Government of India
Law Commission of India
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Consultation Paper on

Adopting a Shared Parentage System in India

I. Introduction

The face of child custody arrangements is changing. Numerous countries across the globe have adopted a preference for shared parentage systems over sole custody arrangements for child custody disputes post-divorce[1]. This trend has arisen largely in a response to changing familial roles (male care takers taking on more child rearing responsibilities) as well psychological studies revealing that the involvement of both parents in child rearing is preferable to sole custody arrangements[2]. However, such preferences for shared custody are often balanced with the "best interest of the child standard". The "best interest of the child" standard is increasingly utilized as the tool to evaluate child custody arrangements in many nations, particularly those who are signatories to the Convention on the Rights of the Child[3]. It requires family courts to consider the well-being of the child as paramount[4].

II. Background on Theory of Shared Parentage

A. Best Interest of the Child/Welfare of the Child Standard

The best interest of the child standard is utilized in a number of countries across the globe. According to the Convention on the Rights of the Child, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

[1] E.g. Australia, Family Law Amendment (Shared Parental Responsibility) Act, Section 61 DA (2005); Netherlands, Civil Code, Article 247 (2009)
[2] Glover, R. & Steel, C., Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, Journal of Divorce, Vol. 12 No. 2-3 (1989)
[3] Convention on the Rights of the Child, Art. 3, (1989).
[4] *Id*

administrative authorities or legislative bodies, the **best interests of the child shall be a primary consideration**"[5]. The Convention goes on to state that a child should be separated from his or her parents if there is "abuse or neglect of the child by the parents"[6]. According to the United Nations Human Rights Commission, the "best interests of the child" is a proxy for the "well-being of a child" based on a variety of circumstances laid out by the Convention[7]. Welfare, as a decision criterion, is generally flexible, adaptable and reflective of contemporary attitudes regarding family within society[8]. However, there are two main criticisms of the best interest of the child standard. First, it is unpredictable and information intensive. Parents who are divorcing are thus left guessing in regard to how the court will handle their child custody dispute; this can lead to unnecessary pre-court bargaining that may indeed be harmful to both child and parents[9]. This could be resolved by a more predictable rule based standard. However, a rule based standard is likely to be rigid and not consider the individual circumstances of each case[10].

Second, the best interest of the child standard primarily focuses on the predicaments of the child rather than including the feelings and intentions of the parents. The parents are also actors within the family who have rights and their own welfare[11].

B. Shared Parentage vs. Sole Custody Arrangements

The literature on shared parentage appears to indicate that shared parentage arrangements fare better for the child concerned than sole custody arrangements (assuming no harmful effects from one or both of the parents as well as in keeping with the best interests of the child standard). In a 1989 study of "intact families", shared parentage agreements and sole custody arrangements, children in shared parentage families fared better in regard to family relationships and self-understanding[12]. Similarly, a study in 1991 found that children in shared/joint custody families had lower incidents of misbehavior

[5] Convention on the Rights of the Child, Art. 3, (1989).
[6] *Id* at Art. 9.
[7] UNHCR, UNHCR Guidelines on Determining the Best Interests of the Child, (2008).
[8] Gilmore, Stephen, Great Debates: Family Law, Palgrave Macmillian, (2014) pp. 76-83
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Glover, R. & Steel, C., Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, Journal of Divorce, Vol. 12 No. 2-3 (1989)

than children in single maternal custody families[13]. In a 1996 study, researchers found that children in shared parenting arrangements had higher grades, more school efforts and decreased prevalence of depression in comparison to sole custody families[14]. More recently, a study on the adjustment of children in joint-custody versus sole-custody arrangements found that children in joint physical or legal custody were better adjusted than children in sole custody arrangements[15].

On the other hand, several studies have shown competing information with regard to whether children (and families) fare better in sole or joint custody homes.[16] First, the concept of a presumption for either sole or joint custody is inimical to the best interests of the child standard. Such presumptions ignore the fact that the best interest standard is conceived of as a case by case application, not a categorical assumption for either such arrangement[17]. Second, the child's interest may be further supplanted by laws requiring a presumption for joint custody[18]. Parents may engage in bargaining and agreeing to a poor joint custody arrangement for fear that they would lose in court against a single parent pushing for joint custody. This may be particularly detrimental in the case of battered women who may feel pressured into bargaining into a joint custody arrangement due to the mental repercussions of such violence at the hands of the other parent[19].

