an offence which is done by a child under 7 years of age.”*³

- Section 2 (1) (e), the Children Act 1960.

*“a boy who has not attained the age of 16 years, and a girl who has not attained the age of 18 years”.*⁴

- Section 2 (k), Juvenile Justice Care and Protection Act, 2015.

*“a person who has not completed 18 years of age.”*⁵

- Section 2 (a), The Prohibition Child Marriage Act, 2006.

*“a child means a person, who, if a male, has not completed 21 years of age, and if a female, has not completed 18 years of age.”*⁶

- Section 2 (b), The Child Labour (Prohibition and Regulation) Act, 1986.

*“a person who has not completed his 14 years of age.”*⁷

- Section 3, The Indian Majority Act 1875.

“every person domiciled in India shall attain the age of majority on his completing the age of 18 years and not before. In computing the age of a person, the day on

² Article 1, UN Convention on the Rights of the Child.

³ Section 82, Indian Penal Code 1860.

⁴ Section 2 (1) (e), the Children Act 1960.

⁵ Section 2 (k), Juvenile Justice (Care and Protection of Children) Act, 2015.

⁶ Section 2 (a), the Prohibition of Child Marriage Act, 2006.

⁷ Section 2 (b), The Child Labour Prohibition and Regulation Act, 1986.

which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the 18th anniversary of that day.”⁸

III. PARENTAL RESPONSIBILITY

Parents are the most important entity in life of a child. In general understanding, a parent is the father or the mother of a child who takes care of the child, raises him/her up and provides him/her with love, care and affection.⁹ According to Black’s Law Dictionary¹⁰, a parent is :

- Either a father or the natural mother of a child;
- Either the adoptive father or the adoptive mother of a child;
- A child’s putative blood parent who has expressly acknowledged paternity;
- An individual or agency whose status as guardian has been established by a judicial decree.¹¹

Article 39 (f) of the Constitution of India, is devoted for parental responsibility towards welfare of children. The provision is as follows :

“that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.”¹²

Development of a child is completely dependent upon the parents. This is responsibility of parents to take care and work for development of child so that after a period of time, the child will contribute in development of the society.

IV. CHILDREN AFTER DIVORCE OF PARENTS

Divorce is a social stigma in Indian society, which is primarily cursed because of its negative impact upon children. After divorce of a legally wedded couple, the children are given under custody of any one of the parent. The Hindu Minority and Guardianship Act 1956 and Guardians and Wards Act 1890, are the statutes which govern custody of children in India. Section 7 of the Guardians and Wards Act 1890, gives the court power to appoint a guardian to a child and section 17 mentions various details which are to be taken into consideration

⁸ Section 3, the Indian Majority Act, 1875.

⁹ Vijender Kumar, *Shared Parental Responsibility : Need of the Hour*, 1 NLUALR 2015, p. 1-12.

¹⁰ Bryan A Garner (ed.), *Black’s LAW DICTIONARY*, 8th ed. 2004, p. 1144.

¹¹ Bryan A Garner (ed.), *Black’s LAW DICTIONARY*, 8th ed. 2004. P. 1144.

¹² Article 39 (f), The Constitution of India, 1950.

while appointment of a guardian.¹³ Section 6 of the Hindu Minority and Guardianship Act provides that the natural guardian of a minor boy or an unmarried minor girl is the father and after him the mother.¹⁴ The section also provides that custody of children who are below the age of five shall ordinarily be under mother. Section 26 of the Hindu Marriage Act empowers the court to pass orders with respect to custody, maintenance and education of minor children.¹⁵ Although there are statutory provisions for welfare of children even after parents are divorced, but state cannot ultimately force the parents to behave in a particular way by interfering into their personal matters.

For overall betterment of the child, proper care and protection must also be clubbed with custody. The word 'custody' in Guardians and Wards Act 1890, refers to actual and constructive custody whereas the word 'care' in the Hindu Minority and Guardianship Act is much wider than the previous mentioned term. When the future of a child is on risk, during the divorce of parents, then the court gives the custody of child to the parent who can take much better care of the child than the other. The development of the child is taken into consideration while granting guardianship and handing out the child under custody of any single parent. Even after a lot of care taken by the state, there are definitely negative consequences of divorce on children.

