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NAVIGATING THE INTERWEAVING LEGAL THREADS OF PARENTAL ALIENATION, BEST INTEREST OF THE CHILD AND PARENTAL RIGHTS: A LEGAL ANALYSIS OF CHILD CUSTODY LAWS IN INDIA

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“A child cannot be tossed like a shuttle cock between the parents.”

- Justice R.M. Lodha and Rohinton Nariman

ABSTRACT

After a marital breakup, issue of child custody comes into light. In fact child custody battles are the byproduct of any marital breakup. Both the parents begin asserting their claims on their children as they are some objects. Parents are considered to be protectors of children but when it comes to child custody cases, they themselves are responsible for all the mental trauma, a child has to face as both parents have conflicting rights which they want to exercise. Further in order to win these child custody battles they resort to any means without even understanding the impact of these tactics on the innocent and fragile mind of child. Many a times they start brainwashing their child by instigating directly or inadvertently against the other parent. Since State is considered to be the *parens patriae* of child, the courts have been endowed with the responsibility of ensuring the welfare of the children in such custody battles. It has been reiterated by the apex court of India in a number of its judicial pronouncements that not the rights of parents but the welfare of the child is of paramount consideration while deciding the issue of child custody. The legislations pertaining to the custody and welfare of the child along with judicial pronouncements have been discussed in this research paper in order to understand the intersection of Parental Alienation, Best interest of the child and the Parental rights.

Keywords: Child, Parental Alienation, Custody, Parental rights, Best Interest of child, Welfare of the child.

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INTRODUCTION

Custody of the child is the most crucial aspect of a breakdown of marriage. The person who suffers the most is neither the father nor the mother when marriage breaks down. It is always the child who is the worst sufferer. In a custody battle between mother and the father, the loser is actually the child as no matter what the child is going to lose one of his parents. The most traumatizing situation for a child is perhaps seeing one's parents getting separated. Being the constant witness to fights and an emotional turmoil among his or her parents is certainly an unfortunate circumstance for a child. As for a child, both of the parents are dear to him or her, being away from one of them can hamper his emotional state of mind severely. Thus, the child custody issues revolve around the concept of parental alienation, best interest of the child and the rights of parents which makes it quite complicated. No doubt time and again the courts in India have emphasised on the welfare of the child being of paramount consideration in such matters but because of the unique circumstances of each case, the courts have faced the problem of how to interpret and decide as to what amounts to welfare of the child. Further the parental alienation has become a serious issue to be dealt with as many times under the influence of one parent or the other and due to the psychological manipulation the child is also not able to decide as to with whom he or she wants to live and this further enhances the problem of courts to decide as to which parent should be given the custody of the child and to whom mere visitation rights are to be granted. Rightly stated, "To turn a child against a parent is to turn a child against himself."³

MEANING OF PARENTAL ALIENATION

A happy ending to a marriage is what divorce aim for. When two people are divorced but have children together, there is still a post-divorce parent-child relationship that requires the parents to continue co-parenting after their split. Children who are in good health have positive relationships with both of their parents and want to spend time with them. Children from previous marriages fall into this group for the most part. The circumstance where a child rejects a parent is at the other extreme of this continuum and is often unpleasant, toxic, and pathological. We meet the phenomenon called "parental alienation" when the rejection is clear-cut, forceful, devoid of any ambiguity or guilt, absolute, and unjustifiable.

Parental alienation refers to the psychological manipulation of a child by words and deeds that

³ X v X (2022) SCC OnLine Mad 4609, decided on 16.09.2022.

make the child perceive one parent negatively. It is essentially brainwashing the child, and it can occur both intentionally and inadvertently. Legally, children must have a positive relationship with both of their parents; in order to do so, each parent must spend a substantial amount of quality time with the child. Regretfully, divorce is typically a contentious process, and a lot of parents let their resentment affect their kids. Alienation is the term used to describe when one parent takes actions to isolate their child, instil fear in them, or make them furious with the other parent.⁴

TYPES OF PARENTAL ALIENATION

Mild Parental Alienation

Mild Parental Alienation means when the child stays away from the estranged parent but they get along well when the alienator is not present.⁵

Moderate Parental Alienation

While they do spend time together, the child is bitter and fiercely opposes contact with the alienated parent. This is known as Moderate Parental Alienation.⁶

