

FEASIBILITY OF SHARED PARENTING LAWS IN INDIA

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INTRODUCTION

Child custody is the most prioritized issue when parents decide to split their ways and fall out of marriage. Neither the mother of the child nor the father gets affected as much as the child gets affected due to this decision. According to a report, “The worst affected due to parent and family breakdowns are the children”. The court wants the best for the child. Child custody refers to the legal guardianship of a child under the age of 18 after the separation of parents. The welfare of the child is the only objective of the court.

In India as far as the custody topic is considered supremacy is given to one parent as per the welfare of the child. In such cases, the other parent is allowed to meet the child on specific days. In *Vikram lal vs Pooja*, the court directed to give the custody of the subject child to the mother and father to ensure that the child gets the love and affection of both parents equally the overnight visitation rights were given to the father. During the hearing, the child was found equally happy and comfortable with the parents. In such cases shared parenting is found effective. The concept of shared parenting comes under joint custody. Sharing physical custody of a child after divorce. In the case of *Smt. Savitha Seetharam vs Sri Rajiv Vijayasarathy Rathnam* joint physical and legal custody was given to parents means both the parents will have equal rights and responsibilities towards the child. In the United Nations of America, United Kingdom, Sweden, Netherlands, Australia, South Africa, Thailand, Singapore and Kenya the concept of shared parenting has been prevalent but not so well entrenched in India. The concept has been ordered in a handful of cases. We should understand that the role of both parents is equally important in the overall development of the child. Both parents have equal responsibilities and impact on the child in their ways physically, mentally and socially as well. The old practice of awarding custody to one parent may be effective in some of the cases but it is not applicable for all. Shared parenting would divide the responsibility equally to both parents for the welfare of the child. It also allows a child to be gender-neutral.

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LEGAL FRAMEWORK OF CUSTODY AND GUARDIANSHIP IN INDIA

India is a diversified country where different religions have separate personal laws that govern matters such as marriage, divorce and child custody. Hindu Minority and Guardianship Act 1956: The custody of a minor under the age of five shall ordinarily be with the mother.

The custody of an illegitimate girl with the mother and an illegitimate boy with the father. Ms. Githa Hariharan & Anr vs Reserve Bank Of India 17 February 1999 The case judgment gave a new point between section 6 (a) of the Hindu Minority and Guardianship Act, 1956. Both parents are natural Guardians of a minor Hindu child and the mother cannot be said natural Guardian only after the death of the father. Mothers should not be given secondary importance as it is gender discriminatory according to articles 14 and 15 of the Indian Constitution and it also affects the welfare of the child. Muslim personal law. The mother has custody of the child and she cannot deny it until she is found guilty of misconduct. According to Hinafi (Hizanat), the custody of the male child will be with the mother till the age of seven and later be terminated and of the female till puberty. According to Shia, the mother holds the custody of a male child till he is two years of age and a female till seven years. In Akbal Ahamd vs Jamila Khatoon And Another in the absence of either the mother or the father the other parent has the right of Custody ignoring the sex and the age of the minor child. Christian personal law, The Christian custody cases are dealt with under the Indian Divorce Act, of 1869 with the Guardians and Wards Act, 1890. In Rosy Jacob vs Jacob A. Chakramakkal 5th April 1973 the court directed that the best interest of the child will be concerned during the custody and not the rights of their parents. Guardians and Wards Act, 1890 Section 41 (1)(e) of the Guardians and Wards Act provides the custody of the child to the guardian whose parents are unfit for the child. The law regulates custody for all children irrespective of their religion. Section 7 authorizes the welfare of the minor.

These laws are considered when the matter of child custody is concerned in India.

JOINT CUSTODY

The Law Commission of India presented the report on 22nd May 2015 emphasizing the welfare of the child should be given topmost priority in custody and guardianship matters. In November 2014 a consultation paper was issued by the commission for analyzing the child custody laws in India and reviewing the effects of shared parenting laws in other countries. In its 257th report which was submitted on May 22nd, 2015 the commission recommended reforms in Indian

child custody laws. Responses received were: The child needs both a mother and father in different aspects of life and he or she should bond with both of them. Stereotypes of gender-based custody that girls should be raised by mothers and boys should be raised by fathers should be broken and a new neutral view of Custody should be adopted. The report also suggested some suggestions for implementation of the law such as parents should have a joint bank account for the child, a parenting plan should be submitted by both parties, and a mediation center should be set up. Joint custody laws are not provided in India but according to some lawyers in the family court, it is reported that the joint custody concept is used in solving custody disputes. In *KM Vinaya vs B Srinivas* both the parents were given equal legal rights for the welfare of the minor child. The parents were directed to bring the child into joint custody and guardianship in the future. Father's rights group has also demanded joint custody laws as in custody cases mothers are given priority in Indian custody laws. They have demanded that fathers must also have equal rights in custody-related matters. According to them, the laws are biased towards the father as they are also the natural guardians of the child. The custody laws should also consider the gender equality mentioned in the Indian constitution.

