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CUSTODY OF CHILDREN TO GRANDPARENTS

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ABSTRACT

This paper sheds light on these legal conflicts for custody. The basic aim is to understand how the legal framework and judicial authorities balance the legal rights of parents and grandparents and the overall best welfare of the child. The paper is structured as follows. The first part of the paper deals with the legal framework relating to custody and guardianship. Due to paucity of words, this paper will limit its focus to the Guardians and Wards 1890 (hereinafter referred to as “the G&W Act”) and the Hindu Minority and Guardianship Act 1956 (hereinafter referred to as “the HMG Act”). The second part of the paper focusses on how the Indian courts have applied the “welfare” principle, that is, welfare of the child as the paramount consideration to grant custody of minor children to their grandparents. The third and final part concludes.

Keywords: Custody, Grandparents, Guardians, Judicial, HMG Act,

INTRODUCTION

The traditional Indian family unit is characterised by the extended joint family system wherein multiple generations live together under the same roof. In such a family unit, nurturing of the children is not the sole responsibility of biological parents. All the family members play an integral role in the upbringing of the children. It is undeniable that grandparents are the most fundamental part of an extended family unit and they share an affectionate bond with their grandchildren. However, times have changed. The extended joint family unit is not the norm anymore and has been replaced by the nuclear family unit. Often, there may be conflicts among parents and grandparents as to what is best for the children. Often, these conflicts also take form of legal custody battles.

I. THE LEGAL FRAMEWORK

There are various personal and secular laws that deal with custody of children. These include the Special Marriage Act 1954, the Hindu Marriage Act 1955, the Indian Divorce Act 1860, the Parsi Marriage Act and Divorce Act 1936. However, this paper focusses on the Guardians

and Act 1890 and the Hindu Minority and Guardianship Act 1956.

The Guardians and Wards Act 1890 is the primary statute that consolidates the law relating to guardians. A “guardian” is defined as a person having the care of the person of minor or of his property or both. Section 7 of the G&W Act deals with the power of the court to make order as to guardianship. Section 8 of the Act provides for persons that are entitled to apply for guardianship. It is clear from the text of section that grandparents are also entitled to make an application for guardianship. Section 19 of the Act prohibits the Court from appoint guardians in certain cases. However, the most prominent provision is Section 17 of the Act which explicitly provides that in appointing a guardian, the court shall be guided by the “welfare of the minor”.

The Hindu Minority and Guardianship Act 1956 is another statute that relates to guardianship but it specifically applies to Hindus. The relevance of the HMG Act lies in its explicit recognition of natural guardians. Section 6 of the HMG Act provides for natural guardians of a Hindu minor. Evidently, grandparents are not natural guardians of a Hindu minor. The Act also deals with other types of guardians: testamentary guardian and de facto guardian. It must be noted that grandparents may be testamentary or de facto guardians of a minor child. However, the exact determination will be based on facts and circumstances of each case. Similar to Section 17 of the G&W Act, the most important provision of the HMG Act is Section 13 which states that welfare of minor shall be the paramount consideration and the HMG Act does not entitle guardianship. This principle, which may be termed as the “welfare” principle, is the gateway to allow custody to grandparents in appropriate cases even though there exists no statutory recognition of rights of grandparents over their grandchildren.

II. WELFARE PRINCIPLE AS THE GATEWAY TO CUSTODY

The legal framework does not recognize any legal rights of grandparents over their grandchildren. Nonetheless, it is now an accepted proposition of law that the primary consideration governing the custody of children is the welfare of the child and not the legal rights of parents. The Supreme Court in its landmark decision in *Rosy Jacob* emphasized that parents do not have an absolute right over the destinies and lives of their children and must yield to the consideration of their welfare. The dictum in *Rosy Jacob* has been followed and affirmed in multiple cases thereafter including but not limited to *Thrity Hoshie*, *Harbax Singh Sandhu* and *Gita Hariharan*.

The Convention on the Rights of the Child also emphasizes that “in all actions concerning children, the best interests of the child shall be a primary consideration”. The Supreme Court in *Nil Ratan Kundu* affirmed the said position and also remarked that the legal position in the United Kingdom and the United States is also similar. As such, the “welfare” principle, that is, the welfare of the child is the paramount consideration, opens a gateway to allow custody of minor children to grandparents.

