NUANCES OF JOINT CUSTODY AND SHARED PARENTING

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It is with great pleasure I appear on your screen this day to deliver this 14th lecture organized by the Lahari Foundation in memory of its first President, Late P.G.C. Chengappa who was a well-known Advocate and a leading member of the Bangalore Bar. Though we hailed from the same Taluk in a small District called Kodagu we did not know each other personally till I joined the Bangalore Bar as a beginner in the profession and had the occasion to meet him; by which time he was an established Advocate. But after we met, I found him to be very affectionate like an elder brother and was one of my greatest well-wishers. Therefore, I consider this opportunity as an honour and proceed to formulate my thoughts on the subject assigned to me.

Before considering the issue relating to ‘joint custody’ and ‘shared parenting’ it is necessary to advert to the aspect relating to custody of a minor child as is provided in law and the manner in which it has evolved with the change in the attitude towards the matrimonial relations and the manner in which the Courts have looked upon this issue. The law as it stands today in so far as Guardianship and Custody, the same is provided under the Guardians and Wards Act, 1890. The Hindu Minority and Guardianship Act, 1956 contains similar provisions for Guardianship and custody of minors among Hindus. These Acts are comprehensive legislations which deal with the appointment of a person as a Guardian for the minor, in respect of the minor’s person or the property or both.

The Act makes it possible to appoint ‘any person’ as the guardian of a minor, not necessarily the parent, though in the present context we are concerned with the appointment of one among the parents, preferably both the parents. Section 7(1) of the Act provides that Court is empowered to appoint a guardian and Section 17 ensures that only when the Court is satisfied that it is for the ‘welfare of the minor’ a guardian is appointed. Though the said provisions of the Act broadly refer to the term ‘welfare of minor’, there is no specific formula to determine nor is there uniform pattern to measure and determine as to what exactly is the welfare of the minor as it will vary from case to case

and will depend on the perception of the person called upon to decide the same. However, it is interpreted by the Supreme Court and the various High Courts in such a way to lay down the broad guidelines to consider the welfare of minor which should be the paramount consideration in the cases relating to custody of the minor. The provisions of Hindu Minority and Guardianship Act, 1956 supplements the Guardians and Wards Act, 1890. It enumerates the classes of natural guardians of a Hindu minor and Section 13 refers to welfare of the minor being the paramount consideration. Once the guardianship is determined, the order for physical custody of the minor would follow after the other aspects, more particularly the welfare principle is also considered.

The married couple involved in a marital dispute and engaged in the battle for separation generally have a self-serving interest over the child. Unfortunately, it has been the experience that the child is treated as a pawn on the chessboard and is used to checkmate the other party and gain an upper hand in the dispute relating to marital discord. They forget that though it brings to an end the marital relationship between the parents, it does not bring to an end the relationship of the child with the parents nor does it take away the status of parents with the child which is an inseparable bond. The matrimonial law also comes into picture to

provide for the courts to decide on custody of children. All matrimonial laws have provisions for custody of the children. For instance, Section 26 of the Hindu Marriage Act, 1955 provides for discretion to be exercised by the Court while passing interim orders or while making such provision in the decree which appears just and proper with respect to the custody, maintenance and education of minor children. Similarly, Section 38 of the Special Marriage Act, 1954, Section 49 of the Parsi Marriage and Divorce Act, 1936 and Chapter XI of the Indian Divorce Act, 1860 dealing with the same subject under the chapter 'Custody of Children' provides for such custody orders. Although dissolution of the Muslim Marriage Act, 1939 is silent on this aspect, Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 includes guardianship.

In the traditional conceptualisation, custody of the minor was confined to the provisions contained in the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 etc. Under the said law, father is the natural guardian of the legitimate child and after him the guardianship vests with the mother; exception being a child below five years of age, in respect of whom the mother is natural guardian.

