

‘BEST INTEREST OF CHILD’ IN CUSTODY LEGISLATIONS-A DYNAMIC CONCEPT

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ABSTRACT

The present article is about the ‘best interest of child’ also termed as ‘welfare of child’. In this article its meaning, significance and ambit has been discussed. The various legislations pertaining to child custody which are founded on this very principle has also been explained. The concept is loud but yet undefined in statutes. The judiciary has made an attempt time and again to define this concept by including different facets of welfare concerning the child in the ambit of the definition of best interest of child’. But it has become an unruly horse which runs at the mercy of judiciary only.

1. INTRODUCTION

The ‘best interest of child’ is the concept on which all the custody legislations are being founded. All the disputes related to grant of custody of minor children revolves around this principle. In the matrimonial discordance, a conflict which always arises besides other disputes that is conflict relating to custody of child. This is one of the most difficult lis to be resolved by courts. When parents are at loggerheads then there is no one for the rescue of little toddlers except the court. Almost all the legislations on the point are founded on this very principle. The concept of best interest of child is also known as ‘welfare of child’. The phrase ‘best interest of child’ is generally used in International laws and Conventions whereas the title ‘welfare of child’ is commonly used in Indian laws pertaining to child custody.

2. MEANING OF ‘BEST INTEREST OF CHILD’

2.1. UN Convention on child rights:

According to UN Convention on the rights of the child- the ‘best interest of child’ is termed as “all the elements necessary to make a decision in a specific situation for a specific individual child or group of children.”¹ Further Article 3 of the convention says, “in all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

2.2. English Law:

In *Halsbury’s laws*² “where in any proceeding before any court the custody or upbringing of minor is in question then, in deciding that question the court must regard minor’s welfare as a first and paramount consideration and may not take into consideration whether from any other point of view the father’s claim in respect of that custody or upbringing is superior to that of the mother or the mother’s claim is superior to that of the father.”

2.3. American Law:

The principle of ‘best interest’ is outlined in American jurisprudence, “as a rule, in a selection of guardian of a minor, the ‘best interest of the child’ is paramount consideration to which even the rights of parents must sometimes yield”.³ “A court is not bound to deliver a child into the custody of any claimant or any person but should, in the exercise of sound discretion, a careful consideration of the facts leave it in custody as its welfare at the time appears to require.”⁴

3. ENACTMENTS ON CUSTODY OF CHILD

¹ Para 47, General Comment No. 14, Committee on the Rights of the Child, (2013).

² Article 511, Halsbury’s laws of England Vol. 24, Ed. IV, P 217

³ Para 31, the American Jurisprudence, Vol. 30 Ed. II, P. 34

⁴ Para 148, the American Jurisprudence, Vol. 30 Ed. II, Pp. 280-281

There are multiple custody statutes for the grant of custody of minor child such as:

Codified laws:

1. Guardian and Wards Act, 1890⁵
2. The Hindu Marriage Act, 1955⁶.
3. The Hindu Minority and Guardianship Act, 1956⁷
4. The Domestic Violence Act, 2005⁸

Other uncodified laws:

1. Muslim law
2. Parsi law
3. Christian law

As far as Indian law is concerned every wardship law is based on welfare principle of child but no law defines the term in its proper context. The relevant legal provisions of the above said custody legislations are discussed hereunder:

Section 17 (1) of the Guardian and Wards Act, 1890 propounded the matters to be considered by the courts while deciding custody petitions. One of the matters mentioned in that is '**welfare of child**'. In dealing with the matters of guardianship and custody of child the court shall place its decision by keeping in mind the welfare of child as per circumstances of the case but it must also subject to personal laws applicable to minor.

If a minor is Hindu the personal law applicable in this subject will be Hindu Minority and Guardianship Act, 1956.

Section 13 of the act is relevant and worded as: The welfare of minor is the paramount consideration. It supersedes all or any of the provision of this act or any other law.

Section 26 of the Hindu Marriage Act, 1955, the custody of child be given by considering the wishes of the child (if he can make intelligible preference). The wishes of child are one of the factors to be considered in the term 'welfare of child'.

Section 17(2) and (3) of the Guardian and Wards Act tried to define the welfare concept in following words: "In considering what will be for the welfare of the minor, the court shall have regard to:

1. Age, sex, religion of the minor.
2. The character and capacity of proposed guardian and his nearness of kin to the minor.
3. The wishes of deceased parent if any.
4. Any previous or existing relations of the proposed guardian with the person or property of the minor.
5. Wishes of the child (if he has attained the age of understanding).
6. Desire of the proposed guardian.

The term welfare is loudly used concept but yet remained undefined by the legislators. It is left to the discretion of the judges to decide the custody cases by keeping in mind the welfare of child as of paramount importance depending upon the circumstances of particular case. But, the judiciary tried to tie this unruly horse of 'welfare of child' by giving various landmark judgments. In the plethora of cases, different factors have been emerged which collectively constitutes the 'welfare of child'.

