

GUARDIANSHIP AND CUSTODY RIGHTS OF UNWED MOTHERS -THE LEGAL PERSPECTIVE

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Introduction

Children are the future of the society, and their upbringing is indirectly, very crucial to the development of any society. The law has recognized this over a period of time, and has made necessary provisions to ensure that in the family system, a child's interest is protected. International, domestic and personal laws have made attempts to secure the same. We have come up with various principles and doctrines, such as the *Tender Years Doctrine*, and the *Best Interest Principle*, to ensure that a child's development is not compromised by the circumstances he is brought up in. The welfare of the child is a universally recognized principle that cuts across different ideologies. The environment in which a child is being brought up is very crucial to his development, and is the underlying factor to influence the laws of guardianship and custody.

Traditionally, in Common law, the father was the sole guardian of the person and property of the child. A mother did not have any authority over children, since women did not have independent legal status; their identities being forged with that of their husbands upon marriage.¹ It was the Custody of Infants Act, 1839, in the UK which empowered the mother to claim custody over minor children. However, the rights of the father continued to remain supreme.

In India, the Guardians and Wards Act was enacted in 1890 by the colonial state, which continued the legacy of Common law and provided for the supremacy of the paternal right in guardianship and custody of children. While Sections 7 and 17 of the Act provided that courts should act in furtherance of the welfare of the minor, Sections 19 and 25 of the original Act,

¹Law commission Report No.257, May 2015

subordinated the same to the supremacy of the father. It is only the Hindu Minority and Guardianship Act, 1956, enacted by the independent Indian state that provides that welfare of the minor shall be the paramount consideration superseding all other factors.

Apart from common law, personal laws have also played an important role in the development of such laws. In the *Shastric Hindu law*, there were hardly any laws of guardianship and custody of children. The children were in the care and protection of the *Karta* of the joint Hindu family. But however, under the modern Hindu law, the obligation to bring up the child is imposed on both the parents. The obligation is also enforceable under Criminal Law.² Muslim Law recognized the law of guardianships and custody. There were rules laid down for the guardianship of the minor and the minor's property. The Muslim law, even in an essentially patriarchal society, laid down that especially in the tender years the custody belonged to mother.³ As to law of guardianship of non-Muslims and non-Hindu children, such as Christians, Parsis and Jew children, the law is majorly provided in the Guardians and Wards Act, 1890.

According to the United Nations Convention on the Rights of the Child (hereinafter, CRC), "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the *best interests of the child* shall be a primary consideration."⁴ Welfare of the child, as a criterion for decision, is generally flexible, adaptable and reflective of contemporary attitudes regarding family within society.

These legal principles stand their ground in theory. However, in practice a woman has to acknowledge the father of the child, while conducting any official business in relation to her child. This makes the situation uncomfortable and intimidating, when the mother is a single parent. In fact, single parent families are on the rise due to several reasons like unwed mothers, sex workers, surrogate mothers, rape survivors, children abandoned by father and also children born through IVF technology.⁵ Also, single mothers face stigma from the society and affects the welfare of the child itself. Thus, the law has to pave the way for social acceptance. The law

² Section 125, Criminal Procedure Code, 1973

³ Paras Diwan, *Muslim Law in Modern India*, 11th Edn. 2014, Allahabad Law Agency, pg.136

⁴ Convention on the Rights of Child, 1990

⁵ *Shalu Nigam v Regional Passport Officer*, W.P.(C) 155/2016 & CM APPLs. 684-685/2016, Delhi HC on 17th May 2016

and the judiciary have been instrumental in protecting both the rights and sentiments of the single parents.

