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LAW COMMISSION OF INDIA

Report No.257

**Reforms in Guardianship and
Custody Laws in India**

May 2015

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22 May, 2015

Dear Mr. Sadananda Gowda ji,

In order to emphasize the “welfare of the child” as the paramount consideration in adjudicating custody and guardianship matters, the Law Commission of India decided to study the issue of adopting a shared parenting system in India.

The Commission, in November 2014, issued a Consultation Paper on the subject. The Consultation Paper analysed shared parentage systems across the world and reviewed the existing law in India. It also posed a set of questions pertaining to shared parenting and invited comments from the public. On receiving several of responses from the public, the Commission set up a sub committee to study the legal provisions pertaining to shared custody in both developing and developed countries, with special emphasis on the circumstances in which joint custody may be granted, parenting plans and mediation. Further, through a series of meetings with legal experts, practitioners and other stakeholders the committee outlined the nature and scope of the concept of shared parenting in India and identified the provisions in the current law that need to be amended.

After several rounds of discussions and deliberations, the views of the Commission centred around (i) strengthening the welfare principle in the Guardians and Wards Act, 1890 and emphasize its relevance in each aspect of guardianship and custody related decision-making; (ii) providing for equal legal status of both parents with respect to guardianship and custody; (iii) providing detailed guidelines to help decision-makers assess what custodial and guardianship arrangement serves the welfare of the child in specific situations; and (iv) providing for the option of awarding joint custody to both parents, in certain circumstances conducive to the welfare of the child.

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The above recommendations of the Commission are put in the form of its Report No.257 titled “**Reforms in Guardianship and Custody Laws in India**”, and is enclosed herewith for consideration by the Government.

With warm regards,

Yours sincerely,

Sd/-

[Ajit Prakash Shah]

**Mr. D.V. Sadananda Gowda
Hon’ble Minister for Law and Justice
Government of India
Shastri Bhawan
New Delhi**

Report No.257
Reforms in Guardianship and Custody
Laws in India

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CHAPTER I

BACKGROUND TO THE REPORT

1.1 This report of the Law Commission of India recommends a number of legislative amendments to emphasize the “welfare of the child” as the paramount consideration in adjudicating custody and guardianship matters. The worst affected in proceedings of 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 courts in India have also arrived at similar conclusions. For instance, the Bombay High Court 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.¹ The Supreme Court has said that the welfare of a child is not to be measured merely by money or physical comfort, but the word welfare must be taken in its widest sense that the tie of affection cannot be disregarded.² 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.³

1.2 Despite its widespread recognition as a relevant consideration, the manner in which the welfare principle occurs in our legal and judicial framework, has

¹ *Carla Gannon v. Shabaz Farukh Allarakhia*, Bombay High Court, Criminal Writ Petition No. 509 of 2009.

² *Nil Ratan Kundu v. Abhijit Kundu* AIR 2009 SC (Supp) 732.

³ Principle 4, Rule 3, Juvenile Justice (Care and Protection of Children) Rules, 2007.

certain problems, which need legislative redressal. First, there is disparity in the relevance accorded to this principle by different legislations regulating custody and guardianship. Second, there is uncertainty and lack of judicial consensus on what exactly constitutes welfare of the child, as a result, in fiercely fought custody battles, there are no ways to ensure that the interests of the child are actually protected. Third, the legal framework is silent on how should custody issues be handled, what factors should be relevant in decision-making, and what should be the process of dispute resolution between parents over children, among others. Fourth, although there are no codified rules governing custody, decision-making in this area is based on the presumption that welfare of the child essentially lies in custody being awarded to any one of the parents, assessed comparatively.

1.3 This report of the Law Commission reviews the current laws dealing with custody and guardianship, namely, the *Guardians and Wards Act, 1890* and the *Hindu Minority and Guardianship Act, 1956*, and recommends legislative amendments to achieve the following objectives:

- 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
- Provide for equal legal status of both parents with respect to guardianship and custody
- Provide detailed guidelines to help decision-makers assess what custodial and guardianship arrangement serves the welfare of the child in specific situations.

- Provide for the option of awarding joint custody to both parents, in certain circumstances conducive to the welfare of the child.

A. “Welfare of the Child”: Historical Evolution

1.4.1 Traditionally at Common law, the father was considered the sole guardian of the person and property of the child. The authority of the father in every aspect of the child’s life, including his/her conduct, education, religion and maintenance, was considered absolute and even the courts refused to interfere with the same. Mothers did not have any authority over children, since mothers did not have independent legal status; their identities being forged with that of their husbands upon marriage. As divorce became possible and mothers began to have independent legal existence and residence, their claim, if not right, to have custody of the children began to be recognized by the courts. However, despite a series of legislations – starting with the Custody of Infants Act, 1839, in the UK – that enabled the mother to claim custody over minor children, the rights of the father continued to remain supreme.

1.4.2 Two developments aided in the dismantling of paternal authority over children under English law. First, in a number of judicial decisions, the courts claimed the *parens patriae* jurisdiction – an even higher parental authority of the state – to supersede the natural guardianship of the father and award custody depending on what promoted the welfare of the child.⁴ Second, through a series of legislations, the British Parliament shifted the emphasis from paternal rights to the welfare of the child and conferred equal legal status to the father and the mother in determining

⁴ *In re, O’Hara*, (1990) 2 IR 232

guardianship and custody. The Custody of Infants Act, 1873, allowed the mother to have custody of the child till the age of sixteen and removed the restriction on petitions made by mothers who had committed adultery. The Guardianship of Infants Act, 1886, recognized equal rights of the mother over custody, access and appointment of testamentary guardian, and allowed the court to appoint and remove guardians in certain circumstances. The Guardianship of Infants Act, 1925, put the claims of the mother and the father in a custody dispute on an equal footing and provided that welfare of the infant shall be the “first and paramount consideration”. Finally, the Guardianship of Minors Act, 1973, conferred the same rights to the mother that the common law gave to the father; the mother was allowed to exercise these rights without the concurrence of the father. If the parents failed to reach an agreement, then the court is authorized to decide the matter based on the principle of welfare of the child.

1.4.3 In India, the Guardians and Wards Act was enacted in 1890 by the colonial state, which continued the legacy of Common law, of the supremacy of the paternal right in guardianship and custody of children. While Sections 7 and 17 of the Act provided that courts should act in furtherance of the welfare of the minor, Sections 19 and 25 of the original Act, subordinated the same to the supremacy of the father. It is only the Hindu Minority and Guardianship Act, 1956, enacted by the independent Indian state that provides that welfare of the minor shall be the paramount consideration superseding all other factors. This legal framework is discussed in detail in Chapter 2 of this report.

B. “Best Interest of the Child” in International Human Rights Law

1.5.1 While the “welfare of the child” principle dominates the domestic legal framework, a comparable legal standard is found in international human rights law. According to the United Nations Convention on the Rights of the Child (hereinafter, CRC), “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.”⁵ The Convention directs the State Parties to ensure that “both parents have common responsibilities for the upbringing and development of the child.”⁶ The CRC provides that a child should be separated from his or her parents if there is “abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child’s place of residence.”⁷ Welfare of the child, as a criterion for decision, is generally flexible, adaptable and reflective of contemporary attitudes regarding family within society.⁸

1.5.2 The Committee on the Rights of the Child has provided additional guidance regarding the best interest standard in its General Comment 14.⁹ The Committee stated that it is “useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests.”¹⁰ The

⁵ Convention on the Rights of the Child, Art. 3, (1989).

⁶ *Id.*, at Art. 18.

⁷ *Id.*, at Art. 9.

⁸ Gilmore, Stephen, *Great Debates: Family Law*, Palgrave Macmillan, (2014) pp. 76-83.

⁹ Committee on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), U.N. Doc. CRC/C/GC/14 (May 29, 2013).

¹⁰ General Comment 14, at ¶ 50.

Committee suggested that the following considerations can be relevant: the child's views; the child's identity (such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, and personality); preservation of the family environment and maintaining relations (including, where appropriate, extended family or community); the care, protection and safety of the child; any situation of vulnerability (disability, minority status, homelessness, victim of abuse, etc.); and the child's right to health and right to education.¹¹ However, there are two main criticisms of the best interest standard when applied to custody issues.

1.5.3 First, it is unpredictable and information intensive. Parents who are divorcing are left guessing as to how the courts will make custody decisions; this can lead to unnecessary pre-court bargaining that may be harmful to both the child and the parents.¹² This could be resolved by a more predictable rule-based standard, which delineates the content of the best interest standard. On the other hand, a rule-based standard is likely to be rigid and not consider the individual circumstances of each case.¹³ Second, the best interest of the child standard primarily focuses on the predicaments of the child alone and does not take into consideration the feelings and interests of the parents. The parents are also actors within the family who have rights and any legal framework must account for their welfare as well.¹⁴ Thus, it is an open question whether the best interest of the child standard is an adequate legal tool to resolve child custody decisions, or whether it needs to be supplemented with further legislative guidelines.

¹¹ General Comment 14, at ¶¶ 52–79.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

C. Joint Custody

1.6.1 The face of child custody arrangements is changing. A number of countries across the globe have adopted a preference for shared parenting systems over sole custody as a post-divorce arrangement with respect to children. In the West, this trend has arisen largely in 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.¹⁵ Studies indicate that children generally fare better when parents share custody, and some jurisdictions in some countries have a legally prescribed presumption of joint custody.¹⁶ However, scholars and courts also caution that a presumption of joint custody can run contrary to the “best interests of the child” standard, especially in cases of domestic violence, where battered women may agree to joint custody out of fear of further violence.¹⁷

1.6.2 In November 2014, the Law Commission of India (hereinafter, the Commission) issued a Consultation Paper on Adopting a Shared Parenting System in India (hereinafter, the Consultation Paper).¹⁸ The Consultation Paper surveyed shared parenting

¹⁵ Glover, R. & Steel, C., Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, *Journal of Divorce*, Vol. 12 No. 2–3 (1989).

