

WELFARE OF THE CHILD AFTER PARENTS' DIVORCE OR SEPARATION – KEY ANALYSIS

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INTRODUCTION

The law governing Custody in India is firmly associated with Guardianship. Though it has a narrower purview as compared to Guardianship. Custody of a child is an essential concept of a matrimonial relationship when the parents fall out of their marriage and reach the courts. It is granted specifically as a matrimonial relief to a parent who seeks such custody. When marriages break, it is neither the father of the child, nor the mother who suffers the most. It is always the child. Thus, in order to deal with the issue of custody, the most crucial point that the courts take into consideration is the welfare of the child.

While there are laws that safeguard the welfare of the child in such matters, there is no law in India that specifically talks about joint-custody and shared parenting. There has been significant demand for laws to be amended in order to include a shared parenting model in India, and many countries have legislations providing for it. As India does not have a legislation that talks about shared parenting, in the absence of the same, the instances in which shared parenting is granted pan out of judicial pronouncements. Therefore, this article relies heavily on judicial pronouncements while discussing the concept of custody after separation and divorce of parents.

It is divided into three parts. The first part explains the welfare principle adopted by the courts while granting custody wherein the most crucial point of consideration is the best interest of the child. The second part provides a critical analysis of the concept of joint custody and shared parenting with an interplay of the welfare principle and raises some concerns that arise out of the absence of a dedicated legislation governing the same. The third and last part of this article provides a suggestive conclusion to the concerns raised in the above parts of the article and a personal opinion.

I – PRINCIPLE OF WELFARE OF THE CHILD

This principle of welfare of the child follows a twin objective approach at deciding custody of the child. The first point of consideration is the assurance of ***best environment for the growth of the child***. The best interest of the child is what holds primacy over any other factor whatsoever. The second point of consideration is that of ***public interest linked with the proper growth of the child***. As the child is the future of the nation, public good depends upon its proper growth, as was reiterated by the Supreme Court in the case of *Vivek Singh v. Romani Singh*.

Therefore, in order to decide the issue of the custody of a child the two things that the court concerns itself with are:

- i. Providing the best environment possible to the child.
- ii. Ensuring his proper growth for public good.

In order to decide which among the two parents is better suited to be granted the custody of the child, the court follows a positive test laid down by the Supreme Court in the case of *Nil Ratan Kundu v. Abhijit Kundu*. The threshold is not that one parent is unfit or disqualified from being granted the custody hence it shall be granted to the other parent. It is that which parent, or guardian, is in a position to best provide for the child. However, it is not that the courts completely disregard the negative factors. They are nonetheless considered to deny custody to a parent unfit in such a context.

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Certain principles of the child's welfare were recently reiterated by the Supreme Court in the landmark judgement of *Smriti Madan Kansagra v. Perry Kansagra*. As per the court, all considerations must yield to the welfare of the child. The Supreme Court also laid emphasis on the fact that whenever a question with regards to custody comes to the court, it must not be determined upon the legal rights of the parties but the "sole and predominant criterion of what would serve the best interest of the minor." In addition to this, the Supreme Court in the case of *Gaurav Nagpal v. Sumedha Nagpal* held that the term welfare must be interpreted in the widest sense wherein the moral and ethical welfare of the child must be given as much importance as his physical well-being. In order to determine such best interest, the court takes into consideration multiple factors including age of the child, living conditions available to it, financial standing of parents, etc.

In the *Nil Ratan Kundu case*, the Supreme Court clearly drew the principles that govern custody of children. The "relevant statutes and the rights flowing therefrom" must be taken into consideration however, these cases must not be decided wholly on the interpretation of the law. The court describes the question of custody as a "human problem" which must be solved with a "human touch". In order to ease the court in extending this human touch, the Supreme Court laid down the rule that while determining custody, a court is "neither bound by statutes nor by strict rules of evidence or procedure nor by precedents." The court must pay the due heed to "child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings," while taking into equal, or even more consideration, its moral and ethical values.

In addition to all this, the court shall also take into consideration its personal interaction with the child. In the *Smriti Kansagra case*, the child whose custody was in question had spent most time with his mother. When the court interacted with the child, he tended to praise and admire his father and that side of the family based on which the court construed his choice and gave it significant weight while deciding that the custody shall be granted to the father.

The *Smriti Kansagra case* also reiterates that the nationality of the child is an important factor to be considered.

If the custody is granted to the parent whose nationality is different from that of the child, such parent is required to obtain an order from the court of the country concerned recognising the Indian Court's order of custody, as was laid down by the Delhi High Court in the case of *Navtej Singh v. State of NCT of Delhi*, and reiterated by the Supreme Court in the *Smriti Kansagra case*.

In addition to these factors, it must also be clear that the position of law is such that the courts do not favour a parent merely on the basis of their financial status. In the case of *Gaurav Nagpal v. Sumedha Nagpal*, the father was significantly superior to the mother in terms of financial standing but the court awarded the custody to the mother nonetheless for she was found fitter to be entrusted with bringing up the child.

The Supreme Court's recent judgement in the case of *Lahari Sakhamuri v. Sobhan Kodali*, sums all rules up and lists down the factors that must be taken into consideration by the courts while dealing with the issue of custody as:

"(1) maturity and judgment;

(2) mental stability;

(3) ability to provide access to schools;

(4) moral character;

(5) ability to provide continuing involvement in the community;

(6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual."

