CUSTODIAL RIGHTS FOLLOWING PARENTAL SEPERATION

Written by ***Varun Zeferino De Mascarenhas***

2nd Year BBA LLB Student, School of Law Christ University

ABSTRACT

The modernization of family life has presented numerous problems before the courts in situations concerning the custodial order that is to be chosen for the child. Child custody is one among the most contentious areas of family law. It encompasses care, control, guardianship, and maintenance of a child which is generally awarded to one of the parents following a divorce or a separation proceeding. The present paper is an insight into the aspect of "welfare of the child" as the paramount consideration in adjudicating custody and guardianship matters which essentially acts as a matter of recognizing and addressing the child's most fundamental needs in the time of family transition. In this light, the paper shall examine the considerations for passing orders for custody and reflect upon the struggle between mother's and father's rights, with children's needs to be commensurate with either position. These requirements are most appropriately addressed by supporting parents in the fulfillment of their parental responsibilities, a goal to which social institutions such as legislatures and the judiciary are bound. In the course of this paper, the custodial rights shall be examined in the context of various legal frameworks including Guardians and Wards Act (GWA), 1890 ; Hindu Minority and Guardianship Act, 1956 ;Hindu Marriage Act, 1955 as well as on the United Nations Convention on Rights of Child. A special emphasis shall be laid on the concept of joint custody in India. Since the issue is sensitive and requires the court to attach relevance to a number of equally valid consideration, the paper shall explore it in detail and determine which custodial order is most apt according to a particular situation.

Keywords: Custody, Parental Separation, Guardianship, Welfare of the Child

INTRODUCTION

Ever since divorce is recognized the world is engaged in finding out adequate solutions to the post-divorce problems. The most important post-divorce problem with which the individual and society are most vitally concerned, is the problem of finding adequate solutions to matters concerning custody, education, maintenance of, and access to children.

Custody means "personal power of physical control". In a wider sense it implies practically all the rights of guardianship as well as care and control of the child. The worst affected in proceedings of divorce and family breakdowns are the children. Maintaining the central importance of the welfare of the child in proceedings of custody will help ensure that the child's future is safe and protected, regardless of changing familial circumstances.

In the welfare of children, the court has the power to make such orders as it thinks fit for the custody, education and maintenance of any child who is below the age of eighteen. It is now a very well established principle that in all the proceedings in respect of children, their welfare is the paramount consideration.

Despite its widespread recognition as a relevant consideration, the manner in which the welfare principle occurs in our legal and judicial framework, has certain problems, which need legislative redressal

HISTORY

Traditionally at Common law, the father was considered the sole guardian of the person and property of the child. The authority of the father in every aspect of the child's life, including his/her conduct, education, religion and maintenance, was considered absolute and even the courts refused to interfere with the same. Mothers did not have any authority over children, since mothers did not have independent legal status; their identities being forged with that of their husbands upon marriage. As divorce became possible and mothers began to have independent legal existence and residence, their claim, if not right, to have custody of the children began to be recognized by the courts.

Two developments aided in the dismantling of paternal authority over children. First, in a number of judicial decisions, the courts claimed the parens patriae jurisdiction – an even higher

parental authority of the state – to supersede the natural guardianship of the father and award custody depending on what promoted the welfare of the child. Second, through a series of legislations, the British Parliament shifted the emphasis from paternal rights to the welfare of the child and conferred equal legal status to the father and the mother in determining guardianship and custody.

The Custody of Infants Act, 1873, allowed the mother to have custody of the child till the age of sixteen and removed the restriction on petitions made by mothers who had committed adultery. The Guardianship of Infants Act, 1886, recognized equal rights of the mother over custody, access and appointment of testamentary guardian, and allowed the court to appoint and remove guardians in certain circumstances. The Guardianship of Infants Act, 1925, put the claims of the mother and the father in a custody dispute on an equal footing and provided that welfare of the infant shall be the "first and paramount consideration". Finally, the Guardianship of Minors Act, 1973, conferred the same rights to the mother that the common law gave to the father; the mother was allowed to exercise these rights without the concurrence of the father. If the parents failed to reach an agreement, then the court is authorized to decide the matter based on the principle of welfare of the child.

