

## **Guardianship and Custody Laws in India- Suggested Reforms from Global Angle**

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**Abstract:** The “Best Interest of the Child / Welfare of the Child” is the paramount consideration in adjudicating custody and guardianship matters. The worst affected in proceedings relating to 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. The Bombay High Court in *Carla Gannon v. Shabaz Farukh Allarakhia, Criminal Writ Petition No. 509 of 2009* held that for determining the final decree, the child’s welfare was the supreme consideration, irrespective of the rights and wrongs that the parents contend. The Supreme Court in *Nil Ratan Kundu v. Abhijit Kundu (AIR 2009 SC (Supp) 732)*, has said that the welfare of a child is not to be measured merely in terms of money or physical comfort, but the word ‘welfare’ must be taken in its widest sense so that the tie of affection cannot be disregarded. On 6<sup>th</sup> July 2015 the Supreme Court in *ABC v. The State (NCT of Delhi)*, delivered a path breaking judgment on gender equality and ruled that even an unwed mother must be recognized as legal guardian of her child without forcing her to disclose the name of the child’s biological father. On 13<sup>th</sup> September, 2013 Karnataka High Court, in *KM Vinaya v B Srinivas (MFA No. 1729/ 2011)*, ruled that both the parents are entitled to get ‘joint custody’ “for the sustainable growth of the minor child”. This Article is divided into nine parts.

**Keywords:** Guardianship and Custody Laws, Welfare of the Child, Indian Judiciary, Shared parentage, Mediation or Conciliation

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### **I. Introduction**

“The law is dynamic and is expected to diligently keep pace with time and the legal conundrums and enigmas it presents.”<sup>2</sup>

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 (hereinafter, GWA) as a “person having the care of the person of a minor or of his property or of both his person and property.”<sup>3</sup> Another term used by the law is ‘natural guardian,’ who is the person legally presumed to be the guardian of a minor and who is presumed to be authorized to take all decisions on behalf of the minor. The legal difference between custody and guardianship (or natural guardianship) can be illustrated by the following example: under some religious personal laws, for very young children, the mother is preferred to be the custodian, but the father always remains the natural guardian. The face of child custody arrangements is changing. Numerous countries across the globe have adopted a preference for shared parentage systems over sole custody arrangements for child custody disputes post-divorce.<sup>4</sup> This trend has arisen largely in a response to changing familial roles (male care takers taking on more child rearing responsibilities) as well psychological studies revealing that the involvement of both parents in child rearing is preferable to sole custody arrangements.<sup>5</sup> However, such preferences for shared custody are often balanced with the “best interest of the child standard”.

The “best interest of the child” standard is increasingly utilized as the tool to evaluate child custody arrangements in many nations, particularly those who are signatories to the Convention on the Rights of the

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<sup>2</sup> *ABC v. The State (NCT of Delhi)* [Arising out of SLP (Civil) No. 28367 of 2011], Para.19

<sup>3</sup> Guardian and Wards Act, No. 8 of 1890] S. 4(2),

<sup>4</sup> Australia, Family Law Amendment (Shared Parental Responsibility) Act, Section 61 DA (2005); Netherlands, Civil Code, Article 247 (2009)

<sup>5</sup> Glover, R. & Steel, C., Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, *Journal of Divorce*, Vol. 12 No. 2-3 (1989)

Child.<sup>6</sup> It requires family courts to consider the well-being of the child as paramount.<sup>7</sup> Over the years, the non-negotiable principle on the basis of which cases of custody of children are decided is that of the ‘best interest and welfare of the child’ which attempts to enable each child to survive and reach his or her full potential.<sup>8</sup>

## **II. Aims and Objectives of the Research Paper**

- a. To 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;
- b. To analyze response of Indian judiciary on Shared Parentage;
- c. To provide equal legal status of both parents with respect to guardianship and custody;
- d. To suggest detailed guidelines to help decision-makers assess what custodial and guardianship arrangement serve the welfare of the child in specific situations; and
- e. To provide for the option of awarding joint custody to both parents, in certain circumstances conducive to the welfare of the child.

## **III. Research Questions**

- a. Whether shared parenting should be an option and/or a preference for the courts?
- b. Should and how can the “best interest of the child”/“welfare of the child” standard be balanced against other factors (i.e. the wishes of the parents, other children, the wishes of the child)
- c. Should such shared parentage arrangements be shared physical custody or shared legal custody or some other derivative thereof?
- d. Whether there should be physical or joint custody or should it be left to the discretion of the judge?
- e. How to create and implement mediation or conciliation institutions to be necessarily involved in the process of grant of guardianship and shared parentage
- f. In which circumstances must shared parentage arrangements be withheld? Eg: domestic violence, insolvency, mental illness
- g. Should and how does gender inequality (e.g. financial) affect establishing a shared parentage preference or option? E.g. the use of children as bargaining chips to secure maintenance
- h. What should be the role of the court in matters of joint custody? Should the court be proactive in such matters i.e. a constant supervisor of such arrangements?

## **IV. Best Interest of the Child/Welfare of the Child Standard**

The best interest of the child standard is utilized in a number of countries across the globe. According to the Convention on the Rights of the Child, “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**”.<sup>9</sup> 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”.<sup>10</sup> 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.<sup>11</sup> Welfare, as a decision criterion, is generally flexible, adaptable and reflective of contemporary attitudes regarding family within society.<sup>12</sup> However, there are two main criticisms of the best interest of the child standard. First, it is unpredictable and information intensive. Parents who are divorcing are thus left guessing in regard to how the court will handle their child custody dispute; this can lead to unnecessary pre-court bargaining that may indeed be harmful to both child and parents.<sup>13</sup> This could be resolved by a more predictable rule based standard. However, a rule based standard is likely to be rigid and not consider the individual circumstances of each case.<sup>14</sup> Second, the best interest of the child standard primarily focuses on the predicaments of the child rather than including the feelings and intentions of the parents. The parents are also actors within the family.<sup>15</sup>

### **Shared Parentage vs. Sole Custody Arrangements**

The literature on shared parentage appears to indicate that shared parentage arrangements fare better for the child concerned than sole custody arrangements (assuming no harmful effects from one or both of the

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<sup>6</sup> Convention on the Rights of the Child, Art. 3, (1989)

<sup>7</sup> *Ibid*

<sup>8</sup> Principle 4, Rule 3, Juvenile Justice (Care and Protection of Children) Rules, 2007.

<sup>9</sup> Convention on the Rights of the Child, Art. 3, (1989)

<sup>10</sup> *Ibid* at Art. 9

<sup>11</sup> UNHCR, UNHCR Guidelines on Determining the Best Interests of the Child, (2008).

<sup>12</sup> Gilmore, Stephen, *Great Debates: Family Law*, Palgrave Macmillian, (2014) pp. 76-83

<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid*

parents as well as in keeping with the best interests of the child standard). In a 1989 study of “intact families”, shared parentage agreements and sole custody arrangements, children in shared parentage families fared better in regard to family relationships and self-understanding.<sup>16</sup> Similarly, a study in 1991 found that children in shared/joint custody families had lower incidents of misbehavior than children in single maternal custody families.<sup>17</sup> In a 1996 study, researchers found that children in shared parenting arrangements had higher grades, more school efforts and decreased prevalence of depression in comparison to sole custody families.<sup>18</sup> More recently, a study on the adjustment of children in joint-custody versus sole-custody arrangements found that children in joint physical or legal custody were better adjusted than children in sole custody arrangements.<sup>19</sup>

On the other hand, several studies have shown competing information with regard to whether children (and families) fare better in sole or joint custody homes.<sup>20</sup> First, the concept of a presumption for either sole or joint custody is inimical to the best interests of the child standard. Such presumptions ignore the fact that the best interest standard is conceived of as a case by case application, not a categorical assumption for either such arrangement.<sup>21</sup> Second, the child’s interest may be further supplanted by laws requiring a presumption for joint custody.<sup>22</sup> Parents may engage in bargaining and agreeing to a poor joint custody arrangement for fear that they would lose in court against a single parent pushing for joint custody. This may be particularly detrimental in the case of battered women who may feel pressured into bargaining into a joint custody arrangement due to the mental repercussions of such violence at the hands of the other parent.<sup>23</sup>

## **V. Legal Framework Governing Custody and Guardianship in India;**

### **A. Statutory Law**

#### **i. 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 every religion.<sup>24</sup> 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.<sup>25</sup> 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.’<sup>26</sup> Section 17 lays down factors to be considered by the court when appointing guardians.<sup>27</sup> 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.’<sup>28</sup> 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.<sup>29</sup> Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court ‘may’ consider his/her preference.<sup>30</sup> Section 19 of the GWA deals with cases where the court may not appoint a guardian.<sup>31</sup> 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

<sup>16</sup> Glover, R. & Steel, C., Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, *Journal of Divorce*, Vol. 12 No. 2-3 (1989)

<sup>17</sup> Rockwell-Evans and Kim Evonne, Parental and Children’s Experiences and Adjustment in Maternal Versus Joint Custody Families, Doctoral Dissertation, North Texas State University (1991)

<sup>18</sup> Buchannan, M. & Dornbusch, Adolescents After Divorce, Harvard University Press (1996)

<sup>19</sup> Bauserman, R., Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review, *Journal of Family Psychology*, Vol. 16, No. 1, (2002), pp. 91-102

<sup>20</sup> Julie Poehlmann, “Representations of Attachment Relationships in Children of Incarcerated Mothers,” *Child Development* 76, no. 3 (May/June 2005): 679-696

<sup>21</sup> “In the end, as in every child custody decision, it is the welfare of the children which governs and each case will turn on its individual facts and circumstances”, *Dodd vs. Dodd*, 93 Misc. 2d 641, 403 N.Y.S. 2d 401, 402 (1978)

<sup>22</sup> Schulman, J. & Pitt, V., *Second Thoughts on Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 *Golden Gate U.L.Rev.* 556 (1982)

<sup>23</sup> *Ibid*

<sup>24</sup> Section 2 of the HMGA states that its provisions are ‘supplemental’ to and ‘not in derogation’ of the GWA

<sup>25</sup> Guardian and Wards Act, No. 8 of 1890, S.6 (“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.”)