The plain meaning of the provision is that the mother is the guardian after the death of the father. But the Supreme Court in the case of Gita Hariharan vs. RBI (1999) 2 SCC 228 interpreted the word 'after' as 'in the absence of' and ruled that the mother is the guardian of the child, even in the life time of the father, if he is absent for any reason, including neglect. Therefore, age of the minor child is not the only criteria to decide custody and guardianship and it does not mean that the mother loses custody after the child turns five; it just means that the issue of custody can be considered differently at that age and to dislodge custody from the mother who had the custody for five years, the Court will have to be satisfied with very good reasons and cannot be done in a routine manner.

Following these provisions, the courts would normally order custody to one parent; in majority of the cases to the mother and the visitation rights to the other, namely, the father. It unfortunately sounds like presenting the trophy to the winner and the looser being given the consolation prize in a competition. In abstract, if the law relating to custody of children as it stands is noted, it appears simple, but in reality it is in fact complex. It is simple because there is only one principle which guides all such proceedings relating to custody, which is the 'welfare principle' but the complexity arises when a just and proper order

is required to be made by the Court in as much as the difficulty lies inappropriately determining what in fact would be to the welfare of the child. The child who is the main stakeholder in the entire issue hardly has any say in the matter and even if he or she does, the choice offered will be a difficult one.

The facts and circumstances of each case would vary and what is good to be considered as the welfare of the child in one circumstance may not be good in another case and vice versa. That apart, in the very same set of facts the welfare principle could be considered in various ways as there can be no straight jacket formula which would guide the courts to consider the welfare principle in a uniform manner. In the case of ***Kumar V. Jahgirdar Vs. Chethana K. Ramateertha AIR 2004 SC 1525***, in the hierarchy, the Family Court and the High Court took opposite views in respect of the same set of facts and was ultimately settled by the Supreme Court upholding the view of the High Court with modifications. In that case the married couple had obtained divorce on mutual consent and agreed to their appointment as joint guardians. The custody of the female child was agreed to be with each other during alternate weeks.The mother thereafter remarried which resulted in the battle for exclusive custody of the female child. The mother filed application for exclusive custody and failed; so she sought for

modification of divorce conditions. The ex-husband by filing a counter application sought for exclusive custody as the mother had remarried, due to which the welfare of the child would suffer. The Family Court, considering the remarriage and change in lifestyle of the mother as an handicap ordered custody of the child in favour of the natural father i.e. ex-husband and weekly visitation was ordered in favour of the mother. The High Court however took a different view and reversed the order of the Family Court by giving exclusive custody of the child to the mother and weekend visitation right to father. The Supreme Court while considering the same no doubt held that for the custody of child, the mother is to be preferred than father in all cases is not the correct view and such generalisation cannot be made. Having stated so it was also held that re-marriage is not a disqualification and taking into consideration other aspects relating to the welfare of the child, however maintained the order of the High Court whereby the custody was granted in favour of the mother, with visitation rights to the father, but certain modifications were made to regulate the same.

In the case of ***Vikram Vir Vohra Vs. Shalini Bhalla, (2010) 4 SCC 409*** the Court awarded the custody of the minor child to the mother with visitation rights to the father despite the fact that the son had been with the father since the time of birth where again the welfare of the child

in the perception of the Court was the consideration. Further in the case of ***Sheila B. Das Vs. P.R. Sugasree 2006 (3) SCC 62*** where the issue related to the custody of 12 year old minor, the custody was awarded to the father who was an Advocate and granted visitation rights to the mother who was a Doctor by profession. In this case the Court held that either parent is fit to take care of the child provided that he/she is financially stable and is able to take care of the child.

No doubt as the paramount consideration in matters relating to custody being the welfare of the child, the Court will look at all relevant circumstances based on the material available on record, however the factum of 'welfare' would ultimately depend on the perception of the Court. The question would be, whether the welfare principle could be met by only the financial stability of either of the parent to meet the material needs of the child or is it the overall development of child that matters. As far back as in 1893, the English Court of Appeal in the case of McGrath (In Re McGrath, (1893) 1 Ch.143) held that welfare is not just about money and physical comfort, but also the moral and religious welfare of the child. It was further held that the bond of affection cannot be disregarded. It appears very sound as a statement, but when it comes to decision making, let alone the Courts but how does even the parent or the most erudite scholar of child welfare decide in an

objective manner as to what is in the best interest of the child without making moral or value judgments. However, the skill of the Judge is in the process of ascertaining what can be considered to be for the welfare of the child, while realising and being alive to the fact that there is hardly ever a completely happy resolution. This requires a delicate balance to be worked outside the rigid contours of law.