Severe Parental Alienation

The child is adamant about staying away from their estranged parent. To get away from the parent, they could hide or flee. In these situations, the alienator is committed to destroying the bond between the child and the other parent.⁷

PARENTAL ALIENATION SYNDROME (PAS)

PAS and parental alienation are commonly misdiagnosed. The term "parental alienation syndrome" was first used in 1985 and was written about extensively by American psychiatrist Dr. Richard Gardner, who passed away in 2003. He defined the syndrome as, "A childhood disorder that arises almost exclusively in the context of child-custody disputes. It is a disorder in

⁴ Cydni, 'Parental Alienation - Definition, Examples, Cases, Processes' (*Legal Dictionary*, 8 January 2017) <<https://legaldictionary.net/parental-alienation>> accessed 20 March 2024.

⁵ 'Custody Special Circumstances: Supervised or Interstate Visits, etc.' (*Custody X Change: The Trusted Software for Parenting Schedules*) <www.custodyxchange.com/topics/custody/special-circumstances/parental-alienation.ph> accessed 20 March 2024.

⁶ Ibid.

⁷ Ibid.

which children, programmed by the allegedly “loved” parent, embark upon a campaign of denigration of the allegedly “hated” parent. The children exhibit little if any ambivalence over their hatred, which often spreads to the extended family of the allegedly despised parent.”⁸

SIGNS AND SYMPTOMS OF PAS

- i) Unreasonable or illogical campaign to demonize a devoted parent.
- ii) Child's severe dichotomization of one parent (black & white thinking).
- iii) Demonization of all the relatives and acquaintances of the targeted parent.
- iv) Child's disrespectful behaviour and mindset toward the parent in question.
- v) Refusal to feel sorry for the targeted parent or a lack of compassion for their suffering.
- vi) When speaking to the targeted parent, the child adopts the same tone as the narcissistic parent.⁹

INTERNATIONAL PERSPECTIVE ON PARENTAL ALIENATION

Parental alienation has become a global concern. Though there are only a few countries which have enacted legislations thereby criminalising it but almost every country is giving a thought to tackle this problem in order to save the innocent children. A bill aimed at criminalizing parental alienation in family courts was signed into law by Brazilian President Luiz Inacio Lula da Silva on August 26, 2010.¹⁰ Brazilian President Jair Bolsonaro signed legislation into effect on May 18, 2022, which modified the Child and Adolescent Statute of 1990 to provide additional processes for the suspension of family power, as well as the Law of 2010 to prevent parental alienation against children.¹¹ Parental alienation has not been specifically outlawed in South Africa. But when it comes to issues of custody, visitation, and parental duties, the South African legal system prioritizes the child's best interests. A legislative foundation to shield kids from

⁸ Ken Lewis, ‘Parental Alienation Can Be Emotional Child Abuse’ (NCSC) <www.ncsc.org/_data/assets/pdf_file/0014/42152/parental_alienation_Lewis.pdf> accessed 20 March 2024.

⁹ Traci Pedersen, ‘Narcissistic Parental Alienation: Signs, Causes, and Tips’ (*Psych Central*, 22 June 2016) <<https://psychcentral.com/disorders/children-with-narcissistic-parental-alienation-syndrome#warning-signs>> accessed 20 March 2024.

¹⁰ Bootie, ‘Brazil: Parental Alienation defined in Law -’ (*Lawyer in Brazil*, 2 September 2010) <www.lawyerinbrazil.com/brazil-parental-alienation/> accessed 15 March 2024.

¹¹ ‘Brazil: New Law Modifies Measures to Be Taken Against Parental Alienation’ (*The Library of Congress*) <www.loc.gov/item/global-legal-monitor/2022-07-04/brazil-new-law-modifies-measures-to-be-taken-against-parental-alienation/> accessed 22 March 2024.

