

PROTECTION TO THE CHILD UNDER THE LAW OF GUARDIANSHIP

By

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Whenever a court is called upon to determine any issue in respect of the Children vis-à-vis their parents it decides the matter solely on the basis of the welfare of the child and does not consider the issue from the point of view of the rights of the parents. The modern law proceeds on the principle that there is social interest in the protection of children. The parents can not claim rights against the children just because they happens to be the father or the mother. A decade ago, the Supreme Court in a land mark decision¹ held that “mother also is a natural guardian having concurrent power with the father in the matters concerning the minor even during the life time of the father”. The court also held that its interpretation of the Hindu Minority and Guardianship Act, 1956 (hereinafter called HMG Act) and the Guardians and Wards Act, 1890 (hereinafter called GW Act) is in pursuance of the International Convention, on the elimination of All Forms of Discrimination against Women, 1979 (CEDAW) and Beijing Declaration, 1995. These instruments direct all signatories to take appropriate measures to prevent any discrimination against women. India ratified CEDAW in the year 1993.

Guardians and Wards (GW) Act, 1980 and Hindu Minority and Guardianship Act :

The HMG Act has brought about certain changes in the position and status of guardians. The Act improved the status of the mother as one of the natural guardians. However this

Act is not a complete legislation in matters relating to guardianship. The provisions of the GW Act have to be relied on in all those cases where HMG Act is silent. Therefore the provisions of the GW Act have to be applied in the interpretation of HMG Act.

According to HMG Act ‘Guardian’ means a person having care of the person of a minor or his property². The natural guardians of Hindu Minor are father and after him the mother but in case of illegitimate children the mother and after her the father and in case of married girl the husband³. However no person shall be entitled as natural guardian of a minor under the provisions of HMG Act except in case when the father has ceased to be a Hindu or he has completely and finally renounced the world. The father’s right over the child is absolute and uncontrolled. He is also the proper judge to decide the welfare of the child. In *Sundara Murthy v. Shanumuga Nadar*⁴ the Madras High Court held that “even if the father neglects to look after or to discharge his obligations towards the minor, the mother cannot be the natural guardian, so long as the father is alive”. The Madras High Court in another case said “no one other than the father and failing him the mother has an absolute right to have the guardianship over the minor child. The Hindu Law recognized primacy of the father as the legal guardian and custodian of his unmarried minor daughter when he is alive. Failing the father, the mother comes into picture and she should assume such guardianship and custody.

1. *Geetha Hariharan v. Reserve Bank of India*, AIR 1999 SC 1149. The Bench comprising of CJ Dr. A.S. Anand and Justice M. Srinivasan and U.C. Benerjee.

2. Section 4 (b) of HMG Act, 1956.

3. Section 6.

4. AIR 1980 Mad. 207.

Child's Welfare is the Paramount Consideration :

Under the Convention on the Rights of the Child, 1989 adopted by the General Assembly of the United Nations, the state parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for upbringing and development of the child. The best interest of the child will be their basic concern⁵. The Convention provides that States parties that states parties shall ensure that a child shall not be separated from his or her parents against their will, except by the competent authorities who shall subject to judicial review determine, in accordance with applicable law and procedure, that such separation is necessary for the interest of child⁶. In all actions concerning the children whether undertaken by public or private, social welfare institutions, courts of law, administrative authorities or, legislative bodies, the best interest of the child shall be the primary consideration⁷. The Government of India acceded to this Convention on 11th December, 1992.

According to the Section 13 HMG Act, on the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration. No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating the guardianship in matters relating to marriage if the court is of the opinion that his or her guardianship will not be for the welfare of the minor.

