

# MATRIMONIAL REMEDIES- PART II



***BY SUMIT ATTRI  
ADVOCATE ON RECORD  
SUPREME COURT OF INDIA***

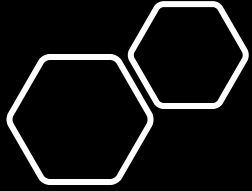
*Email: [attrisumit@gmail.com](mailto:attrisumit@gmail.com)*

*[sumit.attri@cyrilshroff.com](mailto:sumit.attri@cyrilshroff.com)*

# AGENDA

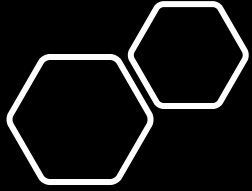
CUSTODY OF CHILDREN

SETTLEMENT OF  
MATRIMONIAL PROPERTY  
AND OTHER RESOURCES



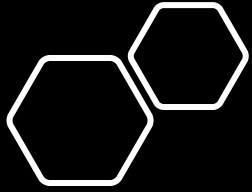
# INTRODUCTION

*After divorce or legal separation of the couple, there are various factors that need to be considered, in terms of custody of children, visitation rights, payment of maintenance amount and alimony, settlement of matrimonial property and other resources.*



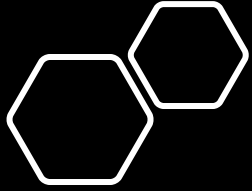
# Custody of Children

- Legal position in relation to custody/parental responsibility following the breakdown of a relationship or marriage.
- Legal position in relation to access and visitation rights following divorce or judicial separation.
- Operation of personal laws on the subject of child custody



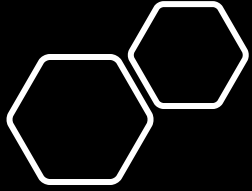
# Legal position in relation to custody/parental responsibility following breakdown of a marriage

- No standard formula can be applied in relation to custody/parental responsibility following the breakdown of a relationship or marriage. The most important principle governing the decisions of the courts in relation to children is the best interest and welfare of the child.
- Generally the mother has a preferential right to the custody of infants, children below the age of five years and female children. However, where the court upon substantial evidence reaches the conclusion that the mother cannot secure the best interest and welfare of the child, the primary custody of infants can be entrusted to fathers.



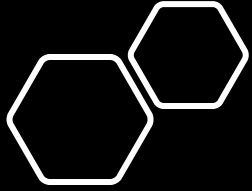
# Legal position in relation to access/contact/visitation following the breakdown of a marriage

- The courts in India are very favourable in permitting access/contact/visitation following the breakdown of a relationship or marriage to the parent who does not have custody of the child.
- It is settled law that a child should not miss out on the love and affection of both the parents as a result of breakdown of marriage. Depending on the facts and circumstances of the case, the courts may permit, weekly, fortnightly or overnight visitation. The court may also permit sharing of the holidays between the parents.
- In fact the Supreme Court as recently as 2019 gave a specific order observing that *“A child has the right to affection of both parents”* while enhancing the visitation rights available to the father.
- The decisions on this aspect by courts have to be passed based on the facts of each case and a straight jacket formula cannot be made applicable.



# Operation of personal laws on the subject of child custody

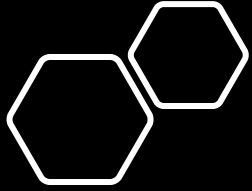
- Guardians and Wards Act 1890 (“GWA”) is a secular law for appointment and declaration of guardians and allied matters, irrespective of caste, community or religion.
- In certain matters, the court will give consideration to the personal law of the parties.
- All the personal law matrimonial statutes make provisions for dealing with the issue of child custody. The provisions in the matrimonial Acts can, however, be invoked only when there are some proceedings pending under the said Act. The courts normally pass orders regarding custody of children at the time of passing decree for divorce and judicial separation to avoid multiplicity of litigation.



