

IMPACT OF DIVORCE ON CHILDREN : A SOCIO-ECONOMIC AND LEGAL STUDY

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Introduction

This paper evaluates the traumatic experience of the children of divorced parents. Initially, the pain experienced by children is distressing as they see the family disintegrating and sense vulnerability.¹ Divorce, in any circumstance, rips a child apart, emotionally and psychologically, thwarting upon the child's wellbeing.² However, long term affects are determined by the behavior on the part of the parents which determines good adjustment for children going through divorce.

A major impact of divorce is on the parent-child relationship. The quantity and quality of contact between children and non-custodial parents-usually fathers-tend to decrease and the relationship with the custodial parent-usually the mother shows signs of tension.³ Further, divorce raises the needs of definitive articulation of child rights in the present context and how they must be represented in a divorce proceeding.

Divorce is an extremely disturbing experience for all children depending upon the age or maturity level.⁴ In the present context, when the family in India is understood as the first line of defense, in an event of divorce, family serves as a source of stability.⁵ In light of this let us now observe the experience of children in the family while going through their parents divorce.

Child's Behaviour Associated with Divorce

Divorce is inarguably intensely distressing for children. Outside the realm of family, because of the stigmatization of divorce, the child faces a

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1. Sara Eleoff, AN EXPLORATION OF THE RAMIFICATIONS OF DIVORCE ON CHILDREN AND ADOLESCENTS, http://www.childadvocate.net/divorce_effects_on_children.htm.
2. Jayna Solinger, THE NEGATIVE EFFECTS OF DIVORCE ON CHILDREN, <http://www.public.iastate.edu/~rhetoric/105H16/cova/jlscova.html>.
3. F. Furstenberg and C.W Nord, PARENTING APART: PATTERNS OF CHILD REARING AFTER MARITAL DISRUPTION. *Journal of Marriage and the Family*, 47, 893-904 (1985).
4. Kelly and Wallerstein, BRIEF INTERVENTIONS WITH CHILDREN OF DIVORCING FAMILIES, 47 *American Journal of Orthopsychiatry* 23, 29-30 (1977).
5. M. Desai, TOWARDS FAMILY POLICY RESEARCH. *Indian Journal of Social Work*, 56,

tough time attempting to be accepted by a conservative society.⁶ In socio-economic attainments, children who experience their parents' divorce have lower educational prospects than children from intact homes.⁷ Within the family, the obvious effects are on the physiological behaviour of the child.⁸ There are also children who are left in a guilty conscious in the post-divorce period especially if they are a frequent witness to the parent's feuds.⁹ They are left thinking what is that they did to cause the divorce. Moreover, in older age groups the assumption of *hyper-maturity* is also common as children often assume the tasks of adults to stabilise the custodial parent's household.¹⁰ There is also a reciprocal dependency relationship between the child and the single parent which is in 90 percent of the cases the mother. This principally relates to a closer relationship between the parent and the child more as peers, both struggling to keep the family going.¹¹ A lack of generational boundaries means a less hierarchical family and less authoritative generational distinctions. This is understood to inadequately socialise children or place them in a disadvantageous position when they find themselves in hierarchical organisations.¹²

pp. 25-231 (1995); Amitai Etzioni, THE FAMILY: IS IT OBSOLETE? *Journal of Current Social Issues* 14 (1977).

6. Andreas Diekmann and Kurt Schmidheiny, THE INTERGENERATIONAL TRANS MISSION OF DIVORCE, <http://paa2004.princeton.edu/download.asp?submissionId=40951>.
7. Andrea H. Beller and Sheila F. Krein, EDUCATIONAL ATTAINMENT OF CHILDEN FROM SINLGE PARENT FAMILIES: DIFFERENCE BY GENDER, EXPOSURE, RACE, *Demography* 25: 221-234 (1998). It is also observed that children of divorce have lower level of employment, and financial attainment due to the instability within the family structure. See S. McLanahan, and G. Sandefur, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994).
8. Sadness and depression are common to all age-groups of children which is further characterised by loss of appetite, relentlessness, lack of decision making, difficulty in concentrating etc. See Howard Raab, THE EFFECT OF DIVORCE ON CHILDREN, <http://www.divorcesource.com/FL/ARTICLES/raab3.html>.
9. Watson, THE CHILDREN OF ARMAGEDDON: PROBLEMS OF CUSTODY AFTER DIVORCE, *Syracuse Law Review* 55, 78 (1969).
10. Kalter, CHILDREN OF DIVORCE IN AN OUTPATIENT PSYCHIATRIC POPULATION, *American Journal of Orthopsychiatry* 40,48(1977); McDermott, PARENTAL DIVORCE IN EARLY CHILDHOOD, *American Journal of Psychology* 1424, 1424 (1968).
11. Robert Weiss, "Marital Separation"(1975).
12. Steven L. Nock, THE FAMILY AND HIERARCHY, *Journal of Marriage and the Family*, 50 (Nov): 957-966 (1988). Article 9(1) of the Convention states that: States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Financial Considerations

