

Contesting Rights Over Children

Custody and Guardianship in Matrimonial Disputes

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THE recent Supreme Court judgement delivered on February 2, 1999 declaring the mother as a natural guardian of her children is hailed as a path breaking one in the realm of Indian family law. (See, *Geeta Hariharan vs. Reserve Bank of India*, 99(2) SCC, p.228) Many have interpreted it to mean that women will no longer be haunted by the fear of losing custody in matrimonial disputes, as now they are elevated to the status of 'natural guardians'.

In my view, this is rather an exaggerated rating of the judgement. The issue of custody had already been decided in women's favour in many earlier decisions. In the present case, the apex court did not address this issue. The question before the court was a limited one, whether mothers could also be deemed as natural guardians during the lifetime of their husbands. Section 6(a) of the Hindu Guardianship and Minority Act, 1956 (HGMA) stipulated that the father is the natural guardian of the minor and 'after him' the mother. The court reinterpreted the words 'after him' to read 'in his absence' in order to arrive at a harmonious interpretation of the constitutional mandate of gender equality.

The court spelt out certain situations – (a) when the father is

indifferent towards the child (b) if the child is in the exclusive custody of the mother (c) due to physical or mental incapacity the father is incapable of acting as the guardian (d) when it is decided mutually between the parents that the mother will act as the guardian where - the mother could be deemed as the natural guardian even during the life time of the father. A point to note is that only when the father has abdicated his responsibility or by consent agreed to elevate the mother to the status of a natural guardian would the judgement come into effect. But in keenly contested custody battles, this judgment will not be relevant.

The perceived revolutionary impact of the judgement even on

this limited question gets diminished in the context of an earlier decision delivered in 1970 (*Jijabai Gajre vs. Pathankhan*). The principle that a separated wife can be deemed as the 'natural guardian' of her children had already been upheld in this case. An agreement entered into by the mother who had raised her daughter single handed had been validated on the premise that when the father is absent, the mother is deemed as the 'natural guardian'.

Several misconceptions govern issues of custody in matrimonial disputes. This article is an attempt to clear some of them. Guardianship implies the proprietary rights, and custody implies the responsibility



of raising a child. While there was a leaning towards the father in issues of proprietary rights, the mother's role as caretaker of her children had been granted due recognition for well over a century.

To give a brief sketch of the history, the concepts of custody and guardianship in HGMA are derived from the Guardians and Wards Act of 1890 (GWA), which in turn was based on English family law. Soon after divorce was granted statutory recognition in England, in the mid-nineteenth century, separated and divorced wives challenged the 'natural guardianship' of their husbands. It is in this context that the principle that the 'best interest of the child is paramount' started gaining recognition. By mid-twentieth century, the principle became one of the primary pillars of the family law in England. Even a wife who had committed a matrimonial 'fault' could be awarded custody of the child. The courts held that the aim of matrimonial litigation is not to punish the guilty but only to ensure the welfare of the child.

"It is impossible to rule that just because a woman had once committed adultery she was not a fit person to look after her child.' ... 'If the welfare of children requires, even an immoral mother can be given custody," the English courts proclaimed.

The Guardians & Wards Act, 1890, one of the first Indian statutes to address this issue, incorporated the tension then prevailing in England. While S.19 stipulated that father is the natural guardian of the minor, S.17 prescribed that the welfare of the child is paramount. Despite the wide variations regarding parental right of custody in the diverse personal laws, courts in India

have taken recourse to the principle, 'best interest of the minor' to award custody to the mother. The best interest maxim overrides the stipulations in different personal laws and is applied universally in all custody litigations.

'To deprive a child of tender age of its mother's love and care would not be in the best interest of the child' has been the well established legal doctrine. This concept was awarded statutory recognition under S.6 (a) of HGMA, which prescribed that the custody of a child below five years should ordinarily be with the mother. But this doctrine cannot be extended to imply that once the child is older, the custody will automatically revert to the father, without ascertaining the wishes of the child. Courts do not view the child as an object to be tossed around between the warring parents. Since the child remains unrepresented in matrimonial disputes, it is the duty of the court to ensure that the child's interests are not harmed or negated. Hence women's anxiety that once the son enters his teens or the daughter reaches puberty, s/he will be snatched away and placed in the father's care, against the child's wishes, are generally baseless.

But the 'best interest of the child' doctrine is more complex than it appears on the face of it. When the father is wealthy and the mother has no independent source of income, where would the 'best interest' of the child lie? Way back in 1920, in two significant cases, the courts ruled that just because a mother does not have the same financial resources, it does not mean that she should be denied custody of the minor children. The

later decisions have reaffirmed this premise.

While non-working mothers are haunted by the fear of lack of monetary resources, working mothers are faced with another set of tensions. Would a woman who has paid employment and spends most of her waking hours outside of the home be a better caretaker? Right up to the eighties, the issue remained unresolved. But more recently, it has been held that a mother cannot be denied custody on the basis that she is gainfully employed, and now this reasoning has become an established principle. However, it is rather wishful to presume that the Indian courts would grant custody to a woman who is living in adultery. The decisions on this issue are ambiguous.

So while the courts had gradually changed the parameters of awarding custody from 'natural guardian' to 'best interest of the child', the social institutions lagged far behind, causing endless hardships to women. One institution that consistently humiliated single mothers is the school system. Usually divorce brings about a change of residence for women, and consequently change of school for their children. Women were constantly pressured to obtain their absentee husband's signatures on school leaving certificates. Banks and passport authorities also remained conservative in their approach and revered the role of the father as the natural guardian. They viewed him as the only parent equipped with the ability and social responsibility to act on behalf of minors. It is in this area that the Supreme Court judgment has brought about a significant change and sent out clear signals

that decisions made by the mother are equally valid.

