International Journal of Psychosocial Rehabilitation, Vol. 24, Issue 10, 2020
ISSN: 1475-7192

Critical Analysis Of Custody And Guardianship Rights Of Mothers In India

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Abstract:
This Article has critically analysed the changing interpretation and growth of Custody and guardianship rights of Mothers in India and its various aspects by representing the approach and the ideology of the Indian courts while deciding the custody and guardianship rights of women in India. We need to accept that laws concerning children, like most laws, will inevitably remain flawed and in need of constant revision because of different dimensions such as women empowerment, Social and Educational Development and also due to increasing trend of judicial Activism.
This article will answer above issues in the context of two legislations the first one is Guardians and Wards Act, 1890 which law is a secular legislation and secondly Hindu Minority and Guardianship Act, 1956 which is applicable only to Hindus.

Keywords*: Children, Custody, Guardians and Wards Act, 1890; Guardianship, Hindu Minority and Guardianship Act, 1956.*

1. Introduction

"The law is dynamic and is expected to diligently keep pace with time and the legal conundrums and enigmas it presents."
The law governing custody of children is closely linked with that of guardianship. Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor.
The term "*custody*" is not defined in any Indian family law, whether secular or religious. The term "*guardian*" is defined by the Guardians and Wards Act, 1890 as a "*person having the care of the person of a minor or of his property or of both his person and property*."

Home can be a wonderful place to live but continuous fights between the partners of a marriage disturb the atmosphere at home and create havoc on the members of a family. One does not need a mansion to lead a happy marital home. The foundation of a happy home is love, sharing of joys and sorrows, and not in that, sense bricks and concrete. The happiness that brings enduring worth to life is not the superficial happiness that is dependent on circumstances. The marital discord sometimes reaches a stage where the parties are unmindful of what psychological, mental and physical impact it has on children. It is worse when there is a single child, be it a boy or a girl.

Sometimes, the situation comes where the child has become the focus of controversy. Bitter legal fights have been fought and the parties have travelled the corridors of several courts. Efforts have been made unsuccessfully to bring about conciliation between the parties. The best way to make children good said a learned author is to make them happy which lies in the best interest of the child.

2. Legislative Intent of the acts : HMGA[3] & GWA[4]:

Children are not merely chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.
At the time when HMGA and GWA were enacted the approach of Indian courts were restricted to the literal interpretation of the law but as the condition of women in Indian Society changes and due to increased women empowerment the Indian courts have changed their approach of looking these two enactments now every court and

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[4] *Guardians and Wards Act, 1890*

specially the constitutional courts i.e. High Courts and Supreme Court determine the intention of the Legislature by relying on the concept of **"*ex visceribus actus*"** which says that- In the exposition of Statues, the intention of the legislature is to be gathered from the whole of the statute and every part of it taken and compared with other parts.
In ***Aswini Kumar v. Arbinda Bose*,*Regional Provident Commr., Bombay v. Shree Krishna Metal Manufacturing Co.***, The Apex court of India clearly lays down a principle that:
"The ordinary rule of grammar cannot be treated as an invariable rule which must always and in every case be accepted without regard to the context. If the context definitely suggests that the relevant rule of grammar is inapplicable, then the requirement of the context must prevail over the rule of grammar. The intention of the legislature must be gathered from the whole of the statute. It is the duty of the court to take care that every statute must be interpreted ex visceribus actus (within the four corners of the Act). The reason is that there should not be any contradiction between one part of a statue and another and one part will help in understanding of another. If there is an irreconcilable contradiction, the latter section is treated as an exception to former".

Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a Court of law, the word ***'after'*** in the Section 6 of the Hindu Minority and Guardianship Act, 1956 would have no significance as the Court is primarily concerned with the **"best interests of the minor"** and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor.

Absolute gender justice in the case of guardianship is still a distant dream, although ***Geeta Hariharan v. Reserve Bank of India*** was a landmark judgment. 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, otherwise, or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise.

In considering the above principles, merely because there is no defect in his personal care and his attachment for his children, which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him.

3. Concept of Welfare of Child: Custody of Child

In considering the question of the welfare of the minors due regard has of course to be paid to the right of the father to be the guardian and to all other relevant factors having a bearing on the minor's welfare. The presumption is that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure.

Where there is no dichotomy between the fitness of the father to be entrusted, with the custody of his minor children and considerations of their welfare, the father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under Section 25 HMA merely because there is no defect in his personal character and he has attachment for his children, which every normal parent has.

In ***Ram Kishore Singh v. Nirmala Devi Kushwaha and another,***M.P. High Court laid down certain *welfare of the minor* guidelines, it is well settled that in matters concerning custody of minor children, and "*not the legal right of this or that particular party is paramount consideration*". Regarding custody of minor the following genuine facts are to be kept in mind:–

a) Ascertainable wishes and feelings of the child concerned, considered in the light of his age and understanding.
b) His physical, emotional and educational needs.
c) The likely effect on him on any change in the circumstances.
d) His age, sex, ground and any characteristics, which the Court considered relevant and lastly.
e) Any harm which he has suffered or is at risk of suffering.

Therefore, now the Indian courts started giving duly weightage to the relevant considerations and facts that appears to be just in the custody of the child welfare.

Therefore, we can conclude, "Despite wide variations regarding the right of custody in the personal laws, the courts in India have applied the "***principle of the welfare of the child* or *the best interest of the child***." Every case is different, and the interpretation of the best interest varies from case to case.

4. Parens Patriae Jurisdiction- Importance of Judicial Interference

The word ***`welfare'*** used in *Section 13* of the Hindu Minority and Guardianship Act, 1956 has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical wellbeing. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae jurisdiction* arising in such cases.