4. JUDICIAL PRONOUNCEMENTS

4.1. English Case Law: The English case on the point is *Mc Grath, Re.*, the ld. Judge Lindley observed in this case that, "the dominant matter for the consideration of the court is the welfare of the child. The welfare of the child is not to be measured by money only normally physical comfort but the word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as physical well-being. Nor can tie of affection be disregarded."⁹

⁵ Section 12 and 25.

⁶ Section 26.

⁷ Section 6 and 13.

⁸ Section 21

⁹ (1893) 1 Ch 143: 62 LJ Ch 208

4.2. Indian Case Laws: The Supreme Court of India explained the welfare principle in *Rosy Jacob vs Jacob A*¹⁰ “the court held that the object and purpose of 1890 Act is not merely physical custody of minor but due protection of the rights of ward’s health, maintenance and education. The power and duty of the court under the Act is the welfare of the minor. In considering the question of welfare of minor due regard has of course is to be given to right of father as natural guardian and if the custody of father cannot promote the welfare of the children, he may be refused to such guardianship.”

4.2.3. Consideration for Welfare is of Minor not of Parents: The high court of Bombay stated in *Saraswathi Bai Shripad vs Vasanjit*, that it is the welfare of minor child which is to be considered by the courts as of paramount significance. Neither the welfare of father nor of the mother to be regarded as any importance¹¹.

4.2.4. Legal Rights of Parents and Welfare Concept: It is the welfare or interest of the child which is the evaluative measure in custody cases. Neither any legal provision nor any legal rights of the parties can override the ‘welfare of child’. In *Surinder Kaur Sandhu (Smt.) vs Harbaksh Singh Sandhu*¹² the court has analyzed that even though section 6 of Hindu Minority and Guardianship Act, 1956 awards the status of natural guardian to father. But, it can never supersede the welfare the child. The welfare of child always remains the concept of paramount importance while deciding the custody of child¹³.

In *Mausmi Goitra Ganguli vs Jayant Ganguli*¹⁴ the Supreme Court held in this case that in wardship litigations it is only the welfare of child which is of paramount importance, the rights of parents have nothing to do with it.

Another landmark judgment given by the Supreme Court of India in the year 2008. The court observed in *Neel Rattan Kundu and Anr vs Abhijit Kundu* “The principle of law in relation to the custody of minor child. It is trite that while determining the question to which parent care and control of a child should be committed. The first and paramount consideration is the welfare and interest of child and not the rights of the parents under statute. Undoubtedly, the provisions of law pertaining to the custody of child contained either in the Guardian and Wards Act, 1890 (section 17) or the Hindu minority and Guardianship Act, 1956 (Section 13) also hold out the welfare of the child are of predominant consideration. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of minor. The question of welfare of the minor child has again to be considered in the background of the relevant facts and circumstances. Each case has to be decided on its own facts and other decided cases can hardly serve as binding precedents in so far as the factual aspects of the case are concerned. It is no doubt, true that father is presumed by the statutes to be better suited to look after the welfare of the child, being normally the working member and head of family, yet in each case the court has to see primarily to the welfare of the child in determining the question of his or her custody. Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of child. It is here that the heavy duty is cast on court to exercise its judicial discretion judiciously in the background of all relevant facts and circumstance bearing in mind the welfare of the child as paramount consideration”.

4.2.5. Character of the Parents: Again the Supreme Court in *KirtiKumar Maheshankar Joshi vs Pardeep Kumar Karunashankar Joshi*,¹⁵ has disregarded the rights of the natural guardian and gave the custody of the child to maternal uncle against the right of father as a natural guardian. The facts of the case were, the mother of the two minor children died in unnatural circumstances. The father was facing charges under section 498-A IPC. Children were staying in the custody of maternal uncle. Meanwhile father has filed custody petition of two children against maternal uncle. When courts ask the wishes of children they expressed their desire to live with maternal uncle rather than with the father. The court held that, “after talking to the children and accessing their state of mind we are of view that it would not be in the interest and welfare of children to handover their custody

¹⁰ 1973 (1) SCC 840

¹¹ AIR 1941, Bom 103

¹² (1984)3 SCC 698

¹³ Also referred to Elizabeth Dinshah Mrs. Vs. Arvind M. Dinshah, 1987 (1) SCC 42, Chanderkala Menon (Mrs.) vs. Vipin Menon (Capt.) 1993 (2) SCC 6

¹⁴ JT (2008) 6 SC 643

¹⁵ 1992 (3) SCC 573

to their father Pardeep Kumar we are conscious that the father, being natural guardian has preferential right to the custody of children. But, keeping in view the facts and circumstances of the case and wishes of children who according to us are intelligent enough to understand their well-being. We are not inclined to handover the custody children to father at this stage.”