In India, the Guardians and Wards Act was enacted in 1890 by the colonial state, which continued the legacy of Common law, of the supremacy of the paternal right in guardianship and custody of children. 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.

CONSIDERATIONS FOR PASSING ORDERS FOR CUSTODY

While making orders for the custody of children the court takes into account a number a factors:

(A) Welfare of the child
(B) Wishes of the parent
(C) Wishes of the child
(D) Age and sex of the child

(A)Welfare of the child

In matters of custody the welfare of the children is of paramount consideration.

Section 25 of Guardians and Wards Act, 1890 lays down that in committing custody, the welfare of the children will be the main consideration before the court.

In cases coming under this act the courts have taken divergent views on account of statutory provisions of Section 19 which lays down that a father cannot be removed from guardianship unless he is found unfit and Section 17 which lays that the court should take into consideration, the welfare of the child.

Section 13 of Hindu Minority and Guardianship Act 1956 lays down that in matters relating to guardianship and custody of children, "the welfare of minor shall be the paramount consideration." This is now an established judicial view.[1]

In considering what is for the welfare of children the courts take into account several other factors.

Custody of Mother

Section 6 of the Hindu Minority and Guardianship Act lays down that the custody of the minor up to the age of 5 years should be with the mother. But it does not mean that thereafter the mother cannot have custody of child.[2]In the case of **Sheela v Jivan**[3] it was also held that a mother cannot be deprived of custody merely because she had remarried.

(B) Wishes of the parents

The question of the wishes of parents usually arise in two situations

- When the dispute relating to children is between a parent and a third party, and
- When the dispute is between the parents.[4]

With regard to the first situation, the wishes of the parent can be disregarded only if doing so will be in the paramount welfare of the child. Upjohn, J. observed that "The natural parents

[1] Rajiah v. Dhanpal, AIR 1986 Mad 99
[2] Devi v Sandhya, AIR 1985 Gau 97
[3] AIR 1988 AP 275
[4] Dr.Paras Diwan, Family Law 254 (Allahabad Law Agency, 2016).

have a strong claim to have their wishes considered, first and principally, no doubt, because normally it is part of the paramount consideration of the welfare of the infant that he should be with them, but also because as the natural parents they are the proper persons to have the upbringing of the child they have brought into the world."[5]

In the instance of custody between parents the court in **Fulkumari v. Budh Singh**[6] observed that though the wishes of the parents were not conclusive, still considerable weight was attached to them.

But these would be disregarded if giving effect to them would be injurious to the child's welfare.

Custody to third persons

Generally, custody is given to either of the parents but where welfare so requires, custody may be given to a third person.

In **Baby v. Vijai**[7] the court while granting the custody of two minor children to maternal grandfather , observed that even if the father was not found unfit, custody might be given to the third person in the welfare of the child.

(C) Wishes of the child

It is a statutory provision in all Indian matrimonial statutes that the court will take into account the wishes of the child if the child is grown up enough to express its wishes. Although the Indian Courts have considered the wishes of the child there still exists controversy among the High Courts as to what is the age of discretion when the child is capable of expressing its intelligent preference.

However, the Indian Courts have settled down to view that wishes of the children is an important consideration and at what age a child is capable of expressing his intelligent preference depends upon the mental development or maturity of the child.[8]

[5] J v. C (1970) AC 688.
[6] (1914) 25 IC 122.
[7] AIR 1992 Ker 289.
[8] Murarilal v Saraswati AIR 1925 Lah 375

In the case of **Jaswant Kaur v. Chanan Singh** the court observed that the wishes of child is a relevant consideration but welfare of the child is paramount consideration and if the welfare of the child so requires, the wishes of the child may be disregarded.[9]

(D)Age and Sex of the child

The Indian decisions are abounding with judicial statements of general nature. With regard to children of tender years, it is now a firmly established practice that mother should have their custody since father cannot provide the maternal care and affection which are essential for their proper growth.

The Hindu Minority and Guardianship Act, 1956 contains a statutory provision which lays down that custody of child upon the age of 5 years should ordinarily be with the mother.