<sup>26</sup> Guardian and Wards Act, No. 8 of 1890, S. 7

<sup>27</sup> Guardians and Wards Act, No. 8 of 1890, S.17

<sup>28</sup> Guardian and Wards Act, No. 8 of 1890, S. 17(1)

<sup>29</sup> Guardian and Wards Act, No. 8 of 1890, S. 17(2)

<sup>30</sup> Guardian and Wards Act, No. 8 of 1890, S.17(3)

<sup>31</sup> Guardian and Wards Act, No. 8 of 1890, S.19

unfit to be a guardian.<sup>32</sup> 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.<sup>33</sup> Section 25 of the GWA deals with the authority of the guardian over the custody of the ward.<sup>34</sup> 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.<sup>35</sup>

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.

## ii. 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.<sup>36</sup> 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:

- 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**,<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup>

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 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.

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<sup>32</sup> Guardian and Wards Act, No. 8 of 1890, S.19(b)

<sup>33</sup> Personal Laws (Amendment) Act, No. 30 of 2010, S. 2

<sup>34</sup> Guardian and Wards Act, No. 8 of 1890, S. 25

<sup>35</sup> Guardian and Wards Act, No. 8 of 1890, S. 25(1)

<sup>36</sup> Paras Diwan, LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY (2012), Universal Law Publishing Co.: New Delhi, P. xv.

<sup>37</sup> (1999) 2 SCC 228

<sup>38</sup> *Gita Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228, 25

<sup>39</sup> Hindu Minority and Guardianship Act, No. 32 of 1956, S.13

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.<sup>40</sup>

### iii. 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.

### iv. Islamic Law

In Islamic law, the father is the natural guardian, but custody vests with the mother until the son reaches the age of seven 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.<sup>41</sup> 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.<sup>42</sup> 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. These cases are discussed below:

### (v) 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<sup>43</sup> and Section 41 of the Indian Divorce Act, 1869,<sup>44</sup> 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.

## VI. Response of Indian Judiciary to 'Guardianship and Custody Laws'

The Supreme Court of India<sup>45</sup> and almost all High Courts have held that in custody disputes, the concern for the best interest/welfare of the child supersedes even the statutory provisions on the subject outlined above. While the older cases under the GWA unequivocally hold that the father can be deprived of his position as the natural guardian only if he is found to be unfit for guardianship, there are many cases where the courts have made exceptions to this notion.

Some illustrative examples are as follows. In a 1950 decision under the GWA, 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> Where both parents of the child were dead and the paternal relations claimed custody of the child who was residing with the maternal relations, the Calcutta High Court held that welfare of the minor was the paramount concern, and the paternal relations did not have a preferential position in matters of custody.<sup>49</sup> There are similar examples from other High Courts as well.

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<sup>40</sup> Guardian and Wards Act, No. 8 of 1890, S. 17(1) ("In appointing or declaring the guardian of a minor, the court shall . . . be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.") (Emphasis added).

<sup>41</sup> Paras Diwan, LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY (2012) Universal Law Publishing Co.: New Delhi, at P. xvi.

<sup>42</sup> *Ibid.*, at P. xvii

<sup>43</sup> Parsi Marriage and Divorce Act, No. 3 of 1936, S. 49

<sup>44</sup> Indian Divorce Act, No. 4 of 1869, S. 41

<sup>45</sup> *Mausami Ganguli v. Jayant Ganguli*, (2008) 7 SCC 673

<sup>46</sup> *Soora Beddi v. Cheema Reddy*, AIR 1950 Mad 306

<sup>47</sup> *Vegesina Venkata Narasiah v. Chintalpati*, AIR 1971 AP 134

<sup>48</sup> *L. Chandran v. Venkatalakshmi*, AIR 1981 AP 1.

<sup>49</sup> *Satyandra Nath v. B. Chakraborty*, AIR 1981 Cal 701

In deciding cases involving Muslim children, High Courts have decided in favor of the mother only when her right to custody was supported by Muslim law. In *Suharabi v. D. Mohammed*,<sup>50</sup> where the father objected to the mother's custody of the one-and-a-half year-old daughter on the ground that she was poor, the Kerala High Court held that the mother was authorized to have custody of a daughter of that age under Islamic law. In similar vein, in *Md. Jameel Ahmed Ansari v. Ishrath Sajeeda*,<sup>51</sup> the Andhra Pradesh High Court awarded the custody of an eleven-year-old boy to the father, on the ground that Muslim law allowed the mother to have exclusive custody only until the age of seven in case of male children, and there was nothing to prove that the father was unfit to be a guardian in this case. In another case, the Madhya Pradesh High Court interpreted Mahomedan Law to allow custody for the mother.<sup>52</sup>

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.

#### **A. Superior Position of the Father**

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). But 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. It reveals age-old distrust for women and feeling of superiority for men and inferiority for women. Whatever may have been the justification for the same in the past, assuming there was some, there is no warrant for persisting with this ancient prejudice, at least after the ushering in of the Constitution of India which proclaims the right of women to equality and guarantees non-discrimination on the ground of sex under the lofty principle enshrined in Article 15. 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."*<sup>53</sup>

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."<sup>54</sup>

The problem is further highlighted by the inconsistency between the superior position of the father in statutory law and recent judicial thinking on parental roles. In *Padmaja Sharma v. Ratan Lal Sharma*,<sup>55</sup> the Supreme Court held that the mother was equally responsible to pay towards the maintenance of the child. While pursuing the goal of equality in parental responsibility is laudable, the decision leads to an ironic result—the mother is not deemed a natural guardian and therefore does not have a say in significant decisions affecting the child, but she has equal financial responsibility towards the child. Similarly, in a 2004 judgment, commenting on a judgment of the Karnataka High Court that reversed a Family Court order and allowed the mother to retain custody of the minor daughter, the Supreme Court noted,

*"We make it clear that we do not subscribe to the general observations and comments made by the High Court in favour of mother as parent to be always preferable to the father to retain custody of the child. In our considered opinion, such generalisation in favour of the mother should not have been made."*<sup>56</sup>

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 natural guardians.

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<sup>50</sup> AIR 1988 Ker 36

<sup>51</sup> AIR 1983 AP 106

<sup>52</sup> *Mumtaz Begum v. Mubarak Hussain*, AIR 1986 MP 221

<sup>53</sup> Law Commission of India, 133<sup>rd</sup> Report, August (1989), Para. 4.1, available at: <http://lawcommissionofindia.nic.in/101-169/Report133.pdf>

<sup>54</sup> Law Commission of India, 133<sup>rd</sup> Report, August (1989), Para.4.3, available at: <http://lawcommissionofindia.nic.in/101-169/Report133.pdf>

<sup>55</sup> AIR 2000 SC 1398

<sup>56</sup> *Kumar v. Jahgirdar v. Chethana Ramatheertha*, SLP (Civil) 4230-4231/ 2003, Supreme Court of India, Judgment dated 29 January, 2004.

## B. Indeterminacy of the Welfare standard

While the welfare principle is used extensively by appellate courts dealing with custody issues, there is no evidence of the extent of its use by the lower courts. Based on a study of Family Court orders, legal academician Asha Bajpai notes,

*The best interest of the child may have been considered by the courts, but there was no mention of this standard in the orders. The courts did not give any information regarding the factors that they considered or their reasons for awarding custody. The orders just mentioned to whom custody was awarded in a particular case.*<sup>57</sup>

The problem with respect to the welfare principle is that despite its extensive invocation, the appellate judicial decisions do not illuminate the legal content of this principle. Family Law scholars note that while there are illustrations galore, no principled basis can be found in the manner in which courts use the welfare of the child standard. Legal academician Archana Parashar analyzed Supreme Court judgments from 1959 to 2000 that used the best-interest principle in custody disputes. Parashar concluded that in the absence of legislative guidance regarding what factors should be used to assess the best interest of a minor, courts give varied interpretations based on their personal ideas about what is best for the children and notions of ideal parenthood.<sup>58</sup> For instance, there are contradictory judgments on whether the financial capacity of a parent is a relevant factor in deciding custody.<sup>59</sup> Indeed, a large number of judgments have established precedents in favour of the mother. But as Parashar rightly notes, these decisions are also based on the judges' perceptions of who is a 'good' mother. Consequently, women who do not fit into such criteria would have difficulty claiming custody of children.

