



Welfare of the children: The paramount consideration

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Abstract

The right of parents regarding the custody and control of their children are to be exercised, not in the interest of or for the benefit, of the parents, but in the interest of and for the welfare of the children themselves. This article purports to put forward the importance of welfare of the children in deciding the custody and guardianship matters.

Keywords: children, custody, decisions, guardianship, parents

Introduction

Happy are those, who have a heart of gold and no one can claim to own this purity except for children. This calls for a duty of the society to give prime importance to the welfare of the children. The golden principle eloquent as the luminous pole star in the entire gamut of the laws relating to custody and guardianship of children in India is the rule that the welfare of the children is the paramount consideration, not the right of the parents ^[1].

Parental right versus welfare of children

Our courts have been confronted with the problem of giving effect to the principle of supremacy of paternal right as enshrined in Section 19 of the Guardians and Wards Act and at the same time subordinating it to the interest of the child ^[2]. More often than not they have found themselves unable to get over the paternal power in view of express provisions of Section 19. Yet time and again they have tried to get over the letter of the law and have said that welfare of child is the paramount consideration before which paternal right must give way ^[3]. This is a fascinating study of a judicial process where our Judges are faced with the dilemma of interpreting of the law as it exists and of giving it a progressive twist so that it confirms with the social needs, especially in a matter where the courts exercise parental jurisdiction ^[4]. The right of parents regarding the custody and control of their children are to be exercised, not in the interest of or for the benefit, of the parents, but in the interest of and for the welfare of the children themselves

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The word "Welfare" has the widest amplitude ^[5]. It is to be understood in its widest sense so as to cover the material and physical wellbeing, education, health, happiness and moral welfare of the child ^[6].

What constitutes the welfare of the minor has to be determined by the court after a careful consideration of the facts and circumstances of the case, as the Indian laws do not lay down any test or guidelines to determine what is for the welfare of the minor. Sections 17 and 19 of the Guardians and Wards Act contain some guidelines and they can be usefully referred to as the two Acts (Hindu Minority and Guardianship Act, 1956 (Sec 13) and Guardians and Wards Act, 1890) are complimentary to each other. The

court may in determining what is for the welfare of the minor has to take into account the age and sex of the minor, the character and capacity of the guardian, the needs of the minor as also the wishes of the minor where he or she is of sufficient age and discretion to express his or her preference, though in appropriate cases the wishes may be disregarded.

Section 17 lays down the real test which the court has to apply in appointing a guardian of a minor and test is whether the appointment will be for the welfare of the minor ^[7]. After deciding under section 7 that the appointment of a guardian for the minor is necessary, it is the duty of the court to select from among those who are willing to be, in the best interest of the minor.

Under the Guardians and Wards Act, 1890, section 17 lists many considerations which should weigh with the court in selecting a guardian for a minor but the paramount consideration is the welfare of the minor. "The dominant matter for the consideration of the court is the welfare of the child but the welfare of the child is not to be measured by money only, or by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered, other than its physical well-being, nor can the ties of affection be disregarded" ^[8]. The term 'welfare' includes both material and spiritual welfare ^[9]. In fact, the question of the true welfare of the minor is of such paramount importance that the recognized right of guardianship under the law to which the minor is subject, must if necessary, be assigned a relatively subordinate position ^[10]. What would be "for the welfare of the minor must necessarily depend upon the facts and circumstances of each particular case" ^[11].

Matters to be considered by the court in appointing a guardian

Section 17 of the Guardians and Wards Act, 1890, enumerates all the matters which should be considered by the court in appointing a guardian. Once it is decided under sec 7 of this Act that the appointment of the guardian is necessary, the court then selects a person from among those who are willing to act as a guardian, and whose appointment would best serve the interest of the child. However, these matters are only tentative suggestions or mere guidelines and they definitely do not specify any hard and fast rules for

the appointment of a guardian. Thus, they can be overlooked or molded by the court to serve as or the best interest in the child's welfare.

Section 17: "Matters to be considered by the court in appointing guardian-.In appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what consistently with law to which the minor is subject, appears to be in the circumstances to be for the welfare of the minor".

In considering what will be for the welfare of the minor, 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, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. The court shall not appoint or declare any person to be guardian against his will.

Section 17 of the Guardians and Wards Act, 1890 has been discussed in detail as follows:

1. Consistently with the law to which the minor is a subject

The welfare principle should as far as possible, be consistent with the personal law, which is not the same for all the communities in India. In the case of *Kalimunissa V Shah Salimkhas*,^[12] the Madhya Pradesh High Court held that consideration of 'welfare of the minor' subordinates the dictates of 'personal law'. The scope and ambit of the expression 'consistently with the law to which a minor is a subject' was very lucidly laid down in a J & K case. It is observed: In the case of appointment of guardian, the court is charged with a duty of appointing the most suitable person amongst the rival claimants for guardianship Under S. 17, normally a person who under the personal law would be entitled to the custody of the child or the minor in preference to anyone else, should be appointed as the guardian, this is however a flexible rule. The scope of the sec (1) of S 17 is that the court has to see who out of the several applicants has a preferential right to be appointed guardian of the minor under the personal law of the minor keeping in view the welfare of the minor. Should however that person be found unfit, he will not be appointed the guardian and even though he is found fit enough, if there exists weighty considerations against his appointment in comparison to the claimant, he will still not be appointed, if that course is found essential for the welfare of the child^[13].