Money or lack of it poses a problem in post-divorce households. To begin with, about thirty-five percent of the children of divorced parents live in poverty.¹³ Child support payments and financial assistance when not paid put much pressure on the custodial parent.¹⁴ On the other hand, wealth increases access to positive opportunities and decreases the likelihood of negative traumas, such as transportation difficulties, serious illness without adequate medical care.¹⁵

Some may dismiss the argument of financial resources not being relevant to children's positive experience as 'idealistic' however researchers have maintained another viewpoint that the importance of wealth tends to be overestimated in relation to other factors and the possession of wealth can itself serve as evidence of a lack of parental commitment.¹⁶

Step Families

Step-families often prove to be very complicated as children find it difficult to adjust with the step-parent and the extended step-family. Initially the child may prove to be obstinate in adjusting but it is possible for the new family to become a strong family unit.¹⁷ The new family must take things very slowly, especially the spouses, to help the child cope up with his/her life just like themselves.

Children learn how to relate to others by watching their parents relate to each other. Divorce gives them an unconscious notion of not trusting their mates.¹⁸ Divorce also significantly increases the chances of young

13. NAESP Staff Report, *One-Parent Families and Their Children*, 60 *Principal* 31, 33 (1980) at 31.

14. Leighton E. Stamps, Seth Kunen, and Robert Lawyer, JUDICIAL ATTITUDES REGARDING CUSTODY AND VISITATION ISSUES, 25 *Journal of Divorce and Remarriage* 23,33 (1996).

15. Alan C. Acock and K. Jill Kiecolt, IS IT FAMILY STRUCTURE OR SOCIOECONOMIC STATUS? 68 *Social Forces* 553 (1989). This is often to say that lower socio economic status increases sources of stress and is correlated with lower self-esteem in children of divorced families. See N.J. Shook & J. Jurich, CORRELATES OF SELF-ESTEEM AMONGST COLLEGE OFFSPRING OF DIVORCE FAMILY, 18 *Journal of Divorce and Remarriage* 18-314 at 157 (1992).

16. Carolyn J. Frantz, ELIMINATING CONSIDERATION OF PARENTAL WEALTH IN POST DIVORCE CUSTODY DISPUTES, *Michigan Law Review*, Vol. 99, No. 1. (October 2000), pp. 216-237.

17. L. K. White, THE EFFECT OF PARENTAL DIVORCE AND REMARRIAGE ON PARENTAL SUPPORT FOR ADULT CHILDREN, *Journal of Family Issues*, 13, 234-250. (1992).

18. Paul R. Amato and Alan Booth, A PROSPECTIVE STUDY OF DIVORCE AND PARENT CHILD RELATIONSHIPS, *Journal of Marriage and the Family* 58 (May 1996):356-365.

people leaving their homes due to friction with a parent, increases the chances of premarital cohabitation, and also the odds of premarital pregnancies or fatherhood.¹⁹

Child's involvement in Parental Conflict

In the light of effects of divorce of parents on their children, it is important to note that children are interested and affected parties in a divorce action though they are not directly involved in the divorce proceedings.²⁰ When parents resort to divorce the rights of a child in the companionship and care of the parents inarguably becomes significant.

The phrase 'children's rights' is not definitive.²¹ These rights therefore can only be broadly enunciated with the help of the Constitution and the Convention on Rights of the Child relating to the present context.

Although a child's rights may be limited, they should not be ignored or eliminated since children are, in fact, persons under the Constitution wherein all fundamental rights are guaranteed to them. Article 39(f) of the Constitution lays down the responsibility on the State to frame a policy securing the children.²² The provisions under Article 15(3)²³ and Article 51-A(k)²⁴ also voice the rights of the child.

Under the Convention on the Rights of the Child the primary duty is placed on the parents and then on the State.²⁵ It is provided for the State parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination due to the status of parents or family.²⁶

19. Edgar F. Borgatta and Rhonda J.V. Montgomery, CONSEQUENCES OF DIVORCE FOR CHILDREN, *Encyclopedia of Sociology*, 2nd ed. 2000, Vol. I, p. 707.