harm—including parental alienation—is provided by the Children's Act of 2005.¹² No doubt parental alienation has been declared illegal in many countries but as of right now, parental alienation is not expressly prohibited under federal law. Instead, civil family law actions are generally used to resolve the issue. In these proceedings, judges have the jurisdiction to make decisions regarding custody and visitation schedules that are in the best interests of the kid. Nonetheless, it's critical to acknowledge that certain jurisdictions have addressed parental alienation in their criminal justice systems. When deciding on custody or visitation schedules, courts in these states are permitted to take parental alienation into account through the enactment of legislation or the use of particular legal rules. These laws offer a framework for handling parental alienation within the framework of family law, without outright criminalizing it.¹³ States are being urged to forbid any discussion of parental alienation in family courts due to concerns about fabricated claims of parental alienation. It was suggested that men use Parental Alienation as a legal ruse to disprove women's claims of domestic abuse in the UN Special Rapporteur on Violence Against Women and Girls (UNSRVAW) report, “Custody, Violence Against Women and Violence Against Children.” During its 53rd session, the United Nations Human Rights Council (UNHRC) rejected the measures that the Report recommended due to strong opposition from scientists and victims who were impacted by the situation. The report *presented the controversial narrative- “Parental Alienation was merely a legal contrivance by men to counter women’s domestic abuse allegations.”*¹⁴

PARENTAL ALIENATION AND CHILD CUSTODY LAWS IN INDIA

No statutory provision in India explicitly talks about Parental alienation. In fact there is no statutory recognition of the concept of parental alienation. Not even a single statute mentions about parental alienation. However the detailed provisions on custody and guardianship along with various landmark judicial pronouncements have filled the gap to a great extent.

¹² Heidi Barter, ‘Parental Alienation and Laws Applicable in South Africa: A Comprehensive Guide - Law Firm - Barter McKellar’ (*Barter McKellar*) <www.bartermckellar.law/family-law-explained/parental-alienation-and-laws-applicable-in-south-africa-a-comprehensive-guide> accessed 15 March 2024.

¹³ ‘Understanding the Criminalization of Parental Alienation in the United States: State-by-State Analysis ▷ Family Law - Rey Abogado’ (*King Lawyer*) <<https://reyabogado.com/us/in-what-states-is-parental-alienation-a-crime/#:~:text=Currently,%20no%20federal%20law%20specifically%20criminalizes%20parental%20alienation..based%20on%20the%20best%20interests%20of%20the%20child.>> accessed 17 March 2024.

¹⁴ Terrence White, ‘Parental alienation and the United Nations: is gender politics getting in the way of children’s wellbeing? — The Centre for Male Psychology’ (*The Centre for Male Psychology*) <www.centreforalepsychology.com/male-psychology-magazine-listings/parental-alienation-and-the-united-nations-is-gender-politics-getting-in-the-way-of-childrens-wellbeing> accessed 20 March 2024.

*Guardian And Wards Act, 1890*¹⁵

The GWA¹⁶ is a nonreligious legal framework that governs guardianship and custody matters for all children living in India, regardless of their faith. It gives the District Courts the authority to name guardians for a minor's person or property in cases when the natural or testamentary guardian under personal law is unable to fulfil their legal obligations to them. The Act is a comprehensive code that outlines the guardians' responsibilities and rights, the process for removing and replacing them, and the consequences of their misbehaviour. It is a general body of law that supports each religion's own rules pertaining to guardianship matters. GWA empowers the court to designate a guardian for a minor's person, property, or both, if the court is convinced that doing so is essential for the minor's "welfare."¹⁷ Courts must consider the minor's or ward's best interests when choosing a guardian for their person or property under the GWA. This is clear from Sections 7¹⁸ and 17¹⁹ of the act. However, Section 19(b) implies that the court cannot use its power to name another person as the guardian unless it determines that the mother or father is especially unsuited to serve in that capacity. Therefore, the parent's right to serve as the minor's guardian must take precedence over the court's ability to act in the minor's best interests.

*Hindu Minority and Guardianship Act, 1956*²⁰

There were no rules pertaining to either child custody or guardianship in classical Hindu law. Since Karta was in charge of all dependents' general care and property management in the Joint Hindu Family, special legal regulations pertaining to guardianship and custody were deemed unnecessary. In contemporary Hindu law, the Hindu Minority and Guardianship Act, 1956 (HMGA) stipulates that a minor's natural guardian is their father, followed by their mother. Ordinarily, the mother will have custody of a child who has not completed the age of five.²¹ However, Section 13 provides that the minor's welfare is to be the paramount consideration in determining the minor's guardianship.

Muslim Law

According to Islamic law, the mother is granted custody of the child until the daughter enters

¹⁵ Act No. 8 of 1890.

