

Habeas Corpus In Apex Courtan Alternative Path To Obtain Child Custody, Sidestepping The Traditional Custody Petition In District Court

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INTRODUCTION

It is historically presumed and also often found to be embedded in the legal principles of family laws of many modern-day countries that during a child's "tender" years (generally regarded as the age of four and under), the mother should have custody of the child. The family laws prevalent in India upholds the doctrine no differently and, generally, in any custodial dispute between sparring couples having "tender aged" children, usually the custodianship is awarded to the mother.

However, in recent times, the 'tender-years' doctrine has been replaced by '*best interests of the child*' doctrine in advanced economies such as the USA and European Union as the tender-years doctrine was often not doing the justice in terms of child welfare needs and in USA the tender-years doctrine was found to be violating the **Equal Protection Clause** of the **Fourteenth Amendment** to the U.S. Constitution.

In India too, the Courts, including the Hon'ble Supreme Court of India, recently have started upholding Child Welfare to be of paramount importance and a thing that is ideally given priority to, eroding away the historical notion that a mother is a better welfare provider for a child in its tender years. It is submitted that welfare of a child means psychological, social and also physical development of the child which are necessary for shaping an independent personality. In the first instance, it is upto the law to ensure that the child grows and develops in the best environment. The best interest of the child has been placed at the highest strata. In Elizabeth Dinshaw, this Court has observed that whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

Another justification behind the "welfare" principle is the public interest that stand served with the optimal growth of the children. It is well recognized that children are the supreme asset of the nation. Rightful place of the child in the sizeable fabric has been recognized in many international covenants, which are adopted in this country as well. Child centric human rights jurisprudence that has been evolved over a period of time is founded on the principle that public good demands proper growth of the child, who are the future of the nation. (Vivek Singh Vs. Romani Singh 2017(3) SCC 231)

Furthermore, the 'tender-years' rule has been grossly misused and abused by many sparring mothers all over the world, including in India, to isolate, alienate and eradicate the presence of fathers from the children's lives falsely using the Writ of *Habeas Corpus*, in which the mother claims the child has been illegally detained by the father, in the eyes of law.

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. The Court of Appeals in England and Wales discussed that how the court would determine what is best in the interest of the child which was considered In Re (McGrath (Infants), [1893] 1 Ch. 143 C.A) where the court observed that:

"...The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

The Hindu Minority and Guardianship Act, 1956 was enacted as a law complementary to the Guardians and Wards Act, 1890. This defines a 'minor' to be a person who has not completed the age of eighteen years. 'Guardian' has been defined as a person having the care of the person of a minor or of his property or of both his person and property and includes-

NATURAL GUARDIAN

According to this Act, means any of the guardians mentioned in Section 6. It states that the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in the joint family property) are - (a) in the case of a boy or an unmarried girl, the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Section 8 lays down that the natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate but the guardian can, in no case, bind the minor by a personal covenant. Sub-section (5) of Section 8 lays down that the Guardians and Wards Act, 1890, shall apply in certain circumstances. Section 13 of the

Act lays down that in the appointment or declaration of any person as guardian of Hindu minor by a Court, the welfare of the minor shall be the paramount consideration. Indeed sub-section (2) of Section 13 lays down that no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor. This section is complementary to Section 17 of the Guardians and Wards Act, 1890 which lays down that in appointing or declaring the guardian of a minor the Court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

In *Elizabeth Dinshaw (Elizabeth Dinshaw Vs. Arvand M. Dinshaw, 1987(1) SCC 42)* the Hon'ble Supreme Court has observed that whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child.

It is submitted that welfare of the minor child is the paramount consideration. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child. (*Rajeswarin Chandrasekhar Ganesh Vs. State of Tamil Nadu & Ors*) 2022 SCC Online SC 885. Also the issue as to the welfare of the child again arose In re {"O" (An Infant), [1965] 1 Ch. 23 C.A.} observed that in all cases the paramount consideration is the welfare of the child; but that, of course, it does not mean to add up shillings and pence, or situation or prospects, or even religion for the child. The entire background of the child's life, and the major consideration to be taken into account as who are his parents and who are ready to do their duty? The question as to what would be the dominating factors while examining the welfare of a child was considered in in New Zealand court in the case of (*Walker v. Walker & Harrison, 1981 New Ze Recent Law 257*) wherein it was observed that what is more important is child stability and security, loving and understanding care and guidance, and warm and compassionate relationships which are essential for the development of the child's character, personality and talents. In the context of consideration of an application by a parent seeking custody of a child through the medium of a Habeas Corpus proceeding, it has been stated in American Jurisprudence, (2nd Edn. Vol. 39 that)"

An application by a parent, through the medium of a Habeas Corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the court may properly consult the child, if it has sufficient judgment.