# Child Custody under Hindu Law

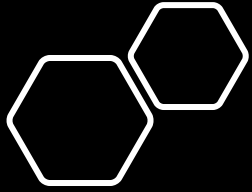
- Section 26 of the Hindu Marriage Act authorises courts to pass as well as revoke interim orders in any proceeding under the Act, with respect to custody, maintenance and education of minor children, in consonance with their wishes.
- Under Hindu Law there is an additional Act namely the Hindu Minority and Guardianship Act 1956 (“HMGA”) dealing with issues regarding child custody. The provisions of HMGA (and other personal laws) and the GWA are complementary and not in derogation to each other. The courts have to interpret the acts in a harmonious manner without reading the sections as contrary to each other. Though Section 5 of HMGA mentions about the overriding effect of this Act.
- Under Section 6(a) of HMGA the custody of a child till the age of five years should ordinarily be with the mother.
- Under section 13 of HMGA In determining the question of custody and guardianship, the paramount consideration is the welfare of the child . The word `welfare' has to be taken in its widest sense, and must include the child's, moral as well as physical well-being, and also have regard to the ties of affection.
- In respect of older children our courts take the view that the male children above the age of sixteen years and female children above the age of fourteen years, should not ordinarily be compelled to live in the custody to which they object. However, such wishes are granted only if they are consistent with their welfare. In leading case of '*Venkataramma v. Tulsi*', the court disregarded the wishes of the children as it found these to induced by persuasion and children were even tortured.
- Custody has also been granted to third persons, as in the case of '*Baby v., Vijay*' wherein the court granted custody of two minor children to maternal grandfather, as the court observed that even if the father was found unfit, custody might be given to a third person in the welfare of the child.





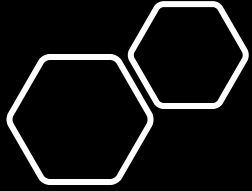
# Child Custody under Muslim Law

- In Islamic law, the father is the natural guardian, but custody vests with the mother until the son reaches the age of seven and the daughter reaches puberty.
- The concept of Hizanat provides that, of all persons, the mother is the most suited to have the custody of her children up to a certain age, both during the marriage and after its dissolution. A mother cannot be deprived of this right unless she is disqualified because of apostasy or misconduct and her custody is found to be unfavorable to the welfare of the child



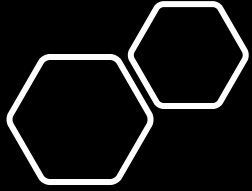
# Child Custody under Christian Parsi, Christian Law and under Special Marriage Act

- Under Section 49 of the Parsi Marriage and Divorce Act, 1936 the court may from time to time pass interim orders and make provisions in the final decree of divorce/judicial separation with respect to custody, maintenance and education of the minor children. The court upon change of circumstances on an application by either party can make changes to its interim orders or final decree regarding custody, maintenance and education.
- Sections 41, 42, 43 & 44 of the Indian Divorce Act, 1869, provides for custody, maintenance and education of children. The courts are authorised to issue interim orders for custody, maintenance and education of minor children in any proceeding under these Acts and also have the power to vary, alter the orders passed earlier under the act in petitions for judicial separation, dissolution or nullity of marriage.
- The Inter religion marriages are governed by the Special Marriage Act. Most of the provisions of SMA are akin to HMA 1955. Under Section 38 of the SMA the courts from time to time can pass orders with respect to custody, maintenance and education of minor children consistently with their wishes wherever possible. The said orders on an application can be revoked, suspended or varied from time to time.



# Factors Considered by the Courts when Granting Custody

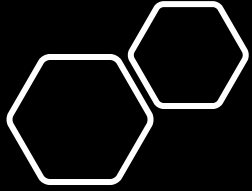
- Various factors are predominantly considered by the Courts while granting custody. While taking a decision regarding custody or other issues pertaining to a child, “welfare of the child” is of paramount consideration, as held by Supreme Court in *Sheoli Hati v. Somnath Das*, (2019) 7 SCC 490.
- The welfare of the minor however is very broadly defined and includes many diverse factors. It is upon the court to weigh all the factors before coming to a conclusion regarding custody of the children.
- The mere fact that the mother is economically less secure than the father, or that she suffers from ill-health or a disability is not usually reason enough to deny her custody because maintenance is the father's responsibility irrespective of who holds custody.