The wide discretion available to judges under the welfare principle also means that certain issues that should merit consideration are not treated seriously while determining custody. Allegations of sexual abuse against female children by fathers, grandfathers or other male relatives are brushed aside without any investigation, if they appear improbable to the judge.<sup>60</sup> Legal scholar and activist Flavia Agnes notes in this regard that "the courts must exercise their power with great prudence and caution, so that it does not result in violation of the basic human right of children, the right to life, which includes the right to live without fear and trauma."<sup>61</sup> The determinants of the welfare standard should, therefore, be clearly laid down so as to prevent judges from disregarding certain issues while determining custody and access.

This chapter has reviewed the legal framework governing guardianship and custody in India, and has identified two areas that require legislative reform.

The face of child custody arrangements is changing. Numerous countries across the globe have adopted a preference for shared parentage systems over sole custody arrangements for child custody disputes post-divorce.<sup>62</sup> This trend has arisen largely in a response to changing familial roles (male care takers taking on more child rearing responsibilities) as well as psychological studies revealing that the involvement of both parents in child rearing is preferable to sole custody arrangements.<sup>63</sup> However, such preferences for shared custody are often balanced with the "best interest of the child standard". The "best interest of the child" standard is increasingly utilized as the tool to evaluate child custody arrangements in many nations, particularly those who are signatories to the Convention on the Rights of the Child.<sup>64</sup> It requires family courts to consider the well-being of the child as paramount.<sup>65</sup>

**On 6<sup>th</sup> July 2015 the Supreme Court in *ABC v. The State (NCT of Delhi)*<sup>66</sup>, delivered a path breaking judgment on gender equality and ruled that even an unwed mother must be recognized as legal guardian of her child without forcing her to disclose the name of the child's biological father.**

The above judgment is a reflection of the dynamic thinking of the Apex Court which wants to keep company with the changing time. The GWA was passed by parliament way back in 1890. Thereafter the Indian

<sup>57</sup> Asha Bajpai, Custody and Guardianship of Children in India, 39(2) FAMILY LAW QUARTERLY 441, 447 (2005)

<sup>58</sup> Archana Parashar, Welfare of Child in Family Laws—India and Australia, 1(1) NALSAR LAW REVIEW 49, 49 (2003)

<sup>59</sup> In *Rosy Jacob v. Jacob A Chakramakkak* [AIR 1973 SC 2090] the Supreme Court gave custody of the children to the mother because she was economically well off and hence, would be able to take care of the children. In *Bhagya Lakshmi v. Narayan Rao* [AIR 1983 Mad 9], the Madras High Court gave custody to the father, since he had the means to provide the best comfort and education to the children. In *Ashok Samjibhai Dharod v. Neeta Ashok Dharod* [II (2001) DMC 48 Bom] the Bombay High Court held that affluence of the father or his relatives is not a factor in his favor for giving him custody.

<sup>60</sup> Flavia Agnes, Family Law II: Marriage, Divorce and Matrimonial Litigation (2011), Oxford University Press: New Delhi, Pp. 257-259

<sup>61</sup> *Ibid.* at 259

<sup>62</sup> E.g. Australia, Family Law Amendment (Shared Parental Responsibility) Act, Section 61 DA (2005); Netherlands, Civil Code, Article 247 (2009)

<sup>63</sup> Glover, R. & Steel, C., Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, Journal of Divorce, Vol. 12 No. 2-3 (1989)

<sup>64</sup> Convention on the Rights of the Child, Art.3, (1989)

<sup>65</sup> *Ibid.*

<sup>66</sup> [Arising out of SLP (Civil) No. 28367 of 2011]

society experienced many upheavals, as a result of which the S.C. wanted to turn GWA in favour of the child's utmost welfare. That is why this novel judgment.

### **C. Developments of Shared Parentage in India**

The idea of shared parenting is still new to Indian custody jurisprudence. While the old principle of the father, as the natural guardian has been laid to rest, in its place the 'best interest of the child' principle is applied to custody disputes. It has been held by the Supreme Court of India that in custody disputes, the concern for best interest of the child supersedes even statutory provisions on the subject outlined above.<sup>67</sup> Under this principle, the custody of minor children is mostly awarded to mothers. For instance, in a 2010 judgment, the Supreme Court altered the fortnightly visitation rights of the father and allowed the mother to take the minor son to Australia where she had got a job, based on this principle.<sup>68</sup> Similarly, in *Gaurav Nagpal v Sumedha Nagpal*,<sup>69</sup> although the son had been with the father since the time of his birth, which was a strong argument in favor of the father, the Supreme Court reversed this arrangement and awarded custody to the mother with visitation rights for the father. Different High Courts have held that greater economic prosperity of the father and his relatives is not a guarantee of the welfare of a minor and that it does not disturb the presumption in favor of the mother while deciding custody.<sup>70</sup> There are a plenty of such examples from both the Supreme Court of India and High Courts.

But in recent times there have also been instances when the Apex Court has emphasized that it cannot be assumed that a mother is naturally a better custodian for the child or better placed to respond to the diverse needs of the child. In a 2004 judgment, commenting upon a judgment of the Karnataka High Court, that reversed the Family Court order and allowed the mother to retain the custody of the minor daughter, the Apex Court noted,

We make it clear that we do not subscribe to the general observations and comments made by the High Court in favour of mother as parent to be always preferable to the father to retain custody of the child. In our considered opinion, such generalisation in favour of the mother should not have been made.<sup>71</sup>

A reflection of this attitude was seen in *Ashish Ranjan v Anupama Tandon*<sup>72</sup>, where the Court, referring to the mother, who had been given custody originally, noted: "The mind of the child has been influenced to such an extent that he has no affection/respect for the applicant (the father)". This, the Court held was a violation of the visitation rights granted to the father, and hence amounted to contempt of the Court. Thus, at present, in judicial practice, there is neither a presumption that father is the natural guardian nor a presumption that mother is biologically better equipped to care for the minor. The judicial approach on child custody has evolved to such a level, that the context is favorable to take the discussion to the logical next step, which is the idea of shared parenting. Though shared parenting or joint custody is not specifically spelled out in Indian law, it is reported that Family Court judges do use this concept at times to decide custody battles.

Two examples of attempts to institutionalize shared parenting in India are noted below. A set of guidelines on 'child access and child custody' prepared by the Tata Institute of Social Sciences (Mumbai) for Family Court judges and Counsellors in Maharashtra understands joint custody in the following manner:

child may reside alternately, one week with the custodial parent and one week with non-custodial parent, and that both custodial and non-custodial parent share joint responsibility for decisions involving child's long term care, welfare and development.<sup>73</sup>

Although the guidelines state that the above framing of the idea of joint custody is consistent with the 1989 UN Convention on the Rights of the Child, it must be noted that such a mechanical approach to understanding joint custody is inimical to the notion of best interest of the child, as it treats the child as a chattel to be passed around between the two parents every alternate week.

The second example of joint custody is found in a recent judgment of the Karnataka High Court, which used the concept to resolve the custody battle over a twelve year old boy. In *KM Vinaya v B Srinivas*<sup>74</sup>, a two judge bench of the Court ruled that both the parents are entitled to get custody "for the sustainable growth of the minor child". The 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 expenditure of the child.

<sup>67</sup> *Mausami Ganguli v Jayant Ganguli*, (2008) 7 SCC 673

<sup>68</sup> *Vikram Vir Vohra v Shalini Bhalla*, Civil Appeal No 2704/ 2010, Supreme Court of India, Judgment dated 25 March, 2010.

<sup>69</sup> Civil Appeal No. 5099/ 2007, Supreme Court of India, Judgment dated 19 November, 2008

<sup>70</sup> *Ravi Shankar v Uma Tiwari*, I (1999) DMC 585 MP; *Ashok Shamjibhai Dharod v Neeta Ashok Dharode*, II (2001) DMC 48 Bom

<sup>71</sup> *Kumar V. Jahgirdar v Chethana Ramatheertha*, SLP (Civil) 4230-4231/ 2003, Supreme Court of India, Judgment dated 29 January, 2004.

<sup>72</sup> Contempt Petition (Civil) No. 394 of 2009, Supreme Court of India, Judgment dated 30 November, 2010.

