

SHARED PARENTING SYSTEM VIS A VIS CUSTODY OF CHILD - WOULD INDIA IN NEED OF LEGISLATION FOR CARING CHILDREN?

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Abstract

The concept of child custody system is changing. To determine the custody of the child the welfare of the child is the paramount consideration. Accordingly the concept of shared parentage has grown, which is the new concept in custody system. In this concept both the parents will participate in upbringing of the child. While the concept of shared parenting system is prevalent in countries like US, UK, Canada, Netherlands, Australia etc. but it is new in India though it is gradually increasing. Some of the provisions of shared parenting system of those countries are also discussed in the present article. In India, at present the custody of children are determined by two laws – the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956 but both the Acts are silent on joint custody or shared parenting for children. As there is no straitjacket formula that can be applied universally to all cases of custody, India is in need of new law in this regard. The Law Commission of India is also concerned about the issue of adopting a shared parenting system in India and submitted its 257th Report along with the proposed amendment. Before submitting this Report the Commission issued a Consultation Paper on this subject and invited suggestions on the topic. In the present article various judicial decision on shared parenting system are discussed. Some of the reasons for favouring and criticizing the shared parenting system are mentioned in this article. Some suggestions are also put forward in this article to make this provision fruitful and effective.

Keywords – Custody, shared parenting, joint custody, best interest of the child, parenting plans, Hindu Minority and Guardianship Act, 1956, Guardians and Wards Act, 1890

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Introduction

Guardianship and custody of minor child are important aspects of matrimonial relations and the issue becomes very complicated when couples wish to dissolve their marriage and consequently battle in court over the custody of their minor child. In a custody battle, no matter which parent wins the child is always the loser. But in the concept of shared parenting both the parents may participate in upbringing of the child. The concept of child custody is changing. The concept of shared parenting is the new concept in custody jurisprudence. In recent years, interest in shared parenting has grown among parents who no longer live together, after divorce or separation but where both wish to spend time with children. It is very much necessary and beneficial for the child. Generally divorce and separation affects the upbringing of the child to a great extent. The conflicts, anger and differences between the parents in case of divorce or separation should affect the mental growth of the child. Shared parenting may provide a healthy chance of living a normal life of the child.

While the concept of shared parenting system is prevalent in countries like US, UK, Canada, Netherlands, Australia etc but it is new in India though it is gradually increasing. In India, the spouses generally fight with each other for divorce or separation forgetting about what's best for the child and take on single parenting instead of co-parenting, in rigidity against the spouse. Generally this divorce or separation brings about bitterness, publicity exploiting the emotions of parents as well as the child, leaving the child hurt and confused. Shared parenting or joint custody of the child would be very helpful and beneficial in this regard for the sake of upbringing of the child.

Meaning of shared parenting

Strictly speaking, parenting is a joint responsibility. A child needs both parents. Mother brings in certain aspects; father brings other aspects in child's development. A child is in need for both the parents and separation from anyone will have a harmful effect on the child. To determine the custody of the child, generally the "best interest" of the child is considered. It is the subjective by nature and judicial discretion plays very vital role in this regard. Shared parenting is a system for the custody of child after divorce or separation as both parents have the right and responsibility of being actively involved in the raising and upliftment of the child. To put it simple, shared parenting system is based on the

principle that parental responsibility should be shared by the parents and the child should not be deprived from the love and affection of both the parents. Both the parents have the reasonable access to their child keeping in mind the welfare of the child. A child has regard for both the parents and separation from anyone will have a harmful effect on the child. Here the term 'shared' is used to mean 'joint', actually shared parenting is meant for both joint legal custody and joint physical custody like US. According to US joint legal custody means both parents have equal rights and responsibilities towards the child including the child's education; health care etc. whereas joint physical custody means both the parents will share physical custody of the child by providing equal time and contact. In case shared parenting both parents are involved in all aspects of the child's life. Though shared parenting is not specifically mentioned in Indian law but recently this concept is frequently used to decide the custody of child.