20. Hansen, THE ROLE AND RIGHTS OF CHILDREN IN DIVORCE ACTION, 6 *Journal of Family Law* 1, 9-11 (1966); Speca and Wehrman, PROTECTING THE RIGHTS OF CHILDREN IN DIVORCE CASES IN MISSOURI, 38 *UMKC Law Review* 1, 6 (1969).

21. It is an umbrella term encompassing myriad sets of rights relating to different situations a child may be found in. See Scott A. Cannon, FINDING THEIR OWN "PLACE TO BE": WHAT GREGORY KINGSLEY'S AND KIMBERLY MAYS' "DIVORCES" FROM THEIR PARENTS HAVE DONE FOR CHILDREN'S RIGHTS, 39 *Loyola Law Review* 837 (1994).

22. Article 39(f) of the Indian Constitution states that: The State shall, in particular, direct its policy towards securing 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.

23. Article 15(3) of the Indian Constitution states that: Nothing in this Article shall prevent the State from making any special provision for women and children.

24. Article 51A(k) of the Indian Constitution states that: It shall be the duty of every citizen of India who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between six and fourteen years.

25. Convention on the Rights of the Child, General Assembly Resolution 44/25. [Hereinafter referred to as "Convention"].

26. Article 2(1) of the Convention states that: States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without

This essentially means that a child of divorcees shall not be discriminated against in educational institutions etc.²⁷ The most relevant Article which pertains to separated parents provides for the best interest of child to be taken into consideration while deciding the residence of the child.²⁸ Further, both parents are sought to be responsible for the development of the child and for the necessary assistance.²⁹ Thus, the broad category of rights ensures the welfare of the child during the parents' divorce.

Despite the strong infringement on a child's interests implicit in divorce, the law currently does not consider children to be affected parties except in the issues regarding custody.³⁰ Leaving apart the archaic legislations on personal laws which govern child custody, there is no special legislation to treat child rights on a larger platform and to accord them special status and thus to treat these children as different from others.³¹

discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

27. It is also the states responsibility to ensure the care and protection of child taking into account the rights and duties of the parents as provided under Article 3(2) of the Convention which states that: States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. Further, the child has the right to be cared for by the parents as provided under Article 7(1) of the Convention which states that: The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
28. Article 9(1) of the Convention states that: States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
29. Article 18(1) of the Convention states that: States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
30. BALANCING CHILDREN'S RIGHTS INTO THE DIVORCE DECISION, 13 *Vermont Law Review* 531 (1989).
31. Such children do not fall within the ambit of 'child in need of care and protection' under the Juvenile Justice(Care and Protection) Act, 2000 since the provisions do not specifically relate to children undergoing a parental conflict but cursorily look upon children neglected by the parents or with a parent who is unfit to rear them. Section 2(d)(ii-b) of the Juvenile Justice (Care and Protection) Act, 2000 states that "a child in need of care and protection is one who is residing with a guardian who has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person". Also, Section 2(d)(iv) stipulates that "a child in need of care and protection who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child."

There are special set of child rights that come to the fore during divorce proceedings which must be looked into from a distinct point. These rights may include both parents to remain jointly and severally liable for care and maintenance of the child; to establish a stable home for the child close to the pre-divorce standard of living.

The reform by the way of a specialised legislation³² to focus on the child rights in case of parental conflict is a proactive step towards looking into this special situation demanding a specific articulation of child rights. Further, the policy of mediation should be employed rather than the use of solicitors because mediation is seen as a more effective way of reducing hostility and encouraging cooperation.³³ The difference simply lies in recognizing autonomous 'child rights' rather than just the 'rights' to be protected.³⁴

Child Rights vis-à-vis Parental Rights

The concept of rights presents special difficulty because of the conflicting interests and rights of the parents and child.³⁵ Parents are seen as protectors of their children's interests but their interests may differ vastly from those of their children.³⁶

We solicit the rights of individuals to emphasize their autonomous selves. Such emphasis may be obscure in the case of parent-child relationships. The problem that emerges in defining the parent and child rights separately is that of demarcating the *self* of parent and children.³⁷ The idea of according equality rights in the specific context of Article 14 of the Constitution of India to children is then relatively confounding.³⁸ The concept of equality that entails differential treatment to respond to different needs must especially be looked into with regards to children.