<sup>73</sup> <http://www.mphc.in/pdf/ChildAccess-040312.pdf>, Pg 24 (Last accessed 4 November, 2014)

<sup>74</sup> MFA No. 1729/ 2011, Karnataka High Court, Judgment dated 13 September, 2013

- ✓ Each parent was given visitation rights on Saturdays and Sundays when the child is 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.

The six monthly arrangement found in this example is much more workable than the weekly arrangement and is likely to cause less instability and inconvenience to the child. It may be noted however, that the terms 'joint' or 'shared' do not mean giving physical custody to parents with mechanical equality, and it is here that judicial pragmatism and creativity is going to play a huge role in developing this concept further.

## **VII. International Approaches to Shared Parentage**

Shared parentage systems vary widely across the globe. An international comparative review reveals the vast diversity of such approaches amongst nation-states. Furthermore, a review of the diversity of approaches in the international context offers perspective on potential reforms in India; however, any such reforms adopted in India must be grounded in Indian culture, society and gender relations.

### **1) United States & Canada**

There are generally two forms of joint custody in the United States: Joint legal custody and joint physical custody. Joint legal custody, as defined for example in the State of Georgia, "means both parents have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care...." Joint physical custody, as defined in Georgia, "means that physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents". Thirty five states in the United States have a presumption or strong preference for joint custody however; statutes delineate the circumstances in which such a presumption is resolutely disavowed. For example, the State of Idaho notes that "[T]here shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence".<sup>75</sup> The State of New York has several requirements regarding awarding joint physical custody. The Braiman rule requires, that for orders of joint physical custody, there should be "relatively stable, amicable parents, behaving in a matured civilized fashion" and that such joint arrangements are prohibited where the parents are antagonistic to each other and demonstrate an inability to cooperate.<sup>76</sup>

Similarly in the District of Columbia, such a rebuttable presumption in favor of joint custody is extinguished upon a finding by a preponderance of the evidence that an "intra-family offense" (e.g. "child abuse", "child neglect", "parental kidnapping") has occurred.<sup>77</sup>

In Canada under the Divorce Act, the court may grant an order of joint custody, however, such an order must be "in the best interests of the child", it should take into account past conduct if "relevant to the ability of that person to act as a parent of a child", and "take into consideration the willingness of the person for whom custody is sought to facilitate such contact".<sup>78</sup> The majority of States in the United States have a common ground in regard to the decision making power of each parent, with neither parent having a more advantageous control for joint decisions.<sup>79</sup> However, some states allow for the parent with physical custody to have the ultimate responsibility in disputes.<sup>80</sup>

### **2) Australia**

Australia has a presumption of shared equal parental responsibility when devising parenting orders post-divorce.<sup>81</sup> However, this presumption is limited by several factors: abuse of the child or another child, family violence, and the best interests of the child standard. The shared responsibility presumption does not address amount of time spent with each parent, but merely responsibility. Australia allows for expansive and detailed parenting plans that can deal with a wide variety of subjects, such as, the communication a child is to have with another person or other persons, the process to be used for resolving disputes about the terms or operation of the plan and "any aspect of the care, welfare or development of the child or any other aspect of

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<sup>75</sup> Idaho, Title 32, Chapter 7, 32-717B, Joint Custody

<sup>76</sup> Braiman v. Braiman, 378 N.E. 2d 1019 (1978)

<sup>77</sup> District of Columbia, D.C. Code 16-911, Custody of Children

<sup>78</sup> Canada, Divorce Act, Custody Orders, (R.S.C.), c. 3 (2nd Supp.) (1985)

<sup>79</sup> Interpreted from various case laws, important ones being *Taylor v. Taylor* 508 A.2d at 967.

*Anderson v. Anderson*, 56 S.W.3d 5, 8 (Tenn. App. 1999). In that case, the parents had joint legal custody but the parent with residential custody (the mother) argued that she had the power to decide upon the child's education. The Court of Appeals disagreed: "If Mother has the unilateral right, as she claims, to make the decision of home schooling *vis-a-vis* public schooling, Father is thereby relegated to a powerless position and joint custody is rendered meaningless."

<sup>80</sup> North Carolina, General Statutes, Chapter 50A: Uniform Child Custody Jurisdiction in and Enforcement Act and Uniform Deployed Parents Custody and Visitation Act

<sup>81</sup> Australia, Family Law Amendment (Shared Parental Responsibility) Act, Section 61 DA (2005)

parental responsibility for a child”.<sup>82</sup> However, the Act repeatedly states, the “best interests of the child” is the “paramount consideration”.<sup>83</sup>

Furthermore, Australian family courts rarely award joint physical custody in post-divorce arrangements. The reason being, that courts have developed a detailed list of pre-conditions for such shared physical custody. Such pre-conditions include: geographical proximity, compatible parenting, and ability of the parents to supervise the child, child’s adaptability, mutual trust, co-operation and good communication.<sup>84</sup> Furthermore, parents who wish to secure a joint physical custody arrangement must also prove other conditions such as: degree of maturity<sup>85</sup>, value, attitude and behavior of the parents<sup>86</sup>, and openness of mind to communicate with the other parent.<sup>87</sup>

### 3) United Kingdom

The United Kingdom has specific requirements for awarding shared residence orders (joint custody arrangements). First, such an arrangement must represent the factual reality of the child’s life.<sup>88</sup> The court will evaluate whether to award a shared residence order or the combination of a residence order and a contact order.<sup>89</sup> Family courts in the United Kingdom take into account several factors before awarding joint physical custody: welfare principle<sup>90</sup>, the no-delay principle<sup>91</sup> and the no-order principle.<sup>92</sup> The welfare principle includes several factors which are to ensure both the welfare of the child as well as consistency in the State. These factors include: “the ascertainable wishes and feelings of the child concerned, his physical, emotional and educational needs, the likely effect on him of any change in his circumstances, his age, sex, background and any characteristics of his which the court considers relevant, any harm which he has suffered or is at risk of suffering, how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs, and the range of powers available to the court under this Act in the proceedings in question”.<sup>93</sup> The no-delay principle notes that any delay in determining a question regarding the upbringing of a child shall be considered by the court as “likely to prejudice the welfare of the child”.<sup>94</sup> The no-order principle holds that courts shall not make an order unless an order would be better for the child than making no order at all.<sup>95</sup>

### 4) South Africa

In South Africa, family courts are reluctant to award sole custody to either parent. Such an exclusive arrangement is usually resorted to only in the event that one of the parents is unfit for parenting or abused the child.<sup>96</sup> However, family courts in South Africa do not frequently award joint physical custody of children on the basis that such an arrangement would be disruptive for the child, particularly in cases in which the parents live far apart.<sup>97</sup> Instead, courts grant joint custody (but not joint physical custody of the parent<sup>98</sup>). South Africa offers a unique look at autonomy of the children in question for custody arrangements.<sup>99</sup> Of particular note, South Africa takes into account the opinions of the children in dispute. According to Chapter 10 of the South African Children’s Act “Every child has a right to participate and have a voice”.<sup>100</sup>

### 5) Netherlands

In the Netherlands, there has been an increasing trend towards shared parentage. In 1996, the Dutch Parliament passed a law mandating that joint legal custody be the presumed standard for post-divorce parenting in the Netherlands.<sup>101</sup> However, judicial decisions whittle down the force of this legislation.<sup>102</sup> From 2009, all

<sup>82</sup> Australia, Family Law Amendment (Shared Parental Responsibility) Act, Section 63C(2)(i), DA (2005)

<sup>83</sup> Australia, Family Law Amendment (Shared Parental Responsibility) Act, Section 65 AA, DA (2005)

<sup>84</sup> *Padgen and Padgen (1991) FLC 92-231*

<sup>85</sup> *Foster and Foster (1977) FLC 90-281.*

<sup>86</sup> *Forck and Thomas (1993) FLC 92-372.*

<sup>87</sup> *C v B (2005) FamCA 94*

<sup>88</sup> United Kingdom, A joint residence: Parental responsibility (2008) EWCA civ 867

<sup>89</sup> United Kingdom, K (shared residence order) (2008) 2 FLR 380

<sup>90</sup> A v A (Minor’s) (Shared residence order) (1994) 1 FLR 669; United Kingdom, Children Act, Part I, 3 (1989)

<sup>91</sup> United Kingdom, Children Act, Part I, 2 (1989)

<sup>92</sup> United Kingdom, Children Act, Part I, 5 (1989)

<sup>93</sup> United Kingdom, Children Act, Part I, 3 (1989)

<sup>94</sup> United Kingdom, Children Act, Part I, 2 (1989)

<sup>95</sup> United Kingdom, Children Act, Part I, 5 (1989)

<sup>96</sup> Archard D and Skivenes M “Balancing a child’s interests and child’ views” 2009 JCR, page 2

<sup>97</sup> Barrat A and Burman S “Deciding the Best Interests of the Child “ 2001 SALJ.