V. PSYCHOLOGICAL IMPACT ON CHILDREN AFTER DIVORCE OF PARENTS

The biggest concern about the child after divorce of parents is psychological trauma. The child who was till now living under the care and protection of both, the father and the mother, will have to suddenly quit any one of them. The child will then be deprived of love and affection of the other parent who has been denied his/her custody. In such cases, if the court finds it appropriate, then the other parent is allowed to visit the child frequently. This remedy, although made for benefit of the child has resulted in more detriment of emotions.

In daily life of the child, he/she is made realized that his/her parents have divorced. In simple conversations also the child is made aware of this fact unknowingly. For example, when corrected answer sheets are distributed or results are declared in schools, all children are directed to have signatures of father as well as mother or the child has to go to school with both the parents for parent-teacher meetings. At such times, the child faces a lot of difficulties. He/she is anxious imaging the future that how would he/she gather courage to ask for signature on answer sheets or ask his/her own parents to accompany with him to school.

¹³ Guardians and Wards Act, 1890.

¹⁴ The Hindu Minority and Guardianship Act 1956.

¹⁵ The Hindu Marriage Act, 1956.

In such cases, the child begins to feel unlucky and many a times desires to suicide. The psychological impact on child's mind is very crucial. The child is confused regarding his future. The first thought which comes into the child's mind is that his/her parents don't love him/her. Because of this thought the child begins to react in a negative manner with both the parents.

DILEMMA OF THOUGHTS OF A CHILD

For any person, generally, it is very difficult to measure love, care and affection, which is received from society. The same condition is with children of divorced parents. It has been seen that, when any child, before granting of custody, is asked the question that to whom does he/she love more, the child has either remained silent or has answered in favor of the parent who has asked the question or is present at that place.

During visit of the parent who has been denied custody of the child, this dilemma has arose to heights. Most dangerous part of that child is when the other parent meets him/her. The other parent brings him/her many gifts and materialistic pleasures so that the child must think that the other parent also cares. But this pleasure is only for the time being. As soon as the other parent leaves, the custodial parent starts to curse the child. Whenever the child plays with toys given by the other parent, the custodian behaves rudely with the child. Such instances take place in everyday life of a child of divorced parents.

VIOLENCE BY CHILDREN

Innocent children are used as tools of vengeance in divorce and custodial matters.¹⁶ Any parent may blame the other regarding any misbehave of the child. Generally it is seen that children also become violent in cases of domestic violence, because such activities are observed by them in house on a regular basis. Usually mothers blame that because of the fact that her husband beats her in front of the children, they have also learned to react rapidly using physical violence. This violence and hyperactive behavior of children later grows more when they attain majority and subsequently, the society gets violent people in the country. When the child grows up, he will carry this violent behavior in daily life which will resultantly reduce his socialization.

VI. SOCIAL PROBLEMS FOR THE CHILD

During dispute talks of parents, the child is left alone. This causes the child to stay aloof from people. The mind of a child is so immature that he/she cannot understand the complexities of

¹⁶ Times of India, 19 February 2017, 10:38 IST, <https://timesofindia.indiatimes.com/city/delhi/parents-use-kids-to-strike-at-spouse-hc/articleshow/57227416.cms>.

relationship which exist between parents. The first social institution in one's life is the family. For any person, the process of socialization begins from the family. Basic traits of behavior are learned from the family. The ties between family gives joy to the members. It is the place where people share their feelings and emotions. But the case is entirely opposite for a child of divorced parents. Such children never see happy family, where they can learn socialization and share feelings and emotions.

Life of a child, whose parents keep on fighting and are urging to have divorce knows no happy society. For any child, family is the first step and culture of family is understood of characteristic of whole world by the child. As a child of divorced parents sees only fight and sorrow whole day, his/her understanding is that this world is full of sorrow and all people on this earth fight always. During most of the time after divorce, the child is left alone and he/she finds it much better. For that child, staying aloof and not talking to anyone is the best way to live happily because he/she understands that as soon as any conversation will take place between himself/herself any other person, there will be quarrel and sadness all around. Children of divorced parents prefer to stay alone and hesitate to socialize.