In the work of Judith S. Wallerstein which studied children of divorced parents over 25-year period, the psychologist shares the results of impact of divorce on children and the drawback in the system. She states “With all due respect, our rigid court structure may be the wrong forum for making decisions about parents and children at the time of divorce. Judges have no special training to help them deal with families in crisis. They are charged with safeguarding the best interests of children without knowledge about the needs of children at different developmental stages. Few have been exposed to studies on the impacts of divorce on children and what helps or hinders their adjustment. Moreover, the courts are hard pressed for time and staff. What influences the child are the long-term circumstances of life during the post-divorce years. As couples exit the Court house steps, profound changes in parent-child relationships lie ahead. Parenting in the post-

divorce family is far less stable than parenting in the functioning intact family."

Further the studies have also revealed that the children need both parents present in their lives. Otherwise it leads to PARENTAL ALIENATION SYNDROME which is a term coined by American child psychiatrist Richard Alan Gardner to describe a condition of children who have been psychologically manipulated into showing unwarranted fear, hostility or disrespect towards the other parent during child custody dispute. In simple terms it occurs when a parent attempts to brainwash a child into hating the other parent. The Court should, therefore, be slow to make orders that will cause one parent to be distanced from the child. No matter what the opinions are, presently in the existing set up it is ultimately the courts which will have to pass orders and it is in that view the courts must be aware that the post divorced parenting is different from parenting in intact families. The Supreme Court in the case of ***Vivek Singh Vs. Romani Singh(2017) 3 SCC 231*** has taken note of the existence of parental alienation syndrome where children were involved in matrimonial disputes between the parents. It is indicated therein that it has at least two psychological distractive affects:

(i) First, it puts the child squarely in the middle of a contest of loyalty, a contest which cannot possibly be won. The child is

asked to choose who is the preferred parent. No matter whatever is the choice, the child is very likely to end up feeling painfully guilty and confused. This is because in overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from all conflicts.

(ii) Second, the child is required to make a shift in assessing reality. One parent is presented as being totally to blame for all problems, and as someone who is devoid of any positive characteristics. Both of these assertions represent one parent's distortions of reality.

It is in these circumstances, the issue relating to joint custody as a first step and the shared parenting as an ultimate solution becomes relevant in matters relating to custody which would be in the interest of the child as a welfare principle. In general, the main object of joint custody is to provide both parents equal control over decisions regarding a child's upbringing and to split the time that a child spends living with each of them. On the other hand, shared custody focuses on how much contact the child has with each parent. Often the terms 'joint custody' and 'shared custody or parenting' are applied as if they mean the same thing. However, each term refers to a separate type of custody and two

different forms of custody arrangements. The difference to be remembered is that 'joint custody' is more concerned with making legal decisions for the child, whereas 'shared parenting' is about how much time each parent gets to spend with the child. The concept of shared parenting is not provided for in the enactments which have been referred to above. Certain other countries, in order to ensure that both parents after their divorce would have full access to the child have adopted the concept of shared parenting. In USA either joint legal custody, where both parents have to jointly take major decisions about the child or joint physical custody, where the child shares time equally with both parents is prevalent. Similarly, several other countries have also enacted laws to ensure that neither of the parent gets sole custody but on the other hand the parental responsibility is shared.