<sup>98</sup> *Ibid*

<sup>99</sup> *Ibid*

<sup>100</sup> South Africa, Children’s Act, Ch. 10 (2005)

<sup>101</sup> Shared parenting in the Netherlands’, P. TROMP MSC, Dutch Father Knowledge Centre; (VKC), August 10, 2013, <file:///Users/aarti/Downloads/20130810-PeterTromp-Shared-Parenting-Netherlands.pdf

<sup>102</sup> *Ibid*

divorces must be accompanied by a parenting plan based on the assumption of a shared parentage system.<sup>103</sup> The plan must include: the division in the care and parenting tasks, how to inform and consult each parent on parenting the children and the costs of caring and parenting the children.<sup>104</sup> If no plan can be agreed upon or the plan is not amenable, the judge has the discretion to send the divorcing parents to a mediator in order to acquire such a plan before continuing the divorce proceedings.<sup>105</sup> The Dutch citizens appear to approve of such a trend with a 2012 poll revealing that 71% of those sampled, agree with co-parenting after divorce.<sup>106</sup>

## 6) Thailand

There are generally two procedures for securing child custody arrangements in Thailand. The first is by mutual consent and the second, by the court.<sup>107</sup> Mutual consent is an option for previously married parents who have divorced by mutual consent, previously married parents who had an uncontested divorce, or unmarried couples in which the child is registered as the legitimate child of the father and the unmarried parents agree on the custody arrangement.<sup>108</sup> The court decides custody arrangements when, there was a contested divorce. In such cases, the court can award custody to the parents or to a third person as a guardian in lieu of the parents if it is in the “happiness and interest”<sup>109</sup> of the child.

## 7) Singapore

Singapore family law requires the court to consider the best interests of the child. According to the Women’s Charter,<sup>110</sup> the court may not make “any judgment of divorce or nullity of marriage or grant a judgment of judicial separation” unless the court is satisfied “that arrangements have been made for the welfare of the child and that those arrangements are satisfactory or are the best that can be devised in the circumstances” or “that it is impracticable for the party or parties appearing before the court to make any such arrangements”.<sup>111</sup> The “welfare of the child” is the “paramount consideration” however, subject to this, the court shall consider the wishes of the parents and the wishes of the child.<sup>112</sup> The court may issue an injunction restraining the other parent from taking the child out of Singapore where “any matrimonial proceedings are pending” or “where, under any agreement or order of court, one parent has custody of the child to the exclusion of the other”.<sup>113</sup>

## 8) Kenya

The Children Act governs child custody disputes in Kenya.<sup>114</sup> Kenyan law draws the distinction between “actual custody” and “legal custody”.<sup>115</sup> “Actual custody” is the “actual possession of a child, whether or not that possession is shared with one or more persons”.<sup>116</sup> “Legal custody” is “so much of the parental rights and duties in relation to possession of a child as are conferred upon a person by a custody order”.<sup>117</sup> The Kenya family courts consider several factors in awarding child custody such as: “the conduct and wishes of the parent or guardian of the child, the ascertainable wishes of the relatives of the child, ...the ascertainable wishes of the child, whether the child has suffered any harm or is likely to suffer any harm if the order is not made, the customs of the community to which the child belongs, the religious persuasion of the child, ...the circumstances of any sibling of the child concerned, and of any other children of the home, if any and the best interest of the child”.<sup>118</sup> It is important to note that Kenyan law does not place the “best interest of the child” necessarily as paramount and instead includes this as one factor to consider in the section describing child custody orders. However, in Part II of the Act, the law requires that “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**”.<sup>119</sup>

## 9) Other Arrangements

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<sup>103</sup> Netherlands, Civil Code, Article 247 (2009)

<sup>104</sup> *Ibid*

<sup>105</sup> *Ibid*

<sup>106</sup> *Ibid*

<sup>107</sup> Thailand Civil and Commercial Code (Part III), Book IV, Section 1520

<sup>108</sup> *Id*; Thailand Civil and Commercial Cod (Part III), Book IV, Section 1547

<sup>109</sup> Thailand Civil and Commercial Code (Part III), Book IV, Section 1520

<sup>110</sup> Singapore, Women’s Charter (1961)

<sup>111</sup> Women’s Charter, Arrangements for Welfare of Children, Part 123 (1)

<sup>112</sup> Women’s Charter, Arrangements for Welfare of Children, Part 125 (2)

<sup>113</sup> Women’s Charter, Arrangements for Welfare of Children, Part 131 (1)

<sup>114</sup> Kenya, The Children Act; available at [https://www.icrc.org/applic/ihl/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/95bcf642e7784b63c1257b4a004f95e8/\\$FILE/Children's%20Act.pdf](https://www.icrc.org/applic/ihl/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/95bcf642e7784b63c1257b4a004f95e8/$FILE/Children's%20Act.pdf)

<sup>115</sup> The Children Act, Part VII, 81 (1) (c) & (d)

<sup>116</sup> *Ibid*

<sup>117</sup> *Ibid*

<sup>118</sup> The Children Act, Part VII 83 (1) (a)-(j)

<sup>119</sup> The Children Act, Part II (2)

Alternating custody is a more specific form of shared parentage in which parents (or other guardians) share physical custody of the child by shifting the child between the guardians after extended time in each guardian's physical custody. In Spain, shared custody is not only a preference but as per 2005 Act, it can be decided without the express agreement of both parents (all that is needed is the request of one of parents and favorable opinion of Prosecutor). Courts can on its own decide to grant a shared custody arrangement as in "this regime of custody the superior interest of the minor is well protected".<sup>120</sup> On the whole, Spain has shown a general trend over the years towards a shared custody arrangement. Currently, the law holds no preference for one parent over the other (mother versus father) and instead such arrangements (as noted above) are awarded based on the best interest of the child standard. In 2005, the Spanish Parliament modified the Civil Code and established the preference for shared custody arrangements in the law.<sup>121</sup> The Supreme Court in 2010 held that instability (not having a single home for the child as the child is split between the parents) is not a factor to be considered in the court's decision to award shared custody.<sup>122</sup>

In contrast, numerous countries across the globe continue to prefer legally, sole physical custody. For example, Norway has a legal presumption for sole physical custody.<sup>123</sup> However, the child has "right of access to both parents even if they live apart".<sup>124</sup> Of note, the parent "who is with the child may make decisions concerning the care of the child while they are together".<sup>125</sup> Norway awards considerable autonomy to the divorcing parents regarding the extent of the right of access only limited by the "best interests of the child standard".<sup>126</sup>

### VIII. Summary Of Recommendations

Researcher fully and unflinchingly supports the recommendations and suggestions made by the *Law Commission of India in its 257<sup>th</sup> Report (22<sup>nd</sup> May 2015)*, has given a comprehensive report under the title of "Reforms in Guardianship and Custody Laws in India".<sup>127</sup> The best interest of the child should be the sole consideration which supersedes all others.

The recommendations of the Law Commission India in its 257<sup>th</sup> Report are captured in the Hindu Minority and Guardianship (Amendment) Bill, 2015, and the Guardians and Wards (Amendment) Bill, 2015, which are appended to the report. The Bills, respectively, amend the Hindu Minority and Guardianship Act, 1956, and the Guardians and Wards Act, 1890. In this regard, the Law Commission also makes incidental reference to some of the recommendations of *the 83rd report (26<sup>th</sup> April 1980) of the Law Commission*, under the title of '*The Guardians and Wards Act, 1890 and certain provisions of the Hindu Minority and Guardianship Act, 1956*',<sup>128</sup> as well as *the 133rd report (29<sup>th</sup> Aug. 1989) of the Law Commission*, under the title of '*Removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of the welfare principles*'.<sup>129</sup>

The Commission provides detailed legislative text by recommending the insertion of a new chapter IIA dealing with 'Custody, Child Support and Visitation Arrangements'. The Commission also provides specific guidelines to assist the court in deciding such matters, including processes to determine whether the welfare of the child is met; procedures to be followed during mediation; and factors to be taken into consideration when determining grants for joint custody. The recommendations are discussed in detail in the following pages.

#### A. Amendments to the Hindu Minority and Guardians Act, 1956

The Law Commission recommends the following amendments to this Act:

1. **Section 6(a):** This section lists the natural guardians of a Hindu minor, in respect of the minor's person and property (excluding his or her undivided interest in joint family property). In the case of a boy or an unmarried girl, this section clearly states that the natural guardian of a Hindu minor is the father, and after him the mother. Even after the Supreme Court's judgment in *Gita Hariharan v Reserve Bank of India*,<sup>130</sup> the mother can become a natural guardian during the lifetime of the father only in exceptional circumstances. This is required to be changed to fulfill the principles of equality enshrined in Article 14 of the Constitution.

Accordingly, the Law Commission recommends that this superiority of one parent over the other should be removed, and that both the mother and the father should be regarded, simultaneously, as the natural

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<sup>120</sup> Spain, Law 15/2005.