International aspects of shared parenting

The International Council on Shared Parenting (ICSP) is an international association with individual members from the sectors science, family professions and civil society. The purpose of the association is first, the dissemination and advancement of scientific knowledge on the needs and rights ("best interests") of children whose parents are living apart, and second, to formulate evidence-based recommendations about the legal, judicial and practical implementation of shared parenting. The first International Conference on Shared Parenting organized by the ICSP took place in Bonn, Germany, on 9-11 July 2014. This was the first such gathering of scholars, practitioners and NGO representatives interested in the emerging paradigm of shared parenting in families in which parents are living apart. A wide range of topics as well as perspectives on shared parenting were discussed and debated, and at the end, the conference arrived at the six major areas of consensus, namely¹ –

- (i) There is a consensus that shared parenting is a viable post-divorce parenting arrangement that is optimal to child development and well-being, including for children of high conflict parents. The amount of shared parenting time

¹ First International Conference on Shared Parenting, 2014, retrieved from http://twohomes.org/tikiindex.php?page=en_conference_2014&redirectpage=conference_2014 on 01.10.2015.

necessary to achieve child well-being and positive outcomes is a minimum of one-third time with each parent, with additional benefits accruing up to and including equal (50-50) parenting time, including both weekday (routine) and weekend (leisure) time.

- (ii) There is consensus that “shared parenting” be defined as encompassing both shared parental authority (decision-making) and shared parental responsibility for the day-to-day upbringing and welfare of children, between fathers and mothers, in keeping with children’s age and stage of development. Thus “shared parenting” is defined as “the assumption of shared responsibilities and presumption of shared rights in regard to the parenting of children by fathers and mothers who are living together or apart.”
- (iii) There is a consensus that national family law should at least include the possibility to give shared parenting orders, even if one parent opposes it. There is a consensus that shared parenting is in line with constitutional rights in many countries and with international human rights, namely the right of children to be raised by both of their parents.
- (iv) There is a consensus that the following principles should guide the legal determination of parenting after divorce – i.e. shared parenting as an optimal arrangement for the majority of children of divorce, and in their best interests, parental autonomy and self-determination and lastly limitation of judicial discretion in regard to the best interests of children.
- (v) There is a consensus that the above apply to the majority of children and families, including conflict families, but not to situations of substantiated family violence and child abuse. There is a consensus that the priority for further research on shared parenting should focus on the intersection of child custody and family violence, including child maltreatment in all its forms, including parental alienation.
- (vi) There is a consensus that an accessible network of family relationship centers that offer family mediation and other relevant support services are critical in the establishment of a legal presumption of shared parenting, and vital to the success of shared parenting arrangements.

The second International Conference on Shared Parenting, 2015 of the ICSP is scheduled for December 9-11, 2015, in Bonn, Germany. The intersection of shared parenting and family violence will constitute major theme of the upcoming conference.

The United Nations Convention on the Rights of the Child, 1989 (commonly abbreviated as the CRC, CROC, or UNCRC) is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children.² Like many other countries India has also ratified this convention. According to this Convention a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.³

Laws on custody of child in India

In India, at present the custody of children are determined by two laws – the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956. Both the Acts are silent on joint custody or shared parenting for children. The Guardians and Wards Act, 1890 is a comprehensive legislation dealing with the appointment of a person as a guardian of a minor both in respect of his/her person or property. The Act makes it possible for any person to apply to be appointed as a guardian of a minor. The Act also provides for appointment of joint guardians, both in respect of the person and property of the minor. Section 17 of the Act, which is a key provision as regards appointment of a guardian, provides that a court shall be guided by what appears in the circumstances to be for the welfare of the minor.

Another relevant legislation i.e. the Hindu Minority and Guardianship Act, 1956 enumerates the classes of natural guardians of a Hindu minor. But these laws are vested with the idea that guardianship has to be given to one parent and never considered that the best interest can also be derived from the custody of a joint parenting.