Law with relation to Unwed Mother in India

The most important legislation that provides for a Right to Guardianship even to unmarried persons is The Guardians and Wards Act- 1890. The concept of guardianship and custody has been dealt by taking a wider approach. Under the provisions of the Act the court has a power to appoint or declare a guardian for a minor or minor's property. Section 7 of the act provides that the court may appoint or declare a guardian when satisfied that it is for the welfare of the child. It also provides for removal of existing guardian. In *Ram Prasad v. District judge*⁶ the court held that the word 'welfare includes both moral and material welfare'. Section 19(b) provides for appointment of another person if the natural guardian is found unfit. It can be seen that the law stands for securing the welfare of the child. It does not concern itself with too many procedural lapses.⁷

It has to be noted that when exercising its power under the Guardians and Wards Act or Hindu Minority and Guardianship Act, the court is under no obligation to make an order whenever an application is made, the court can exercise discretion keeping in mind the welfare of the child.

Under the Hindu law father is the natural guardian of his child and is preferred to child's mother but over the period of time the law had moved in favor of mothers. A mother can also be appointed as a guardian if it deems fit for the welfare of a child. The Guardians and Wards Act does not specify that only a father can be appointed, it provides that any parent can claim the custody. The Act further provides that if the welfare of the child so demands, even a stranger can be appointed as a guardian. However, the mother needs to reveal the father's identity and is secondary custodian. But the view of the courts has changed recently and this procedural necessity has been relaxed.

Case Analysis

Githa Hariharan v Reserve Bank of India⁸

⁶ 51 I.c. 651. 56 P R 1919

⁷ Society of sisters of charity st.gerosa convent v. Karnataka state council for child welfare. AIR 1992 kant 263

⁸ AIR 1999 SC 1149

The petitioner, Ms. Githa Hariharan, applied to the RBI for 9% Relief Bond to be held in the name of their minor son, along with an intimation that the petitioner being the mother, would act as the natural guardian for the purposes of investments. The application however was sent back to the petitioner by the RBI Authority advising her to produce the application signed by the father and in the alternative the Bank informed that a certificate of guardianship from a Competent Authority in her favor ought to be forwarded to the Bank. And it is this communication from the RBI authorities, which is stated to be arbitrary and opposed to the basic concept of justice in this petition under Article 32 of the Constitution challenging the validity of section 6 of the Hindu Minority and Guardianship Act, 1956. “The natural guardian of a Hindu minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are –

- a. In the case of a boy or an unmarried girl-the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
- b. In case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;
- c. In the case of a married girl-the husband”

There is also a divorce proceeding pending in the District Court of Delhi, between the petitioner and her husband. The minor, has been living with the mother, and despite the attempts made by the petitioner, her husband showed apathy towards the minor. But the father has been repeatedly writing letters claiming that he is the natural guardian of the minor, and no decision regarding the minor can be taken without his permission. Under this background the petitioner challenged the validity of Section 6(a) of the Hindu Minority and Guardianship Act, 1956, under Article 14 and Article 15 of the Constitution. The petitioner contended that the provisions of section 6 of the Act seriously disadvantage woman and discriminate man against woman in the matter of guardianship rights, responsibilities and authority in relation to their own children. In this case, the court borrowed the concept of equity from England. The English courts have held that the dominant matter or factor is the consideration of the child’s welfare. And the welfare of the child is not restricted to physical or monetary well-being. Moral, religious feelings and ties of affection also play a major role in the welfare of the child. Thus, the court observed that while considering the welfare of the child, strict interpretation of the law, is not

conducive. The court has to exercise judicial interpretation while deciding the welfare of the child. The statute therefore on a plain reading with literal meaning being ascribed to the words used, depicts that the mother's right to act as a natural guardian stands suspended during the lifetime of the father and it is only in the event of death of the father, the mother obtains such a right to act as a natural guardian of a Hindu minor. In the event, the word 'guardian' in the definition section means and implies both the parents, the same meaning ought to be attributed to the word appearing in section 6(a) and in that perspective mother's right to act as the guardian does not stand obliterated during the lifetime of the father. Section 6(a) itself recognises that both the father and the mother ought to be treated as natural guardians and the expression 'after' therefore shall have to be read and interpreted in a manner so as not to defeat the true intent of the legislature. "In our opinion the word 'after' shall have to be given a meaning which would serve the need of the situation, welfare of the minor 'after' does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as 'in the absence of' - be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word 'after' as used in Section 6 then and in that event the same would be in accordance with the intent of the legislation viz. welfare of the child." ⁹

Thus, the Honorable Court in this case established the fact, that by virtue of dominant patriarchy, the father does not get priority over guardianship rights. Both father and mother have to be treated equally in such situations.