<sup>121</sup> Spain, July of 15/2005 Act, Art. 92

<sup>122</sup> Spanish Supreme Court, STS, 1st, 8.10.2009

<sup>123</sup> Kitterod, R.H. & Lyngstad, J., Untraditional Caring Arrangements Among Parents Living Apart: The Case of Norway, Demographic Research, Vol. 27, Art. 5 (2012), pp. 121-152.

<sup>124</sup> Norway, The Children Act, Chapter 6, Right of Access, Section 42, 1981

<sup>125</sup> *Ibid*

<sup>126</sup> Norway, the Children Act, Chapter 6 Right of Access, Section 43, 1981.

<sup>127</sup> <http://lawcommissionofindia.nic.in/reports/ReportNo.257CustodyLaws.pdf>

<sup>128</sup> Law Commission of India, 83rd Report, April (1980), available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>

<sup>129</sup> Law Commission of India, 133rd Report, August (1989), available at <http://lawcommissionofindia.nic.in/101-169/Report133.pdf>

<sup>130</sup> (1999) 2 SCC 228

guardians of a minor. This also follows from the recommendation of the Commission that the welfare of the minor must be the paramount consideration in every circumstance. This concept of welfare being paramount is already captured in Section 13 of the 1956 Act. In recommending such an amendment to Section 6, the Commission reaffirms the recommendations of its 133rd report, to give equal rights to both the mother and father in respect of a minor and his/her property.<sup>131</sup> It also reaffirms the recommendations of the 83rd report of the Law Commission, in intending the two provisions (Sections 6 and 13) to be read together.<sup>132</sup> Such a reading will necessarily imply that neither the father nor the mother of a minor can, as of a right, claim to be appointed by the court as the guardian unless such an appointment is for the welfare of the minor.

The Guardians and Wards Act, 1890 has also undergone similar legislative changes, moving away from an absolute and natural right of a father to be the guardian.<sup>133</sup> The 1890 law was enacted at a time when women had limited rights in law, and it was in need of reform. According to the older version of Section 19(b) of the 1890 Act, the court could not appoint a guardian of a minor (other than a married female), if the minor's father was living and not unfit to be the guardian. The Personal Laws (Amendment) Act, 2010 amended this clause to refer also to the mother in the same vein as the father, thereby making the law more equitable.<sup>134</sup> The recommendations of the Commission, in context of the changes to the 1890 Act, therefore, are merely removing anomalies in one law that have already been removed in another.

The proviso to Section 6(a) presently provides that the custody of a minor below 5 years of age will ordinarily be with the mother. The Commission believes that this position should be allowed flexibility in cases where the court decides to grant joint custody, and the text of the provision is amended accordingly.

**2. Section 7:** This section provides that the natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother. The language of this section is incongruous in that it refers only to the natural guardianship of an adopted son, and does not refer to an adopted daughter. The Hindu Minority and Guardianship Act, 1956 came into force at a time when the general Hindu law as administered by the courts did not recognise the adoption of a daughter. Thus, at the time of passing of the Act, the adoption of daughters was only allowed under custom and not under codified law. This explains the reason why the drafters of the Act included the guardianship of only adopted sons and ignored the adoption of daughters.<sup>135</sup> It was also enacted before the Hindu Adoptions and Maintenance Act, 1956, which corrected the legal position of adoption of a daughter statutorily.<sup>136</sup> The effect of the later law is that the adoptive father and the adoptive mother would be regarded as the natural guardians of the adopted child.<sup>137</sup> It follows that the Hindu Minority and Guardianship Act, 1956 should also include both an adopted son and an adopted daughter within the scope of natural guardianship. The Commission merely corrects this by amending the Hindu Minority and Guardianship Act, 1956 to be in consonance with the Hindu Adoptions and Maintenance Act, 1956. Further, the Commission recommends that the natural guardians of an adopted child should include both the adoptive parents, in keeping with its recommendations to Section 6(a) provided above, and previous legislative changes such as the Personal Laws (Amendment) Act, 2010. Accordingly, the Commission recommends that Section 7 be amended to refer to the natural guardianship of an adopted child who is a minor, which will pass, upon adoption, to the adoptive mother and father.

• **Researcher therefore suggests that Sections 6 & 7 should be amended on the following lines:**

**Section 6** - In the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the principal Act) in Section 6,

(1) for clause (a), the following clause shall be substituted, namely:--

“(a) in the case of a boy or an unmarried girl – the mother and the father;”

(2) the Explanation shall be numbered as Explanation 1, and after the Explanation as so numbered, the following Explanation shall be inserted, namely:--

“Explanation 2.-- For the purpose of clause (a), unless joint custody is granted by the court under Chapter IIA of the Guardians and Wards Act, 1890, the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.”

**Section 7**- In the principal Act, for Section 7, the following Section shall be substituted, namely:--

<sup>131</sup> Law Commission of India, 133rd Report, August (1989), Para. 4.3, available at: <http://lawcommissionofindia.nic.in/101-169/Report133>

<sup>132</sup> Law Commission of India, 83rd Report, April 1980, Para. 6.44, p. 30, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>

<sup>133</sup> *Venkata Narasiah v. Peddiraju*, 1970 (1) ALT 25; *Kumarswami Mudaliar v. Rajammal* AIR 1957 Mad. 563

<sup>134</sup> Personal Laws (Amendment) Act, No. 30 of 2010, chapter II

<sup>135</sup> Paras Diwan, LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY, 3<sup>rd</sup> edn., 2000, p. 226.

<sup>136</sup> Hindu Adoptions and Maintenance Act, No. 78 of 1956, S. 10

<sup>137</sup> MULLA HINDU LAW, ed. Satyajeet A. Desai, 21st edn., 2010, p 1258.70 55

“(7) Natural guardianship of adopted child. – The natural guardianship of an adopted child who is a minor passes, on adoption, to the adoptive mother and father.”

## **B. Amendments to the Guardians and Wards Act, 1890**

The Law Commission recommends the following amendments to this Act:

**1. Section 17:** This section provides for matters to be considered by the court in appointing the guardian of a minor, and requires the welfare of a minor to be consistent with the laws to which the minor is subject. In the past, Section 17 was read with Section 19 of this Act (which deals with the preferential right of natural guardianship).<sup>138</sup> Before being amended by the Personal Laws (Amendment) Act, 2010, Section 19 offered a preferential right to the husband (of a minor girl), or the father (in all other cases) to be the guardian of the minor, if neither were unfit to be appointed guardian. The 2010 Act included the mother along with the father as a natural guardian of the child, and changed the position of the law slightly.<sup>139</sup> However, the welfare of the child was still not, under law, truly the paramount consideration in such matters.

The Law Commission recommends that the possibility of any alternate reading be corrected in statute, and reaffirms, in this context, the general recommendations made by the 83rd report of the Law Commission. Thus, in the appointment or declaration of a guardian, the welfare of the minor must be paramount, and everything else must be secondary to this consideration. In determining welfare, however, the court may give due regard to the laws to which the minor may be subject. As the 83rd report observed, “such an amendment will settle the position for all times to come,”<sup>140</sup> and will remove the possibility of the appointment of a guardian without first assessing welfare.

**2. Section 19:** This section provides for the preferential right of certain persons to be regarded as natural guardians. It provides that the court may not appoint a guardian, if the husband of a minor who is a married female is not unfit to be the guardian of her person, or if the father or mother (who are living) of a minor other than a married female is similarly not unfit to be the guardian. Here, too, the Commission reaffirms the 83rd report regarding the importance of the welfare principle, and recommends that in determining whether a person is unfit to be a guardian in these circumstances, the welfare of the minor under Section 17 shall be the paramount consideration.

**3. Section 25:** This section provides for the arrest of a ward if the ward leaves or is removed from the custody of his guardian, if such arrest is for the welfare of the ward. As with its recommendations above, the Law Commission concurs with its 83rd report, in various aspects.<sup>141</sup> First, the concept of arrest of a minor is an archaic one, and needs to be amended to reflect modern social considerations. Therefore, the Law Commission recommends a substitute section, replacing ‘arrest’ with the requirement to return the ward to the custody of his or her guardian. Again, the Commission reiterates the necessity of placing the welfare of the minor as the paramount consideration.

Second, the present text of the law is unclear as to whether a guardian who has never had custody of a minor is entitled to the relief under this section. This needs to be clarified, and accordingly, the Law Commission reiterates the recommendations of the 83rd report<sup>142</sup> as regards the language of the provision to specifically state that it applies in cases where the child is not in the custody of the guardian, though the latter is entitled to such custody.

Third, it recommends that the court must not make an order under this section in respect of a child of fourteen years of over, without taking into consideration the wishes of the child.<sup>143</sup> This is in consonance with the provisions of Section 17 of this Act, which allows the court to consider the stated preference of a minor, if the minor is old enough to form an intelligent preference. In a scenario where the minor of over fourteen years of age has left or been removed from the custody of his or her guardian, the Commission recommends that the court must take into consideration the preference of the child.