III. International Approaches to Shared Parentage

Shared parentage systems vary widely across the globe. An international comparative review reveals the vast diversity of such approaches amongst nation-states. Furthermore, a review of the diversity of approaches in the international context offers perspective on

[13] Rockwell-Evans and Kim Evonne, Parental and Children's Experiences and Adjustment in Maternal Versus Joint Custody Families, Doctoral Dissertation, North Texas State University (1991).
[14] Buchannan, M. & Dornbusch, Adolescents After Divorce, Harvard University Press (1996)
[15] Bauserman, R., Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review, Journal of Family Psychology, Vol. 16, No. 1, (2002), pp. 91-102
[16] Julie Poehlmann, "Representations of Attachment Relationships in Children of Incarcerated Mothers," Child Development 76, no. 3 (May/June 2005): 679-696
[17] "In the end, as in every child custody decision, it is the welfare of the children which governs and each case will trun on tis individual facts and circumstances", Dodd vs. Dodd, 93 Misc. 2d 641, 403 N.Y.S. 2d 401, 402 (1978).
[18] Schulman, J. & Pitt, V., Second Thoughts on Child Custody: Analysis of Legislation and Its Implications for Women and Children, 12 Golden Gate U.L.Rev. 556 (1982).
[19] *Id*.

potential reforms in India; however, any such reforms adopted in India must be grounded in Indian culture, society and gender relations.

A. United States & Canada

There are generally two forms of joint custody in the United States: Joint legal custody and joint physical custody. Joint legal custody, as defined for example in the State of Georgia, "means both parents have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care…." Joint physical custody, as defined in Georgia, "means that physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents". Thirty five states in the United States have a presumption or strong preference for joint custody however; statutes delineate the circumstances in which such a presumption is resolutely disavowed. For example, the State of Idaho notes that "[T]here shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence"[20]. The State of New York has several requirements regarding awarding joint physical custody. The Braiman rule requires, that for orders of joint physical custody, there should be "relatively stable, amicable parents, behaving in a matured civilized fashion" and that such joint arrangements are prohibited where the parents are antagonistic to each other and demonstrate an inability to cooperate[21].

Similarly in the District of Columbia, such a rebuttable presumption in favor of joint custody is extinguished upon a finding by a preponderance of the evidence that an "intra-family offense" (e.g. "child abuse", "child neglect", "parental kidnapping") has occurred[22].

In Canada under the Divorce Act, the court may grant an order of joint custody, however, such an order must be "in the best interests of the child", it should take into account past conduct if "relevant to the ability of that person to act as a parent of a child", and "take into consideration the willingness of the person for whom custody is sought to facilitate such

[20] Idaho, Title 32, Chapter 7, 32-717B, Joint Custody.
[21] *Braiman v. Braiman*, 378 N.E. 2d 1019 (1978)
[22] District of Columbia, D.C. Code 16-911, Custody of Children.

contact"[23]. The majority of States in the United States have a common ground in regard to the decision making power of each parent, with neither parent having a more advantageous control for joint decisions[24]. However, some states allow for the parent with physical custody to have the ultimate responsibility in disputes[25].

B. Australia

Australia has a presumption of shared equal parental responsibility when devising parenting orders post-divorce[26]. However, this presumption is limited by several factors: abuse of the child or another child, family violence, and the best interests of the child standard. The shared responsibility presumption does not address amount of time spent with each parent, but merely responsibility. Australia allows for expansive and detailed parenting plans that can deal with a wide variety of subjects, such as, the communication a child is to have with another person or other persons, the process to be used for resolving disputes about the terms or operation of the plan and "any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child"[27]. However, the Act repeatedly states, the "best interests of the child" is the "paramount consideration"[28].