In light of the above, there are two possible situations where custody of minor children may be granted to their grandparents. The first situation where custody may be granted to grandparents is when the parents are unfit to be a guardian. The custody in this case flows from the right of the guardian to have his ward in his custody. The second situation is when grandparents are granted custody regardless of the fact that they are not guardians. The custody in this case flows, again, from the “welfare” principle.

III. JUDICIAL TRENDS

In a recent decision in *Vivek Kumar Chaturvedi v State of UP*, the Supreme Court remarked that grandparents cannot have a better claim than the father, who is the natural guardian of the child. This is the general proposition of law, that is, the custody of the child remains with the natural guardian. However, it is not always the case that merely because the father or mother is the natural guardian, the custody should rest with him or her. Guardianship and custody are two distinct concepts. Thus, custody of the child may be given to grandparents even though guardianship vests with the parent(s). The custody in such case flows from the principle of best interests of the child. Furthermore, the Supreme Court in *Nil Ratan Kundu* also remarked that in such cases, the applicable test is a “positive test”, that is, whether the custody would be in the welfare of the child and not a “negative test” as to whether the parent is unfit or disqualified to be vested with the custody of the child.

Consider the Supreme Court decision in *Anjali Kapoor v Rajiv Baijal*, wherein the Court granted custody of the minor child to her grandmother as against the father, who is natural guardian. Another case in point is the Delhi High Court decision in *Irshad v Nadeem*, the grandparents filed an application under Section 7 of the G&W Act seeking guardianship and permanent custody of their grandson. The factual matrix of the case included allegations against the father for murder of his wife, that is, the mother of the child on account of failure to comply with demands for dowry. The Delhi High Court remarked that the G&W Act deals with two

aspects: guardianship and custody. With regards to guardianship, the Court held that guardianship generally lies with the natural guardian unless he/she is unfit to be a guardian and awarded guardianship, to the father. However, with respect to custody, the Court remarked that the child cannot be suddenly uprooted from his grandparents and it would be in the best interests of the child to continue to remain with the grandparents.

The decision in *Anjali Kapoor* and *Nadeem* illustrated the first sub-category of cases where one of the parents is no more and the grandparents are granted custody. The second sub-category of cases are those where both the parents are no more and other relatives fight for the custody of the minor child. A case in point is the Supreme Court decision in *Swaminathan Kunchu Acharya v State of Gujarat*, wherein the Court granted custody of the minor grandson, whose parents succumbed to COVID 19, to his paternal grandparents as against his maternal aunt. The Court remarked that income and age of grandparents are not enough to tilt the balance against grandparents. The additional factors that weighed in favour of the grandparents were: better education in Ahmedabad (a Metro city) and existence of more disposable time for the child at the hands of the grandparents. Furthermore, the Court noted that there was nothing on record to show that the grandparents had not taken proper care of the child.

Nonetheless, it must be noted that custody orders are not permanent. These orders are made considering the facts and circumstances at the time of making the applications. Therefore, it is completely plausible that custody of the minor children, who have been with the grandparents, may shift later to the surviving parent, who is also the natural guardian. The shift in custody will again dependent on the facts and circumstances of each case but even in such cases, one of the crucial rights of grandparents is that of visitation. The Madras High Court in *Aashifa Behum v Khader Beevi* recognized that grandparents cannot be denied visitation rights especially in light of the fact that the minor child had been in the care of the grandparents since birth. The court noted that grandparents play an essential role in the moral and emotional development of the child. A similar view was adopted by the Supreme Court in *Anjali Kapoor*, wherein it was observed that moral or religious welfare of the child must be considered along with the physical well-being of the child.

CONCLUSION

Both the Guardians and Wards Act 1890 and the Hindu Minority and Guardianship Act 1956 do not grant explicit custodial rights to grandparents. The evolving interpretation of the

"welfare of the child" as the paramount consideration has created a legal pathway for custody to be given to grandparents. In all these cases mentioned above, the primary consideration is the welfare of the child. There is no straightjacket formula for determining when custody of the minor child should be given to the grandparents. Ultimately, each case depends on its peculiar facts and circumstances. While the courts remain cognizant of the statutory framework; its interpretation through the lens of the welfare principle ensures that the child's best interests prevail, even over the legal rights of parents as natural guardians. The analysis shows that there are two ways for grandparents to seek custody of minor children. First, by making an application under for guardianship and concomitantly, custody flows from thereon. Second, even in the absence of guardianship being vested in the grandparents, custody may be granted to grandparents if it serves the overall welfare and best interests of the child.