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<sup>138</sup> Law Commission of India, 83rd Report, April (1980), Para.6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf> 56

<sup>139</sup> Personal Laws (Amendment) Act, No. 30 of 2010, Chapter II

<sup>140</sup> Law Commission of India, 83rd Report, April (1980), Para.6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>

<sup>141</sup> Law Commission of India, 83rd Report, April (1980), Para.6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf> ,Para.7.18

<sup>142</sup> Law Commission of India, 83rd Report, April (1980), Para.6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>, Para.7.14-7.17

<sup>143</sup> Law Commission of India, 83rd Report, April (1980), Para.6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf> ,Para.7.20

- **Researcher therefore suggests that Sections 17, 19 & 25 of Guardians and Wards Act, 1890 should be amended on the following lines:**

**a. Amendment of Section 17** - In the Guardians and Wards Act, 1890 (hereinafter referred to as the principal Act), in section 17,

- (i) for sub-section (1), the following sub-section shall be substituted, namely:--
- (ii) “(1) In appointing or declaring the guardian of a minor, the welfare of the minor shall be the paramount consideration.”;
- (iii) after sub-section (1), the following sub-section shall be inserted, namely:--  
“(1A) Subject to the provisions of sub-section (1), the court shall have due regard to the law to which the minor is subject, in appointing or declaring the guardian of that minor.”

**b. Amendment of Section 19** - In the principal Act, in section 19, after clause (c), the following proviso shall be inserted, namely:--

- 1) “Provided that in determining whether a person is unfit to be a guardian under clause (a) or clause (b), the welfare of the minor as required under sub-section (1) of section 17 shall be the paramount consideration.”

**c. Substitution of New Section for Section 25** - In the principal Act, for Section 25, the following section shall be substituted, namely:--

“Section 25- Proceedings for custody of ward-

- 1) Notwithstanding anything contained in section 19, if a ward leaves or is removed from the custody of a guardian of his person, or is not in the custody of the guardian entitled to such custody, the court, if it is of the opinion that it will be for the welfare of the ward to return to the custody of his guardian or to be placed in his custody, may make an order for his return, or for his being placed in the custody of the guardian, as the case may be.
- 2) For the purpose of enforcing the order, the court may exercise the power conferred on a Magistrate of the first class by section 97 of the Code of Criminal Procedure, 1973.
- 3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.
- 4) In making an order under this section, the court shall have regard to the welfare of the ward as the paramount consideration.
- 5) The court shall not make an order under this section in respect of a child of fourteen years or over, without taking into consideration the preference of the child.”

- **Researcher therefore suggests that after Chapter II “Chapter IIA: Custody, Child Support and Visitation Arrangements” may be added to in the principal Act.**

**Insertion of New Chapter** – In the principal Act, after Chapter II, the following Chapter IIA shall be inserted, namely:--

**“Chapter IIA: Custody, Child Support and Visitation Arrangements**

**Section 19A- Objectives of the Chapter-**

The objectives of this Chapter are to ensure that the welfare of a minor is met by:--

- a) ensuring that the child has the benefit of both parents having a meaningful involvement in his life, to the maximum extent consistent with the welfare of the child;
- b) ensuring that the child receives adequate and proper parenting to help achieve his full potential;
- c) ensuring that the parents fulfil their duties, and meet their responsibilities concerning the care, welfare and development of the child;
- d) giving due consideration to the changing emotional, intellectual and physical needs of the child;
- e) encouraging both the parents to maintain a close and continuing relationship with the child, and to cooperate in and resolve disputes regarding matters affecting the child;
- f) recognising that the child has the right to know and be cared for by both the parents, regardless of whether the parents are married, separated, or unmarried; and
- g) protecting the child from physical or psychological harm or from being subjected to, or exposed to, any abuse, neglect or family violence.

**Section 19B- Applicability of this Chapter<sup>144</sup>-**

The provisions of this Chapter shall apply to all proceedings involving parents related to custody and child support, including such proceedings arising under the Indian Divorce Act, 1869, the Parsi Marriage and Divorce Act, 1936, and the Hindu Marriage Act, 1955.

**Section 19C- Definitions-**

For the purpose of this Chapter:--

(a) "Joint custody" is where both the parents:--

- i. share physical custody of the child, which may be equally shared, or in such proportion as the court may determine for the welfare of the child; and
- ii. equally share the joint responsibility for the care and control of the child and joint authority to take decisions concerning the child; and

(b) "Sole custody" is where one parent retains physical custody and responsibility for the care and control of the child, subject to the power of the court to grant visitation rights to the other parent.

**Section 19D- Award of custody-**

(1) In a proceeding to which this Chapter applies, the court may order joint custody or sole custody consistent with the welfare of the child.

(2) In determining whether an order under this section will be for the welfare of the child, the court shall have regard to the guidelines specified in the Schedule.

(3) Subject to the welfare of the child being the paramount consideration, the court may modify an order under this section, and record the reasons for doing so.

**Section 19E- Power to pass additional orders-**

The court shall have the power to pass any additional or incidental orders necessary to effectuate and enforce any order relating to the custody of the child.

**Section 19F- Mediation -**

(1) The court will ordinarily refer the parents to the court-annexed mediation centre or, in the absence thereof, to such person as the court may appoint as mediator, either at the commencement of, or at any stage during, the proceedings under this Chapter.

(2) A mediator to which parents are referred to under sub-section (1) must possess relevant professional qualifications or training in mediation, and sufficient skill and experience in mediation relating to family disputes.

(3) For the purpose of this section, every High Court and District Court and Family Court shall maintain a list of court-annexed mediation centres or individual mediators.

(4) The court-annexed mediation centres or individual mediators shall be identified and paid remuneration in accordance with a scheme prepared for this purpose by the concerned High Court, in consultation with the respective State Governments.

(5) For the purpose of ordering or performing any mediation under this section, the court and the appointed mediator shall have regard to the guidelines specified in the Schedule.

(6) The court may, where it considers appropriate or necessary, seek assistance from a trained and experienced professional to undertake an independent psychological evaluation of the child.<sup>145</sup>

(7) A mediation ordered by the court under this section must ordinarily conclude not later than sixty days from the date of such order, unless extended by the court, where necessary.<sup>146</sup>

**Section 19G- Child support -**

(1) A court may pass appropriate orders for the maintenance of children, and fix an amount that is reasonable or necessary to meet the living expenses of the child, including food, clothing, shelter, healthcare, and education.

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<sup>144</sup> Personal laws in India deal with the concept and idea of child support to some extent through the concept of custody of children in codified Hindu Marriage Act, No. 25 of 1955, u/S. 26. And Parsi Marriage and Divorce Act, No. 3 of 1936, u/S. 49, and the Indian Divorce Act, No. 4 of 1869, u/S. 41 and 43. However, these provisions do not list the reasons for which such child support is required. U/S. 20 The Hindu Adoptions and Maintenance Act, 1956 has a provision for maintenance of children, but merely casts an obligation of maintenance on the father in *Krishnakumari v. Varalakshmi* AIR 1976 AP 365, as well as on the mother MULLA HINDU LAW, ed. Satyajeet Desai, 21st edn. 2010, p. 1378, Maintenance here means the provision for food, clothing, residence.

<sup>145</sup> Marital mediation Staff, What is the Difference between Marital Mediation and Marital Counseling?, February 22, 2013, available at <http://www.maritalmediation.com/faqs/what-is-the-difference-between-marital-mediation-and-marital-counseling-2/> (Last visited on April 22, 2015).

<sup>146</sup> *Baljinder Kaur v. Hardeep Singh*, AIR 1998 SC 764

(2) For the purpose of determining reasonableness or necessity, the court may take into consideration the following factors, namely:--

- (a) the financial resources of each of the parents;
  - (b) the standard of living that the child would have had if the marriage had remained intact;
  - (c) the physical and emotional condition of the child;
  - (d) the particular educational and healthcare needs of the child; and
  - (e) any other factors that the court considers fit.
- (3) An order of the court under this section must subsist till the child reaches 18 years of age.
- (4) Notwithstanding anything contained in sub-sections (1), (2) and (3), the court may make such further orders as it considers fit, including:--
- (a) requiring the payment of a sum greater than the sum determined under sub-section (1);
  - (b) requiring the subsistence of an order for a duration longer than as provided under sub-section (3), but such order shall not subsist in any case beyond such time as the child reaches 25 years of age;<sup>147</sup>
  - (c) requiring the subsistence of an order under sub-section (3) beyond such time as the child reaches 25 years of age in case of a child with mental or physical disability;<sup>148</sup> and
  - (d) making the estate of a parent, who dies during or after the conclusion of proceedings under this section, liable for obligations under the order passed by the court.”