Though there are no specific provisions with regard to joint custody and shared parenting in the laws that have been enacted, with the changing times the courts in India, within the framework of law presently available has introduced the concept of joint custody and shared parenting while taking into consideration the welfare of the child and appropriate orders have been made. In one such instance, in the case of ***K.M. Vinaya Vs. B.R. Srinivas 2015 16 SCC 405*** such joint custody was ordered. In the said case the Family Court based on the evidence

and material available on record held that the father is entitled to the exclusive custody of the child and directed the mother to hand over the custody of the child to the father within a period of one month. When the said judgment was assailed before the High Court, the High Court held that the father is entitled to the custody of the minor child from 1st January to 30th June and the mother is entitled to custody of the minor child from 1st July to 31st December of every year till the minor son attains the age of majority which was a form of shared parenting. The Supreme Court while considering the correctness of the same referred to an earlier decision of the Supreme Court wherein it was held that in deciding the question of custody, the welfare of the minor is the paramount consideration and the fact that the father is the natural guardian could not *ipso facto* entitle him to custody. Stating so, the Supreme Court modified the order of the High Court to a more meaningful shared parenting arrangement and allowed the custody to continue with the mother during the weekdays while the custody would remain with the father during weekends. The sharing of the holidays was also ordered in the manner as indicated therein which is as follows:

> "5.1 The minor child Vathan will live with the appellant mother from Monday to Friday. On every Saturday from 8.00 a.m. till Sunday at 8.00 p.m. the appellant mother will send the child to the custody of the respondent father and he shall return the child to the mother by 8.00 p.m. on every Sunday.

5.2 The aforesaid arrangement is for a period of first weekends in a month and in the last week of the month the child will remain in the custody of the appellant mother for the purpose of updating his studies.

5.3 Both the parties are directed to see that the child shall be made available for the respondent father during summer vacation/winter vacation/X-mas vacation. The child shall spend first half of the vacation periods with the father and in the second half periods of the vacation the child will remain in the custody of the mother.

5.4 The custody of the child during festivals, birthdays, etc. will be shared between the father and the mother on a mutually agreed basis.

5.5 We also further direct the parties to bring up the child in the joint custody and guardianship in future.

5.6 As agreed by both the parties, they shall take steps and withdraw all the proceedings pending before the courts below and withdraw all the allegations made against each other by filing necessary affidavits by both in all the proceedings.

5.7 It is agreed between the parties that the father can have access to the son through mobile phone, landline or Skype, during the week days at a mutually agreed time. Similarly, the mother will also have access when the boy is with the father."

In a very recent decision in the case of ***Smriti Madan Kansagravs. Perry Kansagra*** (C.A.No.3559 of 2020 dated 28.10.2020), though custody order in favour of the father residing in Kenya was affirmed it was only after ascertaining the view of the 11 year old child and it was made subject to obtaining a "mirror order" from the Court in Kenya as it was transnational matter. However, co-parenting was ensured by observing "This would, however, not imply that the

mother would be kept out of the further growth, progress and company of her son. Smriti would be provided with temporary custody of the child for 50% of his annual vacations once a year, either in New Delhi or Kenya, wherever she likes. Smriti will also be provided access to Aditya through emails, cell phone and Skype during the weekends."

Further the Karnataka High Court in its decision in the case of ***Smt. Savitha Seetharam Vs. Shri Rajiv Vijayasarathy*** (judgment dated 11.09.2020 in MFA No.1536/2015 c/w MFA No.137/2015) discussed about shared parenting. It is observed therein that "….there is clear momentum in law towards shared parenting with the child in focus and the rights of the child being the over-riding factor rather than the rights of the separated parents. It would be ideal if the parents jointly submit a plan for shared parenting. In the alternative, the Court must exercise its parens patriae jurisdiction". "That while preparing a joint parenting plan, care must be taken so that there is no instability or inconvenience caused to the child. Also, the expression "joint" or "shared" would not mean mathematical exactitude or precision, as there must be pragmatism and innovation required at every stage. The personal profile of the parent, their educational qualification, residence, economic and social status, etc., would be important factors while developing the joint parenting plan. As there is no legislation as such in

India on shared parenting, the same must evolve with judicial interference, innovation and involvement in assessing the requirements of each child". It further held that "….it is necessary to remind ourselves that a child requires both, the mother and the father in jointly bringing up the child which would have a holistic impact on the overall growth of the child."