¹⁶ Several states in the U.S. have this. *See, e.g.*, Idaho Code Ann. § 32-717B(4) (“Except as provided in subsection (5), of this section, absent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor child or children.”); Minn. Stat. Ann. § 518.17(2)(b) (“The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child.”).

¹⁷ DEPARTMENT OF LEGISLATIVE SERVICES, CHILD CUSTODY: BACKGROUND AND POLICY IMPLICATIONS OF A JOINT CUSTODY PRESUMPTION 6 (2011) (“Advocates for victims of domestic violence argue vehemently against placing a presumption of joint custody in the law.”).

¹⁸ The paper is available at <http://lawcommissionofindia.nic.in/Consultation%20Paper%20on%20Shared%20Parentage.pdf>.

systems in several countries, including the United States, Canada, Australia, the United Kingdom, South Africa, Netherlands, Thailand, Singapore, and Kenya. The systems studied in the Consultation Paper represented a wide variety of approaches to post-divorce custodial arrangements. The Consultation Paper also reviewed the existing law in India regarding child custody, including the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956, as well as relevant Supreme Court and High Court decisions, and concluded that the law on custody in India had evolved to a point where it was appropriate to initiate a discussion on the idea of shared parenting. To that end, the Consultation Paper posed a set of questions pertaining to shared parenting and invited comments from the public.

D. Summary of Responses received by the Commission

1.7.1 Of the 125 responses, most were in favour of shared custody. Some of the reasons for this were:

- Children need both their mother and father—they seek advice from each parent in different situations.
- Children need adequate opportunities to bond with each parent.
- Shared physical custody without shared legal custody will lead a child to believe that the parents do not have equal moral authority. Shared legal custody without shared physical custody will prevent a child from bonding with both parents.
- Shared custody can reduce acrimony between the parents.

- Some women misuse the protections in Protection of Women from Domestic Violence Act, 2005 and Section 498A of the Indian Penal Code, to take children away from their fathers. However, in shared custody arrangements, parental contact would be withheld only for child abuse, neglect, or mental illness. Children should have contact with both parents regardless of whether the parents reconcile.
- Gender-based stereotypes—e.g., that a girl child should be raised by the mother and a boy child by the father—are outdated. Both parents have valuable contributions to make in the lives of children of either gender.

1.7.2 A few reasons were given against a shared parenting law:

- During divorce proceedings, husbands use child custody to force their wives to give up maintenance or withdraw criminal complaints.
- It is not healthy for a child to move between two homes. A stable, anchored home is the best option.
- In a patriarchal society where women and children are often harassed, ensuring the child's safety could be a problem.
- Where parents have unresolved issues, they will not be able to agree on joint decisions for the child.
- India does not have the necessary supportive measures, such as: laws for division of matrimonial property; the right to reside in the matrimonial home; a financial plan for the future security of the caretaker spouse; and foster homes for the children.
- It could be used to harass women.

1.7.3 Several respondents had suggestions on how to implement a shared parenting system in India:

- Courts are not well suited to adjudicate custody disputes. Instead, mediation centres should be set up, staffed by people trained in advising parties on issues pertaining to children and relationships. Lawyers will just make the situation worse.
- Parents should have to submit a “Parenting Plan” which provides the personal profile, educational qualification, residence, and income of both parties.
- Parents should open a joint bank account that can only be used for the child’s expenses.

E. The Present Report

1.8 After receiving a large number of responses to the Consultation Paper, the Commission formed a sub-committee comprising the Chairman, Justice A.P. Shah; Prof. Moolchand Sharma, Member, Law Commission of India; Prof. Yogesh Tyagi and Mr. R. Venkataramani, Part-Time Members, Law Commission of India; Ms. Dipika Jain, Associate Professor and Mr. Saptarshi Mandal, Assistant Professor, Jindal Global Law School. The committee surveyed legal provisions pertaining to shared custody in both developing and developed countries, focusing in particular on the circumstances in which joint custody is granted or avoided; parenting plans; and mediation. Further, through a series of meetings with legal experts, practitioners and other actors involved in child custody disputes, the committee outlined the nature and scope of the concept of shared parenting in India and identified the provisions in the current law that need to be amended. The committee was assisted by Ms.

Sumathi Chandrashekar, Consultant, Law Commission of India; Mr. Brian Tronic; Ms. Upasana Garnaik and Ms. Kimberly Rhoten, Assistant Professors, Jindal Global Law School; and Ms. Madhuvanti Rajkumar, Ms. Smriti Sharma and Mr. Pranay Lekhi, Researchers, Law Commission of India. The Committee also acknowledges the valuable suggestions and inputs made by Justice (Mrs) Manju Goel, Retired Judge, Delhi High Court and Ms Laila Ollapally of Centre for Advanced Mediation Practice, Bangalore.

CHAPTER II

LEGAL FRAMEWORK GOVERNING CUSTODY AND GUARDIANSHIP IN INDIA

2.1 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.”¹⁹ 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.

A. Statutory Law

(i) Guardians and Wards Act, 1890

2.2.1 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 the District Courts to appoint guardians of

¹⁹ § 4(2), GWA.

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.²⁰ 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.²¹

2.2.2 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.'²² Section 17 lays down factors to be considered by the court when appointing guardians.²³ 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.'²⁴ Section 17(2) clarifies that in determining what is for 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

²⁰ For instance, Section 2 of the HMGA states that its provisions are 'supplemental' to and 'not in derogation' of the GWA.

²¹ Guardian and Wards Act, No. 8 of 1890, § 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.").

²² Guardian and Wards Act, No. 8 of 1890, § 7.

²³ Guardians and Wards Act, No. 8 of 1890, § 17.

²⁴ Guardian and Wards Act, No. 8 of 1890, § 17(1).

minor.²⁵ Section 17(3) states that if the minor is old enough to form an intelligent opinion, the court ‘may’ consider his/her preference.²⁶

2.2.3 Section 19 of the GWA deals with cases where the court may not appoint a guardian.²⁷ 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 unfit* to be a guardian.²⁸ 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.²⁹

2.2.4 Section 25 of the GWA deals with the authority of the guardian over the custody of the ward.³⁰ 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.³¹

2.2.5 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

²⁵ Guardian and Wards Act, No. 8 of 1890, § 17(2).

²⁶ Guardian and Wards Act, No. 8 of 1890, § 17(3).

²⁷ Guardian and Wards Act, No. 8 of 1890, § 19.

²⁸ Guardian and Wards Act, No. 8 of 1890, § 19(b).

²⁹ Personal Laws (Amendment) Act, No. 30 of 2010, § 2.

³⁰ Guardian and Wards Act, No. 8 of 1890, § 25.

³¹ Guardian and Wards Act, No. 8 of 1890, § 25(1).

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

2.2.6 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.³² 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).

2.2.7 In *Gita Hariharan v. Reserve Bank of India*,³³ 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

³² Paras Diwan, *LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY* (2012), Universal Law Publishing Co.: New Delhi, P. xv.

³³ (1999) 2 SCC 228.

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 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.*³⁴

2.2.8 Therefore, in the above specific situations, the mother could be the natural guardian even during the lifetime of the father.

2.2.9 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.³⁵

2.2.10 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,

³⁴ *Gita Hariharan v. Reserve Bank of India*, (1999) 2 SCC 228, ¶ 25.

³⁵ Hindu Minority and Guardianship Act, No. 32 of 1956, § 13.

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.

2.2.11 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.³⁶

(iii) *Hindu Marriage Act, 1955*

2.2.12 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

³⁶ Guardian and Wards Act, No. 8 of 1890, § 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).

authorizes courts to revoke, suspend or vary such interim orders passed previously.

(iv) Islamic Law

2.2.13 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.³⁷ 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.³⁸ 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

2.2.14 Similar to Section 26 of the Hindu Marriage Act, 1955, under Section 49 of the Parsi Marriage and Divorce Act, 1936³⁹ and Section 41 of the Indian Divorce Act, 1869,⁴⁰ courts are authorized to issue interim orders for custody, maintenance and education of minor children in any proceeding under these Acts.

³⁷ Paras Diwan, LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY (2012) Universal Law Publishing Co.: New Delhi, at P. xvi.

³⁸ *Id.*, at P. xvii.

³⁹ Parsi Marriage and Divorce Act, No. 3 of 1936, § 49.

⁴⁰ Indian Divorce Act, No. 4 of 1869, § 41.

Guardianship for Parsi and Christian children is governed by the GWA.

B. Judicial Interpretations

2.3.1 The Supreme Court of India⁴¹ and almost all of the 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.

2.3.2 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.⁴² Courts have held that in deciding custody, children should not be uprooted from their familiar surroundings just to give effect to the father's right to natural guardianship.⁴³ 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.⁴⁴ 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

⁴¹ *Mausami Ganguli v. Jayant Ganguli*, (2008) 7 SCC 673.

⁴² *Soora Beddi v. Cheema Reddy*, AIR 1950 Mad 306.

⁴³ *Vegesina Venkata Narasiah v. Chintalpati*, AIR 1971 AP 134.

⁴⁴ *L. Chandran v. Venkatalakshmi*, AIR 1981 AP 1.

welfare of the minor was the paramount concern, and the paternal relations did not have a preferential position in matters of custody.⁴⁵ There are similar examples from other High Courts as well.