Beaumont, CJ. Represents the judicial view that …if mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of the child.[10] In the case ***In re* Kamal Rudra**, Das J. a similar view was expressed.

But a mother who neglects the infant child as she does not want to sacrifice the type of life she is leading can be deprived of custody.[11]

Our courts with regard to older children take the view that the male children above 16 years and female children above the age of 14 years, should not be compelled to live in a custody which they object.

In **Iyer v. Iyer**[12] it was held that the wishes of the mature children will be given consideration only if they are consistent with their welfare.

But, in **Sheila B Das v. P.R. Sugasree**[13] where a girl child who was little more than 12 years of age and intelligent enough to take her own decisions wanted to live with father, the court granted the custody to her father.

[9] AIR 1962 Manipur 60.
[10] Saraswati Bai v Sripad, AIR 1941 Bom 103.
[11] K.S Mohan v. Sandhya, AIR 1993 Mad 59.
[1212] AIR 1948 Mad 294.
[13] AIR 2006 SC 1343.

LEGAL FRAMEWORK

Statutory Law

(A) Guardians and Wards Act (GWA), 1890

The GWA is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion. It authorizes District Courts to appoint guardians of the person or property of a minor, when the natural guardian as per the minor's personal law or the testamentary guardian appointed under a will fails to discharge his/her duties towards the minor. The Act is a complete Code laying down the rights and obligations of the guardians, procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issues under very religion.[14] Even if the substantive law applied to a certain case is the personal law of the parties, the procedural law applicable is what is laid down in the GWA.[15]

Section 7 of the GWA authorizes the court to appoint a guardian for the person or property or both of a minor, if it is satisfied that it is necessary for the welfare of the minor.

Section 17 lays down factors to be considered by the court when appointing guardians. Section 17(1) states that courts shall be guided by what the personal law of the minor provides and what, in the circumstances of the case, appears to be for the welfare of the minor.

Section 17(2) clarifies that while determining what constitutes the welfare of the minor, courts shall consider the age, sex and religion of the minor; the character and capacity of the proposed guardian and how closely related the proposed guardian is to the minor; the wishes, if any, of the deceased parents; and any existing or previous relation of the proposed guardian with the person or property of the minor.

Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court may consider his/her preference.

[14] Section 2 of the HMGA states that its provisions are supplemental to and not in derogation of the GWA
[15] Section 6 of Guardian and Wards Act,1890 (In the case of a minor, nothing in this Act shall be construed to take away or derogate from any power to appoint a guardian of his person or property or both, which is valid by the law to which the minor is subject.)

Section 19 of the GWA deals with cases where the court may not appoint a guardian. Section 19(b) states that a court is not authorized to appoint a guardian to the person of a minor whose father or mother is alive, and who, in the opinion of the court, is not unfit to be a guardian. The earlier Section 19(b) prevented the court from appointing a guardian in case the father of the minor was alive. This clause was amended by the Personal Laws (Amendment) Act, 2010 and was made applicable to cases where even the mother was alive, thus removing the preferential position of the father.[16]

Section 25 of the GWA deals with the authority of the guardian over the custody of the ward.34 Section 25(1) states that if a ward leaves or is removed from the custody of the guardian, the court can issue an order for the ward's return, if it is of the opinion that it is for the welfare of the ward to be returned to the custody of the guardian.

Reading the above provisions together, it can be concluded that, in appointing a guardian to the person or property of a minor under the GWA, courts are to be guided by concern for the welfare of the minor/ward. This is evident from the language of Sections 7 and 17. At the same time, the implication of Section 19(b) is that unless the court finds the father or mother to be particularly unfit to be a guardian, it cannot exercise its authority to appoint anyone else as the guardian. Thus, power of the court to act in furtherance of the welfare of the minor must defer to the authority of the parent to act as the guardian.