NEED TO ADOPT SHARED PARENTING LAWS IN INDIA

In Western countries, law has been made regarding shared parenting and they have proven effective in the overall development of children. Joint custody is awarded in most of the cases in Western countries and sole custody in exceptional cases. In India the option of joint custody should be provided in cases as an option, if the parents are convinced joint custody should be awarded for the welfare of the child. In the judiciary joint custody has been engaging as an option in the child custody cases. As discussed above we have seen for the betterment of the child, parents also agree to joint custody. However, the concept has been used only in a handful of cases. It should be made available in all cases for the welfare of the child with the mutual understanding of the parents. India is a developing country, and with development in each sector, the development of family laws should also be updated. According to Flavia Agnes, 'In custody battles nowadays, the mother and father are equipped as natural guardians; they need to care for the children of a tender age routinely. The best interest of the child should be taken into consideration with the existing living arrangements and a good home environment should be prioritized. In Custody matters the overall welfare should be considered. Also, The principle of "the best interest of the child" is implemented in Article 3 (1) Convention on the Rights of the Child (CRC), which provides that "in all actions concerning children, whether undertaken

by public or private social welfare institutions, a court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. In the assessment, the child's health, education and family environment should be considered. The main aim of shared custody is the welfare of the child in every aspect.

MEDIATION IN CHILD CUSTODY

Mediation is a concept in which a neutral third party tries to solve the dispute of disputing parties to arrive at a negotiable settlement. It is a nonbinding dispute resolution method. In child custody, it is in the best interest of the child to establish a solution that meets the family's needs and not to determine right or wrong. The child gets the assurance that their parents are willing to work together to resolve their family disputes. Parents are in a better position to decide what is good for their child, it also helps parents to trust each other for future negotiation. It is easier to work with the plan that parents have formulated themselves rather than the one that is imposed by the court. Mediation produces better outcomes for children after divorce. According to Section 9 of the Family Courts Act, 1984 in the court proceeding, at the first instance in arriving at a settlement between the parties, the family court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to settle if there is a reasonable possibility. The Supreme Court stated that Many times the cause of the matrimonial dispute is trivial and can be sorted. When the dispute is taken up to the family court for the first instance it must be referred to mediation centers. 10-15 % of the matrimonial dispute gets settled in the court through the mediation center. Mediation is a method of alternative dispute resolution that has legal recognition now. The Mediation Training Manual circulated by the Mediation and Conciliation Project Committee of the Supreme Court, States that disputes relating to matrimonial cases and custody of children are normally suitable for Alternative Dispute Resolution processes.

In South African law, 'A confrontational approach should be avoided and a conciliation and problem-solving approach should be followed'.

In Virginia law, 'mediation shall be used as an alternative to litigation where appropriate.'

In China, a court dealing with divorce cases 'shall carry out mediation'. Mandatory mediation has been criticized as it may be problematic in some cases.

In Canada, family mediation is promoted widely as an alternative to litigation.

The above-mentioned laws tell how mediation is implemented in family matters in Western countries as well as in India.

CONCLUSION

In conclusion, The face of joint custody is changing in the whole world. Western countries across the globe have adopted the law of joint custody. The best interest of the child is prioritized, the child gets the love and affection of both the parents. The legal guardianship of the child will be shared equally by both parents. The child will be able to connect equally with maternal as well as paternal grandparents. Each decision for the betterment of the future of the child will be taken by both the parents be it educational, medical, religious or extracurricular activities. The welfare of the child will be prioritized in this law.

Considering some factors like whether both the parents will be able to cooperate for the welfare of the child, whether each of them is willing to continue the relationship between the child and the other parent, whether they will be able to implement a day-to-day care plan for the child, the extent to which both are willing to work together and any other circumstances that court think is relevant joint custody was awarded in cases of Yashita Sahu vs State of Rajasthan,

Sanjay Kumar vs Suman Kumari and Tushar Vishnu Ubale vs Archana Ubale . These cases are a good example of how joint custody laws can be practiced in India. This legal reform will have a huge impact on the Indian judiciary system. It will eliminate the problems faced by the child after the separation of parents. Beyond the legal aspect, it will provide a shift towards the welfare of the child. While challenges may persist in the implementation of the law, the acknowledgement of the feasibility of shared parenting will play a pivotal role in the pursuit of the welfare of the child, offering a brighter future for them.

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