Welfare of the child is not to be measured by money alone nor by physical comfort only. Ties of affection cannot be disregarded. Where the child while in the custody of mother was getting good education and doing well in studies, the proposal of his father for an immediate American education cannot be a ground for shifting the custody of minor from mother to father^[14].

In *Snehlata's* case the child was taken away by the mother who later shifted herself to U.K. and the child remained with his maternal grandparents in India. In this case custody was granted to the father and it was held that when the contest is between the father and mother, the question poses some difficulty but when the contest is between the father and others (here maternal grandparents of the minor) the father's right is preferred^[15].

Where both spouses obtained divorce and later each of them remarried, and their child born out of wedlock remained for

A long time with the grandmother it was held that the child (who was then 14 years of age) grew up well in an atmosphere which was conducive to its growth, and the sudden show of affection by one or the other of the parents who had been strangers to the child all along may not be itself be a legitimate ground for diverting the environment to which the child was used to; the grandmother therefore was allowed to retain the custody of the child^[16].

2. Age of Minor

The age of a minor is an important matter for the consideration of the court where the minor is practically of full age or is of tender years.

Though the father is the natural guardian of a Hindu child, if the natural mother is a suitable person, the courts will, as a general rule, hand over the custody of the child of tender years to the mother for it is impossible, in the case of a young child, to find an adequate substitute for the love and care of the natural mother. The right of the mother to the custody of her young children is recognized in India^[17].

3. Character and capacity of the proposed guardian -

Section 10(1) of the Guardians and Wards Act enjoins that the qualification of the proposed guardian should be stated on the application itself. It is eminently desirable that no person should be appointed guardian of the person or property of an infant without some enquiry as to his fitness for the office^[18].

But the court should not consider the applicant to be an unfit person on the mere plea of the opposite party, unless there is evidence to show that the plea is well founded. The court should ignore such baseless objection and appoint the most suitable person. A court is to weigh the merits of the proposed guardian to see whether he is best suited for the welfare of the child^[19].

4. Nearness of kin

In determining the question of welfare of the minor, the court may take into consideration the nearness of relationship of the applicant, which is the matter of main consideration since very early days. It is generally seen that the nearer the relationship of the guardian to the minor, the more likely it is that the interest of the minor will be looked after^[20].

Agnates are preferred over cognates by the Hindu sages. Mohammedan law provides for a list of kins. Near relations have preference under the English law. In modern times, welfare of the child prevails over all the factors which can be influenced by the personal laws.

5. Existing or previous relations of the proposed guardian

Existing or previous relations of the proposed guardian with the minor or the property of the minor have an important bearing on the question of fitness of the proposed guardian; they point to the degree of affection subsisting between the proposed guardian and the minor. A person may disqualify himself for appointment as the guardian of the person or property of a minor by his present or past conduct towards the minor or the property of the minor. Thus, a person who has been guilty of any kind of ill treatment of the minor should not be appointed guardian of the person, as that would not serve the purpose of welfare of the minor.

6. Wishes of the deceased parents

In appointing a guardian, the court will pay attention to the wishes of the father or mother of the infant, keeping in mind that their wishes should not be disadvantageous to the child. Thus, the wishes of the parent should not be summarily disregarded, for though it may be conceded that the wishes of the parents are by no means conclusive, still considerable weight must be attached to the preference indicated by the parent. But such wish of the deceased parents would lose its consideration and importance if the same would appear injurious to the child or the proposed guardian appear otherwise unfit for the purpose of appointment.

7. Intelligent preference of the minor

This is considered by the court when the child has attained the age of intelligent discretion. On the question as to welfare, according to Indian courts also, the wishes of the minor who is old enough should be consulted not as conclusive on the matter, but as an important factor, to be taken into account in arriving at a conclusion. But any preference expressed by the minor should not be considered unless it is also intelligent^[21].

8. Willingness of the proposed guardian

For the welfare of the child it is very important that the proposed guardian must be strongly willing to act as a guardian and take the child in his or her custody, for the lack of that willingness can become a hindrance in the proper welfare of the child.

By sub-section (3) of section 10 every application must be accompanied by a declaration of the willingness of the proposed guardian to Act and sub-section (5) of section 17 provides that the court shall not appoint or declare any person to be a guardian against his will. The sub-section embodies the general rule of law that no person, who does not consent to be a guardian, can be competent to act as one^[22].

Court's discretion

Section 3 of the Guardians and Wards Act, 1890 had provided for retention of the inherent jurisdiction of High Courts.

The Courts of justice possesses powers which were not given by the legislation and which no legislation can take away. These powers spring not from legislation of tribunals themselves. There are 'inherent powers' resident in all Courts of superior jurisdiction. These are those powers which are necessary for the proper and complete administration of justice and such powers are essential to their existence.

In matters relating to appointment of guardian very wide discretion and powers rest with the court. For the welfare of the child it has got the discretion even of appointing a guardian in presence of the minor's own father and mother. The discretion of the court can afford to overlook the guidelines given in section 17 of the Guardians and Wards Act, the case laws and all the other laws if the welfare of the child calls for it, for the basic principle all the laws of guardianship has to be the overall development and welfare of the minor.

To sum up, speaking at a seminar in New Delhi on 8 July 2017, organized by International Law Association, the then Chief Justice of India JS Khehar called upon the government to make a comprehensive law, as children are

the future of our nation, therefore, their physical, mental, moral health cannot be compromised due to the matrimonial disputes.

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