2.3.3 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*,⁴⁶ 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*,⁴⁷ 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.⁴⁸

2.3.4 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.

⁴⁵ *Satyandra Nath v. B. Chakraborty*, AIR 1981 Cal 701.

⁴⁶ AIR 1988 Ker 36.

⁴⁷ AIR 1983 AP 106.

⁴⁸ *Mumtaz Begum v. Mubarak Hussain*, AIR 1986 MP 221.

(i) Superior Position of the Father

2.3.5 We have noted above, 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.*⁴⁹

2.3.6 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.”⁵⁰

2.3.7 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*,⁵¹ 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 a preferable to the father to retain custody of the child. In our considered opinion, such

⁴⁹ Law Commission of India, 133rd Report, August (1989), ¶ 4.1, available at: <http://lawcommissionofindia.nic.in/101-169/Report133.pdf>

⁵⁰ Law Commission of India, 133rd Report, August (1989), ¶ 4.3, available at: <http://lawcommissionofindia.nic.in/101-169/Report133.pdf>

⁵¹ AIR 2000 SC 1398.

*generalisation in favour of the mother should not have been made.*⁵²

2.3.8 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.

(ii) *Indeterminacy of the Welfare standard*

2.3.9 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.*⁵³

2.3.10 The problem with respect to the welfare principle is that, despite its extensive invocation, the appellate judicial decisions do not illuminate the legal

⁵² *Kumar v. Jahgirdar v. Chethana Ramatheertha*, SLP (Civil) 4230-4231/ 2003, Supreme Court of India, Judgment dated 29 January, 2004.

⁵³ Asha Bajpai, *Custody and Guardianship of Children in India*, 39(2) FAMILY LAW QUARTERLY 441, 447 (2005).

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.⁵⁴ For instance, there are contradictory judgments on whether the financial capacity of a parent is a relevant factor in deciding custody.⁵⁵ 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 such criteria would have difficulty claiming custody of children.

2.3.11 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.⁵⁶ Legal scholar and activist Flavia Agnes notes in this

⁵⁴ Archana Parashar, *Welfare of Child in Family Laws—India and Australia*, 1(1) NALSAR LAW REVIEW 49, 49 (2003).

⁵⁵ 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.

⁵⁶ Flavia Agnes, *Family Law II: Marriage, Divorce and Matrimonial Litigation* (2011), Oxford University Press: New Delhi, Pp. 257-259.

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.”⁵⁷ 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.

2.3.12 This chapter has reviewed the legal framework governing guardianship and custody in India, and has identified two areas that require legislative reform. The next chapter discusses the concept of shared custody based on examples from other jurisdictions.

⁵⁷ *Id.*, at 259.

CHAPTER III

THE CONCEPT OF JOINT CUSTODY

A. International Approaches to Joint Custody

3.1.1 Joint custody systems vary widely across the globe. A comparative review of different countries reveals a vast diversity of approaches. The term “joint custody” can refer to several different things: joint legal custody, joint physical custody, or a combination of both. The definition in the State of Virginia recognizes this:

*“Joint custody” means (i) joint legal custody where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child's primary residence may be with only one parent, (ii) joint physical custody where both parents share physical and custodial care of the child, or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.*⁵⁸

3.1.2 Similarly, the State of Georgia defines joint custody as “joint legal custody, joint physical custody, or both joint legal custody and joint physical custody.”⁵⁹

3.1.3 There is a similar distinction between sole legal custody and sole physical custody, although some States (including Virginia) combine them together.⁶⁰ The State of California has the following definitions:

⁵⁸ VA Code Ann. § 20-124.1.

⁵⁹ Ga. Code Ann., § 19-9-6(4).

⁶⁰ VA Code Ann. § 20-124.1 (“‘Sole custody’ means that one person retains responsibility for the care and control of a child and has primary authority to make decisions concerning the child.”).

“Sole legal custody” means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.⁶¹

“Sole physical custody” means that a child shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation.⁶²

3.1.4 One of the unifying themes across the different shared parenting systems is the importance given to the best interest of the child.⁶³ However, jurisdictions differ on how they apply this standard. Some have a presumption that shared parenting is in the best interest of the child—Australia’s Family Law Act, for example, states that, “[W]hen making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child.”⁶⁴ Other jurisdictions allow for shared parenting but do not contain this presumption. Minnesota law explicitly states that “[T]here is no presumption for or against joint physical custody,” with certain exceptions.⁶⁵ Canada, South Africa, the U.K., and Kenya also have no presumption for or against joint custody.⁶⁶

⁶¹ West’s Ann. Cal. Fam. Code § 3006.

⁶² West’s Ann. Cal. Fam. Code § 3007.

⁶³ See, e.g., Canada Divorce Act, 1985, § 16(8) (“In making an order under this section, the court shall take into consideration only the best interests of the child . . .”); Australia Family Law Act, 1975, § 65AA (as amended 2006) (“[I]n deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.”); South Africa Children’s Act, No. 38 of 2005, § 9; U.K. Children’s Act, 1989, § 1(1).

⁶⁴ Australia, Family Law Act, 1975 § 61DA (as amended); see also Idaho Code Ann. § 32-717B(4) (“[T]here shall be a presumption that joint custody is in the best interests of a minor child or children.”).

⁶⁵ M.S.A. § 518.17(2)(a).

⁶⁶ Canada Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), § 16(4), (8); South Africa Children’s Act, No. 38 of 2005, §§ 22, 23, 30; U.K. Children’s Act, 1989, §§ 8, 11(4); Kenya Children’s Act §§ 82(1), 83(1).

3.1.5 Many countries that allow (or even have a statutory preference for) shared parenting do not allow it in some cases. Where there is domestic violence or any sort of abuse, most jurisdictions have a presumption against shared parenting.⁶⁷ Shared parenting is also disfavoured where parents have a particularly contentious relationship. As a US Court of Appeals noted in *Braiman v Braiman*:

*Joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion. As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos.*⁶⁸

3.1.6 Practical considerations are also relevant. Some jurisdictions consider geographical proximity when deciding an award of shared parenting.⁶⁹ Family courts in South Africa, for example, 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 where the parents live far apart.⁷⁰ Also, the *de facto* living situation of child can be relevant—in the United Kingdom, shared residence orders “may be regarded as appropriate where it

⁶⁷ Id. St. 32-717B(5) (“There 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”) (Idaho); Australia Family Law Act, 197 (as amended), § 61DA(2) (presumption that equal parental responsibility is in the best interest of the child does not apply if there are reasonable ground to believe that a parent has engaged in abuse or family violence).

⁶⁸ *Braiman v. Braiman*, 44 N.Y.2d 584 (1978) (citations omitted); see also *Padgen and Padgen* (1991) FLC 92-231 (Austr.) (setting preconditions for shared custody, including compatible parenting, mutual trust, co-operation, and good communication).

⁶⁹ *Padgen and Padgen* (1991) FLC 92-231 (Austr.).

⁷⁰ A Barrat and S Burman, “Deciding the Best Interests of the Child” 118 South African Law Journal (2001).

provides legal confirmation of the factual reality of a child's life.”⁷¹

3.1.7 A number of jurisdictions recognize the distinction between legal custody (the right to make major decisions for a child, such as decisions involving education, medical and dental care, religion, and travel arrangements)⁷² and physical custody (the right to provide routine daily care and control of the child).⁷³ This distinction parallels the distinction between guardianship and custody in India. Some jurisdictions use other terms for this distinction. In Australia, for example, “parental responsibility”—defined as “the duties, powers, responsibilities and authority which, by law, parents have in relation to children”—is distinct from the amount of time the child spends with each of the parents.⁷⁴ Similarly in France, “parental authority,” which refers to “a set of rights and duties whose finality is the welfare of the child,”⁷⁵ is distinct from a parent’s

⁷¹ *In re A*, [2008] EWCA Civ 867, ¶ 66.

⁷² See V.A.M.S. 452.375(1)(2) (“‘Joint legal custody’ means that the parents share the decision-making rights, responsibilities, and authority relating to the health, education and welfare of the child, and, unless allocated, apportioned, or decreed, the parents shall confer with one another in the exercise of decision-making rights, responsibilities, and authority”); 15 V.S.A. § 664(1)(A) (“‘Legal responsibility’ means the rights and responsibilities to determine and control various matters affecting a child’s welfare and upbringing, other than routine daily care and control of the child. These matters include but are not limited to education, medical and dental care, religion and travel arrangements. Legal responsibility may be held solely or may be divided or shared.”).

⁷³ See VA Code Ann. § 20-124.1 (“‘Joint custody’ means . . . (ii) joint physical custody where both parents share physical and custodial care of the child”); 15 V.S.A. § 664(1)(B) (“‘Physical responsibility’ means the rights and responsibilities to provide routine daily care and control of the child subject to the right of the other parent to have contact with the child. Physical responsibility may be held solely or may be divided or shared.”); Ga. Code Ann., § 19-9-6(3) (“‘Joint physical custody’ 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.”).

⁷⁴ Compare Austrl. Family Law Act 1975 § 61B (“In this Part, parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.”), with Austrl. Family Law Act 1975 § 61DA (the presumption that parents have equal responsibility “does not provide for a presumption about the amount of time the child spends with each of the parents”).