The Courts in India in number of cases have applied the welfare principle. In *Manju Tewari v. Dr. Rajender Tewari*⁸, The Supreme Court held that the minor would be in the

custody of the mother only if it would be detrimental to his or her interest if the custody is given to father. In fact there is a difference between the custody and guardianship. Custody means the keeping, guarding, caring and watching of a minor whereas guardianship is the legal right for the overall care of minor's person and property or both. Therefore, guardianship is more comprehensive and valuable than mere custody. If the father is deprived of the guardianship of the children, he ceases to have any right to move the court regarding care and custody of the children whereas if he continues to be the guardian, and only custody is given to the mother he can always move the court for returning the custody to him whenever he proves the circumstances justifying it *i.e.* the welfare of the child.

This proviso of clause (a) of Section 6 of HMG Act, provides that the custody of the minor who has not completed the age of five years shall ordinarily be with the mother. The Parliament intended that a child below the age of 5 years require nourishment and upbringing, which can only be done by mother. Therefore the child below the age of 5 years has been put in the custody of mother and simultaneously in the guardianship of the father. The custody of a child below 5 years has been given to the mother: "ordinarily" means that if the mother's custody is not in the interests of the child, it may be given to the father even when the child is below 5 years.

In *Dr. Snehalatha Mathur v. Mahendra Narain*⁹ the mother who was in custody of her daughter aged above five months, took a decree of divorce from her husband. She entrusted the custody of her child to her parents for the time being and left for foreign country for a temporary period. The child stayed with the grand father and grand mother and developed great affection with them. Later on the father claimed the custody of

5. U.N. Convention of the Rights of the Child : Article 18.

6. Ibid Article 9(1).

7. Ibid Article 3.

8. AIR 1990 SC 1156

9. AIR 1980 Raj. 64.

the daughter, on the ground that he is the natural guardian and therefore the child should be in his custody. The court conceded that though the child was in the custody of maternal grandparents, yet the child was deemed to be in the custody of her mother only. However, the court held that keeping in view the over all interest and welfare of the child, it is desirable to entrust the child to the custody of the father because he is very much keen to look after the child.

Recognizing the order of the German Court the Kerala High Court reiterated the principle of the welfare of the child in *Margret v. Chakoo*¹⁰. In this case an Indian Christian domiciled in India went to West Germany for higher studies and married there a German domiciled woman. Two children, a boy and a girl, were born of this marriage. But the marriage broke down and mother obtained a decree of divorce from a German Court and also an order of custody of children in her favour. Subsequently, defying the order of the German Court the father flew to India with the children. He did not inform the mother about the children either before leaving or after arriving in India. However, the mother was able to trace the whereabouts of the children and came to India and filed for permission to take the children out of India. Nair J said that the Court would recognize the German order of custody and give effect to foreign judgment; as to do so would be in the interest of the welfare of the children.

In *Surender Kaur Sandhu v. Harbux Singh Sandhu*¹¹, the Supreme Court again invoked the concept of the welfare of the child. The

parents of the child who were Indians had gone to England to settle there. A child was born to them in England. Father tried to get the mother of the child murdered for which offence, he was convicted by the court. The mother obtained a probation order for him but he abused her magnanimity and ran away to India with the child. The mother obtained a custody order from the Family Division of the High Court of England. In pursuance of that order she filed a writ petition in the Punjab and Haryana High Court. The High Court, in the interest of the welfare of the child, allowed the child to stay in India. The Supreme Court reversed the findings of the High Court and held that under the circumstance it would in the interest of the child to be committed to the custody of the mother. The court further observed, "Section 6 of the HMG Act, 1956 constitutes the father as natural guardian of a minor son. But the provision cannot supersede the paramount consideration as to what is presented to us today, the boy, from his own point of view ought to be in the custody of the mother." The Precedent of this case been followed by the Rajasthan High Court in *Isabell v. Ramsingh*¹² case.

The courts in India right from the inception of the Guardians and Wards Act 1890 have consistently given effect to the principle of predominance to the interest and welfare of the child. The U.N. General Assembly also agreed that State parties should use their best efforts to ensure recognition of the common responsibility of the parents for upbringing and develop and development of the child. The best interests of the child should be their basic concern.

10. AIR 1970 Ker. 1.

11. AIR 1984 SC 1124.

12. AIR 1985 Raj. 30.