In Islamic law, the father is the natural guardian, but custody vests with the mother until the son reaches the age of seven and the daughter reaches puberty. Islamic law is the earliest legal system to provide for a clear distinction between guardianship and custody, and also for explicit recognition of the right of the mother to custody.⁴ The concept of Hizanat provides that, of all

² The United Nations Convention on the Rights of the Child, 1989, retrieved from <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, on 01.10.2015.

³ Ibid, Article 9.

⁴ Diwan, Paras (2012). Law of Adoption, Minority, Guardianship & Custody (p. xvi). New Delhi: Universal Law Publishing Co.

persons, the mother is the most suited to have the custody of her children up to a certain age, both during the marriage and after its dissolution. A mother cannot be deprived of this right unless she is disqualified because of apostasy or misconduct and her custody is found to be unfavorable to the welfare of the child.⁵

Under Section 49 of the Parsi Marriage and Divorce Act, 1936 and Section 41 of the Indian Divorce Act, 1869, Courts are authorized to issue interim orders for custody, maintenance and education of minor children in any proceeding under these Acts. Guardianship for Parsi and Christian children is governed by the Guardians and Wards Act, 1890.

Shared parenting in other countries

Shared parenting would mean both parents, after their divorce, would still have full access to the child. Different countries throughout the world have their own different laws on custody of child. Many countries have already adopted the shared parenting in case of custody of child.

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) are prevailed as already stated earlier.

The Family Law (Shared Parental Responsibility) Amendment Act 2006 introduced the most radical changes to Australia's family law since the original Act in 1975 i.e. Family Law Act, 1975. The Amendment Act attempted a significant cultural change – to encourage more shared and co-operative parenting after separation, and to shift the focus, for post-separation dispute resolution, away from court action and towards private, mediated methods. However, the Act repeatedly states, the “best interests of the child” is the “paramount consideration”. To grant joint physical custody, Australian courts consider a lot of pre-conditions such as, geographical proximity, compatible parenting, co-operation, ability to supervise the child etc. before applying for the joint parenting of the child the parents need to prove other conditions such as: degree of maturity, value, attitude and behavior of the parents, and openness of mind to communicate with the other parent.

⁵ *Ibid.*

In United Kingdom joint custody arrangements must represent the factual reality of child's life. Welfare principles decide that no order is made that is not good for the child. Family courts in the United Kingdom take into account several factors before awarding joint physical custody: welfare principle, the no-delay principle and the no-order principle.

There are generally two procedures for securing child custody arrangements in Thailand. The first is by mutual consent and the second, by the court.⁶ Mutual consent is an option for previously married parents who have divorced by mutual consent, previously married parents who had an uncontested divorce, or unmarried couples in which the child is registered as the legitimate child of the father and the unmarried parents agree on the custody arrangement.⁷ The court decides custody arrangements when, there was a contested divorce. In such cases, the court can award custody to the parents or to a third person as a guardian in lieu of the parents if it is in the “happiness and interest” of the child.⁸

In the Netherlands, there has been an increasing trend towards shared parenting. In 1996, the Dutch Parliament passed a law mandating that joint legal custody be the presumed standard for post-divorce parenting in the Netherlands.⁹ From 2009, all divorces must be accompanied by a parenting plan based on the assumption of a shared parenting system. The plan must include: the division in the care and parenting tasks, how to inform and consult each parent on parenting the children and the costs of caring and parenting the children. If no plan can be agreed upon or the plan is not amenable, the judge has the discretion to send the divorcing parents to a mediator in order to acquire such a plan before continuing the divorce proceedings.¹⁰

In South Africa, family courts are reluctant to award sole custody to either parent. According to the Children's Act No. 38 of 2005, parental responsibility includes the responsibility and the right (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child. The biological mother of a child, whether married or unmarried, has full parental responsibilities

⁶ Thailand Civil and Commercial Code (Part III), Book IV, Section 1520.

⁷ *Ibid*, Section 1547.

⁸ *Ibid*, Section 1520.

⁹ Article 247 of Netherland Civil Code.