⁷⁵ France Civil Code Art. 371-1.

right of access and lodging.⁷⁶ Kenya distinguishes between “legal custody” and “actual custody.”⁷⁷

B. Joint Custody in India

3.2.1 Although joint custody is not specifically provided for in Indian law, it is reported by lawyers that Family Court judges do use this concept at times to decide custody disputes. Two examples of attempts to institutionalize shared parenting in India in recent times are noted below. A set of guidelines on ‘child access and child custody,’ prepared by the Child Rights Foundation, a Mumbai-based NGO, 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.*⁷⁸

3.2.2 Although the guidelines state that this understanding of joint custody is consistent with the CRC, it must be noted that there can be no straitjacket formula that can be applied universally to all cases of custody.

3.2.3 The second example of joint custody is found in a 2011 judgment of the Karnataka High Court, which used the concept to resolve a custody dispute involving

⁷⁶ France Civil Code Art. 373-2-1 (“Where the welfare of the child so requires, the judge may commit exercise of parental authority to one of the parents. The exercise of the right of access and lodging may be refused to the other parent only for serious reasons.”).

⁷⁷ Kenya Children’s Act, § 81(c)–(d).

⁷⁸ Child Rights Foundation, *Child Access and Custody Guidelines* (2011), available at <http://www.mphc.in/pdf/ChildAccess-040312.pdf>, p. 24.

twelve-year old boy. In *KM Vinaya v. B Srinivas*,⁷⁹ a two-judge bench ruled that both parents are entitled to get custody “for the sustainable growth of the minor child.” 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 expenditures of the child.
- Each parent was given visitation rights on Saturdays and Sundays when the child was 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.

3.2.4 In addition to the above examples, there has been a growing demand to institute shared custody in India, from ‘father’s rights’ groups, who argue that the Indian family laws, including the law of custody, are biased towards the mothers. Consequently, these groups demand that fathers must have ‘equal rights’ over custody of children. This assertion about the law being biased towards the mothers is not only factually incorrect, but the demand is also based on a faulty understanding of equality in our constitutional and legal framework. As we have discussed below, the father is still deemed the natural guardian under both religious and secular family laws, while the mother is not. Further, in our society, equality in conjugal and family life is still a distant dream. A large number of women continue to disproportionately bear the burden of housework and childcare, even when they have a paid employment outside the home. Thus, when during the

⁷⁹ MFA No. 1729/ 2011, Karnataka High Court, Judgment dated Sept. 13, 2013.

subsistence of marriage, there is no equality in parental and caregiving responsibilities, then on what ground can one claim equality in parental rights over children after the dissolution of the marriage? Our Constitution and the legal framework direct the state to pursue substantive equality. Substantive equality recognizes the difference in the socio-economic position of the sexes within the home and outside of it, and aspires to achieve equality of results. We therefore reject the position of the father's rights groups on shared parenting based on the rhetoric of equal rights over children.

3.2.5 Having said that, however, we feel it is important to consider the potentials of the shared parenting model in India for several other reasons, discussed below.

C. Reasons for Adopting Joint Custody in India

3.3.1 First, with rapid social and economic change, conjugal and familial relationships are becoming more complex and so are the conditions of their dissolution. As these social changes that affect family life escalate, we need to update the laws governing the family relationships, during and after the marriage. At present, our legal framework for custody is based on the assumption that custody can be vested with either one of the contesting parties and suitability is determined in a comparative manner.⁸⁰ But, just as the basis for dissolving marriage has shifted over time, from fault-based divorce to mutual consent divorce, we need to think about custody differently and provide for a

⁸⁰ Swati Deshpande, *Divorced Dads Unite for Custody Rights*, Times of India (Sept. 9, 2009), <http://timesofindia.indiatimes.com/india/Divorced-dads-unite-for-custody-rights/articleshow/4988614.cms> ("Their experience is that family courts often swing totally one way or the other as child-custody battles usually end with one parent getting full control over the minor; the other parent is allowed only partial access during weekends or school holidays.").

broader framework within which divorcing parents and children can decide what custodial arrangement works best for them.

3.3.2 Second, the judicial attitude towards custody matters has evolved considerably. As legal scholar and activist, Flavia Agnes notes,

*In modern day custody battles, neither the father, as the traditional natural guardian, nor the mother, as the biologically equipped parent to care for the child of tender age, are routinely awarded custody. The principle, best interest of the child takes into consideration the existing living arrangements and home environment of the child. ... Each case will be decided on its own merit, taking into account the overall social, educational and emotional needs, of the child.*⁸¹

3.3.3 But despite this development in judicial attitude, we have ignored the idea that under certain favourable circumstances, the best interest of the child could also result from simultaneous association with both the parents. Since there is no inherent contradiction between pursuing the best interest of the child and the concept of shared custody, the law needs to provide for this option, provided certain basic conditions are met.

3.3.4 Third, as already mentioned, a number of institutions, including the judiciary, have already started engaging with the idea of shared custody. We have referred to some of these recent developments above. But currently this idea is being put into practice

⁸¹ Flavia Agnes, *Family Law II: Marriage, Divorce and Matrimonial Litigation* (2011), Oxford University Press: New Delhi, p. 255.

in a haphazard manner. There are several components to the idea of shared custody, such as clear determinants of the best interest of the child standard, the role of judges and mediators, parenting plans and so on. These must be laid down in the law, in order for shared custody to be a viable option that facilitates divorcing parents to mutually agree on the preferred custodial arrangement, without compromising on the welfare of the child.

3.3.5 In the legal systems of several Western countries that we have reviewed in this chapter, there is a presumption in favor of joint custody, and sole custody is awarded only in exceptional circumstances. We have already referred to the inequalities in parental roles, responsibilities and expectations that exists in our country. Therefore, we are not in favor of the law placing a presumption in favour of joint custody. As opposed to the case of guardianship, where we have recommended shared and equal guardianship for both parents, in this case, we are of the view that joint custody must be provided as an option that a decision-maker can award, if the decision-maker is convinced that it shall further the welfare of the child.

CHAPTER IV

MEDIATION IN CHILD CUSTODY CASES

4.1 Mediation refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement.⁸² In the context of child custody, the focus of mediation is not to determine who is right or wrong, but rather to establish a solution that meets a family's needs and is in the best interest of the child.⁸³ The benefits of mediating a child custody dispute are that both parents have input in determining custody and access arrangements for their children; the children feel more secure knowing that their parents are willing to continue working together to resolve family problems; parents are in the best position to decide what their children need; it helps parents develop some trust in each other, which allows for future negotiation on issues that arise; it is easier to work with a plan that parents have formulated themselves, rather than one that is imposed by the court; and it can help avoid a long and costly court battle.⁸⁴ Mediation reportedly produces better outcomes for children after divorce.⁸⁵

A. Current Legal Framework for Mediation in India

4.2.1 Section 89 of the Code of Civil Procedure, 1908 provides that a court can formulate terms of a settlement and give them to the parties for their

⁸² *Afcons Infra. Ltd. v. Cherian Varkey Constrn.*, (2010) 8 SCC 24, ¶ 8.

⁸³ Terri Garner, *Child Custody Mediation: A Proposed Alternative to Litigation*, 1989 J. DISP. RES. 139, 139–40.

⁸⁴ *Family Conciliation Services—Frequently Asked Questions*, MANITOBA FAMILY SERVICES, http://www.gov.mb.ca/fs/childfam/family_conciliation_faq.html (last visited Mar. 23, 2015).

⁸⁵ Danielle Gauvreau, *Mediation versus Litigation: Examining Differences in Outcomes amongst the Children of Divorce*, RIVERDALE MEDIATION, <http://www.riverdalemediation.com/wp-content/uploads/2009/07/Gauvreau-Mediation-vs-litigation.pdf> (last visited Mar. 23, 2015).

observation and, after receiving the observation of the parties, reformulate the terms and refer the same for arbitration, conciliation, judicial settlement (including settlement through Lok Adalat), or mediation. Rule 3 of Order XXXIIA of the Code of Civil Procedure, 1908 states that, in suits or proceedings relating to matters concerning the family, where it is possible to do so consistent with the nature and circumstances of the case, the court has a duty to assist the parties in arriving at a settlement. Also, if at any stage, it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

4.2.2 Additionally, Section 9 of the Family Courts Act, 1984, lays down the duty of the Family Courts to assist and persuade the parties, at first instance, in arriving at a settlement in respect of subject matter. The Family Courts have also been conferred with the power to adjourn the proceedings for any reasonable period to enable attempts to be made to effect settlement if there is a reasonable possibility.

4.2.3 There is a growing need of mediation for matrimonial disputes in India. In *K. Srinivas Rao v. D.A. Deepa*,⁸⁶ the Supreme Court stated that,

Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10 to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore,

⁸⁶ AIR 2013 SC 2176.

feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres. Matrimonial disputes particularly those relating to custody of child, maintenance, etc. are preeminently fit for mediation.

4.2.4 Furthermore, the Mediation Training Manual,⁸⁷ circulated by the Mediation and Conciliation Project Committee of the Supreme Court, states that all cases arising from strained or soured relationships—including disputes relating to matrimonial causes, maintenance, and custody of children—are normally suitable for Alternative Dispute Resolution processes.⁸⁸

B. International Approaches to Mediation in Child Custody

4.3.1 Despite many differences in the law regulating divorce and child custody worldwide, there is a broad awareness that the best way to reorganize a family after separation involves a consensual/extrajudicial solution that minimizes conflict and encourages collaborative parenting.⁸⁹

4.3.2 Virginia law specifies that, “Mediation shall be used as an alternative to litigation where appropriate.”⁹⁰ The goals of mediation “may include development of a proposal addressing the child's

⁸⁷ The Manual is available at <http://supremecourtfindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf>

⁸⁸ Mediation Training Manual, at p. 67, available at <http://supremecourtfindia.nic.in/MEDIATION%20TRAINING%20MANUAL%20OF%20INDIA.pdf>

⁸⁹ Giancarlo Tamanza et al, *Separation and Divorce in Italy: Parenthood, Children's Custody, and Family Mediation*, 51(4) FAMILY COURT REV. 557, 557 (2013).

