

Child custody rights in India

Divorce is never easy but once a divorce decree is ordered it affects the child more than it does to the husband and the wife. When both the parents are contesting for child custody, the court will intervene to look at what works best for the child before granting child custody.

Gone are the days when the mother is favoured by awarding the custody rights of the child. Both the mother and the father have the same right to claim child custody as the Court has always put the welfare and interest of the child in the forefront and not the rights of the parents.

What the court looks for before granting child custody?

Before awarding custody rights to either the mother or the father, the court evaluates various factors that are conducive for the child. The factors include but are not limited to:

- A stable and a healthy home environment the parent can provide
- The strength of the parent-child relationship with each parent
- The parent's willingness to hold custody of the child
- The physical, emotional and mental health of the child
- The willingness of the child
- Any evidence of domestic abuse – verbal, physical or mental
- Safe-keeping and ethical upbringing of the child
- The wishes of the deceased parent if any
- When the custody involves more than one child, the court awards custody to keep them together

Statutory rights:

The provisions of child custody are provided under the matrimonial statutes governed by the personal laws. Apart from that there is The Guardians and Wards Act 1890 (GAWA) which governs child custody matters in India along with other personal laws. The act provides for regulations and redressal pertaining to custodial issue irrespective of the religion of the parents or the child and is read along with the personal laws governing custody of minor children.

Custody under Hindu Laws:

According to the Hindu Minority and Guardianship Act, 1956, the custody of all children below the age of five (5) is awarded to the mother and in case of a boy or unmarried girl above the age of five, the father gets the custody.. Section 26 of the Hindu Marriages Act, 1955 provides for the Court to pass interim orders and make provisions with respect to the custody, maintenance and education of minor children, consistently with their wishes and also to revoke, suspend or vary any orders previously passed.

Custody under Christian Laws:

As per Section 41 of the Indian Divorce Act, 1869, the courts have the right to pass orders as to the custody, education and maintenance of minor children, in any suit for obtaining a judicial separation.

Custody under Parsi Laws:

As per Section 49 of the The Parsi Marriage and Divorce Act, 1936, the courts have the right to pass orders as to the custody, education and maintenance of minor children, in any suit for where the subject of the suit is marriage of the parents.

Custody under Muslim Laws:

As under the Right of Hizanat, the custody of the child is always with the Mother until the son reached the age of 7 and the daughter attain puberty. The mother cannot be deprived of this right unless considered unfit.

For marriages that are registered under the **Special Marriage Act, 1954**, Section 38 of the Act provides for provisions relating to the custody of minor children. The District courts have the right to pass interim orders and make provisions as to the custody, education and maintenance of minor children, consistently with their wishes.

Does a parent with better financial stability win child custody battle?

Not really. The financial status of the parent doesn't guarantee to win the child's custody. It's the parent's capability to raise the child morally and ethically sound that matters while awarding child custody. Providing financial support plays an important role but that alone doesn't ensure custody while actually the mother or the father is not able to meet the basic emotional support the child needs.

Can a mother prevent the father from seeing the child?

Yes, but only when there is proof that the involvement of the father is not the child's best interest. If the father is proved to be unfit as a parent or if he had caused any violence he can totally be void of any visitation rights in order to protect the child.

How the mother can win the child custody battle?

As mentioned earlier, custody rights have now become gender-neutral – both the mother and the father have equal rights to claim child custody. The mother should be able to prove that the father is unfit as a parent and unable to raise the child by gathering documental evidence. The mother should be able to prove that granting custody to the father is not in the best interest of the child.

Can child custody be changed or modified?

If there is any significant change in the circumstances since the final court order, custody decisions of the child might be changed. Some of the conditions under which the court changes the child custody order are as follows:

- When one of the parents violates the existing court order
- If there is any domestic violence or abuse happening in the parent's house who is having current custody of the child
- When the current custody parent has lost his/her ability to meet the children's needs
- When the parent holding current custody has relocated so that the current order becomes impractical to follow
- When the current order is no longer at the child's best interest or if the child's needs have changed

Types of child custody

The court has to decide upon what is best for the child in terms of Health, maintenance, education and overall wellbeing. The courts have time and again emphasised that the welfare of the minor is the only consideration, irrespective of the claims of the parties to the custody. Depending upon various factors the courts decide whom to award child custody.

Physical custody – physical custody of the child will be awarded to either the father or the mother. The parent who is having physical custody of the child will also be the primary guardian. The other parent will be granted visitation rights once in a week or fortnight or sometimes once in a month as the case may be.

Legal custody – both the parents have the right to make important decisions such as joining in educational institutions, the type of medical care to be provided, etc. while physical custody could be awarded to only one parent who can take decisions on a day-to-day basis, both parents as legal guardians of the child can involve in important matters regarding the child together.

Joint custody – both parents can take turns in keeping the child in their custody. The duration of the custody with one parent may vary from a few days to even a month. By having joint custody the child will also be benefited as the child will get the support of both the parents during his/her tender age.

Sole custody – if either of the parents is provento be unfit to hold custody of the child, the court with no other option offers the other eligible parent sole custody of the child.

Third party custody – A third party apart from the biological parents will be granted custody by the court.

Who else can claim child custody?

The custody of the child can primarily be claimed by the father or the mother. If both of them are deceased, then the child's maternal or paternal grandparents or other close relatives of the child can claim custody but only under strict compassion to

raise the child. In certain cases, as mentioned earlier, the Court may grant custody to a third party.

How is child maintenance calculated?

While determining the maintenance of the children, the status of both the parties and the reasonable wants of the child are considered. The maintenance should include provision for food, clothing, residence, education and medical attendance of the child.

Who should pay for child maintenance?

The provisions governing maintenance of children and parents are covered under various Statutes.