



Impact Factor:4.081

## Importance of Mediation in Matters Relating To Custody of The Child

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**ABSTRACT:** *When the threads of a matrimonial home are in tenterhooks of a plausible breakdown, the fate of the child/children bears the brunt of the animosity of the parents. Custody of a child is an issue which needs to be mutually and peacefully arrived upon by the parents, keeping aside their personal grievances against each other and solely focusing on the welfare of their child. This is where mediation can play a pivotal role at arriving at a solution without hampering the wellbeing of the child because of the dispute between his/her/their parents. Courts in India have time and again endorsed the option of mediation in child custody matters. This paper will delve upon the importance of undertaking mediation as a redressal mechanism for deciding the custody of a child. In this pursuit, this paper will analyse various laws relating to custody of the child, the Law Commission of India Report, relevant Judgements of the Courts in India, and the laws pertaining to the same in various other countries thereby elucidating the relevance and significance of mediation in matters relating to the custody of a child.*

**Keywords** -Mediation, Welfare, Child, Custody, Parents etc.

### 1. INTRODUCTION (MEDIATING FAMILY DISPUTES)

Upholding the sanctity of human relations and protecting them from the outcomes of spurts and disputes, is one of the significant roles of mediation in the present day dispute redressal system. Mediation seeks solutions by moving from an adversarial dispute redressal system to mutual understanding, cooperation and peaceful co-existence. The process of arriving towards the solution is less spiteful because the ultimate aim of the parties becomes 'solution' and not 'vengeance'. Unlike a court which is burdened with impeding work and is bound by the rules of procedure and strictures of statutes, a mediator has all the time allotted for the parties mediating, and is not bound by the mandates of following strict procedure in arriving at a decision. The process is congenial, wherein each party gets a forum to express their view point and contentions in a congenial environment. The ultimate aim of this process is peaceful co-existence with a futuristic vision.

Family in ancient India was considered sacrosanct, more so because marriages were perpetual and divorce or separation was not heard of. With time the society started recognizing the breakdown of marriages and the various personal laws eventually recognized the concept of divorce.

### 2. THE SENSITIVE ISSUE OF THE CUSTODY OF THE CHILD

With divorce comes the issue of the custody of the child. An innocent party in the dispute, who if not taken care of, bears the brunt of the parents' animosity, is the

child. Custody of the child does not mean mere physical custody, but with the same come many ancillary responsibilities, like schooling, sports, religion, holidays, lifestyle, etc., that need to be decided upon considering the best interest of the child. Custody of a child is an issue which needs to be mutually and peacefully arrived upon by the parents, keeping aside their personal grievances against each other and solely focusing on the welfare of their child. This is where mediation can play a pivotal role at arriving at a solution without hampering the wellbeing of the child because of the dispute between his/her/their parents. Child custody mediation is a cooperative process with the ultimate common goal in mind that is in the child's best interest.<sup>1</sup> It is a process wherein both the parents can be actively involved and responsible for the welfare of the child. Ensuring a normal lifestyle for the child, irrespective of the breakdown of his/her family is ensured when mediation is resorted to in matters of family disputes.

The Supreme Court has held time and again that whenever the custody or taking care of a minor is in question, then the minor's welfare must be regarded as the paramount and first consideration.<sup>2</sup> The welfare of the child cannot be quantified merely in terms of physical amenities or money, but factors like moral and mental wellbeing should also be also taken into consideration.<sup>3</sup> Unlike other family matter issues, which need not look beyond a certain period of time to come, matters relating to child custody, need to be futuristic in perspective. It has to be ensured that the future and life of the child is safe, secure and normal, and that it is not adversely affected by the breakdown of the marriage.

However, there is no straight-jacketed definition of the term “*welfare of the child*”, it is circumstantial and greatly dependent on the facts of each individual case. Active cooperation and coordination of both the parents is important, and this is not very feasible in an adversarial court-room environment. The fighting parents need to sit down, keeping their differences aside and prioritize the ultimate welfare of their child. It is not the better right of either the father or mother to the custody of the child, which is important in matters of child custody.<sup>4</sup>

The best process to facilitate such a practice is through mediation. The Supreme Court in *K. Srinivas Rao v. D.A. Deepa*,<sup>5</sup> held that when it comes to matrimonial disputes in particular those pertaining to custody of the child, they “*are preeminently fit for mediation.*” The Law Commission of India Report on Reforms in Guardianship and Custody Laws in India<sup>6</sup> also discusses about the importance of mediation in child custody cases. Why is mediation the favored mechanism and how effective is the same, needs to be delved into in greater detail in the course of this discussion.

