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Legal Aspects of Child Custody Evaluation

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ABSTRACT

Family law proceedings include a broad range of issues, including custody, maintenance, support, valuation, visitation, relocation and termination of parental rights. This study attempts to fill a gap in the literature by assessing the perspectives of attorneys regarding child custody evaluations completed by mental health professionals. There are many laws that govern child custody under the Hindu law i.e., Hindu Marriage Act (Section 26), Hindu Minority and Guardianship Act, & Guardians and Wards Act. Child custody can be claimed at any time during judicial separation or divorce. Parents have custody of the child only until it turns 18 after that the child is considered majority of age. Moreover, the custody cannot only be given to a parent, but also a non-parent. The welfare and wish of the child are considered by the court before granting child custody. Courts are pro-child and do what is best for the child. Finally, survey findings suggest that custody evaluations play a significant role in decisions to negotiate with a settlement rather than proceed to a trial.

Keywords: *Child custody, judicial separation, divorce, parental guidance.*

I. PRINCIPLES IN RELATION TO CHILD CUSTODY

For a child custody to take place, an order is to take place either under the provisions of the Guardians and Wards Act, 1890 or the Hindu Minority and Guardianship Act, 1956 where the interest and welfare of the minor is to be given importance.

The desire of the child coupled with the availability of an appropriate and conducive environment for proper upbringing together with the means and ability of the parent concerned to take care of the child are some of the pertinent factors that have to be taken into account by the court while deciding the issue of custody of a minor, as in the Gayatri Bajaj vs. Jiten Bhalla case

The object and purpose of the Guardians and Wards Act 1890: is not merely physical custody of the minor but due to protection of the rights of ward's health, education and maintenance.

Children are not chattels for their parents hence their decision and importance also matter.

- Absolute right of parents over the lives and destinies of their children, in the modern changed social conditions must provide to the considerations of their welfare as human beings,

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as in the case of Gaurav Nagpal vs. Sumedha Nagpal.

- Financial conditions are to be better but they are not the sole determining factor for the custody of child, Mausami Moitra Ganguli vs. Jayant Ganguli.

- The word “welfare” used in Section 13 of the Hindu Minority and Guardianship Act, 1956 has to be interpreted literally and must be taken in its widest sense. The ethical and moral welfare of the child must also weigh with the court as well as its physical well-being. Though the special statutes provision which govern the rights of the parents or guardians may be taken into consideration, Gaurav Nagpal v. Sumedha Nagpal.

- Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor, as in the case of Surinder Kaur Sandhu vs. Harbax Singh Sandhu.

- Even a temporary custody order in favour of the parent should not insulate the minor from parental touch and influence of the other parent which is very important for a healthy growth of the minor and development of his personality, as in Ruchi Majoo vs. Sanjeev Majoo case.

- The principles laid down in proceedings under the Guardians and Wards Act, 1890 are equally applicable in dealing with the custody of a child under Section 26 of the Hindu Marriage Act, 1955, since in both the situations two things are common: first, being orders relating to custody of a growing child and secondly, the paramount consideration of the welfare of the child. Such considerations are dynamic nor can they be squeezed in a straitjacket. Therefore, each case has to be dealt with on the basis of its peculiar facts, Vikram Vir Vohra vs. Shalini Bhalla.

- It is not the “negative test” that the father is not “unfit” or disqualified to have custody of his son/daughter that is relevant, but the “positive test” that such custody would be in welfare of the minor which is material and it is on the basis that the court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian, Nil Ratan Kundu vs. Abhijit Kundu.

II. HOW TO KNOW TYPE OF CUSTODY GRANTED?

Till the time the court specifically mentions any conditions, the parent who is given the custody is awarded both parental and legal custody. The court will make it clear to both the parties if any additional conditions are discussed.

WHO CAN CLAIM CHILD CUSTODY?

Either the mother or the father can claim the custody the child. In any other situation, where the parents are not in the case due to any other law or are deceased, then in that case, the maternal or paternal grandparents or any other relatives are given the responsibility of custody. In most cases, the third person is appointed as the guardian of the child.

III. WHO HAS THE PRIORITY TO CLAIM CHILD CUSTODY?

Regardless of the claims of the parties to the custody of children, the welfare of the minor is the only factor taken into account while determining custody, as the Honourable Supreme Court and other Indian courts have stated time and time again.

The mother is typically granted custody of a kid under the age of five, both under Hindu and secular law. Fathers typically receive custody of the older males, while mothers obtain custody of the older girls. Furthermore, the child's best interests are the first consideration, and the court takes the child's preference into account if they are older than nine. In which case custody is denied to a mother who is proven to have mistreated and neglected her child.

IV. METHODS

- **Nature of custody orders**

The Court must remember that it is dealing with a sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life, which is why custody orders are always considered interlocutory orders and by the nature of such proceedings, custody orders cannot be made final and rigid. They are capable of being altered and moulded keeping in mind the needs of the child, *Vikram Vir Vohra vs. Shalini Bhalla*.

- **Estoppel not applicable to custody orders.**

Orders relating to custody of wards even when based on consent are liable to be varied by the court, if the wards welfare demands variation, *Rosy Jacob v. Jacob A. Chakramakkal*.

- **Where to file an application for custody of a child.**

Section 9 of the Guardians and Wards Act, 1890 makes a specific provision as regards the jurisdiction of the court for a claim for grant of custody of a minor. For determining the jurisdiction of the court, the solitary test under Section 9 is the “ordinary residence” of the minor.

- **Interim custody**

The Court makes orders for temporary custody and protection of the person or property of the

minor under Section 12 of the Guardians and Wards Act, 1890. The court must be guided by the welfare of the children while deciding the question of interim custody, since, *Athar Hussain v. Syed Siraj Ahmed*

- **Child examination is important**

Examination by the court of the child in order to ascertain his wish as to whom he wants to stay with is important and desirable. Such examination also helps the court in performing onerous duty, and in deciding the delicate issue of custody of a tender-aged child apart from the statutory provision in the form of sub-section (3) of Section 17 of the Guardians and Wards Act, 1890, *Nil Ratan Kundu vs. Abhijit Kundu*

The Evaluation Process

Psychological testing is done by the evaluators for both the children and parents.

The evaluator might also examine health records, school report cards, and attendance records of the child. Once all the evidence is gathered and reviewed, the evaluator will recommend to the court that either the parents share joint custody or one parent should receive legal and primary custody.

The following are the important details for custody evaluation:

- Wishes or preferences of the child and parents regarding the child custody
- Interactions of the child with each parent, siblings, and individuals who may influence the child significantly.
- Adjustment of the child to home, school, and community environments.
- Physical and mental health of all individuals involved.
- Alienation attempts of parents
- Nature and quality of the emotional relationship between each parent and the child.
- Emotional and psychological stability of each parent
- Parenting skills of each parent
- Each parent's openness to visitation by the other parent.
- Proposal and arrangements of child custody by each parent
- Each parent's pre-divorce parental role and parenting capacity.
- Each parent's degree of anger and distress related to the divorce.
- Sexual orientation of each parent

V. CONCLUSION

The evaluator's opinion should be based on reliable principles and methods. Complex medical terms are to be avoided while preparing report. Custody evaluation is an important part for taking up child custody. Custody evaluation is a process aimed at minimizing emotional problems which are likely to occur in a child during or after the divorce process . In India, the Guardians and Wards Act, 1890, as well as personal laws, determine who gets custody of a child. The most important thing is to assign custody of a child in order to pursue their welfare; other personal law customs and regulations can be suspended if necessary. While the child and parents have preferences, the court makes the final determination about the child's custody.