(B) Hindu Minority and Guardianship Act, 1956

Classical Hindu law did not contain principles dealing with guardianship and custody of children. In the Joint Hindu Family, the Karta was responsible for the overall control of all dependents and management of their property, and therefore specific legal rules dealing with guardianship and custody were not thought to be necessary.[17]

However, in modern statutory Hindu law, the Hindu Minority and Guardianship Act, 1956 (hereinafter, HMGA) provides that the father is the natural guardian of a minor, and after him, it is the mother. Section 6(a) of the HMGA provides that:

[16] Section 2 of Personal Laws (Amendment) Act, 2010
[17] Dr. Paras Diwan, Law of Adoption, Minority, Guardianship and Custody (Universal Publishing Co.)

1) In case of a minor boy or unmarried minor girl, the natural guardian is the father, and after him, the mother; and

2) the custody of a minor who has not completed the age of five years shall ordinarily be with the mother (emphasis added).

In **Gita Hariharan v. Reserve Bank of India**[18] the constitutional validity of Section 6(a) was challenged as violating the guarantee of equality of sexes under Article 14 of the Constitution of India. The Supreme Court considered the import of the word after and examined whether, as per the scheme of the statute, the mother was disentitled from being a natural guardian during the lifetime of the father. The Court observed that the term after must be interpreted in the light of the principle that the welfare of the minor is the paramount consideration and the constitutional mandate of equality between men and women. The Court held the term after in Section 6(a) should not be interpreted to mean after the lifetime of the father, but rather that it should be taken to mean in the absence of the father. The Court further specified that absence could be understood as temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise.

Therefore, in the above specific situations, the mother could be the natural guardian even during the lifetime of the father. Section 13 of the HMGA declares that, in deciding the guardianship of a Hindu minor, the welfare of the minor shall be the paramount consideration and that no person can be appointed as guardian of a Hindu minor if the court is of the opinion that it will not be for the welfare of the minor.[19]

The following can be concluded with respect to guardianship under the HMGA. First, the father continues to have a preferential position when it comes to natural guardianship and the mother becomes a natural guardian only in exceptional circumstances, as the Supreme Court explained in Gita Hariharan. Thus, even if a mother has custody of the minor since birth and has been exclusively responsible for the care of the minor, the father can, at any time, claim custody on the basis of his superior guardianship rights. Gita Hariharan, therefore, does not adequately address the original problem in Section 6(a) of the HMGA. Second, all statutory guardianship

[18] (1999) 2 SCC 228
[19] Section 13 of Hindu Minority and Guardianship Act, 1956

arrangements are ultimately subject to the principle contained in Section 13 that the welfare of the minor is the paramount consideration. In response to the stronger guardianship rights of the father, this is the only provision that a mother may use to argue for custody/guardianship in case of a dispute.

The point of difference between the GWA and the HMGA lies in the emphasis placed on the welfare principle. Under the GWA, parental authority supersedes the welfare principle, while under the HMGA, the welfare principle is of paramount consideration in determining guardianship. Thus, for deciding questions of guardianship for Hindu children, their welfare is of paramount interest, which will override parental authority. But for non-Hindu children, the court‘s authority to intervene in furtherance of the welfare principle is subordinated to that of the father, as the natural guardian.

(C) Hindu Marriage Act, 1955

Section 26 of the Hindu Marriage Act authorizes courts to pass interim orders in any proceeding under the Act with respect to custody, maintenance and education of minor children, in consonance with their wishes. The Section also authorizes courts to revoke, suspend or vary such interim orders passed previously.

(D) Islamic Law

In Islamic law, the father is the natural guardian, but custody vests with the mother until the son reaches the age of 7 and the daughter reaches puberty. Islamic law is the earliest legal system to provide for a clear distinction between guardianship and custody, and also for explicit recognition of the right of the mother to custody.

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.In judicial decisions under the GWA involving Muslim children, courts have sometimes upheld the mother‘s right to custody over children under Islamic law and on other occasions have given custody to the mother out of concern for the welfare of the child.

(E) Parsi and Christian Law

Similar to Section 26 of the Hindu Marriage Act, 1955, under Section 49 of the Parsi Marriage and Divorce Act, 1936[20] and Section 41 of the Indian Divorce Act, 1869[21] courts are authorized to issue interim orders for custody, maintenance and education of minor children in any proceeding under these Acts.Guardianship for Parsi and Christian children is governed by the GWA.