32. There are legislations like Children Act, 1989 in England which specifically cater to the needs of these children. See J. Roche, THE CHILDREN ACT 1989: ONCE A PARENT ALWAYS A PARENT? (1991) 5 *Journal of Social Welfare and Family Law*, pp.345-61, 355.

33. R E Emery and M M Wyer, DIVORCE MEDIATION, *American Psychologist* 42. 4-2-480.

34. J. Roche, CHILDREN'S RIGHT IN THE NAME OF THE CHILD, 17 *Journal of Social Welfare and Family Law* 281-300 (1995), at 281.

35. Keiter, PRIVACY, CHILDREN AND THEIR PARENTS, 66 *Minnesota Law Review* 459, 498 (1982); DEVELOPMENTS IN THE LAW: THE CONSTITUTION AND THE FAMILY, 93 *Harvard Law Review*, 1156, 1221-40 (1980).

36. Olsen, THE MYTH OF STATE INTERVENTION IN THE FAMILY, 18 *Michigan Journal of Law Reform* 835, 851 (1985).

37. See Hegel, *Philosophy of Right*, sections 158-64; Aristotle (*Politics* 1: 13.15 and 7.16-17), does describe children as "another self" of the parents.

38. Colleen Sheppard, CHILDREN'S RIGHT TO EQUALITY: PROTECTION VERSUS PATERNALISM, 1 *Annals Health Law* 197 (1997).

Parental right to raise children is fundamental even though not expressly mentioned in the Constitution.³⁹ This traditional approach that favours parental rather than children's rights led the State to affirm the inherent *parens patriae* jurisdiction of the State to protect the best interests of the child.⁴⁰

When divorcing parents have agreed on a common course of action, there is little reason to believe that the judge is in a position to make a better decision. The parents are far more familiar with their children than any Court could hope to become.⁴¹ While it is possible that some parents would trade off reduced custody or visitation privileges for higher support payments or even a fit parent to not want custody at all, it is not clear how the Courts by forcing such a parent to take unwanted custody would be in the best interests of the child. Hence, only unusual custodial arrangements which pose imminent harm to the child should justify intervention.⁴²

Rights of Parents and Children Involved in Custody Cases

A divorce is often followed by prolonged conflicts over the custody of minor children. It is therefore, essential to analyse the aspect of child custody and how the children are affected largely through the custodial arrangements. Custody means the obligation to control, care for and supervise a child. Custodial parent may be the guardian for both the person and property of the minor and is often over-loaded with the child's responsibility. There are also consequences of being the non-custodial parent, such as not being able to take the child out without the Court's permission.⁴³

The basic conflict in social principles in a custody case is whether to treat the child as a detached individual, apart from his/her blood-ties, or to emphasize the family unit from the standpoint of the parent.

One of the natural rights incidentals to parenthood is the right to custody of the child recognised as a common law doctrine of 'parental autonomy' which the Courts do not easily discard.⁴⁴ Also observe that the natural right of the parent to the care of a child prevails as against an entire

39. Nancy B. Shernow, RECOGNIZING CONSTITUTIONAL RIGHTS OF CUSTODIAL PARENTS: THE PRIMACY OF THE POST-DIVORCE AMILY IN CHILD CUSTODY MODIFICATION PROCEEDINGS, 35 *University of California Law Review*, 677 (1998).

40. Bernard M. Dickens, THE MODERN FUNCTION OF LIMITS OF PARENTAL RIGHTS, 97 *L.Q.Review* 462 (1981).

41. Mnookin and Kornhauser, BARGAINING IN THE SHADOW OF LAW: THE CASE OF DIVORCE, 88 *Yale Law Journal* 950, 957-58, 995-96 (1979).

42. Folberg and Graham, JOINT CUSTODY OF CHILDREN FOLLOWING DIVORCE, 12 *U.C. Davis Law Review* 523, 559 (1979).

43. CHILD CUSTODY AND VISITATION, http://www.umiacs.umd.edu/users/sawweb/sawnet/divorce/child_custody.html.

44. *In re White*, (1936) 6 Cal(2d) 166.

stranger.⁴⁵ However, cases like *V. Meenapushpa v. V. Ananthan Jayakumar*⁴⁶ point out that the custody of children is being granted to grandparents also when going according to the wishes of a mature child.⁴⁷ This principally conflicts with the 'parental autonomy' which is acquired by parents by the virtue of giving birth to the child which has nothing to do with the intervention of the State. Thus, there are two sets of interests competing in a custody case.⁴⁸

Factors Ascertaining the 'Best Interest' of Child

The law cannot prevent all damage to the child's interests caused by divorce, since it cannot compel harmonious human relationship. It can, however, provide a means for reducing the damage by ensuring that the child's interests are not neglected in divorce custody proceedings.⁴⁹ While there has been no formal enunciation of factors ascertaining best interest, the Courts look at the following decisive factors:

- Child's age, gender, mental and physical maturity and also of parents;
- Relationship and emotional ties between the parent and the child;
- Parent's ability to provide the child-food, shelter, clothing, medical care, education; and
- Child's established living pattern-school, home, community.