ABC v The State (NCT of Delhi)¹⁰

The appellant, in this case filed an application under the district court that she, the natural mother, of her son be appointed as his guardian. The court denied her application because she refused to reveal the details of the father. She raises her son on her own, without any assistance from the father. Therefore she filed an application under Section 7 of the Guardians and Wards Act, 1890 before the Guardian Court for declaring her the sole guardian of her son. Section 11 of the Act requires a notice to be sent to the parents of the child before a guardian is appointed.

⁹Githa Hariharan & Anr. v. Reserve Bank of India, AIR 1999 SC 1149

¹⁰ Judgment given on 6th July, 2015 by Supreme Court of India.

On appeal to the High Court, the court said that to decide the guardianship of the child, a notice has to be sent to the father, because he also has an interest in the welfare of the child, irrespective of marriage between mother and father. The appellant argued that the disclosure of the name of the father will have an adverse effect on her child, because he was already married. *Amicus curia* was appointed by the Court to look in to this matter extensively. The Court relied on personal laws and laws and cases from other countries. Under both Hindu and Muslim law, the mother of the illegitimate child is the guardian. This is because maternity is a fact. Laws of countries, like England, Ireland, and USA also have provisions that declare the mother as the natural guardian of the illegitimate child.

Taking this into consideration, the Supreme Court asked the Guardian court to repudiate the dismissal order and consider the Appellant's application for guardianship, without notice to the father. The court said that the word "parent" has not been defined in the Act, and the word includes both mother and father.

The court allowed this because, the father, if he wanted to exercise his rights should have kept track of the child. Also, the appellant declared that she will not deny the father his rights, if and when he pursues it. Even then, the Court has asked her to place the details of the father in a sealed envelope, which will be opened only on specific order issued by the Court.

Shalu Nigam v Regional Passport Officer¹¹

The case came before the Delhi High Court, because the petitioner sought the reissuance of her daughter's passport without the insistence upon the father's name being mentioned in the application. The petitioner is divorced and the biological father of her daughter has abdicated his rights and liabilities as a father.

The petitioner contended that the insistence for the father's name will alter her daughter's identity. This identity is one she has been using since birth, as the petitioner's daughter, due to the father's abandonment, because she was a girl child. The Court appointed an Amicus Curiae, who produced cases, in connection with the matter at hand. The Court relied on the above mentioned cases, and a few others to decide the issue in favour of the petitioner. The Court held that due to the absence of a legal requirement to mention the father's name, the respondents cannot insist upon the same. The Court was also of the view that the mother's

¹¹W.P.(C) 155/2016 & CM APPLs. 684-685/2016, Delhi HC on 17th May 2016

name is sufficient in cases like the present case, especially as a single woman can be a natural guardian and also a parent.

Further, the Court also implied that the insistence of the respondent's upon the father's name will alter the child's identity. The identity of the child would be then connected to a father, who abandoned her. This, in itself would be detrimental to the welfare of the child.

Conclusion

It is evident that the law favors the father of the child when it comes to custody and guardianship. But the courts have eventually realized that procedural formalities and a patriarchal structure of law cannot become a hindrance to the development of child. The law in India was adopted from the Common Law and various International Law instruments, especially the principle of welfare of child and has moved towards securing the best interest of child. But yet an unmarried mother (divorced) has better stand in law when it comes to custody of a child than an unmarried mother (illegitimate child). Law is evolving and with the parallel growth of feminist jurisprudence, women are also being provided their rights. Paramount consideration shall be given to nothing else but the development of the child. The mother and father both have to be treated as natural guardians. There should be no superiority of one over the other. The superiority of fatherhood or motherhood cannot come in the way of a child's welfare. The law certainly needs reformation and while interpreting the same, the aim of the judiciary should be to protect the child's interest.