MONETARY VALUE OF LOVE AND CARE FOR THE CHILD

In cases where custody of the child is granted to any one parent and the other parent has visiting rights, then the child as well as parents measure the value of love and care in monetary terms. During visits, the non-custodial parent brings highly expensive gifts for the child to make him/her think that this parent loves and cares more than the other. Many a times the child also takes benefit of this fact and asks for unnecessary and expensive products which are blindly given by the parent to show their love. This fact is completely dependent upon the economic condition of each parent. Such expensive gifts become a material showoff of invaluable love of parents. Many children actually feel lucky that their parents are divorced so that they get so many gifts. In practical scenario, such children show those expensive gifts to their friends, which again causes detriment to society. Children living in families then feel unlucky that their parents are not divorced that's why they don't get gifts. Some children wish their parents to be divorced so that they can enjoy a luxurious life.

VII. THE DOCTRINE OF 'BEST INTEREST OF THE CHILD'

The legal doctrine followed by the Indian courts concerning children of divorced parents is '*best interest of the child*' doctrine. This doctrine has its origin in 'Convention on the Rights of the Child 1989'. Article 3 (i) of the convention is

"In all actions concerning children, whether undertaken by public or private

*social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”.*¹⁷

It is observed that the court should keep in mind three parameters while taking a final decision in the custody matters. These three parameters are ‘*doctrine of welfare of the child*’, ‘*doctrine of care and protection of the child*’ and ‘*wishes of the child*’. The court either satisfies the parties on the basis of ‘*doctrine of welfare of the child*’ or ‘*doctrine of care and protection of the child*’ or on the basis of the evidence furnished by or on behalf of the child, if the child is the grown one, or is of capable of submitting his/her evidence. But nowhere it has been seen that the court has satisfied all these three parameters. It is desirable on the part of the court to take a holistic approach in the matters relating to custody of the child.¹⁸ The decision on the three parameters is complete discretion of the court keeping in mind the best interest of the child.

Welfare of child : The Hindu Minority and Guardianship Act 1956, deals with guardianship of children. Section 13 of the Act is regarding welfare of the child. The provision gives power to the court to reject guardianship to a person which would be of detriment to the child. The Madhya Pradesh High Court in the case *Bhupindra Singh v Jasbir Kaur*¹⁹ propounded the judgement based on section 13 taking the welfare of the child into consideration. The welfare of the minor child is not measured only in terms of money or physical comforts. It also includes moral, ethical, social and emotional development. The Madras High Court in *D. Rajaiah v Dhanpal*²⁰ the court analyzed all parameters and environment of divorced parents before granting custody, keeping in mind the welfare of the child.

Care and Protection of the child : In the statutes, two words are used regarding welfare of children. The words are ‘custody’ and ‘care’. The word ‘custody’ means actual custody or constructive custody, in other words, custody can be physical or legal. Custody refers to physical keeping of the child. It implies that the child is under custody of a person with whom he/she resides. Whereas, the word ‘care’ means looking after. The court pays due attention on the fact that is the child under care with the guardian.

Wishes of the Child : The child’s own views and wishes are given due consideration while granting custody to any one parent. The ‘Convention on the Rights of the Child 1989’, in Article 12 states that

¹⁷ Convention on the Rights of the Child, 1989.

¹⁸ Vijender Kumar, ‘*Custody of Child : A Critical Appraisal*’, M.D.U. Law Journal, Vol.XI, Part-I, (2006), p. 78.

¹⁹ AIR 2000 MP 330.

²⁰ AIR 1986, Mad. 451.