Furthermore, Australian family courts rarely award joint physical custody in post-divorce arrangements. The reason being, that courts have developed a detailed list of pre-conditions for such shared physical custody. Such pre-conditions include: geographical proximity, compatible parenting, and ability of the parents to supervise the child, child's adaptability, mutual trust, co-operation and good communication[29]. Furthermore, parents

[23] Canada, Divorce Act, Custody Orders, (R.S.C)., c. 3 (2nd Supp.) (1985).
[24] Interpreted from various case laws, important ones being Taylor v, Taylor 508 A.2d at 967.
Anderson v. Anderson, 56 S.W.3d 5, 8 (Tenn. App. 1999). In that case, the parents had joint legal custody but the parent with residential custody (the mother) argued that she had the power to decide upon the child's education. The Court of Appeals disagreed: "If Mother has the unilateral right, as she claims, to make the decision of home schooling vis-a-vis public schooling, Father is thereby relegated to a powerless position and joint custody is rendered meaningless."
[25] North Carolina, General Statutes, Chapter 50A: Uniform Child Custody Jurisdictioin and Enforcement Act and Uniform Deployed Parents Custody and Visitation Act
[26] Australia, Family Law Amendment (Shared Parental Responsibility) Act, Section 61 DA (2005)
[27] *Id* at 63C(2)(i)
[28] *Id* at 65AA
[29] *Padgen and Padgen* (1991) FLC 92-231

who wish to secure a joint physical custody arrangement must also prove other conditions such as: degree of maturity[30], value, attitude and behavior of the parents[31], and openness of mind to communicate with the other parent[32].

C. United Kingdom

The United Kingdom has specific requirements for awarding shared residence orders (joint custody arrangements). First, such an arrangement must represent the factual reality of the child's life[33]. The court will evaluate whether to award a shared residence order or the combination of a residence order and a contact order[34]. Family courts in the United Kingdom take into account several factors before awarding joint physical custody: welfare principle[35], the no-delay principle[36] and the no-order principle[37]. The welfare principle includes several factors which are to ensure both the welfare of the child as well as consistency in the State. These factors include: "the ascertainable wishes and feelings of the child concerned, his physical, emotional and educational needs, the likely effect on him of any change in his circumstances, his age, sex, background and any characteristics of his which the court considers relevant, any harm which he has suffered or is at risk of suffering, how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs, and the range of powers available to the court under this Act in the proceedings in question"[38]. The no-delay principle notes that any delay in determining a question regarding the upbringing of a child shall be considered by the court as "likely to prejudice the welfare of the child"[39]. The no-order principle holds that courts shall not make an order unless an order would be better for the child than making no order at all[40].

[30] *Foster and Foster* (1977) FLC 90-281.
[31] *Forck and Thomas* (1993) FLC 92-372.
[32] *C v B* (2005) FamCA 94
[33] United Kingdom, A joint residence: Parental responsibility (2008) EWCA civ 867
[34] United Kingdom, K (shared residence order) (2008) 2 FLR 380.
[35] *A v A* (Minor's) (Shared residence order) (1994) 1 FLR 669; United Kingdom, Children Act, Part I, 3 (1989)
[36] United Kingdom, Children Act, Part I, 2 (1989)
[37] United Kingdom, Children Act, Part I, 5 (1989)
[38] United Kingdom, Children Act, Part I, 3 (1989)
[39] United Kingdom, Children Act, Part I, 2 (1989)
[40] United Kingdom, Children Act, Part I, 5 (1989)

D. South Africa

In South Africa, family courts are reluctant to award sole custody to either parent. Such an exclusive arrangement is usually resorted to only in the event that one of the parents is unfit for parenting or abused the child[41]. However, family courts in South Africa do not frequently award joint physical custody of children on the basis that such an arrangement would be disruptive for the child, particularly in cases in which the parents live far apart[42]. Instead, courts grant joint custody (but not joint physical custody of the parent[43]). South Africa offers a unique look at autonomy of the children in question for custody arrangements[44]. Of particular note, South Africa takes into account the opinions of the children in dispute. According to Chapter 10 of the South African Children's Act "Every child has a right to participate and have a voice"[45].

E. Netherlands

In the Netherlands, there has been an increasing trend towards shared parentage. In 1996, the Dutch Parliament passed a law mandating that joint legal custody be the presumed standard for post-divorce parenting in the Netherlands[46]. However, judicial decisions whittle down the force of this legislation[47]. From 2009, all divorces must be accompanied by a parenting plan based on the assumption of a shared parentage system[48]. 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[49]. 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

[41] Archard D and Skivenes M "Balancing a child's interests and child' views" 2009 JCR, page 2.
[42] Barrat A and Burman S "Deciding the Best Interests of the Child " 2001 SALJ.
[43] *Id*.
[44] *Id*.
[45] South Africa, Children's Act, Ch. 10 (2005)
[46] *Shared parenting in the Netherlands'*, P. TROMP MSC, Dutch Father Knowledge Centre; (VKC), August 10, 2013, < file:///Users/aarti/Downloads/20130810-PeterTromp-Shared-Parenting-Netherlands.pdf
[47] *Id*.
[48] Netherlands, Civil Code, Article 247 (2009)
[49] *Id*.

divorce proceedings[50] The Dutch citizens appear to approve of such a trend with a 2012 poll revealing that 71% of those sampled, agree with co-parenting after divorce[51].