⁹⁰ VA Code Ann. § 20-124.2(A).

residential schedule and care arrangements, and how disputes between the parents will be handled in the future.”⁹¹ However, in assessing the appropriateness of a referral for mediation, the court shall ascertain upon motion of a party whether there is a history of family abuse.⁹² The fee paid to a mediator is set by statute and is paid by the government.⁹³ Although the statutory scheme does not expressly say so, it appears that courts have the obligation to ensure that a mediated agreement is in the best interest on the child.⁹⁴

4.3.3 South Africa law also encourages mediation. It states that, in any matter concerning a child, “an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided.”⁹⁵ More specifically, a children’s court may order mediation before deciding an issue, but it must consider several factors before doing so: the vulnerability of the child, the ability of the child to participate in the proceedings, the power relationships within the family, and the nature of any allegations made by the parties.⁹⁶ Mediation cannot be used in a matter involving the alleged abuse of a child.⁹⁷ Where parents reach an agreement through mediation, the court must confirm that the agreement is in the best interests on the child.⁹⁸ Also, when divorced parents who are co-holders of parental rights

⁹¹ VA Code Ann. § 20-124.2(A).

⁹² VA Code Ann. § 20-124.4.

⁹³ VA Code Ann. § 20-124.4 (“The fee of a mediator appointed in any custody, support or visitation case shall be \$100 per appointment and shall be paid by the Commonwealth from the funds appropriated for payment of appointments made pursuant to subsection B of § 16.1-267.”).

⁹⁴ See Va. Prac. Family Law § 15:14(i) (2014 ed.) (citing a case where “a trial judge concluded that it would be contrary to public policy to simply enforce an arbitrator’s award without determining whether the award is in the best interests of the child, and, while the arbitrator’s decision could be given weight, it could not be used to deprive the court of its jurisdiction to determine the child’s best interests.”).

⁹⁵ Children’s Act, No. 38 of 2005, § 6(4).

⁹⁶ Children’s Act, No. 38 of 2005, § 49.

⁹⁷ Children’s Act, No. 38 of 2005, § 71(2).

⁹⁸ Children’s Act, No. 38 of 2005, § 72.

and responsibilities are experiencing difficulties in the exercise of their rights, they must attempt to agree on a parenting plan before seeking the court's assistance.⁹⁹ In developing a parenting plan, the parents must either seek assistance from certain specified people (e.g., a social worker) or go through mediation.¹⁰⁰

4.3.4 In China, a court dealing with a divorce case “shall carry out mediation.”¹⁰¹ However, mandatory mediation has been criticized as problematic in cases of domestic violence—mediated agreements in such cases will not be the product of negotiations between parties of equal bargaining power.¹⁰²

4.3.5 In Canada, family mediation is widely promoted as an alternative to litigation.¹⁰³ The Divorce Act, 1985 requires every lawyer or advocate acting on behalf of a divorcing spouse to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of mediation facilities that might be able to assist with this.¹⁰⁴ A lawyer must submit a certification to the court that he or she has discussed this with the client.¹⁰⁵ In addition, Canadian family law provides that parents that cannot agree must attend a mediation information session before appearing before a judge.¹⁰⁶ The session provides information on the

⁹⁹ Children's Act, No. 38 of 2005, § 33(2).

¹⁰⁰ Children's Act, No. 38 of 2005, § 33(5).

¹⁰¹ Marriage Law of the People's Republic of China (1980), art. 32.

¹⁰² Charlotte Germane et al, *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1(1) BERKELEY J. GENDER L. & JUST. 175, 176 (2013); see generally DENNIS P. SACCUZZO ET AL, MANDATORY CUSTODY MEDIATION: EMPIRICAL EVIDENCE OF INCREASED RISK FOR DOMESTIC VIOLENCE VICTIMS AND THEIR CHILDREN (2003), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/195422.pdf>.

¹⁰³ Francine Cyr et al, *Family Life, Parental Separation, and Child Custody in Canada: A Focus on Quebec*, 51(4) FAMILY COURT REV. 522, 528 (2013).

¹⁰⁴ Divorce Act, 1985, § 9(2).

¹⁰⁵ Divorce Act, 1985, § 9(3).

¹⁰⁶ Francine Cyr et al, *Family Life, Parental Separation, and Child Custody in Canada: A Focus on Quebec*, 51(4) FAMILY COURT REV. 522, 528 (2013).

mediation process, including the nature and objectives of mediation, the steps involved in the process, the role of the mediator, and the roles played by the spouses.¹⁰⁷ After attending this session, the spouses can proceed with mediation or continue legal proceedings. Provincial laws also provide for mediation.¹⁰⁸ In the province of Quebec, for example, divorcing couples that have children can obtain the services of a professional mediator during the negotiation and settlement of their application for separation, divorce, dissolution of the civil union, child custody, spousal or child support, or the review of an existing decision.¹⁰⁹ Five hours are paid by the Family Mediation Service and another 2.5 hours can be added when a revision of an existing court judgment is needed.¹¹⁰ Some provincial laws also specify the duties of dispute resolution professionals¹¹¹ and the required qualifications for family mediators.¹¹²

4.3.6 This chapter set forth the existing law in India regarding mediation in family matters and how such mediation is implemented in other countries. The following chapter will discuss other important considerations for deciding child custody cases.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See, e.g., British Columbia Family Law Act, § 8, available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_11025_01.

¹¹² See, e.g., British Columbia Family Law Act Regulations, B.C. Reg. 347/2012, §§ 4–5, available at <http://www.bclaws.ca/civix/document/id/complete/statreg/331105891>.

CHAPTER V

CONSIDERATIONS FOR DECIDING CHILD CUSTODY CASES

5.1 As discussed earlier, the guiding principle in child custody cases is the welfare of the child. However, it can be difficult to determine, in a given case, what specific custody or visitation arrangement would be in the welfare of the child—this standard gives little practical guidance.¹¹³ Because of this, it is important to have guidelines for judges and other decision makers on how to implement this standard. Several organizations have published standards and guidelines for conducting child custody evaluations.¹¹⁴ The following analysis is based primarily on states in the U.S. because they were found to have the most fully developed guidelines.¹¹⁵

A. Factors to Consider for the Best Interest Standard

5.2 A number of jurisdictions have statutes that enumerate specific factors to guide courts when they consider the best interests of a child. Generally, these factors relate to: the physical and mental condition of the child; the physical and mental condition of each parent; the child's relationship with each parent; the needs of child regarding other important people (siblings, extended family members, peers, etc.); the role each parent has played and will play in the child's care; each parent's ability to support the child's contact and relationship with the other parent; each parent's ability

¹¹³ Laura Woodward Tolle *et al*, IMPROVING THE QUALITY OF CHILD CUSTODY EVALUATIONS : A SYSTEMATIC MODEL 2 (Springer 2012) (noting “the lack of clarity and explication of the key standards underlying these [cases]—the best interests of the child”).

¹¹⁴ Laura Woodward Tolle *et al*, IMPROVING THE QUALITY OF CHILD CUSTODY EVALUATIONS : A SYSTEMATIC MODEL 15 (Springer 2012).

¹¹⁵ A number of other countries do not have written guidelines at all (at least, not in an easily accessible form). Guidelines from U.S. states were readily available and found to address all the major issues and challenges that might arise during child custody disputes.

to resolve disputes regarding the child; the child's preference; any history of abuse; and the health, safety, and welfare of the child.¹¹⁶ However, these factors are not exhaustive, and some statutes expressly indicate that courts should consider "other factors as the court deems necessary and proper to the determination."¹¹⁷

B. Determining the Preference of the Child

5.3.1 A child's preference in matters of custody is generally taken into consideration if the child is sufficiently intelligent and mature.¹¹⁸ The preference must also be reasonable—the child's wishes will not be considered by the court if, e.g., it is based on which parent's home has better toys.¹¹⁹ In determining the preference of the child, some courts will interview the child in court chambers (after asking for each parent's permission to do so outside their presence).¹²⁰ The attorneys may be present, but they may or may not be allowed to ask questions during the interview.¹²¹ The

¹¹⁶ See VA. CODE ANN. § 20-124.3; COLO. REV. STAT. ANN. § 14-10-124(1.5)(a); WEST'S ANN. CAL. FAM. CODE § 3011.

¹¹⁷ VA. CODE ANN. § 20-124.3(10); see also 15 V.S.A. § 665 ("[T]he Court shall be guided by the best interests of the child, and shall consider *at least* the following factors:") (emphasis added); COLO. REV. STAT. ANN. § 14-10-124(1.5)(a) ("In determining the best interests of the child for purposes of parenting time, the court shall consider all relevant factors, including . . .").

¹¹⁸ VA. CODE ANN. § 20-124.3(8) (courts should consider the "reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference"); COLO. REV. STAT. ANN. § 14-10-124(1.5)(a)(II) (courts should consider the "wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule"); South Africa Children's Act, No. 38 of 2005, § 10 ("Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.").

¹¹⁹ Aaron Thomas, *A Child's Preference in Arizona Custody Proceedings*, DIVORCENET, <http://www.divorcenet.com/resources/a-childs-preference-arizona-custody-proceedings.html> (last visited May 5, 2015).

