

# AN EXAMINATION OF JOINT PARENTAGE SYSTEM TO ACHIEVE BEST INTEREST OF THE CHILD

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## Introduction

Institution of marriage and upbringing of children has been deep rooted in the Indian society. With respect to growth and development of the children, parents play an immense role. Children have substantial right to enjoy the love and affection from both the parents when necessitated. Such love and affection that the child is supposed to receive gets affected when the parents decide to separate, where the Indian Law permits custody of the children to lie with one of the parents, in accordance to the best interest and welfare of the child. Concept of divorce which was once regulated strictly and had gone through stigmatised legal process has gone through dramatic change. With changing times, needs and demands, Courts have gradually decided to provide for visitational rights to the parent who is deprived of the enjoyment of actual upbringing of the child.

Numerous instances have proved that the visitational rights are not being honoured or that the child is placed out since they are being bounced around at their earlier ages. The child ends with disturbed bonds with the visitational parent which goes against the philosophy of best interest of the child. Despite sea change, the idea of parenthood remains the same and therefore more disputes arise in Court with respect to who gets the custody of the child. This resulted in the laws of parent-child relationship to be updated and amended according to the changing needs of the society. The laws in India are now are being subjected to debate in the context of joint or shared parentage where the boundaries of parenthood where parental disputes are there are provided not to single parent but also to the other parent. To arrive at a settling point, recently, Supreme Court of India is also posed with a

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## PREFERRED CITATION

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challenge of visitational rights, joint parentage system in India.

### Parentage System in India – Legislative Outlook

The law relating to parentage or custody of children is closely linked to the law of guardianship. While guardianship is a broad term and refers to the sum of all rights and powers that an adult has in relation to the person and property of minor, custody or parentage is narrow concept relating to the upbringing and day-to-day care and control of the minor. In India, the law relating to parentage is primarily contained in the Guardians and Wards Act, 1890 and thereafter in various personal laws.

The Guardian and Wards Act, 1890 defines 'guardian' as a person having the care of the person of a minor or of his property, or of both person and property. The Act under Section 7 confers power upon the court to make an order as to guardianship where the court is satisfied that for the welfare of the minor an order should be made appointing a guardian of his person or property or both. The persons who are entitled to apply for an order of guardianship under Section 8, are:

- the person desirous of being, or claiming to be, the guardian of the minor,
- any relative or friend of the minor, or

- the Collector of the district or other local area within which the minor ordinarily resides or in which he has property or
- the Collector having authority with respect to the class to which the minor belongs.

The Act says that the Court shall be guided by the welfare of the minor, consistently with the law to which the minor is subject. In determining what will be the welfare of the child, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes of a deceased parent, any relations of the guardian with the minor or his property. The court may consider the preference of the minor and shall not appoint a guardian against his will.

Hindu law contains provisions related to guardianship and custody under Hindu Minority and Guardianship Act, 1956. The Act under Section 6 set father and thereafter the mother, as the natural guardian of a Hindu boy or a Hindu unmarried girl. However, the custody of child below age of five years shall ordinarily be with the mother. In *Gita Hariharan v. Reserve Bank of India*<sup>1</sup>, Section 6(a) was challenged as violative of Article 14 of the Indian Constitution. The Court observed that the

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<sup>1</sup> (1999) 2 SCC 228.

term 'after' in Section 6(a) should be taken to mean 'in the absence of the father' and interpreted in the light of principle of welfare of the child and constitutional mandate of gender equality. 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'.

Section 9 of the Act gives the father, power to appoint a testamentary guardian in respect of the minor's person or property. And in the case of death of the father such powers shall devolve upon the mother. Finally, Section 13 of the Act, states that the welfare of the minor shall be the paramount consideration in the appointment of guardian by Court. The Law Commission of India points out that under the Guardian and Wards Act, parental authority supersedes the welfare principle, while under Hindu Minority and Guardianship Act, the welfare principle is of paramount consideration.