INTERNATIONAL CONVENTION

While the "welfare of the child" principle dominates the domestic legal framework, a comparable legal standard is found in international human rights law. According to the United Nations Convention on the Rights of the Child (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."[22] The Convention directs the State Parties to ensure that "both parents have common responsibilities for the upbringing and development of the child."[23] The CRC also provides that a child should be separated from his or her parents if there is "abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child's place of residence." [24] Welfare of the child, as a criterion for decision, is generally flexible, adaptable and reflective of contemporary attitudes regarding family within society. The Committee on the Rights of the Child has provided additional guidance regarding the best interest standard in its General Comment 14.

The Committee stated that it is "useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests." The Committee suggested that the following considerations can be relevant: the child's views; the child's identity (such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, and personality); preservation of the family environment and maintaining relations (including, where appropriate, extended family or community); the care, protection and safety of the child; any situation of vulnerability

[20] Parsi Marriage and Divorce Act, No. 3 of 1936, S. 49
[21] Indian Divorce Act, No. 4 of 1869, S. 41
[22] Convention on the Rights of the Child, Art. 3, (1989).
[23] Id., at Art. 18
[24] Id., at Art. 9.

(disability, minority status, homelessness, victim of abuse, etc.); and the child's right to health and right to education.

However, there are two main criticisms of the best interest standard when applied to custody issues.

First, it is unpredictable and information intensive. Parents who are divorcing are left guessing as to how the courts will make custody decisions; this can lead to unnecessary pre-court bargaining that may be harmful to both the child and the parents.This could be resolved by a more predictable rule-based standard, which delineates the content of the best interest standard. On the other hand, a rule-based standard is likely to be rigid and not consider the individual circumstances of each case.

Second, the best interest of the child standard primarily focuses on the predicaments of the child alone and does not take into consideration the feelings and interests of the parents. The parents are also actors within the family who have rights and any legal framework must account for their welfare as well.

Thus, it is an open question whether the best interest of the child standard is an adequate legal tool to resolve child custody decisions, or whether it needs to be supplemented with further legislative guidelines.

JOINT CUSTODY IN INDIA

Joint custody systems vary widely across the globe. Joint custody means

(i) joint legal custody where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child's primary residence may be with only one parent,

(ii) joint physical custody where both parents share physical and custodial care of the child, or

(iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child

In **KM Vinaya v. B Srinivas,**[25] a twojudge bench ruled that both parents are entitled to get custody "for the sustainable growth of the minor child." Joint custody was effected in the following manner:

- The minor child was directed to be with the father from 1 January to 30 June and with the mother from 1 July to 31 December of every year.
- The parents were directed to share equally the education and other expenditures of the child.
- Each parent was given visitation rights on Saturdays and Sundays when the child was living with the other parent.
- The child was to be allowed to use telephone or video conferencing with each parent while living with the other

RECOMMENDATIONS

- Strengthen the welfare principle in the Guardians and Wards Act, 1890 and emphasize its relevance in each aspect of guardianship and custody related decision-making
- Provide for equal legal status of both parents with respect to guardianship and custody
- Provide detailed guidelines to help decision makers assess what custodial and guardianship arrangement serves the welfare of the child in specific situations.
- Provide for the option of awarding joint custody to both parents, in certain circumstances conducive to the welfare of the child.

CONCLUSION

A variety of social, economic and the personal attributes of parents are associated with the type of custodial arrangement established after separation or divorce. This includes family law legislation, family composition (such as the age and sex of the children), the status of the family, and the amount of parental co-operation. Through the course of this paper one can infer

[25] MFA No. 1729/ 2011, Karnataka High Court, Judgment dated Sept. 13, 2013.

that the parents who are able to co-operate and those who are more child-oriented may be more likely to select a joint rather than sole custody arrangement.

Following parental separation, the child custody decisions determine the legal responsibilities of each parent to the child or children. The increase in parental separation has led to greater visibility of child custody decisions. Child custody decisions have implications for parental involvement, child visitation, and child support obligations.

Well, the evidence on living arrangements after separation and divorce is relatively unequivocal on various points as highlighted in the present paper.