### **3. LAWS RELATING TO CUSTODY AND GUARDIANSHIP IN INDIA**

Family laws are predominantly personal laws and therefore, the custody of the child too is governed under various personal laws. The discussion herein below highlights the provisions relating to the custody of the child in various personal laws and the stand taken by the Courts in India with regard to the same.

#### **1. Personal Laws:**

**1.1.Hindu Laws:** In ancient India, the *karta* of the Hindu Undivided Family was considered as the ultimate guardian and any personal dispute between the parents of the child, would not greatly affect the

welfare of the child who would continue to be under the care and protection of the *karta* of the family. However, in the modern Hindu Law, Section 6(a) of the Hindu Minority and Guardianship Act, 1956 states that the father of the child is the natural guardian of the child and “*after him*”, the mother. It is further stated that the mother will ordinarily have the custody of a minor who is younger than five years of age.

In *Gita Hariharan v. Reserve Bank of India*,<sup>7</sup> it has been held by the Supreme Court that the phrase “*after him*” as used in Section 6(a) of the Act should be interpreted as “*in the absence of the father*” and not “*after the lifetime of the father.*” The term ‘*absence*’ could also be interpreted to include the apathy of the father towards the welfare of the child or his inability to take care of the child because of some ailment, etc.

Section 13 of the Act<sup>8</sup> further states that the welfare of the child has been held to be a matter of ‘*paramount*’ importance in deciding the guardianship of the child.

Section 26 of the Hindu Marriage Act, 1955, also lays down provisions for the custody of the child. It is stated that in any proceeding under this Act, the concerned Court may, periodically pass such interim orders as may deem just and proper regarding the custody, education and maintenance of the child and also make such provisions in the decree and also later on an application through one of the petitioners after the decree.<sup>9</sup>

**1.2. Muslim Laws:** Even though under Muslim Law the father is the natural guardian, the child’s custody is vested with the mother until the son reaches 7 years of age and the daughter has reached her puberty. Also recognized as the mother’s right of *hizanat*, which states that the mother is the most appropriate custodian of her children both during the marriage and on its dissolution. This right is enforceable not only against the father but also other persons, as long as the mother is not disqualified for misconduct or otherwise.<sup>10</sup>

**1.3. Christian and Parsi Laws:** Courts are authorized under Section 49 of the Parsi Marriage and Divorce Act, 1936 and Section 41 of the Indian Divorce Act, 1869, respectively to issue interim orders for the custody, education, maintenance, etc. of the minor children in any proceeding under these Acts<sup>11</sup>.

**2. The Guardians and Wards Act, 1890:** The Guardians and Wards Act, 1890 is a secular legislation which governs children in India irrespective of their religion and personal beliefs. Section 19 states that a court is not authorized to appoint a guardian to the person of a minor, whose father or mother is alive, and who is not otherwise unfit to be a guardian.

#### **4. WELFARE OF THE CHILD**

Custody of the child is not a one-off incident, but rather the entire life of the child revolves around this decision. Custody of the child does not mean mere physical custody, but with the same come many ancillary responsibilities, like schooling,

sports, religion, holidays, lifestyle, etc., that need to be decided upon considering the welfare of the child. Even though the welfare principle has been put to use by the Courts in almost all cases relating to child custody, the contents of this principle have not been enumerated in any decision.<sup>12</sup>

Archana Parashar<sup>13</sup> in her article on “Welfare of child in Family Law”, states that because there are no legal requirements for determining the welfare of the child, the Courts apply their own interpretation of the principle based on their own notions of “*ideal parenthood*.” The wide discretion left with the Courts to decide upon custody matters, comes with the possibility of being not applied rightly and the true best interest of the child not always being protected, especially when the environment in the court is adversarial and the matter is more a battle for custody than the issue of the child’s welfare. However, despite the above predicaments and criticisms, it cannot be denied that the Courts have always attempted in protecting the best interest and child’s welfare in matters pertaining to the custody of the child.

Welfare of the child principle further incorporates the principle of joint custody.<sup>14</sup> A child is entitled to the love of both the parents for his/her proper upbringing and happiness. Therefore, mediating towards the joint custody of the child has been recognized over time.<sup>15</sup> Flexible visitation rights, active involvement of both the parents in the important decisions pertaining to the education, health, environment, etc. of the child can play a pivotal role in positively molding of the life of the child who would otherwise be torn apart between his/her parents’ divorce process. However, in cases of domestic violence or when the parents are distantly located, joint custody of the child is generally avoided.<sup>16</sup> Joint custody is considered apt where the same is compatible with the factual situation and will be accommodating to the child’s existing lifestyle.<sup>17</sup>

This brings us to the importance of mediation which resonates in the entire idea of the welfare of the child which can be mutually and accurately determined only in a peaceful environment facilitated by the process of mediation.