The similar case has been decided by the Patna High Court. In *Bimla Devi vs Subash Chandra Yadav Nirala*¹⁶, where father was facing charges under section 498A IPC for murdering his wife. In this case, his legal right of natural guardian was devastated by the court. The custody of minor girl was given to maternal grandmother. The court held it is not contrary to any law.

The court further observed while construing the welfare concept used in section 13 of the Act of 1956, “it is well settled that the word welfare used in this section must be taken in its widest sense. The moral or ethical welfare of the child it was also weigh by the court as well as his physical well being.

The legal guardian cannot claim the custody of child even from third person only by basing his claim on the strength of his legal right of natural guardianship. In *Tarun Ranjan Majumdar and Anr vs Sidhartha Datta*¹⁷ the Calcutta high court while enunciating section 7, 12 and 25 of the Guardian and Wards Act, 1890 held that, certain orders of custody are to be passed having due regard to the welfare of the child superseding the right of natural guardian. It is irrelevant against whom the custody of ward is sought by natural guardian. Even, if the child is in the custody of third person it cannot be questioned by natural guardian, if it is for the welfare of minor.

4.2.6 Wishes of the Child: Section 17(3) of the Act, 1890 gives power to courts to find out the preference of minor children in the pending custody proceedings.

Section 26 of Hindu Marriage Act, 1955 focuses on wishes of the child that court while deciding custody of minor child either during or after the pendency of matrimonial petition must consider the wishes of child as a relevant factor. The wishes of child mean the desire of child. In other words it is the will of the child regarding the choice of parents in custody disputes that with he/she wants to reside in future either mother or father or sometimes with third person that is may be grandparents (maternal/paternal). The wishes of child being one of the important aspects of welfare principle are time and again considered by the judiciary.

The Privy Council in 1914 in *Annie Besant (Mrs.) vs. G. Narayaniah and Anr*¹⁸ held that even in NRI's cases also, wishes of the child are to be considered as a relevant factor in disposing of the custody petitions.

The Rajasthan High Court in the year 2002, observed in *Govardhan Lal and others vs Gajendra Kumar*¹⁹ that while construing custody cases, keeping in mind the best interest of the child as sole criterion it would be proper to know the wishes/desires of the minor that with whom to whom he or she wants to accompany.

The Madras high court while elaborately discussing the concept held that custody petitions cannot be determined on documents, oral evidence or precedents without applying human approach. The human approach is significant for the welfare of the ward. Due to the reason that other documentation can be created by the litigants themselves or as per the advice of the advocates which suits to their convenient²⁰.

The Himachal Pradesh High Court in *Kamla Devi vs State of HP*²¹ the court has elaborately discussed the principle of welfare of child “the court while deciding custody cases in its inherent and general jurisdiction is not bound by the mere legal right of parent or guardian. Though the provisions of the special statutes which governs the rights of the parents or guardian may be taken into consideration. There is nothing which can stand in the way of court exercising its *parens patriae jurisdiction* arising

¹⁶ AIR 1992 Pat 76

¹⁷ AIR 1991 Cal 76

¹⁸ AIR 1914 PC 41

¹⁹ AIR 2002 Raj 148

²⁰ M.K. Hari Govindhan vs A.R. Rajaram, AIR 2003 Mad 315.

²¹ AIR 1987 HP 34

in such cases giving due weight to the circumstances such as a child's ordinary comfort, contentment, intellectual, moral and physical development, his health, education and general maintenance and favorable surroundings. These cases have to be decided ultimately on the courts view of the best interest of the child whose welfare requires that he be in custody of one parent or the other.

4.2.7. Education of Children: The welfare of child can be viewed from the aspect of education of child also. Recently, the Supreme Court in 2017 in *Purvi Mukesh Gada vs Mukesh Popal Lal Gada and others*²² held that a hollistic approach is to be taken I custody cases. The education of children is another important aspect is to be considered for welfare of child. If children is performing well in academics while residing in the company of mother. Unlike father to put the children in boarding schools where the academic performance of children become very low and then he himself handed over the custody of child to mother. Then again in coming of company of mother the children started performing well and got good grades. Again husband filed SLP. The Apex Court while discussing this SLP held that in this case mother is in a position to take better care of children. As education is one of the pre requisites of welfare concept which cannot be overlooked by the courts. Hence, custody granted to mother.

CONCLUSION

Welfare of child has become unruly horse in the hands of judges. Besides, naming the concept, legislations hardly explain it. No custody statue of children has attempted to define it properly. The children are the ultimate sufferers in the warfare of parents. There is no defined set of rules neither by legislator nor by judiciary that what falls under the category of welfare of child and what is not. Every judge has its own subjective mind. One thing is welfare for one but not for another. This concept is having overriding power over the statutes also over legal provisions of the custody statutes also. Hence, it is the mere discretion of judge to award custody or not by covering the case in the umbrella of welfare concept. Misuse of it is paramount in the hands of parents, advocates, judges and others.

²² Criminal Appeal no. 1553 of 2017