F. Thailand

There are generally two procedures for securing child custody arrangements in Thailand. The first is by mutual consent and the second, by the court[52]. 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[53]. 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"[54] of the child.

G. Singapore

Singapore family law requires the court to consider the best interests of the child. According to the Women's Charter[55], the court may not make "any judgment of divorce or nullity of marriage or grant a judgment of judicial separation" unless the court is satisfied "that arrangements have been made for the welfare of the child and that those arrangements are satisfactory or are the best that can be devised in the circumstances" or "that it is impracticable for the party or parties appearing before the court to make any such arrangements"[56]. The "welfare of the child" is the "paramount consideration" however, subject to this, the court shall consider the wishes of the parents and the wishes of the child[57]. The court may issue an injunction restraining the other parent from taking the child out of Singnapore where "any matrimonial proceedings are pending" or "where,

[50] *Id*.
[51] *Id*.
[52] Thailand Civil and Commercial Code (Part III), Book IV, Section 1520
[53] *Id*; Thailand Civil and Commercial Cod (Part III), Book IV, Section 1547
[54] Thailand Civil and Commercial Code (Part III), Book IV, Section 1520
[55] Singapore, Women's Charter (1961)
[56] Women's Charter, Arrangements for Welfare of Children, Part 123 (1)
[57] Women's Charter, Arrangements for Welfare of Children, Part 125 (2)

under any agreement or order of court, one parent has custody of the child to the exclusion of the other"[58].

H. Kenya

The Children Act governs child custody disputes in Kenya[59]. Kenyan law draws the distinction between "actual custody" and "legal custody"[60]. "Actual custody" is the "actual possession of a child, whether or not that possession is shared with one or more persons"[61]. "Legal custody" is "so much of the parental rights and duties in relation to possession of a child as are conferred upon a person by a custody order"[62]. The Kenya family courts consider several factors in awarding child custody such as: "the conduct and wishes of the parent or guardian of the child, the ascertainable wishes of the relatives of the child, …the ascertainable wishes of the child, whether the child has suffered any harm or is likely to suffer any harm if the order is not made, the customs of the community to which the child belongs, the religious persuasion of the child, …the circumstances of any sibling of the child concerned, and of any other children of the home, if any and the best interest of the child"[63]. It is important to note that Kenyan law does not place the "best interest of the child" necessarily as paramount and instead includes this as one factor to consider in the section describing child custody orders. However, in Part II of the Act, the law requires that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a **primary consideration**"[64].

I. Other Arrangements

Alternating custody is a more specific form of shared parentage in which parents (or other guardians) share physical custody of the child by shifting the child between the guardians

[58] Women's Charger, Arrangements for Welfare of Children, Part 131 (1)
[59] Kenya, The Children Act; *available at* https://www.icrc.org/applic/ihl/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/95bcf642e7784b63c1257b4a004f95e8/$FILE/Children's%20Act.pdf
[60] The Children Act, Part VII, 81 (1) (c) & (d).
[61] *Id*
[62] *Id.*
[63] The Children Act, Part VII 83 (1) (a)-(j)
[64] The Children Act, Part II (2)

after extended time in each guardian's physical custody. In Spain, shared custody is not only a preference but as per 2005 Act, it can be decided without the express agreement of both parents (all that is needed is the request of one of parents and favorable opinion of Prosecutor). Courts can on its own decide to grant a shared custody arrangement as in "this regime of custody the superior interest of the minor is well protected"[65]. On the whole, Spain has shown a general trend over the years towards a shared custody arrangement. Currently, the law holds no preference for one parent over the other (mother versus father) and instead such arrangements (as noted above) are awarded based on the best interest of the child standard. In 2005, the Spanish Parliament modified the Civil Code and established the preference for shared custody arrangements in the law[66]. The Supreme Court in 2010 held that instability (not having a single home for the child as the child is split between the parents) is not a factor to be considered in the court's decision to award shared custody[67].