While the above section explains the Principle of the Welfare of the Child to determine which parent must be granted custody, there has been significant argumentation in favour of adopting shared parenting as a usual practice in India. The Law Commission of India in its 257th report provided a proper insight into this concept and suggested certain amendments to the laws pertaining to joint custody parenthood. This part of the article provides an analysis on the concept of shared parenting in the context of the Welfare Principle.

According to the law commission report, there are two models of shared parenting in India. One is **shared responsibility parenting** where the parent not granted custody still shares economic and decision-making responsibility in its life. The other is **shared access parenting** wherein the parent not granted custody still has physical access to the child who lives at alternative intervals with both parents and the responsibility of the child is borne by the parent who has custody at the concerning point of time.

The International Council of Shared Parenting defines it “*to include both the shared parental authority (decision making) and shared parental responsibility for the day-to-day upbringing and welfare of the children, between both the parents keeping in mind children's age and stage of development.*” The concept is prevalent in many countries but India lacks a legislature providing for it. However, it has been granted by the Indian courts in some instances.

One of the most prevalent problems that arise out of the absence of a legislation outlining the way shared parenting should function in India is that monetary responsibility of the parents is assumed to be shared equally or directly proportional to the time spent with the child.

A very recent and landmark judgement of the Karnataka High Court in the case of Smt. Savitha Seetharam v. Sri Rajiv Vijayasathya Rathnam, explains this concept in light of the welfare principle and provides certain grounds along which shared parenting can be granted to the parents. The court notes that the rights of the child must be taken into consideration in these cases and not the rights of the separated parents. It also lays heavy emphasis on the fact that this issue must always be dealt on a case-to-case basis. In light of this, the parents must share a parenting plan with the court before a decree of divorce has been granted to them which caters to the best interests and welfare of the child. The court also clarified the following pointers while drawing the shared parenting model for the parents:

- The joint parenting plan must be drawn so as to prevent any “instability or inconvenience” to the child.
- Parents must share their personal profile with the court to assist it in assessing the requirements of the child accordingly.
- Parental responsibility must be such that the child is treated as an individual with appropriate capabilities, limitation and independent opinions.
- Focus of the model must only be the child’s interests.

Thus, in order to ensure these pointers, the court in this case allowed equal access to the parents for half a year each on different intervals considering his school days, percentage division of his vacations and that both parents must celebrate his birthday together, or with a consensus while sharing all information about him including health, co-curricular, etc with each other regardless of who has the custody at any point of time.

While this case provides an appropriate model for shared access for the parents, it does not talk about the division of expenditure of the child between the parents. The Karnataka High Court in another judgement in the case of K.M. Vinaya v. B.R. Srinivas, held that both parents must be granted custody to aid sustainable growth of the child, and directed the parents to share all expenses of the child equally.

As just and fair as dividing expenses equally might seem, it is not appropriate for the Indian scenario considering that in most cases there is significant disparity between the incomes of both the parents. In the KM Vinaya case this was not a problem as both the parents were earning handsome amount money each. The question here arises that if the parents are not earning equally, how would the court then divide their monetary responsibilities? The next part of this paper deals with this question.

III – SUGGESTIVE CONCLUSION AND PERSONAL OPINION

Considering the importance of shared parenting or joint custody for the sustainable growth of the child, it is important that the courts grant it in the cases where it is possible. However, there must not be a presumption of joint custody in such cases because there are many factors that would defeat the welfare principle if joint custody is granted. For example, if one of the parents is abusive and has a track record of domestic violence, staying with such parent can have serious psychological, and in worse cases, physical repercussions on the child. While dealing with the issue of custody, the courts must therefore apply a test of negating the rights of such parents over the child's custody.

Apart from that, as discussed above, due to the absence of a legislation governing this concept there is a possibility of different courts providing for different methods of shared parenting. As in the KM Vinaya case, the Karnataka High court ordered both parents to share the expenditure of the child equally, if such a principle is adopted by other courts, or is used as a precedent it would lead to significant problems as in most cases the two parents do not have an equal income. In order to deal with this problem, the first and the foremost thing that must be done is drafting a legislation that governs this concept, like other countries. With regards to the problem pertaining to monetary responsibility, I would like to suggest a pro-rata model of expenditure wherein the burden of expenditure borne by each parent shall be proportionate to their income. With such a model, monetary responsibility of the parents could be divided 'equitably' as opposed to 'equally'.

With regards to other terms of the joint custody such as physical access to the child, a model must be submitted by the parents in consensus with each other. If they fail to do so, the courts could grant the same in a manner in which the Karnataka High Court granted in the *Savitha Seetharam case* where certain months of the year and the vacations of the child are spent with the each of the parents.

In my opinion, shared parenting or joint custody would be of vital benefit to the child because that is the only way to preserve the touch of both the parents despite their separation. Marriage as concept evolved, not for companionship of two people but to safeguard the certainty of paternity of the child. The backbone of the institution of marriage is a child and its welfare and if such institution breaks, the welfare of the child must be safeguarded in every manner possible. Granting custody to one of the parents might be beneficial for the child in some cases, but where it is possible to have the touch of both parents, it must be provided so as to ensure the child's sustainable growth. The concept of shared parenting is evidently beneficial for the child but since India lacks a dedicated legislation to this effect, there are certain grey areas that create problems as pointed out above.

Therefore, it is best that a legislation be drafted so as to rule out any possibility of probable problems such as division of expenditure in unequal income of the parents. Such a legislation must give preference to what model the parents come up with and must take into consideration all the relevant details about their personal profile in order to draw the competence each of them has in fulfilling the child's requirement and grant joint custody accordingly.
