The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026
Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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BEYOND CUSTODY BATTLES: THE PSYCHOLOGICAL IMPACT OF DIVORCE ON CHILDREN AND THE ROLE OF FAMILY LAW

- Prabhleen Kaur

I. Introduction

Most divorce-related discussions center around custody, support, and property division. Although these concerns are understandable, the child is often neglected and treated as nothing more than a settlement line item. As a law student who recently studied family law by analyzing a multitude of custody cases, I was surprised to see the numerous ways in which custody cases, as judged by courts, fail to consider the emotional aspects of the children impacted by the decision.

In an effort to step away from the complexities of custody cases, I discuss the emotional impact on children of the thing law schools do not focus on nearly enough, which is divorce, and question whether the legal system as it currently stands is capable of addressing this reality. In the short answer, which is what this article aims to prove, the system is advanced in its capacity to speak regarding these concerns, but remains archaic in its ability to respond.

II. The Silent Casualties: What Divorce Does to a Child's Mind

It helps to start with the psychological before considering the legal system, because the legal system is responding to the former, not the latter. One of the most prominent researchers in this

area, Paul Amato, discovered that children of divorced parents, when compared to children of intact families, experience difficulties in school, exhibit more behavioral difficulties, and possess poorer social skills. Even when the gap is not substantial, many children of divorced parents are raised perfectly fine, and while there are many exceptions, the recurring patterns are telling enough to not be ignored.

The earlier and still quite commonly cited longitudinal studies conducted by Judith Wallerstein and Joan Kelly looked at the long-term effects of divorce on children. They found the first stage of the process of divorce, no matter the age of the child, is the immediate aftermath of divorce, which includes a mixture of rage and guilt, as well as the fear of being abandoned. The self-blame often manifested itself in a belief that the divorce would not have occurred had the child behaved. The response of the adolescent was often manifested by a self-imposed social and academic isolation, as well as behavioral problems. The withdrawal response of both age groups of children was a long felt and pervasive realization that one of the most important parts of their life, the family unit, had become the most unpredictable and unstable.

Robert Emery's research shows that the damage caused by divorce is not the actual divorce itself, but the conflict that surrounds the divorce. The findings of Robert Emery's research would suggest that the self-harm and self-destructive behavior as a result of the divorce process would be less severe for a child of divorced parents who separated with the least possible conflict, than for a child of parents who remained married, but who lived in a conflict and self-destructive household. This single finding, more than any other, would attempt to alter the inconsistencies that exist in family law, among the many other qualitative issues, especially in relation to custody matters.

III. Where the Courtroom Falls Short

Family courts tend to create spaces to be adversarial by design. Generally, one parent’s lawyer would claim the opposite parent to be unfit, or to be financially irresponsible or emotionally absent, and vice versa. The child is usually interviewed once, possibly, by a representative of the

court called a court counsellor, and is expected to capture an entire emotional landscape during that one, possibly brief, interview.

This structure creates odd incentives, and often, reasonable parents, feel one of the few things that are rewarded by the system is that they need to exaggerate the opposite parent's flaws. Most children tend to find out who the parent that is being spoken against is, and that, in itself, creates a level of emotional distress, no matter how beneficial the custody decision is.

To its credit, the Indian court has, in principle, tried to resolve the above problem. In the case of Gaurav Nagpal v. Sumedha Nagpal, the Supreme Court upheld that, in custody matters, the needs of the child would prevail above the needs of the parent(s), and would also prevail above the rights of the parent(s). This principle sounds easy to apply in theory, but in practice, is very difficult, because it cannot be proven with documents; it is a call that would depend on assessment of a psychologist, something that most family courts cannot afford to do.

IV. The Indian Legal Framework: Good Intentions, Patchy Implementation

In India, custody and guardianship laws outside personal law are dominated by the Guardians and Wards Act of 1890 and, for Hindus, by the Hindu Minority and Guardianship Act of 1956. Section 6 of the latter Act names the father as the natural guardian of a minor, with the mother filling in only in his absence. This provision has not stood the test of time and has been progressively interpreted and relaxed by the courts. In Githa Hariharan v. Reserve Bank of India, the Supreme Court interpreted the word "after" in Section 6 not in a strict chronological sense, but in the context of "in the absence of" the father. Thus, a mother can be a natural guardian in the presence of the father in suitable cases. This was a much needed and long overdue change, although the case provides a window into how the bulk of the positive and progressive changes to the law pertaining to guardianship has been made via the courts and their interpretation of outdated laws, as opposed to the legislative process.

Similarly, in Roxann Sharma v. Arun Sharma, the Supreme Court stated that, generally, the interim custody of a child below five years, should remain with the mother. This is consistent with both the law and the assumption regarding the needs of a child. Additionally, the Law Commission of India has addressed the need for a uniform guardianship law that is religion-neutral and places the welfare of the child, rather than the parent, at the core of the law. The recommendation, made in 2015, continues to remain a recommendation and has not been enacted into law. This reflects the slow pace of legal reforms in contrast to the real world, especially in family law.

What is more glaringly absent from this framework, apart from any particular provision, is an inbuilt system for the provision for ongoing psychological support. A custody order is usually a determination, which is mostly a one-off decision and is only occasionally revisited if there is a drastic change in circumstances. However, it is extremely rare for it to be accompanied by an order for counselling, mediation follow up or a periodic assessment on the emotional adjustment of the child. The law decides on who the child will live with, but it is extremely rare for the law to ask how the child is six months after the order.

V. A Brief Comparative Look

There are other systems that provide useful contrasts. The Children Act 1989 in England and Wales provides that the welfare of the child shall be the paramount consideration of the court and provides the court with a 'welfare consideration list.' This list requires the court to assess the child’s emotional and educational needs and the impact of the change in the circumstances on the child. The use of lists in this manner requires the court to address psychological issues, rather than treat the welfare of the child as a residual intangible concern. The provision in some American states of mandatory participation in parenting programmes or mediation, prior to the custody dispute being heard, is based on the belief that the best form of child welfare is the early reduction of parental conflict.

No system is without fault and the inclusion of mandatory mediation may be a detriment to the party in cases of domestic violence. Nonetheless, designing the legal process to minimize the risk of conflict for the child, rather than choosing custody after a conflict, is a principle that Indian family law can benefit from.

VI. What a More Child-Centric Approach Could Look Like

There are several possible changes suggested by the research and examples compared above. First, mandatory mediation, where safe to do so, must be attempted before litigation of custody disputes in full is allowed. The evidence suggests that mediation of disputes and reduction of conflict between parents protects children more reliably than any custody arrangement. Second, the development of a welfare checklist to be used by the courts is suggested, and is similar to the existing English model. Third, a mandatory annual review of the child's welfare after the court has issued a custody order. The review should be built into the custody order and should not depend on the filing of an application for review by the parents. Each of these proposals is a small change that adds to the steps that courts have in theory decided to take.

VII. Conclusion

Divorce is a legal development that has a long lasting psychological impact after the legal process is concluded. Family law has made substantial progress in viewing children in a welfare protection context, as opposed to viewing children as property in a custody and access contest. However, family law has not moved beyond these theoretical constructs. Divorce is, in the end, a legal event with a psychological aftermath that often outlasts the litigation itself by years. Family law has rightly moved away from treating children as property to be divided and toward a welfare-centred standard, but the institutional tools to actually assess and protect that welfare remain underdeveloped.

A custody order that gets the legal question right but ignores the emotional reality of the child it concerns has only done half its job. As courts and legislatures continue to refine this area of law,

the central question worth holding onto is a simple one: not just who wins custody, but who is actually looking out for the child once the case is closed.

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