Where the Sunnis and Shias schools of Muslim law regards father as the natural guardian of the child. However, the custody vests in the mother up to age of seven years in case of son and up to puberty in case of daughter. It recognizes the right of mother to custody. The concept of Hizanat (literally means the care of the infant) 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 unfavourable to the welfare of the child.

Section 41 of the Indian Divorce Act, 1869 authorizes the Courts to issue interim order for custody, maintenance and education of minor children. Thus, guardianship under Christian law is governed by the Guardian and Wards Act. Thus, it is unfortunate that the Indian legal system does not afford a room for Joint Parentage or Shared Parentage system either in the Guardian and Wards Act or in any other personal laws. The system is based upon a determination of who can be the best guardian of the child and entrusting the custody to a sole parent. There is no realization of the importance of joint parentage system for the better upbringing of the child.

### **Joint Parentage and Visitation Rights - Judicial Perspective**

The judiciary has time and again provided for visitational rights along with custodial rights. *Rajan Jairath v. Mrs. Monita Mehta*<sup>2</sup> is one of the earlier cases that involves decision of custody using the provisions of Section 26 of the Hindu Marriage Act, 1955. The

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<sup>2</sup> 2013 (1) RCR (Civil) 546 (P&H)

custody of two children were given to the mother and an impugned order provided for visitational rights to the father. The father was provided a right to visit in the premises of the Court. Against the order, the father moved to provide for rights of stay with the father for certain period. The case is remarkable since the Court had taken the wish of the children in providing long term visitational rights giving due regard to children mental condition and the circumstances around. However, in the case of *Neelam v. Mann Singh*<sup>3</sup>, the visitational rights to the mother who was facing criminal charges were declined since the children were suffering from emotional issues and were attached to the grandparents over the parental care and affection.

The Punjab and Haryana High Court in *Maninderjit Kaur Attwal v. Barinder Singh Pannu*<sup>4</sup> involved reading of the provisions of Guardian and Wards Act, 1890 where the father was provided with the custody of the children and the mother was provided with visitational rights. The case involved a question of whether the mother who is been provided with visitational rights have the liberty to take the children to USA for their vacations. In here, the Courts held in favor of the petitioner-mother with terms that mandated the mother to take adequate safety and security measures during the travel

and the visit. The judgment was a step ahead where an opportunity for a parent with visitational rights to spend some quality time with the separated children thereby enhancing the strength of parental care.

One of the cases, that could run as a forerunner is *KM Vinaya v. B Srinivas*<sup>5</sup> it was held that providing parentage to both parents would help in sustainable growth of the child. It was also provided that the child would stay with each parent for a period of six month and the expenses relating to the child would be equally shared and divided between the two parents. While the child is in custody of the other parent, visitational rights are provided with further telephone facility to another parent. This case could be considered for further the conjugal and family relationship. It would help not only for the growth of child but also to ensure that the parties to bring unanimity in the upbringing of the child. It is in this context, that future cases are to be decided in the best interest of the child.

### Conclusion

There have been serious concerns raised time and again in the judicial forum about the directions that the family law in the understanding of parentage, custody, parental rights and obligations in the changing social conditions. As of now, there

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<sup>3</sup> 2015 (2) RCR (Civil) 291

<sup>4</sup> 2016 (1) PLR 358

<sup>5</sup> MFA.NO.1729/2011 (G & W) Kar. HC

is no consensus in providing the status of shared parentage to both the parents. To bring such a framework, there is a need for changing realities in the family law of the nation. While it is agreed that the concept of sharing parenthood, establishes caregiving of traditional parenthood, it is to be understood, that the consent of the child regarding the

same is to be clearly obtained to ensure that there is fair treatment provided in custodies. Further, a parentage plan could be submitted before the Court to understand how the parentage is shared and how beneficial it would act towards the upbringing of the child.