¹⁰ *Ibid*.

and rights in respect of the child. The father has full parental responsibility if he is married to the mother, or if he was married to her at the time of the child's conception, or at the time of the child's birth or any time in between, or if at the time of the child's birth he was living with the mother in a permanent life-partnership, or if he (i) consents to be identified or successfully applies in terms of Section 26 to be identified as the child's father or pays damages in terms of customary law; (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

Other countries like Singapore, Canada, Kenya etc. all have shared parenting norms and give the interests of the child utmost importance while deciding custody matters.

Judicial approaches on shared parenting in India

In India, the principle that father is the natural guardian is put to rest and best interests of the child even supersedes statutory provisions. In this principle, custody is mainly awarded to mothers and the father gets visitation rights. But there are cases where the court has altered the previous decision of father's visitation rights and allowed the mother to take the child to Australia where she had relocated.

Also the custody rights to the father are denied by many High Courts even when they had greater economic prosperity. In a judgment *Kumar V. Jahgirdar v. Chethana Ramatheertha*¹¹ Supreme Court has reversed the observation that the mother be always the natural guardian and the custody will be given to her always. In the case of *Rosy Jacob v. Jacob A. Chakramakkal*,¹² the Supreme Court has observed that the children are not mere chattels; nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper

¹¹ AIR 2004 SC 1525.

¹² AIR 1999 SC 3821, See also *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*, (1982)2 SCC 544: 1983 SCR (1) 49.

balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

In *Mausami Moitra Ganguli v. Jayant Ganguli*,¹³ the Supreme Court was confronted with the custody conflict over 10 year male child. The court did not consider Section 6 of the Hindu Minority and Guardianship Act after detailing the factors which were indicative of the position that the welfare of the child lies with continuing the custody with the father, this Court dismissed the mother's appeal. The facts are totally distinguishable. The ratio continues to be that it is the welfare of a minor which has paramount importance. The court has held that welfare of the child may have a primacy even over statutory provisions. Again in *Ashish Ranjan v. Anupam Tandon*,¹⁴ the Supreme Court has held that statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

In *Gaurav Nagpal v. Sumedha Nagpal*,¹⁵ the Supreme Court held that section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible. The court further held that the principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force. The same principle was reiterated in another judgment of the Supreme Court in *Vikram Vir Vhora v. Shalini Bhalla*.¹⁶ In this case although the son had been with the father since the time of his birth, which was a strong argument in favour of the father, the Supreme Court reversed this arrangement and awarded custody to the mother with visitation rights for the father.

¹³ (2008) 7 SCC 673.

¹⁴ (2010) 14 SCC 274.

¹⁵ (2009) 1 SCC 42.

¹⁶ AIR 2010 SC 1675 : (2010) 4 SCC 409.

A Supreme Court judgment in *Sheila B. Das v. P.R. Sugasree*,¹⁷ takes the standpoint that either parent, provided she/he is financially stable and able to take care of the child, is fit to be the guardian. In the case of 12-year-old Ritwika, the apex court allowed her father P R Sugasree, an advocate, to take custody, and her mother, Dr Sheila B Das, a doctor, to visit her at regular intervals and spend time with her during school vacations.

In May, 2015 Mumbai Bandra family court gives the judgment¹⁸ which in an interim child custody/visitation order and asked both mother (petitioner) and father (respondent) to make a parenting plan, and has created a shared parenting plan based on those submitted by both of them. It has divided the interim custody of daughter for 6 months of the year each to father and mother. This judgment creates a new precedent by actually putting child's interests as paramount, rather than doing lip service to it by granting custody to mothers, and relegating fathers to their 'sole duty' of maintenance providers. The court at the time of giving judgment considered many things. The final shared parenting plan was evolved after submitting of parenting plan by both mother and father to a marriage counsellor, and then a common parenting plan was evolved by the court. This is very good approach as because usually in family courts we see only mediators, who are more of lawyers than marriage counsellors of any kind. Apart from several other practical directions, the court also considered on how to divide long vacations/holidays time, intimation of school reports to both parents, sharing medical details of child etc. The court further held that since both mother and father are working, child support costs to be shared by both of them. The money is to be deposited into an account in name of child. Opening account in name of child is again in line with our recommendation to law commission, and was mentioned by law commission in its report too. Otherwise the common situation normally is of maintenance being paid to mother who usually has child's custody, but there is later no account of whether the money is being spent on child or not. An account in child's name will make it difficult for any parent to misuse the funds.