¹²⁰ Aaron Thomas, *A Child's Preference in Maryland Custody Proceedings*, DIVORCENET, <http://www.divorcenet.com/resources/a-childs-preference-maryland-custody-proceedings.html> (last visited May 5, 2015); Sleprow, Sleprow & Associates, Inc., *Child's Preference and Awarding Custody in Rhode Island*, HG.ORG LEGAL RESOURCES, <http://www.hg.org/article.asp?id=18641> (last visited May 5, 2015).

¹²¹ *Id.*

judge will usually make a record of the interview (e.g., by using a court reporter),¹²² but the judge can also order that the interview be kept confidential if doing so would be in the best interest of the child.¹²³

5.3.2 Alternatively, instead of an interview, the court can appoint a guardian *ad litem* to represent the child's interests.¹²⁴ The guardian *ad litem* can submit a report regarding what is in the child's best interests, including the child's wishes for custody.¹²⁵ The guardian *ad litem* can also testify about the child's preferences.¹²⁶ The court can also have a social worker or other mental health professional testify about the child's opinion.¹²⁷

C. Access to Records of the Child

5.4 Both parents are generally allowed access to a child's records (medical, educational, etc.).¹²⁸ However, where disclosure of information (for example, the present address of a parent or the child) could

¹²² Sleprow, Sleprow & Associates, Inc., *Child's Preference and Awarding Custody in Rhode Island*, HG.ORG LEGAL RESOURCES, <http://www.hg.org/article.asp?id=18641> (last visited May 5, 2015).

¹²³ Aaron Thomas, *A Child's Preference in Arizona Custody Proceedings*, DIVORCENET, <http://www.divorcenet.com/resources/a-childs-preference-arizona-custody-proceedings.html> (last visited May 5, 2015).

¹²⁴ Aaron Thomas, *A Child's Preference in Maryland Custody Proceedings*, DIVORCENET, <http://www.divorcenet.com/resources/a-childs-preference-maryland-custody-proceedings.html> (last visited May 5, 2015); Sleprow, Sleprow & Associates, Inc., *Child's Preference and Awarding Custody in Rhode Island*, HG.ORG LEGAL RESOURCES, <http://www.hg.org/article.asp?id=18641> (last visited May 5, 2015).

¹²⁵ *Id.*

¹²⁶ Aaron Thomas, *A Child's Preference in Maryland Custody Proceedings*, DIVORCENET, <http://www.divorcenet.com/resources/a-childs-preference-maryland-custody-proceedings.html> (last visited May 5, 2015).

¹²⁷ *Id.*

¹²⁸ *See, e.g.*, N.C.G.S.A. § 50-13.2(b) ("Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child."); W. Va. Code, § 48-9-601; M.G.L.A. 208 § 31 ("The entry of an order or judgment relative to the custody of minor children shall not negate or impede the ability of the non-custodial parent to have access to the academic, medical, hospital or other health records of the child . . .").

present a risk of harm, the court may prevent disclosure of the information.¹²⁹

D. Grand-parenting Time

5.5 When evaluating the best interest of a child for a custody order, courts are generally empowered to consider the child's relationship to friends, extended family members (including grandparents), and other important persons. In many jurisdictions, such relationships are expressly listed in the statutory factors for the best interest of a child standard. Virginia state law, for example, requires a court to consider "[t]he 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."¹³⁰ Thus, courts can provide legal visitation rights to grandparents where appropriate.

E. Mediation

5.6 As discussed earlier in the report, mediation is the widely preferred method for resolving custody and other parenting disputes,¹³¹ and many jurisdictions provide guidelines as to when and how mediation should be employed in such disputes. In cases involving abuse or other mistreatment, for instance, mediation is not seen as appropriate.¹³² Some jurisdictions provide free mediation (at least to a point) for divorcing couples,

¹²⁹ M.G.L.A. 208 § 31 ("[I]f nondisclosure of the present or prior address of the child or a party is necessary to ensure the health, safety or welfare of such child or party, the court may order that any part of such record pertaining to such address shall not be disclosed to such non-custodial parent.").

¹³⁰ VA. CODE ANN. § 20-124.3; COLO. REV. STAT. ANN. § 14-10-124(1.5)(a)(III) (a court must consider "The interaction and interrelationship of the child with his or her parents, his or her siblings, and any other person who may significantly affect the child's best interests"); 15 V.S.A. § 665(b)(7) (a court must consider "the relationship of the child with any other person who may significantly affect the child").

¹³¹ See *supra* Ch. IV.

¹³² *Id.*

which can further encourage collaborative resolution (as an alternative to costly litigation).¹³³

F. Relocation

5.7 When both parents have legal rights regarding a child, relocation disputes can present a challenge. On the one hand, in today's highly mobile society, parents should be allowed to relocate for job opportunities or other important considerations. On the other hand, such relocation can interrupt the other parent's visitation schedule with the child. Courts generally solve such disputes by resorting to several principles. First, in some jurisdictions, a parent does not need permission (either from the court or the other parent) to relocate if it is only a local move or it would not affect the other parent's visitation schedule.¹³⁴ Second, a parent who intends to relocate must give advance written notice to the other parent. Virginia, for example, requires thirty days advance written notice.¹³⁵ This gives the other parent time to contest the move in court. The other key consideration is whether the proposed relocation is in the best interest of the child.¹³⁶ A court may also consider: whether the relocation is for a legitimate purpose; each parent's reasons for seeking or opposing the relocation; the quality of the relationships between the child and each parent; the

¹³³ *Id.*

¹³⁴ UTAH CODE ANN. § 30-3-37(1) ("For purposes of this section, 'relocation' means moving 150 miles or more from the residence of the other parent."); COLO. REV. STAT. ANN. § 14-10-129(1)(a)(II) (requiring court approval for relocations "that substantially change[] the geographical ties between the child and the other party").

¹³⁵ VA. CODE ANN. § 20-124.5; *see also* COLO. REV. STAT. ANN. § 14-10-129(1)(a)(II) ("The party who is intending to relocate with the child to a residence that substantially changes the geographical ties between the child and the other party shall provide the other party with written notice as soon as practicable of his or her intent to relocate . . ."); UTAH CODE ANN. § 30-3-37(2) ("The relocating parent shall provide 60 days advance written notice of the intended relocation to the other parent.").

¹³⁶ Va. Prac. Family Law § 15:11 (2015 ed.) (discussing relocation standards in Virginia); UTAH CODE ANN. § 30-3-37(4) ("In a hearing to review the notice of relocation, the court shall, in determining if the relocation of a custodial parent is in the best interest of the child, consider any other factors that the court considers relevant . . .").

impact of the relocation on the quantity and the quality of the child's future contact with the non-relocating parent; the degree to which the relocating parent's and the child's life may be enhanced economically, emotionally and educationally by the relocation; and the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements.¹³⁷

G. Decision Making

5.8 There are several key areas that should be addressed in a custody order or parenting plan—these are common areas of dispute, so it is best if there are clear rules specifying each parent's role (i.e., which decisions may be made individually, and which must be made jointly):

1. Medical: whether the child is to be hospitalized, and whether a non-emergency surgical procedure is to be performed on the child.
2. Education: the choice of school, enrichment classes, courses, and subjects, and whether the child is to attend a particular school trip or outing, or tuition.
3. Religion: the religious instruction of the child, attendance at places of worship, undergoing religious ceremonies, etc.
4. Extra-curricular activities: choice of extra-curricular activities, taking into consideration the child's interests and aptitude.
5. Travelling with one parent: where the child will spend holidays, and information that the parent has to provide to the other parent (e.g., a detailed itinerary).

¹³⁷ CONN. GEN. STAT. ANN. § 46b-56d(b).

H. Parenting Plan

5.9 A number of jurisdictions require divorcing parents (either jointly or individually) to submit a shared parenting plan to the court. The plan must address major areas of decision making, including: the child's education; the child's health care; religious upbringing; procedures for resolving disputes between the parties with respect to child-raising decisions and duties; and the periods of time during which each party will have the child reside or visit with him, including holidays and vacations, or the procedure by which such periods of time shall be determined.¹³⁸ Some jurisdictions provide additional guidance regarding communication (between parents and between the child and the non-custodial parent); transportation to and from the other parent's residence; what to do if a parent wishes to relocate; how to change scheduled parenting time; and exchanging information about the child.¹³⁹ The parenting plan itself is not a legal document; it must be approved by a court to have legal effect.¹⁴⁰

I. Visitation

5.10.1 A number of jurisdictions have detailed visitation schedules that courts can use verbatim or modify as needed. These serve as templates so that the court does not have to start from scratch. Although these sample schedules vary across jurisdictions, there

¹³⁸ MASS. GEN. LAWS ch. 208, § 31; WASH. REV. CODE § 26.09.184.

¹³⁹ See DOMESTIC RELATIONS COMMITTEE, INDIANA PARENTING TIME GUIDELINES (2013), § 1, available at http://www.in.gov/judiciary/rules/parenting/#_Toc348614670.