When the family unit has been broken in a divorce-custody dispute, neither parent can be presumed to be representative of the child nor the counsel for the parents represent both the child's best interests and the interests of their clients when those interests are divergent. It has been argued, however, that the child's interests are protected by the Court as *parens patriae*.⁵⁰ However, within the 'rigors of adversary proceedings', without separate representation for the child, the Court may neglect

45. *Newby v. Newby* 202 Pac at 892.

46. AIR 2004 Mad 1.

47. The Court in the abovementioned case held that the even though the parents may be of good character and financially secure, and yet not suited to the trust of rearing and educating a child, with whom they had not previously resided.

48. Joseph Landisman, CUSTODY OF CHILDREN: BEST INTEREST OF CHILD v RIGHTS OF PARENTS, *California Law Review*, Vol. 33, No. 2. (June 1945), pp. 306-316.

49. LAWYERING THE CHILD: Principles of Representation in Custody and Visitation Disputes Arising from Divorce, *Yale Law Journal*, Vol. 87, No.6.(May 1978), pp.1126-1190.

50. The *parens patriae* doctrine, which developed in the seventeenth century, allowed the Chancery Court to assume child-protective functions and later to deny custody to an unfit father; Foster and Freed, CHILD CUSTODY (pt. I), 39 *New York Law Review*, 423-24 (1964).

important interests of the child in both the outcome and the process of the proceeding.⁵¹

It is therefore important that a child be represented by a *guardian ad litem* whose central responsibility is to assist the Court to determine the best interest of the children.⁵² It is only to ensure that the child's interests receive priority in the midst of other competing interests⁵³ because the judge who is restricted to the courtroom cannot on his own obtain the facts pertaining particularly to the child's viewpoint.⁵⁴

When applying the 'best interest' standard in contested custody proceedings, Courts must consider the question of how much weight to be given to the child's own custodial preference.⁵⁵ In practice, however the broad discretion given to the Courts often means that the child's preferences may be ignored.⁵⁶ Some Scholars have argued that the children in a divorce custody proceeding be given an absolute or presumptive choice of custodial parent.⁵⁷

Issues of custody and guardianship under the Hindu law are governed by the Hindu Minority and Guardianship Act, 1956. Section 6(a) of the Act defines 'natural guardian' in the case of a boy or an unmarried girl as the father,⁵⁸ and after him, the mother.⁵⁹ Also, it must be noted that the father

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51. Mnookin, CHILD CUSTODY ADJUDICATION, 39 *Law and Contemporary Problems* 226, 286-87 (1975).
52. Oster, CUSTODY PROCEEDING A Study of Vague and Indefinite Standards, 5 *Journal of Family Law*. 21, 23-25 (1965).
53. Maurice K. C. Wilcox, A CHILD'S DUE PROCESS RIGHT TO COUNSEL IN DIVORCE CUSTODY PROCEEDINGS, 27 *Hastings Law Journal* 917, 924 (1976).
54. The child's attorney can be a better fact finder than the judge for several reasons. (1) The judge usually speaks with the child in chambers, if at all. Interview in chambers is still at best brief and takes place in an imposing and unfamiliar environment. Attorneys can and do make efforts to speak to children in surroundings more comfortable to the child. (2). He conducts his own investigation, seeks out facts that he considers important, and can actively discourage attempts to introduce evidence or testimony that he considers irrelevant and likely only to increase the parents' bitterness.
55. Virtually all states provide, either by statute or by judicial decision that the preference of a child should be a factor in the determination of his best interests if s/he is competent to make a reasonable choice. See Speca, THE ROLE OF THE CHILD IN SELECTING HIS OR HER CUSTODIAN IN DIVORCE CASES, 27 *Drake Law Review* 437, 441-43 (1977-1978).
56. Bersoff, REPRESENTATION FOR CHILDREN IN CUSTODY DECISIONS: ALL THAT GLITTERS IS NOT GAULT, 15 *Journal of Family Law* 27, 39-40 (1976).
57. Some scholars argue that there is a general sphere of decision making autonomy for competent minors which, because "a custody decision affects the very essence of what determines a child's future life." See Levy, THE RIGHTS OF PARENTS, 1976 *B.Y.U. Law Review*. 693, 706.
58. Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.
59. Though there has been a storming controversy over the interpretation of the phrase 'and after him' in the said Section, it has now been settled that the phrase necessarily means 'in the absence of' as laid down by the Supreme Court in *Githa Hariharan v. Reserve Bank of India* (1999) 2 SCC 228.