In contrast, numerous countries across the globe continue to prefer legally, sole physical custody. For example, Norway has a legal presumption for sole physical custody[68]. However, the child has "right of access to both parents even if they live apart"[69]. Of note, the parent "who is with the child may make decisions concerning the care of the child while they are together"[70]. Norway awards considerable autonomy to the divorcing parents regarding the extent of the right of access only limited by the "best interests of the child standard"[71].

IV. Existing Laws In India on Custody

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

[65] Spain, Law 15/2005.
[66] Spain, July of 15/2005 Act, Art. 92
[67] Spainish Supreme Court, STS, 1st, 8.10.2009
[68] Kitterod, R.H. & Lyngstad, J., Untraditional Caring Arrangements Among Parents Living Apart: The Case of Norway, Demographic Research, Vol. 27, Art. 5 (2012), pp. 121-152.
[69] Norway, The Children Act, Chapter 6, Right of Access, Section 42, 1981.
[70] *Id*.
[71] Norway, The Children Act, Chapter 6 Right of Access, Section 43, 1981.

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. It further provides that the following matters will be regarded by the court as relevant for considering the welfare of the minor, namely;

a) Age , sex and religion of the minor,

b) The character and capacity of the proposed guardian,

c) His nearness of kin to the minor,

d) The wishes if any, of a deceased parent, and

e) Any existing or previous relation of the proposed guardian with the minor or his property.

If the minor is old enough to form an intelligent preference, the court may consider that preference while appointing the guardian.

The Hindu Minority and Guardianship Act, 1956, provides in Section 8(5) that the Guardians and Wards Act shall apply in respect of an application under this Act. Section 6 of the Act enumerates the classes of natural guardians of a Hindu minor. Further, Section 13 of the Act provides that the welfare of the minor will be the paramount consideration.

It is evident both from the scheme of the legislations and the decisions that have been rendered on the issue of fitness of a parent to be the guardian, that guardianship is a matter to be entrusted to either one of the parents or any other kin of the minor. It is assumed that guardianship has to vest with either one of the contesting parties and suitability is determined in a comparative manner. This foundation and approach has ignored the idea that welfare of the child could also result from the cumulative association of both the parents and not either one of them alone, howsoever best suited any one of them can be in the given circumstances.

V. Developments in India on Shared Parentage

The idea of shared parenting is still new to Indian custody jurisprudence. While the old principle of the father as the natural guardian has been laid to rest, in its place the best interest of the child principle is applied to custody disputes. It has been held by the Supreme Court of India that in custody disputes, the concern for best interest of the child supersedes even statutory provisions on the subject outlines above.[72] Under this principle, the custody of minor children is mostly awarded to mothers. For instance, in a 2010 judgment, the Supreme Court altered the fortnightly visitation rights of the father and allowed the mother to take the minor son to Australia where she had got a job, based on this principle.[73] Similarly, in *Gaurav Nagpal v Sumedha Nagpal*[74], although the son had been with the father since the time of his birth, which was a strong argument in favor of the father, the Supreme Court reversed this arrangement and awarded custody to the mother with visitation rights for the father. Different High Courts 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.[75] There are plenty of such examples from both the Supreme Court of India and the High Courts.

But in recent times there have also been instances when the Apex Court has emphasized that it cannot be assumed that a mother is naturally a better custodian for the child or better placed to respond to the diverse needs of the child. In a 2004 judgment, commenting on a judgment of the Karnataka High Court, that reversed the Family Court order and allowed the mother to retain the custody of the minor daughter, the Apex Court noted,

> *We make it clear that we do not subscribe to the general observations and comments made by the High Court in favour of mother as parent to be always a preferable to the*

[72] Mausami Ganguli v Jayant Ganguli, (2008) 7 SCC 673.
[73] Vikram Vir Vohra v Shalini Bhalla, Civil Appeal No 2704/ 2010, Supreme Court of India, Judgment dated 25 March, 2010.
[74] Civil Appeal No. 5099/ 2007, Supreme Court of India, Judgment dated 19 November, 2008
[75] Ravi Shankar v Uma Tiwari, I (1999) DMC 585 MP; Ashok Shamjibhai Dharod v Neeta Ashok Dharode, II (2001) DMC 48 Bom

> *father to retain custody of the child. In our considered opinion, such generalisation in favour of the mother should not have been made.*[76]

A reflection of this attitude was seen in *Ashish Ranjan v Anupama Tandon*[77], where the Court, referring to the mother, who had been given custody originally, noted: "The mind of the child has been influenced to such an extent that he has no affection/respect for the applicant (the father)". This, the Court held was a violation of the visitation rights granted to the father, and hence amounted to a contempt of the Court.