One other aspect which is also to be taken note is the situation where the couple having lived abroad and due to their marital disputes have fallen apart and one of the spouses returns to India with the child. In that circumstance, when custody orders are passed by the foreign courts and the spouse living in India has kept the child in India, it has resulted in situations where Habeas Corpus petitions were instituted in the High Courts and the Supreme Court, in India, to take custody of the child pursuant to such custody order. In this regard in the case of ***Mrs. Kanika Goel Vs. State of Delhi through SHO and Another Criminal Appeal No.635-640 of 2018*** a petition seeking writ of Habeas Corpus was filed by the father of the minor child aged 3 years before the High Court seeking direction for the child to be returned to the U.S. jurisdiction. In that case both the parents were residents of USA after marriage. Mother of the child in the pretext of the child meeting her parents, took her to India and never returned. While in India she filed a

case for dissolution of marriage. The father filed emergency custody petition in USA. The Family Court at New Delhi passed an ex parte order for restraining the father from taking the child outside India. The father in the meanwhile had obtained order of sole custody of the child from the foreign court. The High Court while considering the petition held that the paramount interest of the minor child was to return to USA so that she could be in her natural environment. It further held that since the mother is able bodied, educated, accustomed to living in Chicago, USA, was gainfully employed and had an income before she came to India in December 2016, she would have no difficulty in finding her feet in USA. However, the Supreme Court held that the principle of comity of courts cannot be given primacy or more weightage for deciding the matter of custody or for return of the child to the native State. Here again 'Welfare of the child' is made the paramount consideration. In that context the Supreme Court ordered that the child would stay in India with the mother till she attains the age of majority or till the court of competent jurisdiction tried custody. In the case of ***Sarita Sharma Vs. Sushil Sharma 2003 (3) SCC 14*** court held that even a decree passed by a foreign court could not override the consideration relating to welfare of the minor child.

Taking note of this situation the Ministry of Human and Child Development has passed an order dated 27th July, 2018 with a view to protect interest of the child in cases where children were taken away by one of the spouses without permission of the other due to marital discord or domestic violence etc., from other countries to India and vice versa. The Government has directed the National Commission for Protection of Child Rights to constitute a mediation cell in NCPCR to resolve the cases of children who were taken away and for preparing a parental plan taking into account the best interest of the child. In the decision in the case of Smt. Savitha Seetharam referred above, the High Court in para-19 observed that the concept of shared parenting may not work at all, particularly when one of the parents resides abroad or in a place different from the residence of another parent. I have referred to the case of Habeas Corpus and the case of Smriti Madan Kansagra etc., to indicate that even in such cases shared parenting would be the appropriate course to avoid all the acrimony. In such cases also the parental responsibility can be shared and it can be agreed for the child to stay with one of the parents in one country and go to the other parent in another country during holidays and such other occasions. In fact, in my opinion, the understanding between the parents to arrive at a shared parenting decision is the ideal one to avoid all these conflicts.

Noticing the various difficulties, the Law Commission of India showed concern about the shared parenting system and proposed set of questions relating to shared parenting and invited suggestions on this aspect. It had released a consultation paper on 'adopting a shared parenting system in India' and after several rounds of discussions and deliberations, the Commission in its 257th report expressed the following views:

(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."

In the course of shared parenting both the parents would have access to the child by alternating during the weekdays and the weekend or on monthly basis. Such time share arrangement may

satisfy both the parents as the child would spend time with both of them; but we should also take note about the discomfort it causes to the child. In such circumstance which place does he or she call his or her real home and how does the child handle the homework, assignments, computer, books, personal belongings, etc. The child will literally be living out of a suit case and it will be unsettling. It is in such scenario that the 'Bird's Nest Custody' provides the comfort of growing up in one environment but with the participation of both parents in which situation the child will not be treated as a shuttle cock or frisbee.