¹⁴⁰ MASS. GEN. LAWS ch. 208, § 31 ("At the trial on the merits, the court shall consider the shared custody implementation plans submitted by the parties. The court may issue a shared legal and physical custody order and, in conjunction therewith, may accept the shared custody implementation plan submitted by either party or by the parties jointly or may issue a plan modifying the plan or plans submitted by the parties. The court may also reject the plan and issue a sole legal and physical custody award to either parent."); WASH. REV. CODE § 26.09.187.

are some common themes. Generally, the schedule will depend on the child's age and the distance between the parents' homes.¹⁴¹ There must be a fair allocation of holidays, birthdays, and school vacations. A child must have time with his/her siblings and other important people in the child's life (grandparents, etc.). A parent's ability to care for a young child (especially infants) may be considered. Some basic options for scheduling parenting time are:

- The child alternates between the parents on a regular basis (e.g., daily, weekly, or monthly)
- The child lives with one parent when school is in session, and lives with the other parent during school vacations
- The child lives primarily with one parent, but visits the other parent on alternating weekends and 1–2 evenings per week (possibly including an overnight stay)

5.10.2 Guidelines on scheduling have been provided by both Indiana and Michigan, which recommend that a child visit a non-custodial parent every other weekend and one weekday evening per week.¹⁴² The Indiana and Michigan guidelines also recommend dividing holidays (some are given to each parent) and then alternating them every year.¹⁴³ However, some holidays (such as winter school vacation) are not alternated, but rather

¹⁴¹ See DOMESTIC RELATIONS COMMITTEE, INDIANA PARENTING TIME GUIDELINES (2013), §§ 2–4, *available at* http://www.in.gov/judiciary/rules/parenting/#_Toc348614670; STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN PARENTING TIME GUIDELINE, *available at* http://courts.mi.gov/administration/scao/resources/documents/publications/manuals/focb/pt_gdlns.pdf; TATA INSTITUTE OF SOCIAL SCIENCES, CHILD ACCESS & CUSTODY GUIDELINES (2011), *available at* <http://www.mphc.in/pdf/ChildAccess-040312.pdf>; COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT, CONNECTING WITH KIDS (2004), *available at* https://www.courts.state.co.us/userfiles/file/self_help/co_parenting_time_book2004.pdf (last visited April 2nd 2015).

¹⁴² INDIANA PARENTING TIME GUIDELINES at § 2(D)(1); MICHIGAN PARENTING TIME GUIDELINE at 7.

¹⁴³ INDIANA PARENTING TIME GUIDELINES at § 2(F)(2); MICHIGAN PARENTING TIME GUIDELINE at 7–9.

shared equally by the parents every year (i.e., the child spends the first half of the vacation with one parent, and the second half with the other).¹⁴⁴ Both states also have additional guidelines for parents that live far away from each other¹⁴⁵ and for young children.¹⁴⁶

5.10.3 In India, visitation rights have been defined by the Supreme Court in *Roxann Sharma v. Arun Sharma*¹⁴⁷ as “a non-custodial parents or grandparent's Court ordered privilege of spending time with a child or grandchild who is living with another person, usually the custodial parent.” In a number of cases, the Supreme Court has granted visitation rights to the non-custodial parent and grandmothers, adoptive parents, maternal uncles and aunts. The prime consideration for visitation rights is the welfare of the child and the proximity of the child to the relation concerned.

5.10.4 For example, in *Prabhat Kumar v. Himalini*,¹⁴⁸ the Court held that the welfare of the child is determined by the benefit of care and affection the minor would receive in granting visiting rights to such family members of the hostile family. The onus of proving such benefit is upon the family member claiming the right. Another important consideration is the nearness of the child to the family member. Here, the Court upheld the order for interim visitation for the father and his relatives, due to a reinforced relationship between the child and father on account of regular visits ordered by the guardianship Judge.

¹⁴⁴ INDIANA PARENTING TIME GUIDELINES at § 2(F)(2)(B). MICHIGAN PARENTING TIME GUIDELINE at 8–9.

¹⁴⁵ INDIANA PARENTING TIME GUIDELINES at § III; MICHIGAN PARENTING TIME GUIDELINE at 23–34.

¹⁴⁶ INDIANA PARENTING TIME GUIDELINES at § II(C) (discussing infants and toddlers); MICHIGAN PARENTING TIME GUIDELINE at 24–25.

¹⁴⁷ *Roxann Sharma v. Arun Sharma* MANU/SC/0165/2015.

¹⁴⁸ *Prabhat Kumar v. Himalini* MANU/DE/0016/201.

5.10.5 The Commission believes it is necessary and useful to lay down broad guidelines on visitation rights, such that they are conducive to the welfare of the child, and to ensure that both parents are able to spend time with the child.

CHAPTER VI

SUMMARY OF RECOMMENDATIONS

6.1 The recommendations of the Law Commission in this 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 (1980) of the Law Commission, entitled ‘The Guardians and Wards Act, 1890 and certain provisions of the Hindu Minority and Guardianship Act, 1956,’¹⁴⁹ as well as the 133rd report (1989) of the Law Commission, entitled ‘Removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of the welfare principles.’¹⁵⁰

6.2 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.

¹⁴⁹ Law Commission of India, 83rd Report, April (1980), available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>

¹⁵⁰ Law Commission of India, 133rd Report, August (1989), available at <http://lawcommissionofindia.nic.in/101-169/Report133.pdf>

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

6.3 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*,¹⁵¹ the mother can become a natural guardian during the lifetime of the father only in exceptional circumstances. This is required to be changed to fulfil 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 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

¹⁵¹ (1999) 2 SCC 228

a minor and his/her property.¹⁵² 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.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ 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

¹⁵² Law Commission of India, 133rd Report, August (1989), ¶ 4.3, available at: <http://lawcommissionofindia.nic.in/101-169/Report133>

¹⁵³ Law Commission of India, 83rd Report, April 1980, ¶6.44, p. 30, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>

¹⁵⁴ *Venkata Narasiah v. Peddiraju*, 1970 (1) ALT 25; *Kumarswami Mudaliar v. Rajammal* AIR 1957 Mad. 563.

¹⁵⁵ Personal Laws (Amendment) Act, No. 30 of 2010, chapter II.

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.¹⁵⁶ It was also enacted before the Hindu Adoptions and Maintenance Act, 1956, which corrected the legal position of adoption of a daughter statutorily.¹⁵⁷ 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.¹⁵⁸ 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

¹⁵⁶ Paras Diwan, *LAW OF ADOPTION, MINORITY, GUARDIANSHIP & CUSTODY*, 3rd edn., 2000, p. 226.

¹⁵⁷ Hindu Adoptions and Maintenance Act, No. 78 of 1956, § 10.

¹⁵⁸ MULLA HINDU LAW, ed. Satyajeet A. Desai, 21st edn., 2010, p 1258.70

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.

B. Amendments to the Guardians and Wards Act, 1890

6.4 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).¹⁵⁹ 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

¹⁵⁹ Law Commission of India, 83rd Report, April (1980), ¶6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>

with the father as a natural guardian of the child, and changed the position of the law slightly.¹⁶⁰ 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,”¹⁶¹ 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

¹⁶⁰ Personal Laws (Amendment) Act, No. 30 of 2010, chapter II.

¹⁶¹ Law Commission of India, 83rd Report, April (1980), ¶6.40, available at <http://lawcommissionofindia.nic.in/51-100/Report83.pdf>

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.¹⁶² 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 report¹⁶³ 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.¹⁶⁴ This is in consonance with the provisions of Section 17 of

¹⁶² *Id.*, ¶7.18

¹⁶³ *Id.*, ¶7.14-7.17

¹⁶⁴ *Id.*, ¶7.20

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.

4. **Insertion of new Chapter IIA:** This chapter deals with custody, child support and visitation issues, covering a range of topics as discussed below.

- a. *Section 19A: Objectives of the chapter.*

This section lays down the principal objectives of this chapter, by way of guidance to the court as to what the chapter seeks to achieve. Children are the most vulnerable persons in a matrimonial dispute, and the trauma that they face during and after the legal determination of such disputes is immeasurably harsh. Children often become pawns in such matters, and are used by their parents for their own purposes, to strike bargains that rarely take into consideration the emotional, social and mental upheavals that the children themselves may be facing. The Commission believes this imbalanced situation can be addressed in some measure through legislative changes that will place a duty upon the court to uphold the child's welfare in each and every circumstance, regardless of the individual interests of the parties involved.

These objectives, therefore, embody the fundamental and most important recommendation of the Law Commission,

regarding the welfare of the child being of utmost consideration. A court is bound to bear in mind these objectives in making an order under this chapter, and will therefore be required to comprehensively assess the consequences of any order it makes in light of these objectives.

The objectives require that the welfare of a child is met by ensuring various other aspects, such as recognising the changing emotional, intellectual and physical needs of the child; maintaining a healthy and continuing relationship with both parents, society and siblings; recognising the prior and future ability and commitment of the parents to participate in the growth of the child; protecting the child from violence of any kind, and so on.

b. Section 19B: Applicability of this chapter.

Custody issues are dealt with in three personal laws, which are, the Indian Divorce Act, 1869 (Sections 41 and 43), the Parsi Marriage and Divorce Act, 1936 (Section 49), and the Hindu Marriage Act, 1955 (Section 26). In general terms, these sections grant the court the power to pass decree/ order regarding the custody, maintenance and education of minor children, whose parents are parties to a suit for divorce or separation.

The new chapter IIA as recommended by the Law Commission provides for detailed considerations in custody matters, and in that regard, is in addition to the powers of the court as listed in the three personal laws. This new

section clarifies that the provisions of this new chapter will apply to all proceedings related to custody and child support, including under the three laws. This cross-reference to the personal laws is provided in the statute to clarify that the recommendations of the Commission are intended to be secular, and applicable to all persons, regardless of the personal laws they may be governed by.

c. Section 19C: Definitions.

This section offers two key definitions, i.e., joint custody and sole custody. Joint custody is where both parents share physical custody of the child (in such proportion as the court determines to be for the welfare of the child), and also equally share the responsibility for the care and control of the child, and decision-making authority. Sole custody is a situation where one parent retains the physical care and control of a child. However, these rights may be subject to the power of the court to grant visitation rights to the other parent.