who is the natural guardian would not 'ipso facto' become the custodian of the child.⁶⁰

Studies however show that eighty-five to ninety percent of children of divorce couples are placed in their mothers' custody.⁶¹ However, the Courts now often extensively delve upon the question of custody of children looking into matters like mental health, financial status etc. of both the parents and the interests of the child rather than moving on *a priori* notion.⁶² Therefore, facts of each case should be a matter of anxious consideration for the Courts as to where the welfare of the child lies.⁶³

Mohammedan Law

Under Muslim law, the father is the sole guardian of the child but, the mother has the primary right to custody. According to the Shia School, the mother's right to custody of the child terminates when the boy reaches the age of two and in the Hanafi School, this right is extended till the age of seven. Both the Schools agree that mother has the right to the custody of a minor girl till she attains puberty. In addition to these classical conditions some flexibility is also accorded in the light of Guardians and Wards Act, 1890 and the Courts are pro-active in their custodial arrangements by applying the criteria of best interests of child.⁶⁴

Other Statutory Provisions

The Law on child custody was codified as early as 1890 in the form of the Guardians and Wards Act which consolidates and amends the law relating to guardians and wards. The Guardians and Wards Act, 1890 is a secular Act and guardianship in communities other than Hindu and Muslims is governed by the Guardians and Wards Act, 1890 which clearly lays down that the father's right is primary. Under Guardians and Wards Act, 1890 'guardian' is defined which is similar to what is in the Hindu Minority and Guardianship Act, 1956.⁶⁵

60. *Samuel Stephen Richard v. Stella Richard* AIR 1955 Madras 451. Not only this, but both Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 stipulate that the child's view is regarded while making an arrangement when the child is above 12 years of age and that maintenance and education of children should be consistent with their wishes wherever possible.

61. L. Weitzman, THE DIVORCE REVOLUTION, 4 *Behavioural Science and Law*. 105, 106-07 (1986) at 222; *Shaik Moidin v. Kunhadevi* AIR 1929 Mad 33.

62. *Y. Varalakshmi v. Kanta Durga Prasad* (1989) 1 DMC 379.

63. *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka* AIR 1982 SC 1276.

64. The Muslim Women (Protection of Rights on Divorce) Act, 1986. The Act also stipulates that the divorced wife is entitled to any outstanding dower, any property given her before or during marriage, and maintenance for children in her custody born before or after the finalisation of the divorce.

65. Section 4(2) of the Guardians and Wards Act, 1890 defines a guardian to be person having the care of the person of a minor or of his property or of both his person and property.

The Divorce Act, 2000⁶⁶ provides law of custodial arrangements for children among Christians.⁶⁷ In case of Parsis, Section 43⁶⁸ of the Parsi Marriage and Divorce Act, 1936 makes provision for the custody of children.

Effect of Remarriage of the Spouse

An impending issue as to what would be the effect of remarriage of a spouse was resolved when the Apex Court in *Lekha v. P. Anil Kumar*⁶⁹ held that the remarriage of the mother cannot be taken as a ground for not granting custody of the child to the mother. Similarly, where a father marries it is not a ground for depriving him of his parental right of custody.⁷⁰

Custody Issues and the Sex of the Child

It is now settled law that child custody can go to either parent.⁷¹ On the sociological front, researchers find that boys raised by fathers and girls raised by mothers may do better than children raised by the parent of the opposite sex.⁷² However, the children's adjustment following a divorce has more to do with the quality of the parent-child relationship than with the gender of the child.

66. Previous Indian Divorce Act, 1869 was amended in 2000.

67. Section 44 of the Divorce Act, 2000 states that: The High Court after a decree absolute for dissolution of marriage or a decree of nullity of marriage and the District Court after a decree for dissolution of marriage or of nullity of marriage has been confirmed, may, 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 the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said court, as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

68. Section 49 of the Parsi Marriage and Divorce Act, 1936 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 [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.