Thus at present, in judicial practice, there is neither a presumption that father is the natural guardian nor a presumption that mother is biologically better equipped to care for the minor. The judicial approach on child custody has evolved to such a level, that the context is favorable to take the discussion to the logical next step, which is the idea of shared parenting. Though shared parenting or joint custody is not specifically spelled out in Indian law, it is reported that Family Court judges do use this concept at times to decide custody battles.

Two examples of attempts to institutionalize shared parenting in India are noted below. A set of guidelines on 'child access and child custody' prepared by the Tata Institute of Social Sciences (Mumbai) for Family Court judges and Counsellors in Maharashtra understands joint custody in the following manner:

> *child may reside alternately, one week with the custodial parent and one week with non-custodial parent, and that both custodial and non-custodial parent share joint responsibility for decisions involving child' s long term care, welfare and development.*[78]

Although the guidelines state that the above framing of the idea of joint custody is consistent with the 1989 UN Convention on the Rights of the Child, it must be noted that such a mechanical approach to understanding joint custody is inimical to the notion of best

[76] Kumar V. Jahgirdar v Chethana Ramatheertha, SLP (Civil) 4230-4231/ 2003, Supreme Court of India, Judgment dated 29 January, 2004.
[77] Contempt Petition (Civil) No. 394 of 2009, Supreme Court of India, Judgment dated 30 November, 2010.
[78] http://www.mphc.in/pdf/ChildAccess-040312.pdf, Pg 24 (Last accessed 4 November, 2014)

interest of the child, as it treats the child as a chattel to be passed around between the two parents every alternate week.

The second example of joint custody is found in a recent judgment of the Karnataka High Court, which used the concept to resolve the custody battle over a twelve year old boy. In *KM Vinaya v B Srinivas*[79], a two judge bench of the Court ruled that both the parents are entitled to get custody "for the sustainable growth of the minor child". The joint custody was effected in the following manner:

- 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.
- The parents were directed to share equally, the education and other expenditures of the child.
- Each parent was given visitation rights on Saturdays and Sundays when the child is living with the other parent.
- The child was to be allowed to use telephone or video conferencing with each parent while living with the other.

The six monthly arrangement found in this example is much more workable that 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.

VI. The Way Forward

We may therefore consider the wisdom and relevance of re-shaping the two legislations with reference to the following:

1. Whether shared parenting should be an option and/or a preference for the courts?
2. Should such a presumption be dependent on the age or gender of the child?

[79] MFA No. 1729/ 2011, Karnataka High Court, Judgment dated 13 September, 2013

3. Should such shared parentage arrangements be shared physical custody or shared legal custody or some other derivative thereof?
4. Should and how can the "best interest of the child"/"welfare of the child" standard be balanced against other factors (i.e. the wishes of the parents, other children, the wishes of the child)
5. How and should the definition of guardian be expanded?
6. How to create and implement mediation or conciliation institutions to be necessarily involved in the process of grant of guardianship and shared parentage
7. Whether child welfare officers may act as information/ service providers?
8. Whether there should be physical or joint custody or should it be left to the discretion of the judge?
9. In which circumstances must shared parentage arrangements be withheld? Eg: domestic violence, insolvency, mental illness
10. Should and how does gender inequality (e.g. financial) affect establishing a shared parentage preference or option? E.G. the use of children as bargaining chips to secure maintenance
11. What should be the role of the court in matters of joint custody? Should the court be proactive in such matters i.e. a constant supervisor of such arrangements?
12. What should be the nature or limit of discretion that judges can use while awarding joint custody decisions?

Those desirous of submitting suggestions/comments to the Law Commission of India may send their written suggestions/comments either in English or Hindi to the Member Secretary, Law Commission of India, Hindustan Times House, 14th Floor, Kasturba Gandhi Marg, New Delhi-110 001, in person, by post or by e-mail at lci-dla@nic.in within 4 weeks.

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