The Supreme Court has said that the welfare of a child is not to be measured merely by money or physical comfort, but the word welfare must be taken in its widest sense that the tie of affection cannot be disregarded.¹⁹

¹⁷ AIR 2006 SC 1343.

¹⁸ Int. Application No .60 of 2015, In Petition No. A- 932 of 2015.

¹⁹ *Nil Ratan Kundu v. Abhijit Kundu* AIR 2009 SC (Supp) 732.

In *K M Vinaya v. B R Srinivas*,²⁰ the Karnataka High Court held that both the parents are entitled to get custody 'for the sustainable growth of the minor child.' The Court has formulated the manner in which manner the joint custody may be affected –

- (i) The minor child was directed to be with the father from 1 January to 30 June and with the mother from 1 July to 31 December of every year.
- (ii) The parents were directed to share equally, the education and other expenditures of the child.
- (iii) Each parent was given visitation rights on Saturdays and Sundays when the child is living with the other parent.
- (iv) The child was to be allowed to use telephone or video conferencing with each parent while living with the other.

Different High Courts and the Supreme Court in number of judgments have held that greater economic prosperity of the father and his relatives is not a guarantee of the welfare of a minor and that it does not disturb the presumption in favor of the mother while deciding custody.²¹

Law Commission of India on shared parenting

The idea of shared parenting in case of a divorce gained further momentum on November, 2014 when the Law Commission of India put out a consultation paper on “Adopting a shared parenting system in India” on its website and invited suggestions on the topic.²² The Consultation Paper analyzed shared parenting systems across the world and reviewed the existing law in India. It also posed a set of questions pertaining to shared parenting and invited comments from the public. The Consultation Paper also reviewed the existing laws in India regarding child custody as well as relevant Supreme Court and High Court decisions, and concluded that the law on custody in India had evolved to a point where it was appropriate to initiate a discussion on the idea of shared parenting. On receiving several of responses from the public, the Commission set up a sub committee to study the legal provisions pertaining to shared custody in both developing and

²⁰ M.F.A No. 1729/2011 (G & W).

²¹ *Ashok Shamjibhai Dharod v. Neeta Dharode*, II(2001) DMC 48 Bom; *Ravi Shankar v. Uma Tiwari*, I(1999) DMC 585 MP; *Gaurav Nagpal v. Sumedha Nagpal*, (2009)1 SCC 42.

²² Retrieved on 01.12.2015 from <http://lawcommissionofindia.nic.in/Consultation%20Paper%20on%20Shared%20Parentage.pdf>

developed countries, with special emphasis on the circumstances in which joint custody may be granted, parenting plans and mediation. Further, through a series of meetings with legal experts, practitioners and other stakeholders the committee outlined the nature and scope of the concept of shared parenting in India and identified the provisions in the current law that need to be amended. After several rounds of discussions and deliberations, the views of the Commission centred around (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. The above recommendations of the Commission are put in the form of its 257th Report titled “Reforms in Guardianship and Custody Laws in India.”²³

Previously the Law Commission in its 133rd Report namely “Removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of the welfare principle,” examined the laws relating to recognition of natural guardianship and appointment by court of guardians for the persons and property of minors and suitable recommendations are made.²⁴

Criticism

Some of the reasons are given below against the shared parenting system in India –

- (i) Both the Guardians and Wards, Act, 1890 and the Hindu Minority and Guardianship Act, 1956 are silent on joint

²³ Law Commission of India, Report No. 257, Reforms in Guardianship and Custody Laws in India, May, 2015. Retrieved on November 17, 2015 from <http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf>

²⁴ Law Commission of India, One hundred thirty third Report on “Removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of the welfare principle,” August, 1989. Retrieved on December 12, 2015 from <http://lawcommissionofindia.nic.in/101-169/report133.pdf>

custody or shared parenting for children of divorcing or separated parents. According to these Acts the welfare of the child is the paramount consideration for determination of the custody of child. But the paramount welfare of child would be incomplete if the child is deprived of equal and quality access to both parents.