69. 2007(1) ALT 35(SC). See also, *Kumar V. Jahgirdar v. Chethana Ramatheertha* 2004 (1) HLR SC 468.

70. *Sura Reddy v. Chenna Reddy* AIR 1950 Mad.306.

71. <http://www.infochangeindia.org/archives1.jsp?secno=4&monthname= March&year = 2006 &detail=T>.

72. However, the children's adjustment following a divorce has more to do with the quality of the parent-child relationship than with the gender of the child. Even so, the judicial point of view throughout the country generally takes the view that female child of growing age needs company more of her mother compared to the father as seen in *Kumar V. Jahgirdar v. Chethana Ramatheertha* AIR 2004 SC 1525. See Mary W. Temke, THE EFFECTS OF DIVORCE ON CHILDREN, <http://extension.unh.edu/family/documents/divorce.pdf>.

Maintenance for Off-springs of Divorcees

Financial problems can be far more catastrophic than the emotional turmoil the child faces. Studies show that only half of all Court-Ordered child support is paid⁷³ affecting the child's daily care, schooling etc. In such a situation the Courts must ensure fall back mechanisms like asking for the extended family members to act as surety etc.

Maintenance under the Hindu law is provided in the Hindu Adoptions and Maintenance Act, 1956 wherein under Section 20⁷⁴ it is obligatory upon the parents to maintain their minor children. In case of Mohammedan law, the maintenance for the children of divorcees is basically to be taken care of by the father regardless of the custodial arrangement. It is stipulated in the Muslim Women (Protection of Rights on Divorce) Act, 1986 in Section 3(b).⁷⁵ Under the Divorce Act, 2000 applicable to Christians, Section 43 deals with Courts' power to make provisions for the minor child's maintenance.⁷⁶ Usually the Courts grant maintenance for children while deciding the issue of maintenance to wives in divorce cases.

Divorce after 1970 has become a dominant institution in the American society⁷⁷ and rights of children have been more broadly defined especially

73. DEALING WITH THE FINANCIAL IMPACT OF DIVORCE, [http://financialplan. about. com/cs/divorceandmoney/a/DealWithDivorce.htm](http://financialplan.about.com/cs/divorceandmoney/a/DealWithDivorce.htm).

74. Section 20 of the Hindu Adoptions and Maintenance Act, 1956 states that: Maintenance of children and aged parents.-(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents. (2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor. (3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

75. Section 3(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 states that: where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children.

76. Section 43 of the Divorce Act, 2000 states that : In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in, or removed to, a High Court, the court may from time to time, before making its decree absolute or its decree (as the case may be), make such interim orders, and may make such provision in the decree absolute or decree, and in any such suit instituted in a District Court, the court may from time to time, before its decree is confirmed, make such interim orders, and may make such provision on such confirmation, as the High Court or District Court (as the case may be) deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the Court.

77. Edgar F. Borgatta and Rhonda J.V. Montgomery, CONSEQUENCES OF DIVORCE FOR CHILDREN, Encyclopedia of Sociology, 2nd ed.2000, Vol. I, p. 709.

in situation of marital disruptions.⁷⁸ Most States in America have stressed that parents should be encouraged to arrive at custody decisions privately.⁷⁹ In the Indian context however, the matter automatically at the time of passing of the decree of divorce comes under the jurisdiction of the Court. This conflicts with the parental authority in making decisions for their child's welfare.⁸⁰

Even in England, the defences of "parental authority" or of "family privacy" are no longer justified for State intervention. The Children Act, 1989 in England addresses the core issue of the rights of a child in divorce proceedings. In India, there has been no comprehensive legislation dealing with rights of child in this context.

It is also important to note that one of the reasons of the high divorce rates in the west is due to the destigmatization attached to the families. Attitudes toward divorce in the west have become more accepting over a period of time, even when children are involved.⁸¹ However, in India the process of divorce is still stigmatised, and in a way society creates a negative stereotype of the children of divorcees.⁸²

Furthermore, while in India the 'best interest of child' criteria is obscure and is left into the hands of judiciary to enumerate upon the parameters, in 1970 American National Conference on Uniform State Laws adopted the Uniform Marriage and Divorce Act which laid down the yardsticks to ascertain the best interest of the child. In the absence of such enumeration the judiciary is left unguided in India.