Thus, it is well established that in issuing the writ of Habeas Corpus in the case of minors, the jurisdiction which the Court exercises is an inherent jurisdiction as distinct from a statutory jurisdiction conferred by any particular provision in any special statute. In other words, the employment of the writ of Habeas Corpus in child custody cases is not pursuant to, but independent of any statute. The jurisdiction exercised by the court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patriae*, for the protection of its minor ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a court of equity. The primary object of a Habeas Corpus petition, as applied to minor children, is to determine in whose custody the best interests of the child will probably be advanced. In a Habeas Corpus proceeding brought by one parent against the other for the custody of their child, the court has before it the question of the rights of the parties as between themselves, and also has before it, if presented by the pleadings and the evidence, the question of the interest which the State, as *parens patriae*, has in promoting the best interests of the child.

Recently, in an ongoing matter in the Hon'ble Supreme Court of India, it has been found out that a Russian woman filed a Writ Petition of Habeas Corpus to the Hon'ble Court as a Petitioner with a covert agenda to take her Indian-born child away from its father to her home-country Russia after she failed to convince her Indian husband to live with her in Russia to make the child a Russian citizen. The Russian woman, admittedly, hailing from a family of Russian spies, is using Russian Embassy's support to the fullest extent to achieve her objective. The Russian woman even strayed from the legal course and attempted to murder her Indian husband to fulfil her goal.

However, the Hon'ble Supreme Court of India, keeping the couple and the child in its close observation for a period of more than one year and through 3 months of mediation session with a Ld. Senior Mediator alongside AIIMS Marital Counselling for 6 weeks, has decided that the welfare of the child is with the Indian father as the father has been effectively discharging the duties of both a father as well as a mother since the child's birth and the mother is found to be negligent and cruel for both the child and the father. In such a case, Hon'ble Supreme Court awarded the interim arrangement w.r.t. joint custody of the child in favour of the father in which the father gets to have the child with him for 20 out of 24 hours in a day wherein the father is responsible for the child's all necessary welfare needs.

In the above case, the child is accustomed and acclimatized to the conditions, culture and environments of the place of his birth i.e. India. It is also stated that the child can communicate very well in Bengali and English. The child is good in expressing his thoughts and his communication is well appreciated by his school teachers and he also has friends in school.

It is settled law that in child custody matters, the writ of Habeas Corpus is maintainable only where it is proven that the detention of a minor child by a parent or others was illegal and without any authority of law. (Kanu Sanyal Vs. District Magistrate, Darjeeling & Ors. (1973) 2 SCC 674)

In (Surya Vadanam v. State of Tamil Nadu), (2015) 5 SCC 450, the husband and wife both were of the Indian origin but the husband became a resident and citizen of the UK. The parties got married in India and had two daughters in the UK. The wife had acquired the British citizenship and the British passport as well. Both the parties were working for gain in the UK. The parties started having some matrimonial problems, as a result of which the wife came back to India with her two daughters. The wife filed a petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 seeking divorce in the Family Court, Coimbatore. Subsequently, the husband filed a petition in the High Court of Justice in the UK for making the children wards of the Court. The High Court made the children wards of the Court during their minority, or until further orders of the Court and the wife was directed to return the children to the jurisdiction of the foreign Court. As the wife failed to obey the orders of the foreign Court, the husband filed a writ petition of Habeas Corpus seeking production of his children and their return to the UK, in the Madras High Court. The High Court dismissed the petition. This Court discussed the law on the custody of the children and observed the following :

“46. The principle of the comity of Courts is essentially a principle of self-restraint, applicable when a foreign Court is seized of the issue of the custody of a child prior to the domestic Court. There may be a situation where the foreign Court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic Court were to pass an effective or substantial order or direction prior in point of time then the foreign Court ought to exercise self-restraint and respect the direction or order of the domestic Court (or vice versa), unless there are very good reasons not to do so.”

It is quite clear that the unanimous stand of the various courts is complete unanimity that the best interests and welfare of the child are of paramount importance while deciding habeas corpus petition. This is the final goal or the final objective to be achieved — it is not the beginning of the exercise but the end.

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The general principle governing the award of custody of a minor is succinctly stated in the following words in “Halsbury’s Laws of England, Fourth Edition, Vol. 24, Article 511 at page 217”:

“... *Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor’s welfare as the 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.*”

CONCLUSION

The shift from the historical presumption of giving custody to the mother during a child's tender years to the principle of "best interests of the child" reflects a more progressive and nuanced understanding of child welfare. This change has been embraced not only in advanced economies but also in India, where the courts have recognized the significance of providing a nurturing and balanced environment for a child's development. However, it is crucial to address the misuse of custody laws to alienate parents and prioritize false claims of illegal detention. The Supreme Court's focus on the child's acclimatization, communication, and the effective discharge of parental duties ensures that custody decisions are made in the child's best interests wherein the Apex court acts as *parens patriae*. By upholding the paramount importance of the child's welfare, the courts contribute to their psychological, emotional, and physical well-being, and promote a just and equitable society.

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