¹⁶ Guardian and Wards Act 1890.

¹⁷ Guardian and Wards Act 1890, s 7.

¹⁸ Ibid.

¹⁹ Guardian and Wards Act 1890, s 17.

²⁰ Act No. 32 of 1956.

²¹ Hindu Minority and Guardianship Act 1956, s 6.

puberty and the son turns seven years old. However, the father is still considered the child's natural guardian. Islamic law is the first to explicitly recognize the mother's right to custody and to make a clear distinction between guardianship and custody.²² According to the Hizanat notion, both during and after a marriage dissolves, a mother is most qualified to be a child's guardian until a specific age. This is a mother's right, and it cannot be taken away from her until it is determined that having her custody would be detrimental to the child's welfare due to misconduct or apostasy.²³

JUDICIAL PERSPECTIVE ON PARENTAL ALIENATION OR PAS

PAS was mentioned in 2006 for the first time in a judgement²⁴ by the Apex Court in India. In this instance, the daughter indicated that she wanted to live with her father after only a little period of time. According to the mother, this was PAS and the father was attempting to poison their daughter. The mother believed this since, although living with her for eight years, the daughter had chosen the father over her. The father won the case, according to the court. Although acknowledging PAS in this case, the court made its decision solely based on the "best interests of the child" theory without delving further into it. As per the "best interests" doctrine, the court renders a decision based on what's in the best interest of the child given the circumstances.

In another landmark case²⁵, the "best interests of the child" theory and PAS were explored together. In this particular custody dispute, the father was content to have visitation rights with the mother in the event that he was granted custody, but the mother insisted on having no access to their children at all. In determining custody, the court considered two factors. First, it argued that the father was in a better position to care for the children emotionally and financially based on the "best interests of the child" tenet. The court also took into account the possibility of PAS if one parent is completely denied access to the children. The children appeared to be a "little withdrawn," which led the court to conclude that such symptoms were already evident. In this instance, custody to the mother would have led to this kind of situation. The father was granted custody as a result. However, this case makes it abundantly evident that the court misunderstood what PAS meant. It has labelled possible estrangement as PAS because it misinterpreted it.

²² Paras Diwan, *Law of Adoption, Minority, Guardianship And Custody* (Universal Law Publishing Co. 2012) 16.

²³ *ibid* 17.

²⁴ *Sheila B. Das v P.R. Sugasree* (2006) 3 SCC 62.

²⁵ *J. Selvan v N. Punidha* (2007) 4 CTC 566.

Despite the fact that this ruling employs an entirely different interpretation of PAS, it gives PAS initial legitimacy. This legitimacy is detrimental because it raises the chance that courts would read the ruling incorrectly in the future and hold that the PAS (in its original form) is enforceable under Indian law.

In 2017, the Apex court²⁶ for the first time legally recognised the phenomenon of PAS in India and discussed its destructive psychological effects on child and stated, “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 the overwhelming majority of cases, what the child wants and needs is to continue a relationship with each parent, as independent as possible from their own conflicts. 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.”²⁷

The Madras HC²⁸ held that a child becomes antagonistic towards himself when they turn against their parents. Parental alienation is inhumane and dangerous for children, who depend on their parents for support throughout their lives, or at least until they reach adulthood." Additionally, it was noted that until a youngster learns hatred from someone they believe in, hatred is not a feeling that a child naturally feels toward their parents. Parental alienation is when a parent pollutes the innocent child's fragile mind by depicting their mother or father as a villain, which will have a lasting effect on the youngster.

The Delhi HC²⁹ granted divorce stating that the Parental alienation from father who has never demonstrated any negligence is a severe form of mental cruelty. The youngster has been utilized as a weapon against the parent in addition to being completely isolated. Witnessing their child slip away and become completely anti-father is the worst thing that can happen to a parent.³⁰

²⁶ *Vivek Singh v Romani Singh* AIR (2017) SC 929.

²⁷ *ibid.*

²⁸ *X v X* (2022) SCC OnLine Mad 4609, decided on 16.09.2022.

²⁹ *ABC v XYZ* (2023) SCC OnLine Del 6099, decided on 13-09-2023.