The introduction of joint custody as a defined term is to recognise the possibility, in law, of a court issuing an order of joint custody, if it is for the welfare of the child. However, the definition of joint custody, and the substantive provisions that follow, must always be read in light of the objectives that open the chapter, which seek to ensure that the custody arrangement eventually granted is always subject to the welfare of the child being met.

d. Section 19D: Award of custody.

This section gives powers to the court to make different kinds of custody orders. However, it also requires the court to consider the detailed guidelines contained in the schedule in this regard. The court retains the power to modify the orders so made, provided such modifications remain in the welfare of the child, and the reasons for such modification are recorded.

e. Section 19E: Power to pass additional orders.

This is an additional power granted to the court, necessary to effectuate or enforce any order relating to the custody of the child under the chapter.

f. Section 19F: Mediation.

Many disputes arising out of divorce proceedings (child custody, child support, etc.) could be solved through mediation. This would promote better outcomes for both parents and children, as well as reduce the strain on the overburdened court system. Before engaging directly with the court system, the Commission recommends that parties to a custody matter must ordinarily consider mediation before the proceedings actually begin, or when the court so orders. The court will usually refer the parents to the court-annexed mediation centre. However, in case there is no such centre, the court may appoint an individual mediator.

At present, Family Courts take assistance from marriage counsellors in settling disputes. Counsellors are different from mediators in terms of their approach. Counselling usually

requires identifying behavioural issues of the individual parties and tends to involve professionals trained in areas of mental health, psychology and sociology, unlike mediation, which requires identifying conflict behaviour and tends to involve professionals trained in dispute resolution.¹⁶⁵ Therefore, the Commission recommends that parties should be given the opportunity to participate in mediation with a trained mediator. Mediators should have appropriate background and training, including in family disputes. Further, High Courts, District Courts and Family Courts should maintain a list of court-annexed mediation centres and individual mediators. These will be identified and paid remuneration in accordance with a scheme designed by the concerned High Court in consultation with the respective state governments.

As the legislation repeatedly emphasises, it is the duty of the court to ensure that the final custody order is for the welfare of the child. For this purpose, the Commission recommends that the court should have the power to obtain an independent psychological evaluation of the child, in order to determine various related issues (e.g., the child's preference, influence of and relationships with the parents, etc.). Further, as in the case of mediation, professional assistance may be required, as neither the court nor mediators may be qualified to understand child psychology.

¹⁶⁵ Maritalmediation 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).

Time-bound resolution is also a key factor to achieve the ultimate objective of ensuring that the welfare of the child is met. The Supreme Court has recognized that Family Courts should ensure that a reasonable time limit is prescribed for the completion of the entire mediation process so as to not delay the resolution of family disputes any further.¹⁶⁶ The Commission recommends that any mediation under this section must be time-bound, and must conclude within sixty days of being so ordered. In the absence of such a requirement, there is a risk that mediation may continue indefinitely and adversely affect the child in question. However, the court can extend this period, where necessary.

g. Section 19G: Child support.

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 Law¹⁶⁷ and Parsi Law,¹⁶⁸ and the Indian Divorce Act.¹⁶⁹ However, these provisions do not list the reasons for which such child support is required. The Hindu Adoptions and Maintenance Act, 1956 has a provision for maintenance of children,¹⁷⁰ but merely casts an obligation of maintenance on the father¹⁷¹ as well as the mother.¹⁷² Maintenance here means the provision for food, clothing, residence,

¹⁶⁶ *Baljinder Kaur v. Hardeep Singh*, AIR 1998 SC 764.

¹⁶⁷ Hindu Marriage Act, No. 25 of 1955, § 26.

¹⁶⁸ Parsi Marriage and Divorce Act, No. 3 of 1936, § 49.

¹⁶⁹ Indian Divorce Act, No. 4 of 1869, § 41 and § 43.

¹⁷⁰ Hindu Adoptions and Maintenance Act, No. 78 of 1956, § 20.

¹⁷¹ *Krishnakumari v. Varalakshmi* AIR 1976 AP 365.

¹⁷² MULLA HINDU LAW, ed. Satyajeet Desai, 21st edn. 2010, p. 1378.

education and medical attendance and treatment.¹⁷³ This definition of maintenance is generally worded so as to be applicable to all persons entitled to claim maintenance under the various provisions of the 1956 Act.¹⁷⁴ The Law Commission believes that child support in custody matters entails much more than the concept of maintenance as captured by the 1956 Act. Accordingly, it empowers the court to specifically pass orders for the maintenance of children. It elaborates that such an order will involve fixing an amount that is “reasonable or necessary” to meet the living expenses of the child, including food, clothing, shelter, health care, and education.

However, terms such as “reasonable” and “necessary” may be construed as vague, and can be abused or wrongly interpreted when fixing amounts for child support. The Commission, therefore, qualifies these terms by recommending certain factors that courts must keep in mind when calculating child support. These include the financial resources of the parents, the standard of living of the child,¹⁷⁵ the physical and emotional condition of the child, his or her educational and healthcare needs or any other factor that the court deems fit for the child’s welfare.

Following the general principle of majority being attained at the age of 18, the Commission recommends that child support must continue till such age of majority. There are cases where

¹⁷³ Hindu Adoptions and Maintenance Act, No. 78 of 1956, § 3(b).

¹⁷⁴ MULLA HINDU LAW, ed. Satyajeet Desai, 21st edn. 2010, p. 1294.

¹⁷⁵ *Sayali Pathak v. Vasant Pathak* 110 (2004) DLT 637.

the court has advised an increase in the age of maintenance from eighteen to twenty-one and asked the Commission for its advice.¹⁷⁶ The Commission is of the view that the court should have the power to continue child support even after a child attains the age of 18, and wherever appropriate, this period may extend till the child reaches the age of 25, and not thereafter.

The Commission also recognises special treatment for children with mental or physical disability.¹⁷⁷ The Hindu Adoption and Maintenance Act, 1956, applies to persons with disability, but the benefits cease at the age of eighteen. The Commission recommends correcting the provision of law to provide child support beyond such time as the child reaches 25 years of age, in case of a child with mental or physical disability.

The Commission recommends that courts should have the power to order for the liability of the estate of a parent who dies during or after an order for child support is passed, to ensure that the welfare of the child remains the key, even after the lifetime of the parent.

h. Schedule: Guidelines

The Commission also recommends various guidelines to accompany the main body of the law, in the Schedule to the Bill. The guidelines discuss the following issues: factors to be taken

¹⁷⁶ 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 23, 2015).

¹⁷⁷ Juvenile Justice (Care and Protection of Children) Act, No. 56 of 2000, § 2(d).

into consideration when granting joint custody, determining the preference of a child, access to a child's records, parenting plan, grand-parenting time, mediation, visitation, decision making, and relocation.

Sd/-
[Justice A.P. Shah]
Chairman

Sd/- [Justice S.N. Kapoor] Member	Sd/- [Prof. (Dr.) Mool Chand Sharma] Member	Sd/- [Justice Usha Mehra] Member
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Sd/-
[P.K. Malhotra]
Ex-officio Member

Sd/-
[Dr. Sanjay Singh]
Ex-officio Member

Sd/-
[Dr. G. Narayana Raju]
Member-Secretary

Sd/-
[R. Venkataramani]
Member (Part Time)

Sd/-
[Prof. (Dr.) Yogesh Tyagi]
Member (Part Time)

**THE HINDU MINORITY AND GUARDIANSHIP
(AMENDMENT) BILL, 2015**

A Bill

*further to amend the Hindu Minority and Guardianship
Act, 1956*

Be it enacted in the Sixty-sixth year of the Republic
of India:-

SHORT TITLE

1. This Act may be called the Hindu Minority and
Guardianship (Amendment) Act, 2015.

**AMENDMENT OF
SECTION 6**

2. 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.”

**SUBSTITUTION OF
NEW SECTION
FOR SECTION 7**

3. In the principal Act, for section 7, the following
section shall be substituted, namely:--

“(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.”

**THE GUARDIANS AND WARDS (AMENDMENT)
BILL, 2015**

A Bill

further to amend the Guardians and Wards Act, 1890

Be it enacted in the Sixty-sixth year of the Republic
of India:-

SHORT TITLE

1. This Act may be called the Guardians and Wards (Amendment) Act, 2015.

**AMENDMENT OF
SECTION 17**

2. 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:--

“(1) In appointing or declaring the guardian of a minor, the welfare of the minor shall be the paramount consideration.”;

(ii) 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.”

**AMENDMENT OF
SECTION 19**

3. In the principal Act, in section 19, after clause (c), the following proviso shall be inserted, namely:--

“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.”

**SUBSTITUTION OF
NEW SECTION
FOR SECTION 25**

4. In the principal Act, for section 25, the following section shall be substituted, namely:--

“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.”

**INSERTION OF
NEW CHAPTER**

5. In the principal Act, after Chapter II, the following Chapter IIA shall be inserted, namely:--

“Chapter IIA: Custody, Child Support and Visitation
Arrangements

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.

19B. Applicability of this Chapter.

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.

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.

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.

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.

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.
- (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.

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.

- (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;
 - (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; 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.”

INSERTION **OF**
SCHEDULE

6. In the principal Act, the following Schedule shall be inserted at the end, namely:--

“SCHEDULE
GUIDELINES FOR CUSTODY, CHILD SUPPORT AND
VISITATION ARRANGEMENTS

I. 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. any family violence involving the child or a member of the child's family;
 - k. whether the child is capable of forming an intelligent preference; and
 - l. 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.

II. 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.
- (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.

III. 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.

IV. GRAND-PARENTING TIME

- (1) 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; and
 - e. any other factor relevant to the welfare of the child.

V. 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.

VI. 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.

VII. 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.

VIII. 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
 - e. 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.

IX. 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.”