# SETTLEMENT OF MATRIMONIAL PROPERTY AND OTHER RESOURCES AFTER DIVORCE

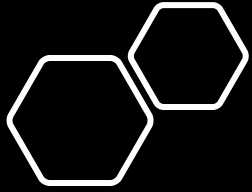
## What constitutes property in Matrimony

- Property can be of various forms, such as shares of a joint business venture, matrimonial home and the contents thereof, loans by one spouse to another etc.
- On the breakdown of marriage, either/ both parties may approach the court to settle the property among the spouses (and children, if involved).



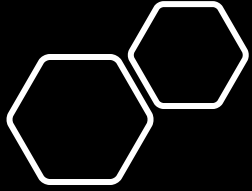
# Settlement of Property by parties themselves

- The exact definition of “Marriage Settlement” is not statutorily defined but has been interpreted according to the facts and circumstances.
- In India, family settlement has been prevalent for a long time, and has also been a legal and valid document (Uma Dutt v. Ram Jivan in AIR 1941 Oudh 185)
- The Hon’ble Supreme Court in *Manali Singhal v. Ravi Singhal ( I (1999) DMC 355 (Del)* has observed that “family settlement” arrived at between the parties in a matrimonial suit, providing for maintenance, division of property etc. was legal and valid. The husband’s failure to fulfil the terms of such “family settlement” entitled the wife to initiate a suit for specific performance of the “family settlement”.
- In divorce by way of mutual consent generally the properties are divided by way of settlement between the parties as all the terms regarding divorce, custody and division of property have to be mentioned in the mutual consent petition.



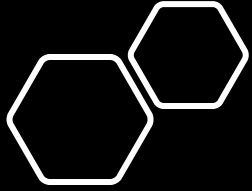
# Maintenance and Disposal of property under Hindu Law

- Under Section 24 of HMA the court can pass orders directing either the wife or husband to pay maintenance amount to other party if the court feels that the affected party has no independent income to support him/her or the necessary expenses for the proceedings.
- Under section 25 of the HMA the court at the time of passing final decree of divorce or judicial separation can pass directions to either wife or husband to pay either a lumpsum, monthly or periodical sum for a term not exceeding lifetime of other spouse. The factors considered are income and property of parties, the conduct and other circumstances of the case. The court on an application can always alter the amount being paid to a party upon change of circumstances.
- Under Sec.27 of HMA, court can also pass order with respect to property presented at or about time of marriage and the property jointly owned by the couple.
- In the case of Rajendra Singh v. Tulsa Bai (1996) DMC 572 (MP) it was held that U/s 27 a petition is only maintainable in respect of the joint property of the wife and husband presented at or about the time of marriage and the exclusive property of the husband cannot be covered under this section.



# Maintenance and Disposal of property under Parsi Law and Special Marriage Act

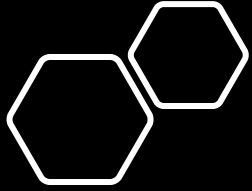
- Under Section 39 of Parsi Act and under Section 36 of the SMA if it appears to the courts that either wife or husband has no independent income to support him/her or the necessary expenses for the proceedings a direction can be passed for payment of expenses of petition and such weekly or monthly sum during the pendency of suit
- Under section 40 of the Parsi Act and Section 37 of SMA the court at the time of passing final decree of divorce or judicial separation can pass directions to either wife or husband to pay either a lumpsum, monthly or periodical sum for a term not exceeding lifetime of other spouse. The factors considered are income and property of parties, the conduct and other circumstances of the case. The court on an application can always alter the amount being paid to a party upon change of circumstances which includes factors such as remarriage, chastity etc.
- Under Sec.42 of the Parsi Act the court can also pass order with respect to property presented at or about time of marriage and the property jointly owned by the couple. U/s 41 a trustee can be appointed for the wife to whom payment would be made.