In the process of shared parenting it is seen that in some parts of the foreign jurisdiction there is also a concept which is termed as "Birds Nest Custody" which is an extended version of co-parenting or shared parenting. The "Birds Nest Custody" is a co-parenting option that prevents children from having to split their time between their divorced parents' home. Instead the children stay in one place and the parents move in to that place alternatively as per the time share agreed between themselves to have the custody and parenting time with the child. According to the article published in "Psychology Today" it is like the birds alighting and departing the nest. This option is workable when the parents are co-parenting as opposed to an arrangement where one is

the custodial parent. This concept is stated to have originated about a decade and a half back when a Virginia Court ruled that it is the best solution for children. While making a similar order, a Court in Canada in the year 2003 is also stated to have told the parents to stop treating their children like “Frisbees” and imposed birds nest custody without either party requesting it. However, in my opinion such arrangement can only be done where the parents are cooperating and they are also well off and as such it cannot be a forced option on the parents.

In cases when the parents cannot genuinely afford such luxury the next best alternative will be to put the child in a decent boarding school where the overall development of the child along with the other boarders is ensured and the child need not witness the acrimony of the parents who have fallen apart. The parent in any event can have access to the child as per agreed schedule during visiting days allowed in the boarding and during vacations when they are allowed to be taken out. The sharing of expenses can be worked out depending upon the financial status. But all such arrangements can be worked out only with the co-operation of the parents with the bottom line being the welfare of the child.

While making a study on this subject I also noticed that an NGO called ‘Save Child India Foundation’ has filed a writ petition in public

interest under Article 32 of the Constitution before the Supreme Court raising certain concerns with regard to child rights which include the issues relating to ‘shared parenting’ and has suggested appropriate orders to be passed by the courts relating to shared parenting. In the process, in the said petition they have also submitted a draft of the shared parenting agreement as envisaged by them. Though recommendations are made by the Law Commission for amendment of the law and even if shared parenting agreements are entered into between the parties the ultimate question would be with regard to implementation of the same since all such proceedings to enforce the same in the courts would be futile in a situation where the human angle is involved, unlike in commercial transaction where if there is the violation of agreements, execution as per law can be made. However, when the paramount consideration is the welfare of the child and if in that context the parents due to the acrimony involved in the matrimonial proceedings do not appropriately consider the shared parenting and the implementation of the same, any number of Court orders or the discussion on the subject will be futile. Therefore, what is required is the change in mind set.

As I have indicated above, the aspect relating to custody requires a more humane approach rather than strict orders of the Court. In fact,

in a paper for “United Nations Experts Group, New York May 2015” the author on considering all aspects relating to the matrimonial and custody issues; it was recommended that the first step is to see parenting disputes as a relationship problem which required therapeutic intervention and only thereafter as a legal problem. When it is viewed in that light it obviously leads to exploration of the option of mediation as the way to resolve the dispute. This requires a fundamental rethinking of the structural place of mediation within the family justice system. The mediation for families after separation should be developed as an alternative to litigation as a pre-litigation concept and the finality however would be to obtain the imprimatur of the court. Therefore, what is needed is to create different pathways for parents who have separated; with litigation being just one of those pathways. It requires a new way of thinking about what it means to take decisions in the best interest of children and about the kinds of services that families need in the aftermath of parental separation. The paper indicates that while making such alternatives Family Relationship Centres (FRC) emerged as a separate form of family law system in Australia. Considering the rise in the matrimonial disputes and the couple seeking separation such initiatives are also required to be considered in our system. For the present, the responsibility will be on the court assisted mediation to consider these aspects as well and ultimately by the court.

Before I conclude, let me recall a statement of Philip Stanhope, a British Statesman – “Judgment is not upon all occasions required, but discretion always is”.

I wish that better sense prevails on all concerned, more particularly the parents involved in custody battles to not treat the children as divisible assets and have magnanimity in arriving at co-parenting arrangement. The learned Lawyers advising them also should assist them and guide them in the right direction. With this hope, I conclude.

Thank you all for your time and patience.