³⁰ ‘Parental Alienation from father who never showed any neglect is an extreme act of mental cruelty: Delhi High Court upholds divorce’ (*SCC Times*, 1 October 2023) <www.sconline.com/blog/post/2023/10/01/delhi-hc-alienation-of-the-child-from-his-father-is-an-extreme-act-of-mental-cruelty-legal-news/> accessed 30 March 2024.

The Supreme Court in a landmark case³¹ held that co-parenting is essential for the minor's healthy development and personality development, thus one parent should not shield him from the other's touch and influence. During the formative and impressionable years of life, it is crucial that the kid receives the care and direction of both parents. The verdict weighs in favour of both parents' roles being equally important in raising their children and preparing them for adulthood. The Court noted that the non-custodian parent's visiting rights will allow the child and the parent to maintain communication and to have happy, educational, and joyful moments.

The Honourable Supreme Court in a landmark judicial pronouncement³² decided that children are more than just toys or possessions for their parents. In today's altered social conditions, parents' absolute rights over their children's lives and destinies must give way to concerns about their welfare as human beings in order for them to develop normally balanced lives and become valuable members of society. In the event of a dispute between a mother and father, the guardianship court is expected to strike a fair and appropriate balance between the needs of the minor children's welfare and the rights of their respective parents over them.

The Apex court expressed a deep concern in a case³³ and observed that it is heartbreaking to witness how the innocent child is ultimately the victim of the legal and psychological struggle between the parents during divorce and custody disputes, which can turn into a maze. It is possible that the parents' interests, not the child's, are reflected in the eventful custody arrangement. The child's future is at stake in a custody battle, yet typically the child is not treated as a real participant in the proceedings. While the kid's interests must always come first according to the best-interests concept, in most cases the child neither defines nor is represented in the traditional sense.

CONCLUSION

The delicate balance between parental rights and the best interest of the child is a crucial pillar in the complex field of family law. A troubling condition known as parental alienation occurs when one parent purposefully damages the child's bond with the other. The child's emotional health is put in danger by this subtle manipulation, which can leave lasting damage that may last into adulthood. Courts, charged with the grave responsibility of deciding cases involving custody and

³¹ *Ruchi Majoo v Sanjeev Majoo* (2011) 6 SCC 479,

³² *Gaurav Nagpal v Sumedha Nagpal* (2009) 1 SCC 42.

³³ *Lahari Sakhamuri v Sobhan Kodali* (2019) 7 SCC 311.

visitation, struggle with this complex issue. They have two responsibilities: protecting parents' constitutional rights and putting the stability, safety, and happiness of the kid first. The balance must be struck so that parental autonomy is not overemphasized at the price of the wellbeing of the child. Judges perform a complex ballet with their gavels, guided by a deep understanding of human psychology, expert testimony, and legal concepts. The youngster, the silent hero, deserves a future free from the conflict between their feuding parents. As a result, the legal system attempts to preserve both the child's pure heart and the delicate links of parenthood by weaving together the threads of justice, compassion, and wisdom. Even though Parental Alienation Syndrome (PAS) isn't specifically defined in Indian law, it has been acknowledged by judges' rulings. The toxic alliance between a narcissistic parent and their kids against the targeted, non-abusive, non-narcissistic parent gives rise to this syndrome. Under the narcissistic parent's manipulation, the innocent or targeted parent experiences animosity and rejection from their own children in this upsetting circumstance. In the perverse world of the narcissist, the children's mental health is turned into a weapon. The breakdown of the child's emotional and physical bond with the targeted parent is one of the many ways that PAS presents itself. The legal system finds it difficult to efficiently handle these problems due to its backlog of cases. Due to the idea of not upsetting established arrangements, custodial parents frequently keep custody, even if they gained it unlawfully. Another frequent practice is protracted court battles against usurping parents, which end with a court interview for the child. Regretfully, the youngster frequently chooses the usurper parent because of the custodial parent's divisive behavior. This condition is consistent with Parental Alienation Syndrome, as defined by psychologists. Finally, even though PAS is not expressly recognized by law, Indian courts are already recognizing its significance. Legal practitioners must negotiate this difficult terrain while attempting to safeguard the child's mental well-being and parental rights, guided by jurisprudence. Let us make sure that no child is harmed as a bystander in the conflicts between divorcing parents as we weave the tapestry of justice, compassion, and wisdom.