- (ii) There is uncertainty and lack of judicial consensus on what exactly constitutes welfare of the child, as a result, in fiercely fought custody battles, there are no ways to ensure that the interests of the child are actually protected. The legal framework is silent on how should custody issues be handled, what factors should be relevant in decision-making, and what should be the process of dispute resolution between parents over children, among others.
- (iii) It is to be borne in mind that countries mentioned above have a presumption that joint custody is not in the best interest of a minor if one of the parents is found to be a habitual perpetrator of domestic violence, child abuse, child kidnap or child neglect. Non-payment of maintenance can surely be construed as a clear case of child neglect. This matter is to be kept in mind in case of shared parenting.
- (iv) Perhaps the actual problem arises when the separated parents re-marry. Generally, the second spouse will not like their partners maintaining any links with the first marriage. So he or she will naturally show a dislike towards the child, causing much harm to the child emotionally. So this matter is to be considered where separated couples who get into a second wedlock and the experiences of their children before framing this new system of parentage.
- (v) Often wide gaps in financial status and social standing of both parents start influencing the child's preference towards more comfortable position. In India, fathers are earning usually and have free-hand in expenses while non-working mothers are left with child support for the childcare, which is not enough to maintain the previous lifestyle. In this case, what both the parents can do is to co-operate with each other in fulfilling the child's needs. Co-parenting is often costly since it involves providing two homes rather than one for a child.

Arguments in favour of shared parenting in India

Some arguments in favour of share parenting are put forward from a child-focused perspective.

- (i) Before and after divorce children need both parents to be physically and emotionally attuned, involved and responsive in their lives and the removal of any parent threatens their physical or emotional security. Children need both their mother and father – they seek advice from each parent in different situations. Children need adequate opportunities to bond with each parent.
- (ii) The children needs emotional support and warmth of the mother who is ordinarily better equipped than the father to import such emotional support and warmth which are essential for building up a balanced personality.
- (iii) Psychological studies revealing that the involvement of both parents in well being of the child rearing is preferable than sole custody arrangements. Shared custody can reduce acrimony between the parents.
- (iv) Shared parenting decreases parental conflict and prevents family violence. Some women misuse the protections in Protection of Women from Domestic Violence Act, 2005 and Section 498A of the Indian Penal Code, to take children away from their fathers. However, in shared custody arrangements, parental contact would be withheld only for child abuse, neglect, or mental illness. Children should have contact with both parents regardless of whether the parents reconcile.

Suggestions

Like US there should be two forms of joint custody – joint legal custody and joint physical custody. In India also custody of a child should be in that form. Either the said Acts may be amended in this regard or the judiciary at the time of giving custody should follow this principle. In case of Joint legal custody both parents would have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care etc. whereas Joint physical custody would mean that physical custody which would be shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents. Some suggestions are given below to make the law relating to custody of the children and shared parenting system in India more effective and useful –