“ (i) States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (ii) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”²¹

In *Sarita Sharma v. Shushil Sharma*²² the Supreme Court has taken a bold step to prove that the wishes of children also form an important element for the consideration of custody under parents after divorce. The facts of the case were that Shushil Sharma and Sarita Sharma got married in 1988, and lived in USA. They had two children, a son and a daughter. After passage of time, the couple developed serious differences, which led to filing a petition for dissolution of marriage in Texas, USA. The interim order passed by the court gave custodial rights to Shushil, the father, who was alcoholic and violent towards wife and children. Sarita was granted visiting rights. In May 1997, Sarita picked up the children from Shushil's residence and flew to India. The American Court passed a decree of divorce and declared the sole custody of children to father, with no visitation rights to the mother. With this decision of American Court, Shushil approached Delhi High Court for custody of children. Sarita filed a special leave petition in the Supreme Court against the decision of High Court. The Supreme Court held that the welfare of the children should be the paramount consideration in dealing with the issue of their custody and that the court should not be guided entirely by the fact that the wife had taken the children from USA despite the order of the American Court. The court passed the order after the two children gave their statements to the court, expressing their desire to stay with the mother. The decision of the supreme court marks an important step in recognizing the best interest of the child after giving due consideration to the wishes of the child over the right to custody that parents may exercise or assert.

VIII. SHARED PARENTAL RESPONSIBILITY

The rules for custody of child after divorce of parents are changing due to dynamics in society. A large number of countries across the globe have adopted a new system of shared parental responsibility, also known as joint parental responsibility, keeping in mind the best interest of the child. This trend arose in response to changing familial roles, where fathers

²¹ Article 12, The Convention on the Rights of the Child, 1989.

²² (1999) 1 SCC 759.

take care of children while mothers have become bread earners of the family. Psychological studies reveal that involvement of both parents in rearing of child is much better and more preferred than sole single parental custody.²³

Article 9 (iii) of the 'Convention on the Rights of the Child' 1989, indicates towards shared parental responsibility after divorce. The provision is

*“State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both the parents on a regular basis, except if it is contrary to the child’s best interest”.*²⁴

Shared parental responsibility is defined as a court ordered relationship where both the parents retain all the parental rights and responsibilities with respect to their minor child, and in which both parents discuss the major decision affecting their child’s welfare jointly.²⁵ The responsibilities can vary from making day-to-day decisions regarding the child’s care, maintenance, and welfare to taking decisions on questions of religious upbringing, discipline, financial, moral, social, recreational, and legal matters, changes in social environment, and non-emergency healthcare. Both the parents are expected to have an active role in providing a sound moral, socio-economic, and educational environment in making future plans consistent with the best interest of the child and in amicably resolving any disputes that arise.²⁶

It is generally seen that after divorce the children are handed over to the mother to take care and the father is made to bare the economic expenses of children. This again is the old stereotypical division on the basis of gender that girls are suppose to marry and nurture children, whereas boys are meant to go out and earn money. But in shared parental responsibility this is not the case. Both, the father and the mother are given the responsibility to nurture the child as well as bare the economic expenses of the child.

At present, in judicial practice, there is neither a presumption that father is natural guardian of the child nor that mother can take better care and nurture the child. The judicial approach for child custody has been evolved to a logical level of shared parental responsibility. In the case *Vikram Vir Vohra v Shalini Bhalla*²⁷ the Supreme Court altered visiting rights of the father and allowed the mother to take minor child to Australia where she had got a job. In case

²³ Law Commission of India, Report no. 257, p.7.

²⁴ Convention on the Rights of the Child 1989.

²⁵ Vijender Kumar, *Shared Parental Responsibility : Need of the Hour*, 1 NLUALR 2015, p. 1-12.

²⁶ Vijender Kumar, *Shared Parental Responsibility : Need of the Hour*, 1 NLUALR 2015, p. 1-12. ; Modelled on the chapter on Dissolution of Marriage; Support; Time-sharing in the Florida Statute, F.S.61.046(14); <http://www.jud6.org/generalpublic/RepresentingYourself/CourtInfoAndResource/SharedPR.htm>.(visited Sept. 10, 2014).

²⁷AIR 2008 SC 2262.