It has already been discussed that there is a need for formal recognition of the rights of child involved in parents' divorce and how the

78. This marks the age of the growth of individual rights and the loss of family autonomy beginning in America from the 1960s. See Edgar F. Borgatta and Rhonda J.V. Montgomery, *Encyclopedia of Sociology*, 2nd ed. 2000, Vol. II, p. 951.

79. Cheryl Buehler and Jean M. Gerard, DIVORCE LAW IN THE UNITED STATES : A FOCUS ON CHILD CUSTODY, *Family Relations*, Vol. 44, No. 4, Helping Contemporary Families. (October 1995), pp. 439-458.

80. Also, the consideration given to the child's preferences is much more in the west while determining the custody than what is relevant in India. It is recognised as a substantive due process protection and cannot be denied to minors merely because of their age; and nothing can limit this recognized right to choose whom to live with.

81. Arland Thornton, CHANGING ATTITUDES TOWARDS SEPARATION AND DIVORCE: CAUSES AND CONSEQUENCES, 90 *American Journal of Sociology*, 856-872 (1985).

82. In India, it is widely assumed that the two-parent family is ideally suited for the socialization of children. See Vasudha Dhagamwar, LAW, POWER AND JUSTICE: THE PROTECTION OF PERSONAL RIGHTS IN THE INDIAN PENAL CODE, Sage Publishers, Delhi (1996); Louis Dumont, A SOUTH INDIAN SUB CASTE: SOCIAL ORGANISATION AND RELIGION OF THE PRAMALI KALLAR, Translated from the French by M Moffatt and L. and A. Morton. Revised by A. Stern, Oxford University Press, Delhi (1986).

child can be helped through the divorce rigmarole. The primary duty is on the parents to constantly *interact* with the child and let him/her know the separation in the family. This will basically maintain their trust in the parents. Interaction further depends upon the age of the child. For toddlers, school goes sharing general information is appropriate while with adolescents there must be greater details shared as to what exactly are the reason for the divorce etc.⁸³

Secondly, the most important factor for children's well being is to not let them be privy to the ongoing conflicts. This must not be confused with *interaction*; it is necessary for the child to know only through the parents. Further, keeping in touch with the non-custodial parent and a regular communication is beneficial for the child's growth.

Moreover, minimum numbers of transitions after the divorce are beneficial for the children. Keeping them in the same school, home or neighbourhood always helps the children relate to some stability without having undergone another set of *changes* for even simple changes are experienced as losses.⁸⁴ Associating with relatives, going out in the neighbourhood, seeing friends for weekends all can help gather support from various sources. Socialising can help children overcome the divorce stigma and this will make it look simpler.

Conclusion

The analytical efforts made aforesaid conclude on the point that the child's psychological balance is deeply affected through the marital disruption and adjustment for changes is affected by the way parents continue positive relationships with their children. Also, as regards the recorded rise in female headed households,⁸⁵ the scholarly opinion largely asserts that fathers need to take up a larger responsibility and provide for timely maintenance.

Apart from the developmental considerations due to family disruption, there are certain rights which need to be looked into from a distinct standpoint to cater to special situations the children are found in during the time of their parents' divorce. As it has been argued, these rights though cannot be distinctively articulated from that of the parent's rights, yet the child should be considered as an autonomous *self* to be accorded individual rights. The researcher also reiterates the need for enumerating the parameters to

83. L. Weitzman, THE DIVORCE REVOLUTION, 4 *Behavioural Science and Law* 105, 106-07 (1986).

84. Cochran and Vitz, CHILD PROTECTIVE DIVORCE LAWS: A Response to the Effects of Parental Separation on Children, 17 *Family Law Quotients* 327, 330-41.

85. Bruce *et al.*, Families in Focus, Population Council, New York, 1995.

determine the best interests of the child rather than leaving the judiciary with absolute powers to determine the child's welfare. From a legal standpoint, the researcher suggests that a single law governing child rights in divorce cases and also matters pertaining to custody and maintenance must come into place for an enhanced framework protecting the child's future.

To ensure that the child receives a stable and nurturing environment after the divorce of the parents, some scholars have opined that if a parent fails to promote the child's interest at some threshold level of adequacy, a form of intervention, ranging from counselling to obtaining fine from the parent as well as loss of parental rights to the child, may be legitimate.⁸⁶ The farfetched idea of a prenuptial agreement may also be worked out though it shall take a while for the Indian environment to be suited to the design.

86. Paul R. Amato and Alan Booth, A PROSPECTIVE STUDY OF DIVORCE AND PARENT CHILD RELATIONSHIPS, *Journal of Marriage and the Family* 58 (May 1996): 356-365.