##### **5. IMPORTANCE OF MEDIATING THE CUSTODY OF THE CHILD**

Divorce has both short-term and long-term effects on the child. Ensuring that the adverse effect of the divorce on the child is minimal is of paramount importance. A divorce need not always be a bad divorce. A good divorce is very much possible if the parents part on amicable terms and take active role in determining the welfare of their child. A good divorce is when both the child and the parents are left least emotionally disturbed at least not worse than they were before the divorce.<sup>18</sup> Highlighting the importance of mediation, Gauvreau<sup>19</sup> lays down the following advantages of mediation in matters of custody of the child, namely:

- Mediation reduces the effect of the parents’ conflict on the child
- Mediation reduces the intensity of the animosity between the contesting parents
- Mediation reduces the duration of the conflict
- Mediation results in positive and better results than the adversarial process
- Mediation agreements cater to the needs of the family more aptly
- Mediation agreements are party specific and therefore more accurate

- Interest of the child plays a vital role in mediation
- Mediation benefits the child because of increased parental cooperation
- Financial interests of the child are better protected in cases of mediation
- Relationship with the children is better maintained because of the cordial nature of mediation
- Mediation facilitates a more facilitative environment for the child to be actively involved in decisions pertaining to his/her custody
- Mediation can be more child-focused and child-inclusive

Mediation facilitates an opportunity to involve the knowledge and skill of a professional neutral person who assists and facilitates the couple in ironing out their mutual differences and arriving at a positive solution for the child.<sup>20</sup> Mediation involves more positive relations after divorce, including financial settlements of the cost of upbringing the child. It helps in focusing the attention of the parents towards the child and his/her well-being. From the psychological perspective, mediation aids in making the divorce procedures and their effect on the children involved less invasive and potentially therapeutic.<sup>21</sup> A Court that is adjudicating upon a matrimonial dispute should refer a matter of child custody to mediation; however decision to refer to mediation should be based on factors like: the vulnerability of the child, his/her ability to participate in the mediation proceedings, the nature and kind of allegations made against a party (for example mediation should not be facilitated in case of alleged child abuse) and the family dynamics.

## **6. CONCLUSION**

One of the main aims of child custody mediation is coming up with a parenting plan. The Report No. 257 of the Law Commission of India discusses the factors to be delved upon when drawing up a parental plan, namely:

- Medical decisions
- Education of the child
- Religion and culture of the child
- Extra-curricular activities
- Holiday and vacation plans of the child, which could involve travelling with one parent
- Visitation rights

Upholding the significance of mediation in matters pertaining to child custody the 257<sup>th</sup> Law Commission Report recommends the insertion of Section 19F to the Guardians and Wards Act, 1890, pertaining to mediation in matters of custody of the child. The Report states that mediation will facilitate better outcomes for both parents and children and at the same time help in easing the pressure on the over-burdened Indian Courts. The Report recommends that the parties to child custody matters must first try mediation before the beginning of the court proceedings or on being so directed through orders of the Court. It is further recommended that the parties should have the opportunity to participate in mediation with the aid of a trained mediator, who has appropriate expertise and training in family disputes. To facilitate the same, lists of court-annexed mediation centres and individual mediators should be maintained by High Courts, District Courts and Family Courts. Assistance of

professionals needs to be taken to get a better understanding of the psychology of the child. The Report suggests the need to mandate the mediation process for child custody matters to be time bound<sup>22</sup> and should conclude within 60 days of being so ordered and initiated.

In the background of the above discussion, it is pertinent to note that there is unanimous opinion across the world about the significance of mediation as a process to decide upon the custody and welfare of a child whose parents are in the tenterhooks of a marital breakdown. The 257<sup>th</sup> Law Commission Report apart from upholding the significance of mediation lays down various checks and mandates which can help in averting the possibility of any form of miscarriage of justice. It can thus be concluded, that mediation takes the issue of child custody from an adversarial background to a cooperative forefront and the ultimate benefactor is the child.

## REFERENCES

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<sup>4</sup> AIR 2013 SC 102

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<sup>6</sup> Chapter IV of the Report No. 257 of the Law Commission of India.

<sup>7</sup> (1999) 2 SCC 228.

<sup>8</sup> The Hindu Minority and Guardianship Act, 1956

<sup>9</sup> The Hindu Marriage Act, 1955

<sup>10</sup> <http://www.lawyersclubindia.com/articles/Custody-of-Children-under-Muslim-Law-1173.asp>

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<sup>12</sup> Report No. 257 of the Law Commission of India on Reforms in Guardianship and Custody Laws in India discusses in detail about Mediation in Child Custody Cases

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<sup>16</sup> Report No. 257 of the Law Commission of India on Reforms in Guardianship and Custody Laws in India discusses in detail about Mediation in Child Custody Cases

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