



Hindu MARRIAGE & DIVORCE

Issues that Affect Dissolution Matters in the United States

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There is a substantial Hindu diaspora in the United States. Hindu marriages, and therefore dissolutions, can have specific, complex issues to resolve. This article examines key matters that may arise in the course of a Hindu couple's dissolution proceedings. The issues may include the validity of the marriage, property and maintenance, jurisdiction, and custody especially in cases where a child is relocated to India without the consent of one parent.

Validity of the Marriage

India has a population of approximately one billion people, of which eighty percent are Hindus. Hindus also live in countries other than India and the United States, such as Sri Lanka and Nepal. Additionally, thirty million nonresident Indians live in countries around the world.

India is a secular democracy with varying faiths, and different statutes apply to different faiths. Additionally, interfaith marriages occur under another act, known as the Special Marriage Act of 1954.

Pursuant to the Hindu Marriage Act of 1955, where both parties are Hindus (or Buddhist, Jains, or Sikhs), the validity of the marriage is dependent on the completion of particular

rites. When all other criteria of age, capacity, and the like are met, a marriage will still be void in the absence of certain rituals and ceremonies. There are issues of fraudulent registration of marriages where, in fact, the Hindu ceremonies were not performed. Moreover, while documents may have been validly registered in accordance with the procedural requirements of the registration rules, if it is found the essential ceremonies did not take place, the mere fact of registration does not make the marriage valid. For example, an integral part of the marriage ceremony requires the parties to complete the “*saptpadi*,” which literally means seven steps that the bride and groom must take around the sacred fire; the marriage becomes binding upon the completion of the seventh step. Without a *saptpadi*, a Hindu marriage has not in fact taken place, and therefore, neither party has rights as a married person.

If a Hindu marries a non-Hindu, such as a Christian or Muslim person, he or she may not marry under the Hindu Marriage Act without conversion of one party to Hinduism. Without conversion, the couple must marry under the Special Marriage Act. There have been times when parties have fulfilled Hindu rituals and then sought registration but failed to disclose that one person is not Hindu, and this

results in a successful contestation of the validity of the marriage. This means that if a client advises that he or she was married per Hindu rituals on a certain date but then came to the United States and had a civil marriage, the date of marriage would be that of the civil marriage if both parties were not Hindus and did not complete a Hindu marriage ceremony. It is not uncommon for parties to symbolically marry in a religious ceremony in India and then a civil ceremony in the United States. For societal and familial reasons, it may be only acceptable to move to the United States together if there has been a religious marriage. Immigration application requirements may also be a consideration.

A Hindu marriage between two parties who share a certain familial connection is known as a “*sapinda*,” or marriage between cousins, and is also largely void with the exception of existence of prior custom in the particular community. The *sapinda* marriage extends to three generations of ascent from the mother’s side and five generations of ascent on the father’s side.

Property and Maintenance

Hindu succession laws give equal property rights to sons and daughters regardless of marital status. So either party may have both nonmarital assets, including inherited or gifted assets, and marital assets. Further, the Hindu Marriage Act provides for maintenance or spousal support of either party from the other depending on income and financial history during the marriage. The payee spouse is entitled to temporary maintenance during the pendency of the proceedings and/or a judgment of maintenance as a part of the dissolution decree, which can be required to be secured by an asset.

This is important in the event of a post-decree proceeding arising when parties divorced in India seek to modify their judgment in the United States. Assuming the judgment is successfully enrolled in India, the court in the States would be able to modify maintenance, but the award of maintenance in the decree under the Hindu Marriage Act could function as evidence of the parties’ intent or lifestyle and affect the outcome in the post-decree proceedings here.

It is important to note that evidence of the intent of the parties could be a factor in the review of maintenance when the recipient party is in a new relationship. While cohabitation reviews in the United States are generally dependent on the financial intertwinement of the recipient party, pursuant to the Hindu Marriage Act, a sexual relationship would likely result in termination of maintenance. Importantly, if a client has the ability to divorce pursuant to the Hindu Marriage Act, whether in India or the United States, the Hindu Marriage Act may award a lump sum amount in lieu of maintenance.

During the marriage (and especially at the time of the wedding), it is customary for the bride and groom to receive gifts from both of their families. In fact, any gifts given to either “in connection with the marriage of the said parties” are

considered the respective property of either the wife or the husband. The interpretation of “in connection with the marriage” can be an issue for interpretation. Often the wife is given extremely valuable jewelry, gold, and precious stones, and, pursuant to the Hindu Marriage Act, these are the bride’s assets and are not to be shared in a dissolution proceeding. In other words, such assets are the wife’s sole and separate property, often termed “*stridhan*,” or a woman’s wealth.

Presents given to the groom are also his sole and separate property so long as they are not deemed “dowry,” which is property promised in exchange for the agreement to wed the bride-to-be and which is now illegal and criminal. Dowry harassment can have criminal consequences. Presents given without demand to either bride or groom are not generally considered dowry, but in some instances, the true nature of the gifts may be challenged.