A contest over child custody surfaces most often in situations of matrimonial dispute. So long as the spouses are engaged in a harmonious relationship, evidently the question of seeking custody does not arise. In divorce proceedings, the most acrimonious battles revolve around child custody.

In view of the legal trends cited above, can it be presumed that all mothers will be awarded custody and all fathers automatically lose custody battles? This presumption is far from the reality. The only governing principle is 'best interest of the child' and the parent seeking custody would have to satisfy the courts on this issue. In modern day battles, neither the father as the traditional 'natural guardian' nor the mother as the 'biologically equipped parent' are automatically awarded custody. A legal battle has to be strategised and carried out in civil or family courts. If the child is of tender years, the task is slightly easier. But to secure custody of older, school-going children is more difficult.

To answer the question as to who will be awarded custody, the structure and procedures of a civil court have to be kept in view. These become far more relevant than proclamations from the higher judiciary or rights under different personal law. Each case will be decided on its own merit. In most cases, the question of rights gets reduced to evolving



an effective legal strategy.

To give an example, Maria had been thrown out of the house, without her two daughters, aged four and one. By the time she approached us, six months had lapsed since the event. She wanted custody of the younger daughter. In order to ensure the custody, we advised her to go to the house and pick up the child with the help of a social agency at a most opportune moment. The strategy succeeded. Within two days, the husband moved the court for custody but so did Maria.

The cases were grouped together. On the first day itself an order was passed that neither parent will disturb the custody of the other child. The husband's advocate flaunted hospital papers of an earlier mental depression suffered by Maria to make her look like an unfit mother. But, this did not influence the judge. After some time, we moved for access

of the older child over weekends and holidays, which was granted. Similar access was not granted to the younger child as we argued that at this stage the child is too young. The case came up for final hearing after three years. By this time there was nothing further to do except retain custody with the respective parent. The issue of mental depression had become redundant by then. The court also granted the mother a lump sum maintenance. The custody battle may have been extremely traumatic if the child was not with her during this period.

If the mother has left the matrimonial home without the child and not taken any steps to claim the custody of the child for several months, by the time she stakes her claim for custody, the child would have comfortably settled down and the mother may have become only a faint memory. In such a situation, it is highly unlikely that she will be awarded custody. The mother will have to prove gross neglect on the part of father, which is difficult if the child is well settled and happy.

At best the mother will be granted right of access or visitation rights. Even this becomes problematic, because by then the child would be tutored against the mother. Ascertaining the wishes of the child also becomes meaningless as children usually reflect the opinions of the elders towards an absentee parent. It is very easy to convince a teenager that her mother is a woman of loose character and has abandoned her for selfish reasons.

So despite the positive decisions discussed above, one principle alone will ensure that women are awarded custody that is, to leave the home with the children or in any case to reclaim physical custody with the help of a social agency, the police, or even at their own initiative, before starting the legal battle. Usually women are apprehensive that they may be charged with kidnapping. But it is highly unlikely that a biological parent will be charged with this offence unless, of course, the child comes to harm. If, at the time of taking the custody of the child, a letter is filed with the local police to this effect, it will avert any further complications.

The next step is to approach the court and obtain an immediate ad-interim order of custody (temporary custody while the case is being decided) and an injunction restraining the husband from taking away the child. This relatively simple step more or less seals the fate of the matter as in Maria's case. Knowing the slow pace of our civil courts, it will be at least six months to one year before even an interim application for custody comes up for hearing. By then the child would have been admitted into a new school and would have become accustomed to the new environment. Rarely would a court grant custody to the father, if the child is well settled with the mother. The same principle also applies to a child who is left with the father.

Once a legal battle commences, the simple principle followed by the courts is to award interim custody to the parent who already has the physical custody, and award visitation rights to the other parent. This is usually over



weekends and school vacations so that studies are not disrupted. Courts tend to believe that the welfare of the child lies in maintaining relationships with both parents.

The routine manner in which access is often granted to fathers becomes a cause of panic to most women. While they struggle to make ends meet raising their children against great odds, the fathers can easily win them over by showering them with gifts. While the mothers have the responsibility, the fathers are left with the pleasant task of occasional recreation with the child. Many also fear that the children can be swayed over with the dazzle of money and higher social status. There are no answers to this dilemma. The children too grasp the changed power balance between the parents. They realise that they are important players in the new scheme. Some make use of it, some reconcile to the new equation, and a few get charred in the process.

At times when the tension becomes unbearable, women succumb and give up custody rather than face the daily emotional turmoil for themselves and their children. This is a

difficult choice, as women's identity in general, and single women's in particular, revolves around 'motherhood'. Single women have already abdicated two of the most widely accepted feminine roles, of wife and housewife. All they are left with is the last vestige of femininity in their role as mothers. Abdicating this amounts to self-negation and may even become a social stigma.

But those of us who run counselling centres, need to re-examine our own traditional notions of motherhood. Do women opt for custody due to social pressures and internalisation of gender roles? In most cases, husbands are left free of all responsibilities. Even meagre maintenance orders to ensure financial support for women cannot be enforced. Divorce ends up in the feminisation of poverty. Many women are left to struggle for basic survival in abject poverty. In many situations, the natal family views them with scorn. There is no space for women, leave alone their children.

In such situations, the children and women themselves may be better off if the husbands are left with the responsibility of raising the children. This strategy will work only if women are assured of regular access to their children in order to oversee their well being. A vigilant legal strategy is required to ensure this. In the event that the child is found neglected it would be possible to reclaim custody later. But in the present situation, the strategy is worth a try. □

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