## **IX. Schedule**

### **Guidelines for Custody, Child Support and Visitation Arrangements**

#### **1. Factors to be Considered for Grant of Joint Custody**

(1) In making an order for joint custody under Chapter IIA, the court shall have regard to the following, namely:--

- a) whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child;
- b) whether each of the parents is willing and able to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
- c) whether the parents are able to jointly design and implement a day-to-day care plan that fosters stability;
- d) the maturity, lifestyle and background (including culture and traditions) of the child and parents, and any other characteristics that the court thinks are relevant;
- e) the extent to which each parent has fulfilled, or failed to fulfil, his responsibilities as a parent;
- f) the extent to which the parents are able or unable to find a reasonable way of working together;
- g) the extent to which the higher income parent is willing to support in creating similar standards of living in each parental home;
- h) the child's existing relationship with each parent, siblings, and other persons who may significantly affect the child's welfare;
- i) the needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
- j) request the presence of a child psychologist, a mediator, or any other specific person identified by the court.
- k) any family violence involving the child or a member of the child's family;
- l) whether the child is capable of forming an intelligent preference; and any other fact or circumstance that the court thinks is relevant.

(2) The court shall direct the parents to conduct an annual review of the welfare of the child and the income of each parent, and to file the same before the court.

#### **2. Determining Preference of the Child**

(1) In determining the preference of the child for any purpose under this Act, the court shall take the following matters into consideration, namely:--

- a) whether the child is of an age and maturity to indicate intelligent preference;
- b) the extent to which the child has an understanding of the circumstances surrounding the court proceedings;
- c) whether the child has had a history of expressing an intelligent preference;
- d) whether any preference of the child so expressed was based on the fact that the child recently spent an extended period of time with either parent; and
- e) whether the child understands the consequences of the preference that he has expressed.

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<sup>147</sup> The Times of India, Raise Age for Child Maintenance to 21: Court, August 12 (2011), available at <http://timesofindia.indiatimes.com/city/delhi/Raise-age-for-child-maintenance-to-21-Court/articleshow/9573821.cms> (Last visited on April 25, 2015)

<sup>148</sup> Juvenile Justice (Care and Protection of Children) Act, No. 56 of 2000, S.2 (d)

- (2) In conducting an interview with the child, the court may, if it considers fit in the circumstances:--
  - a) decide who will be present when the court interviews the child, and if necessary, speak to the child alone, in the absence of the parents or their legal representatives; or
  - b) request the presence of a child psychologist, a mediator, or any other specific person identified by the court.
- (3) The court shall make a record of the interview with the child, and may keep such record confidential if the court determines that it is in the welfare of the child.
- (4) The court or any other person shall not, in any circumstance, require or compel the child to express his views in relation to any matter.

### **3. Access to Records of the Child**

- (1) Unless limited by an order of the court, or any other provision of law, neither parent, regardless of whether such parent has custody of the child or not, shall be denied access to any information about their minor child, including medical, dental, and school records.
- (2) The court may, in exceptional circumstances, after an opportunity of being heard, order specific information to be withheld from a parent.
- (3) In the case of medical records, the court may, if it considers fit, deny access to a parent if the physician or child psychologist treating the child makes a written statement that any such access by the requesting parent would cause substantial harm to the child or another person.

### **4. Grand-Parenting Time**

- (i) A child's grandparent may apply to the court for a grand-parenting time order under one or more of the following circumstances, namely:--
  - a) the parents of the child are divorced or have separated, or proceedings for divorce or separation are pending before the court; or
  - b) the child's parent, who is the daughter or son of the grandparent, is deceased; or
  - c) the grandparent has, in the past, provided an established custodial environment for the child, whether or not the grandparent had custody under a court order.
- (2) An order for grandparenting time may be issued only after giving due notice, and an opportunity of being heard, to both the parents.
- (3) Before issuing an order for grand-parenting time, the court shall determine whether such an order is required for the welfare of the child.
- (4) In determining the welfare of the child under this part, the court shall consider the following, namely:--
  - a) the love, affection, and other emotional ties existing between the grandparent and the child;
  - b) the grandparent's mental and physical health;
  - c) the child's intelligent preference;
  - d) the willingness of the grandparent, except in the case of abuse or neglect, to encourage a close relationship between the child and the parent or parents of the child;
  - e) any other factor relevant to the welfare of the child.

### **5. Mediation**

- (1) The objective of mediation under Chapter IIA is to assist the parties to arrive at an agreement regarding the welfare of the child, and designing an implementation plan to ensure the welfare of the child.
- (2) Where there are undecided issues in proceedings under Chapter IIA, a court may direct the parties to undergo mediation, resolve the issues, and then seek approval of the court.
- (3) It is the role of the mediator to--
  - a) encourage the parties to co-operate;
  - b) assist the parents in realising their responsibilities and duties towards the welfare of the child; and
  - c) in case a joint custody order is likely to be issued, work with the parties to resolve, in a mutually acceptable manner, related issues, including, but not limited to, shared parenting time and shared responsibilities for decision making.
- (4) If either party applies to the court to modify an order issued under Chapter IIA, the court may direct the parties to undergo mediation, to arrive at an arrangement that will work for the concerned parties.

### **6. Relocation**

- (1) A parent intending to relocate shall give thirty days advance written notice to the other parent.
- (2) In case the relocation is opposed, the court must determine if the proposed relocation is for the welfare of the child.

- (3) In determining the welfare of the child in cases of relocation, the court shall take into consideration the following factors, namely:--
- a) whether the relocation is for a legitimate purpose;
  - b) each parent's reasons for seeking or opposing the relocation;
  - c) the quality of the relationships between the child and each parent;
  - d) the impact of the relocation on the quantity and the quality of the child's future contact with the non-relocating parent;
  - e) the degree to which the relocating parent's and the child's life may be enhanced economically, emotionally and educationally by the relocation; and
  - f) the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements.

#### **7. Decision Making**

- (1) An order for custody of a child made by the court under Chapter IIA shall clearly address the following issues, amongst others:--
- a) the religious instruction of the child, attendance at places of worship, undergoing religious ceremonies, and related matters;
  - b) the choice of school, subjects, classes, courses, and tuition, and whether the child is to attend a particular school trip outside the local area;
  - c) whether the child is to be hospitalized, and whether a non-emergency surgical procedure is to be performed on the child;
  - d) the choice of extra-curricular activities, taking into consideration the child's interests and aptitude; and
  - e) where the child will spend holidays, and in cases where required, the information that one parent has to provide to the other parent.
- (2) The court can either make a specific decision (e.g., the child will attend a given school) or allocate decision-making responsibility for a given issue to one parent or both together.

#### **8. Parenting Plan**

- (1) The objectives of a parenting plan are to--
- a) minimise the child's exposure to harmful parental conflict; and
  - b) encourage parents to mutually agree on the division of responsibilities of the child's upbringing through agreements in the parenting plan, rather than by relying on court intervention.
- (2) In designing a parenting plan, the parents must ensure that it is for the welfare of the child, and that--
- a) the day-to-day needs of the child are met;
  - b) any special needs that the child may have are met;
  - c) the child gets to spend sufficient time with each parent so as to get to know each parent, as far as possible;
  - d) there is minimal disruption to the child's education, daily routine and association with family and friends; and transitions from one parental home to another are carried out safely and, effectively.
- (3) A parenting plan may deal with one or more of the following, namely:--
- a) the parent or parents with whom the child is to live;
  - b) the time the child is to spend with the other parent;
  - c) the allocation of parental responsibility for the child;
  - d) the manner in which the parents are to consult with each other about decisions relating to parental responsibility;
  - e) the communication the child is to have with other persons;
  - f) maintenance of the child;
  - g) the process to be used for resolving disputes about the terms or operation of the plan;
  - h) the process to be used for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan;
  - i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for the child.
- (4) The parenting plan must be voluntarily and knowingly arrived at by each parent.
- (5) The court shall not ordinarily interfere with the division of responsibilities between parents reflected in the parenting plan, unless they are ex facie inequitable.
- (6) If the initial parenting plan does not cover certain issues, the parents may approach the court to modify the terms of the plan to address new subjects of decision-making.

**9. Visitation**

(1) An order made by the court regarding visitation must ensure that--

- a) a child has frequent and continuing contact with both parents, when appropriate, and also with extended family and friends; and
- b) both parents have equal opportunities to spend quality time with the child, including during holidays and vacations.

(2) For the purpose of determining visitation rights and times, the court may take the following factors into consideration, namely:--

- a) the age of the child;
- b) the distance between the parental homes;
- c) any holidays, including weekends, festivals and religious occasions, as well as longer school vacations; and
- d) any other commitments of the parents, which might affect their ability to spend quality time with their child.

(3) The court may decide the time, manner and place to exercise visitation rights, and may take into consideration any visitation rights plan that has been submitted to the court by the parents.

(4) A court may limit, suspend, or otherwise restrict, the visitation rights granted to a parent, if the court has reasonable basis to believe that circumstances make such restriction necessary for the welfare of the child, or if there is serious or repeated breach by a parent of any duties imposed by the court in this regard.”