*Gaurav Nagpal v Sumedha Nagpal*²⁸, although the son had been with his father since the time of his birth, the Supreme Court awarded custody to the mother with visiting rights to the father. In many cases, such as *Ravi Shankar v Uma Tiwari*²⁹ and *Ashok Shamjibhai Dharod v Neeta Ashok Dharode*³⁰, the High Courts have held that greater economic prosperity of the father is not a guarantee of the welfare of the minor and the mother was given custody of the child. In the case *Ashish Ranjan v Anupama Tondon*³¹ the Supreme Court noted that the mind of the child was influenced to such an extent that he had no affection or respect for the father. This was violation of visitation rights of the father. In *Padmaja Sharma v Ratanlal Sharma*,³² the Supreme Court held that if both the husband and wife are earning, then the wife is also equally responsible for maintenance of her children.

A set of guidelines on ‘child access and child custody’ prepared by the Tata Institute of Social Sciences Mumbai, for Family Court Judges and counselors in Maharashtra understands joint custody in the following manner

*“Child may reside alternately, one week with the custodial parent and one week with non-custodial parent, and that both custodial and non-custodial parent share joint responsibility for decisions involving child’s long term care, welfare and development.”*³³

It treats child as a chattel to be transported to alternate parent every week.

The Karnataka High Court, in the case *KM Vinaya v B Srinivas*³⁴ held that both the parents are entitled to get custody for sustainable growth and development of the child. The joint custody was implemented in the following manner :

“The minor child was directed to be with father from 1 January to 30 June and with the mother from 1 July to 31 December every year. The parents were directed to share equally all expenditures of the child. Each parent was given visitation rights on Saturdays and Sundays when the child was living with the other parent. The child was allowed to use telephone or video conferencing with each parent while living with the other.”³⁵

²⁸AIR 2009 sc 557.

²⁹I (1999) DMC 585 MP.

³⁰II (2008) DMC 48 Bom.

³¹(2016) 11 SCC 225.

³²AIR 2000 SC 1398.

³³ Sonali Abhang, Guardianship and Custody Laws in India, IOSR Journal of Humanities and Social Sciences, Vol 20, Issue 7, p. 39-58. ; website : <http://www.mphc.in/pdf/ChildAccess-040312.pdf>, Pg 24 (Last accessed 4 November, 2014).

³⁴AIR 2013 SC 102.

³⁵ Sonali Abhang, Guardianship and Custody Laws in India, IOSR Journal of Humanities and Social Sciences, Vol 20, Issue 7, p. 39-58. ; website : <http://www.mphc.in/pdf/ChildAccess-040312.pdf>, Pg 24 (Last accessed 4

IX. ANALYSIS

Children are future of any society and they must be given due care and protection. Due to mistakes of two people who could not continue their marital relationship, children have to suffer. An innocent child has to face a large number of psychological, social, educational and many more problems. Children of divorced parents are reluctant to socialize, blame themselves for divorce of parents, indulge in malpractices, and become violent. This spoils future of a developing nation like India. As judiciary is aware of these facts, the child is given under custody of a parent who can contribute most for welfare of the child. The doctrine of best interest of the child is followed by the judiciary in custodial cases. A new concept of shared parental responsibility is developing in India where both the parents work for best interest of the child together even after divorce. But at last, even after a lot of remedies, the child has to suffer. Best solution for this problem is to have mediation and conciliation and make all efforts to avoid divorce.

X. CONCLUSION

The plight of the children who loose love of a complete family must be taken seriously. The parents seek their own benefit and cause detriment of their own child. Most divorces are caused because of mutual misunderstanding or contrasting interests. Such small matters turn out into divorce and the person who suffers most is the child. The innocent child knows that families are full of fighting and anger. Usually parents fight in front of the children and violence is initiated in his/her mind. Many children blame themselves for divorce of parents.

Best way out of this is shared parental responsibility through mediation. Misunderstandings are mostly because of lack of communication. The spouses, before divorce, must carefully decide welfare of the child, and then act accordingly. They should equally share parental responsibility so that the children should not suffer because of divorce. Modes of alternate dispute resolution are recognized in India, and are encouraged to be applied in family disputes. Mediation and negotiation are very much useful in family cases, because of less cost, speedy justice and win-win situation of both sides in the judgement. The crucial life of children, with delicate feelings and emotions gets valued along with tussle between husband and wife. Children being future of the nation must be nurtured with care and delicacy, avoiding adverse impact of divorce on them.