# Maintenance, damages and Disposal of property under Christian Law

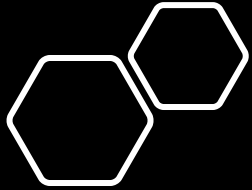
- The disposal of property under the Christian Law is somewhat different from other personal laws discussed here.
- If wife commits adultery then the husband u/s 34 of the Divorce Act can claim damages from the adulterer on the ground of having committed adultery with his wife. The notice of the Petition would be served both on the adulterer and wife. There are certain exceptions u/s 35 when the adulterer is exempted from costs.
- U/s 36 of Divorce Act the maintenance/alimony pending litigation between parties can only be claimed by wife. The amount pending suit shall not exceed  $\frac{1}{5}$ <sup>th</sup> of husband average net income for three years next preceding the date of order. It continues until final decree is passed in the matter.
- U/s 37 the court can direct husband to pay lumpsum, monthly or weekly payments while granting the final decree for dissolution of marriage.
- U/s 39 if the wife commits adultery and a decree is passed for dissolution of marriage any property entitled to wife can be directed by the court to be settled for the benefit of the husband and/or children.
- U/s 40 the court can inquire into existence of ante-nuptial and post-nuptial settlements and can order that amount to be paid for the benefit of wife, husband or kids depending on the facts of the case.
- In short the wife has to pay a part of entitled property in case she commits adultery and the husband has to pay maintenance/alimony to wife and not vice versa unlike other personal laws.





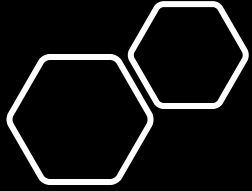
# Stridhan and Dwelling House.

- The properties gifted to the bride before or at the time of marriage or anytime after are her *Stridhan property* and not joint property of husband and wife. The wife has exclusive right over *Stridhan*. If such property is misappropriated by the husband or his family, the wife can allege criminal breach of trust under Sections 405 and 406 of IPC.
- As far as the Dwelling House is concerned, even if the house occupied by the husband and wife was owned exclusively by the husband before marriage, the wife's right of residence is now entrenched, and is commensurate with the status and lifestyle of the parties. (Kanchan B.R. v. Akash Alias (2001) DMC 574 (Del))



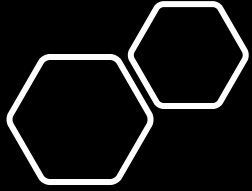
# Maintenance u/s 125 Procedure and Protection of Women from Domestic Violence Act 2005.

- U/s 125 of Code of Criminal Procedure the magistrate can direct the husband to maintain his wife and children who are unable to maintain themselves. This section is applicable to every citizen of India irrespective of their religion as such every wife is entitled to claim maintenance under this section.
- Under the Domestic Violence Act("DVA") aggrieved person means any women who is or has been in a domestic relationship with the Respondent and who alleged to have been subjected to any act of domestic violence by the Respondent. It covers both married females and females in live in relationship.
- The Female can apply to magistrate to seek payment of compensation or damages as a result of violence for herself and for the children.
- Under section 17 of DVA, every Female in a domestic relationship has a right to reside in the shared household whether or not she has a title or interest in the said property and cannot be evicted from the property.
- Under section 19 of DVA the magistrate may impose additional conditions for safety of wife and children. Also u/s 20 the magistrate may direct the respondent to pay monetary relief to the wife for the loss of earnings and other expenses caused due to violence by husband. Such monetary relief will be in addition to any compensation/maintenance under any law for the time being in force.
- Also a magistrate can direct temporary custody of any child to the wife and make visitation arrangements of such child by the husband.



# Marriage Law Amendment Bill 2010 and Protection of Women from Domestic Violence Act 2005.

- The Marriage Laws (Amendment) Bill 2010 was introduced on August 4, 2010 in the Lok Sabha. The bills proposed to amend the Hindu Marriage Act 1955 and Special Marriage Act 1954.
- The Bill proposes to amend divorce laws and division of property after divorce which would be more friendly to women. The bill proposed that wife has the right to oppose the grant of divorce on the ground that the dissolution shall result in grave financial hardships to wife. The court will have to be satisfied that adequate financial provision has been made for children.



# CONCLUSION

At the time of deciding the custody of the Children the welfare of child is of paramount importance and the welfare of child cannot be compromised by the personal laws and welfare is the guiding factor. The substantive personal laws cannot be completely sidelined and must be taken into consideration without affecting the child's welfare.

Regarding the payment of maintenance and alimony the factors including income, property owned by a party, conduct of the parties and other circumstances of the case are kept in mind. In the matter of maintenance and other payments the substantive personal laws play a bigger role as compared to the Custody of the Children.