In ***Nil RantanKundu v. AbhijitKundu***, while explaining the scope and power to make orders as to guardianship and the factors to be considered by the Courts in the matter of appointment of mother as guardian, the Court held as follows: "*In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing there from. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases is bound neither by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising* ***parens patriae jurisdiction*** *and is expected, may bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings."*

In ***ABC v. State (NCT of Delhi)***,the Supreme Court held that "Guardianship or Custody orders never attain permanence or finality and can be questioned at any time, by any person genuinely concerned for the minor child, if the child's welfare is in peril." The uninvolved parent is therefore not precluded from approaching the guardian Court to quash, vary or modify its orders if the best interests of the child so indicate.

5. India's Commitment under International Law: UNCRC

According to the **United Nation *Convention on the Rights of the Child(UNCRC),*** "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***". The Convention goes on to state that a child should be separated from his or her parents if there is "*abuse or neglect of the child by the parents*".According to the United Nations Human Rights Commission, the "best interests of the child" is a proxy for the "*well-being of a child*" based on a variety of circumstances laid out by the Convention.

While the father is always the natural guardian, the mother is given the custody of the child based on what is termed as the "tender age theory". Custody is granted during pendency of a matrimonial dispute between parents [Section 26 of the Hindu Marriage Act (HMA)]. Under the HMA, however, courts have to be guided by the principles of the Hindu Minority and Guardianship Act (HMGA). The mother ordinarily has custody of a child till the age of five years.

6. Sigmund Freud and Child Development : Psychoanalysis Approach

When it comes to deciding the welfare of a child, it becomes important for this court to consider the psychoanalysis of law. According the research done by ***very famous Austrian neurologist Sigmund Freud*** who developed psychoanalysis approach of understanding child's developments in various stages of life, according to which there are specific stages in which an individual has a specific need, and gratification during each stage is important to prevent an individual from becoming fixated in any particular level.

7. Visitation Rights of Parent:

In ***Bimlendu Kumar Chatterjee v. Dipa Chatterjee,***Court held that Right of father to see his child (in the custody of the mother) at regular intervals could not be ignored. It can be inferred in case of ***RuchiMajoo v. Sanjeev Majoo,*** Supreme Court held that ordinarily visitation rights should not be denied. Obstacles and apprehensions in the grant of such rights should be addressed. Visitation rights given to father by imposing conditions on each party and removing obstacles and apprehensions. Husband (not having custody of child) also given right to uninterrupted telephonic contact and video-conferencing under Ss. 7 and 17 of Guardians and Wards Act, 1890.

8. In this Era of Working Mothers:

In the case of ***Thirty HoshieDolikuka v. H.S. Dolikuka***, the Supreme Court laid down the principle that : *whether a woman works or not is irrelevant in judging her ability to take care of her child.* The mother's fitness to act as a custodian of her child was unaffected by whether she worked outside the home for a living or was a housewife. It has now become an established principle that a mother cannot be denied custody just because she is working.

9. Response of Indian Judiciary in Case of Guardianship and Custody Laws

In a 1950 decision under the Guardians & Wards Act, the Madras High Court awarded custody to the mother based on the welfare principle, even though the father was not found unfit to be a guardian. Courts have held that in deciding custody, children should not be uprooted from their familial surroundings just to give effect to the father‘s right to natural guardianship. In a case where the child was brought up by the maternal grandparents after the death of the mother, the Andhra Pradesh High Court held that in view of Article 21 of the Constitution, children cannot be treated as chattel and the father‘s unconditional right to the custody over children and their property cannot be enforced, even if the father was not unfit to act as the guardian.

Two problems can be noted with the legal and judicial framework described above. The first is the superior position of the father in case of guardianship, though not necessarily in case of custody. The second is the indeterminacy of the welfare of the child principle, despite its widespread usage.
The Researcher finds that under the GWA the discrimination between the mother and the father in terms of guardianship has been removed by the 2010 amendment to Section 19(b). However, discrimination between the parents continues under the HMGA. As far back as 1989, regarding the preferential position given to the father under Section 6(a) of the HMGA, the Law Commission of India had stated that:

“Thus, statutory recognition has been accorded to the objectionable proposition that the father is entitled to the custody of the minor child in preference to the mother. Apart from the fact that there is no rational basis for according an inferior position in the order of preference to the mother vis-à-vis the father, the proposition is vulnerable to challenge on several grounds. In the first place, it discloses an anti-feminine bias. In fact, clause (3) of Article 15, by necessary implication, gives a pre-vision of beneficial legislation geared to the special needs of women and children with a pro-women and pro-children bias. It is indeed strange that in the face of the said constitutional provision, the discrimination against women has been tolerated for nearly four decades*.”*

The Commission had recommended amending Section 6(a) to “constitute both the father and the mother as being natural guardians ‘jointly and severally’ having equal rights in respect of a minor and his property.”

Equality between parents is a goal that needs to be pursued and, indeed, the law should not make preferences between parents based on gender stereotypes. However, such equality cannot be only in terms of roles and responsibilities, but must also be in terms of the rights and legal position of the parents. Thus, the first step towards reform in this area is to dismantle the preferential position of the father in the HMGA, and make both the mother and the father as natural guardians.

Hence, “One must not lose faith in humanity. It is an ocean; if a few drops of the ocean are dirty, the ocean does not become dirty. One should never forget that today well lived makes every yesterday a dream of happiness and tomorrow a vision of hope. Therefore, the discord between two partners in a marriage should not spoil the future of the child.”

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