When, however, classification of these assets as nonmarital or marital is contested and the intention of the parties must be examined, if the parties were married under the Hindu Marriage Act, wedding jewelry, which can be substantial in value, is usually considered a nonmarital gift to the wife. The items may need to be formally appraised and also may affect the division of the marital estate. Moreover, if the husband is in possession of these in the United States, the wife may contend that the husband is harassing her and demanding a dowry, and she may file a criminal complaint. This is at times done to exert pressure for settlement in the States or to seek a withdrawal of the U.S. proceedings so that proceedings can occur in India.

Jurisdiction

The Hindu Marriage Act governs all issues related to Hindu marriages if the parties are domiciled in India. An Indian court has vast discretion in interpreting the term “domicile.” In fact, the Indian courts have exercised jurisdiction over persons no longer residing in India when the Indian court determined that the original domicile in India was never abandoned, despite the individuals having lived abroad for several years. An Indian court may find that parties are still domiciled in India if they were married under the Hindu Marriage Act and they maintain ties to India even if they no longer reside there or they are employed abroad. Ties may include retaining property in India or repeated visits to family. Both the United States and India may, therefore, claim jurisdiction, and parallel proceedings are common.

The Indian court may also make custody judgments if a child is in India and if the child was a product of a marriage between two Hindus the court considers domiciled in India. India, therefore, has become a haven for international parental abduction. A parent experiencing marital discord may plan to abduct a child to India with the knowledge that, pursuant to the Hindu Marriage Act and the court’s discretion, the court may exercise jurisdiction over custody matters.

Parental Abduction

India ranks second, after Mexico, as the destination for child abduction from the United States. This is because India is not a signatory to the Hague Convention on the Civil Aspects of Parental Abduction, unlike ninety-eight of the world's countries.

Indian courts often exercise jurisdiction over a child custody matter even when a child has habitually resided in another country or never even been to India. The court considers a foreign child custody judgment or order as a factor, but not determinative, in assessing whether to exercise jurisdiction, citing the best interest of the child as being of paramount importance.

As discussed above, the issue of what constitutes domicile is at the discretion of the Indian judge and is a fact-based inquiry. So for the client who at all suspects that a child might be abducted to India, immediate steps must be taken.

Further, if a party claims dowry harassment, physical or mental abuse, or alcoholism, to name a few factors, a court may refuse to return a child by citing his or her best interest and exercising jurisdiction based on the Hindu Marriage Act.

The Hindu Minority and Guardianship Act provides that a father is the presumptive guardian of unmarried daughters and sons after they turn five years of age and the mother is the presumptive guardian prior to that. In reality, courts have not applied this rule, citing the best interest of the child as a consideration that comes first. Since interparental, intra-country, or intercountry child removal is not statutorily recognized in India, case results depend heavily on judicial discretion, and the jurisprudence is complex and inconsistent. The consistent principal that has emerged is that the court is guided by the principle of the best interest of the child and may routinely exercise jurisdiction even when a child is a foreign citizen and has never lived in India.

Earlier Indian case law from the 1980s was more favorable to the concept of comity of courts, with the Indian Supreme Court returning removed children to their foreign country of origin on a summary basis and invoking the most-intimate contacts doctrine to determine all custody issues. Later judgments, however, were inconsistent with those earlier cases; they held that the best interest of the child is determinative and superior to any other consideration, including the existence of a foreign court order from the jurisdiction from which the child was removed. In fact, the Court warned against “fixation” on a foreign court order. The late 1990s saw the development of case law in which, even where a foreign court custody order existed from the country where the child ordinarily resided prior to removal, the Indian court exercised jurisdiction and also held that the parties were still domiciled in India. Subsequently, in 2010, the Indian Supreme Court seemed to retreat from this position; it stated that where a foreign court had issued previous custody orders and awarded a divorce decree, the removed child should be returned to the country of ordinary residence for further

adjudication. In 2010 and 2013, the Court returned children after finding that, where one parent had removed the child from U.S. jurisdiction, the child should be returned and the court with the most intimate contacts would be the best place to adjudicate the matter.

In a landmark case in 2015, the Indian Supreme Court held that the principle of comity of courts and nations must be respected. It validated the principle of first strike, that is, it held that the court that first adjudicated a custody matter should retain jurisdiction of custody issues. Interlocutory orders of foreign courts were also to be respected. A foreign order, however, was not to be determinative. A local court could review a foreign order and take it into account as a factor in deciding whether to return a child. The decision to review an order was required to be justified by specified reasons and not ordered as routine whenever a local court found itself faced with child custody litigation. The Indian Supreme Court cautioned, though, that before a child could be returned, a court was obligated to consider the nature and effect of a foreign court order; the reasons for repatriation (such as domestic violence); and the potential for moral, physical, social, or psychological harm to the child or parent.

However, in a complete reversal in 2017, the Court held that it had jurisdiction over the matter even if a child had never resided in India and that the principles of comity of courts, the first-strike principle, or *forum non conveniens* had no place in proceedings of custody regarding a minor child. The Court indicated that it would exercise its jurisdiction and retain the child based on the priority of a best-interest analysis, which would be the governing and most important concern. The Indian Supreme Court would, it concluded, apply the doctrine of *parens patriae* in matters of child welfare.

In Sum

Complex issues arise for persons married under the Hindu Marriage Act, which is common among members of the Hindu diaspora in the United States. The issues include the validity of the marriage, classification of assets, and effects on child custody matters. **FA**



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