- (i) The provision contained in section 6(a) of the Hindu Minority and Guardianship Act, 1956 constituting the father as a natural guardian of a Hindu minor's person as well as in respect of his property in preference to the mother should be amended so as to constitute both the father and the mother as being natural guardians 'jointly and severally' having equal rights in respect of the minor.²⁵
- (ii) The guidelines for child custody and access should be framed. It is suggested that in doing so the observations made by the Karnataka High Court in *K. M. Vinaya case* may be followed. Law commission also in its consultation paper on "Adopting Shared Parenting System in India" supported this manner of arrangements in case of shared parenting.²⁶ The commission observed that the six monthly arrangement found in this example is much more workable than the weekly arrangement and is likely to cause less instability and inconvenience to the child. It may be noted however, that the terms 'joint' or 'shared' do not mean giving physical custody to parents with mechanical equality, and it is here that judicial pragmatism and creativity is going to play a huge role in developing this concept further.²⁷ Besides, the other observations made in *K M Vinaya case* that parents should have to submit a "Parenting Plan" which provides the personal profile, educational qualification, residence, and income of both parties as well as Parents should open a joint bank account that can only be used for the child's expenses will also be very effective in this regard.
- (iii) The terms 'best interest' and 'welfare' of the child are to be understood very carefully. Any definition is not enough to cover these terms. These are to be understood by the court depending upon the facts and circumstances of the each and every case while deciding the shared parenting. In determining the 'best interest' and 'welfare' of the child

²⁵ Law Commission of India, One hundred thirty third Report on "Removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of the welfare principle," August, 1989. Retrieved on December 12, 2015 from <http://lawcommissionofindia.nic.in/101-169/report133.pdf>

²⁶ Retrieved on 01.10.2015 from <http://lawcommissionofindia.nic.in/Consultation%20Paper%20on%20Shared%20Parentage.pdf>

²⁷ *Ibid.*

principle, testimony of the child should not be the sole criterion, because a child always may not make a reasoned or right preference. So before deciding the final order the court should judge (after applying its mind) what should be the 'best interest' and 'welfare' of the child depending upon the facts and circumstances of the each and every case.

- (iv) The Law Commission in its 257th Report recommended for the insertion of a new chapter IIA in the Guardians and Wards Act, 1890 which will deal with 'Custody, Child Support and Visitation Arrangements'. The Commission also provides specific guidelines to assist the court in deciding such matters, including processes to determine whether the welfare of the child is met; procedures to be followed during mediation; and factors to be taken into consideration when determining grants for joint custody.²⁸
- (v) In India, either new legislation should be made or amendment should be made in the existing laws mandating that joint legal custody be the presumed standard for post-divorcing parenting. Clear guidelines are required to decide shared parenting in India, irrespective of gender of the child. Children of all ages need their parents' time and resources, and enjoy love and affection from both parents. So simply because two parents want to separate or divorce, the presumption of shared custody itself cannot be invalidated based on age of child. However, the shared parenting plan can have guidelines to keep in mind the age of child and needs of child at that age to be with mother or father.
- (vi) The analyses of laws of different countries are to be taken into consideration at the time of framing of laws in India relating to custody of child to make the laws more meaningful, dynamic and enduring in India.
- (vii) Orders of joint custody should be made only when the parents are amicable, and behave in a matured and civilized manner. It should not be allowed where the parents are antagonistic to each other and demonstrate an inability to cooperate.
- (viii) Shared parenting arrangement must be default arrangement of parenting and ex-parte court orders have

²⁸ Law Commission of India, Report No. 257, Reforms in Guardianship and Custody Laws in India, May, 2015. Retrieved on November 17, 2015 from <http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf>

to be passed and executed if any parent attempts to delay or evade the shared parenting or court proceedings.

Conclusion

Now it is the need of the hour that a more child-focused approach to child custody determination is required. The well being of children should take precedence over professional self interest, gender politics, and the desire of a parent who is found to be a danger to the child and the welfare of the children is the paramount interest. There is too much left to the discretion and wisdom of the court to determine the best interest of the child in each case relating to custody of child. “One size does not fit all,” every country should deal with the custody and guardianship of the children in its own way by taking into consideration the various factors and not just by blindly copying other countries. Accordingly the Law Commission of India rightly observed that joint custody must be provided as an option that a decision-maker can award, if the decision-maker is convinced that it shall further the welfare of the child.²⁹



²⁹ Law Commission of India, Report No. 257, Reforms in Guardianship and Custody Laws in India, May, 2015, Retrieved on November 17, 2015 from <http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf>