

UNWED MOTHERS : CAN BE SOLE GUARDIANSDr. Neeta Beri<sup>1</sup>**Abstract**

An unwed mother can become the sole guardian of her child without disclosing the biological father's name, the Supreme court said in a landmark ruling (ABC v. The State (NCT of Delhi)) aimed at reducing harassment faced by single mothers across the country. In situations where the father has not exhibited any concern for his offspring, giving him legal recognition would be an exercise in futility. In today's society, where women are increasingly choosing to raise their children alone, we see no purpose in imposing an unwilling and unconcerned father on an otherwise viable family nucleus.

**Case Details**

The appellant before the Court was an unwed mother who was a well-educated, gainfully employed and financially secure. She follows Christian faith. In 2010, she had given birth to a male child and raised him without any assistance from or involvement of his putative father. She reasoned that the man, who was married and had a family, never showed any interest in her child, whom she raised on her own. She wanted guardianship rights so that her son would inherit her financial assets. With a view to make her son, her nominee in all her savings and other insurance policies, she filed an application with the local authority for guardianship of the child. However she was informed that she must either declare the name of the father or get a guardianship/adoption certificate from the Court.

The woman then filed an application under Section 7 of the Guardians and Wards Act, 1890 [Act] before the Guardian Court for declaring her the sole guardian of her son. Section 11 of the Act requires a notice to be sent to the parents of the child before a guardian is appointed. Though she published a notice in a daily local, she remained averse to notifying the father's name. However she filed an affidavit stating that if in future, the father raises any objection, the guardianship may be revoked or altered.

11. Procedure on admission of application.—

(1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof and cause notice of the application and of the date fixed for the hearing—

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(a) to be served in the manner directed in the Code of Civil Procedure, 1882 (14 of 1882)1 on—

(i) the parents of the minor if they are residing in any State to which this Act extends;

### **Guardianship Court denies right as father's name not revealed**

In April 2011, the Guardian Court directed her to reveal the name and whereabouts of the father and consequent to her refusal to do so, dismissed her guardianship application.

During the chamber proceedings, however, she revealed the father's name. She gave an undertaking that if at any time in future the father raised objections, the order in her favour may be revoked or altered. The court kept the name in a sealed cover and said it may be disclosed in accordance with its directions.

### **High Court dismisses appeal in limine**

Delhi HC: "Possibly I can say that the appellant/petitioner is not being appropriately advised."

On 8 August 2011, Delhi High Court dismissed the appeal in limine holding that her allegation that she is a single mother could only be decided after notice is issued to the father. HC observed that a natural father could have an interest in the welfare and custody of his child even if there is no marriage and that no case can be decided in the absence of a necessary party. HC observed: Whether or not there is marriage, the same can be known only after the natural father is served, and who could not be served, in the face of the unfortunate stand of the petitioner/appellant that the name, particulars and the address of the father will not be supplied. Also, even assuming that there is no marriage, the natural father would also have an interest in the welfare/custody of the child and also the child's guardianship.

It is a fundamental principle of law that no case can be decided in the absence of a necessary party. Non-joinder of a necessary party is fatal to a case. Surely, the father is a necessary party to the case and the petitioner/appellant cannot be allowed to get a decision in her favour merely by impleading the State as the respondent i.e., without making the natural father as a respondent in the case and serve him.

### **Appeal to Supreme Court**

Aggrieved by the HC's dismissal of her appeal without going into the merits of the case, the woman approached the Supreme Court vide Special Leave Petition (Civil) No. 28367 of 2011. On her request, Court did not disclose her identity and that of her child and the case was named as ABC v.The State (NCT of Delhi). Her case was argued by Senior Counsel Ms. Indu Malhotra. Appellant's submissions -

It was submitted that the future of her child would be marred by any controversy regarding his paternity should the father refuse to acknowledge the child as his own. It was also submitted that as the father is already married, any publicity as to a declaration of his fathering a child out of wedlock would have pernicious repercussions to his present family and there would be severe social complications for her and her child. It was put forward that as, as per Section 7 of the Act, the interest of the minor is the only relevant factor for appointing of a guardian, and the rights of the mother and father are subservient thereto.

Power of the court to make order as to guardianship

(1) Where the court is satisfied that it is for the welfare of a minor that an order should be made-

- (a) appointing a guardian of his person or property, or both, or
- (b) declaring a person to be such a guardian, the court may make an order accordingly.

Supreme Court, feeling that the question arisen in the matter is of far reaching dimensions, appointed senior counsel Mr. Sidharth Luthra as an amicus curiae.

State's submissions -

Respondent – Government of NCT of Delhi justifying its stand, contended that Section 11 requires a notice to be given to the 'parents' of a minor before a guardian is appointed; and that as postulated by Section 19, a guardian cannot be appointed if the father of the minor is alive and is not, in the opinion of the court, unfit to be the guardian of the child. The impugned judgment is, therefore, in accordance with the Act and should be upheld.

#### **Uniform Civil Code stressed:**

The Supreme Court directed that unwed mothers can get birth certificates issued for their biological children merely by furnishing an affidavit to this effect. In the present case, the legal battle for the woman, a Christian, started in 2011 when the local Guardian Court rejected her application under the Guardians and Wards Act after she refused to part with the father's details or name.

Under Section 11 of the Act, a mother applying for sole guardianship needs prior consent of the biological father. Section 19 goes further to say that a mother cannot be the sole guardian if the father is alive and fit.

Her appeal in the Delhi High Court was dismissed for the same reason. In fact, the High Court even reasoned that her status as a single mother could only be determined after hearing from the father too.

In its judgment, the Supreme Court acknowledged that the "predominant legal thought across the world and in some statutes in India" is that a mother is best suited to care for her child. The court

further made this a strong case for ushering in a Uniform Civil Code. “Christian unwed mothers in India are disadvantaged when compared to their Hindu counterparts, who are the natural guardians of their illegitimate children by virtue of their maternity alone. It would be apposite for us to underscore that our Directive Principles envision the existence of a Uniform Civil Code, but this remains an unaddressed constitutional expectation.”

### **Judgment**

The bench reserved its verdict on and pronounced it on 6 July 2015, in favour of the appellant woman.

#### **Other Personal Laws discussed**

- Hindu law: Section 6(b) of the Hindu Minority and Guardianship Act, 1956 makes specific provisions with respect to natural guardians of illegitimate children, and in this regard gives primacy to the mother over the father.
- Mohammedan law accords the custody of illegitimate children to the mother and her relations. The law follows the principle that the maternity of a child is established in the woman who gives birth to it, irrespective of the lawfulness of her connection with the begetter.
- Section 8 of the Indian Succession Act, 1925, which applies to Christians in India, the domicile of origin of an illegitimate child is in the country in which at the time of his birth his mother is domiciled.

Supreme Court then concluded that the above indicates that priority, preference and pre-eminence is given to the mother over the father of the concerned child.

#### **International position referred to**

Supreme Court also referred to the laws and judgments pronounced in other countries like United Kingdom, United State of America, Ireland, Philippines, New Zealand and South Africa and felt that “it should assist in a meaningful, dynamic and enduring interpretation of the law as it exists in India.

Legal position in other countries indicates that the preponderant position that it is the unwed mother who possesses primary custodial and guardianship rights with regard to her children and that the father is not conferred with an equal position merely by virtue of his having fathered the child.

Avowedly, the mother is best suited to care for her offspring, so aptly and comprehensively conveyed in Hindi by the word ‘mamta’.<sup>2</sup>

**India is secular nation and religion must be distanced from law.**

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2. Mohit Singh, advocate at the Supreme Court of India.

Observing that the reference to laws in other countries was to have a holistic understanding of what a variety of jurisdictions felt would be in the best interest of the child and not to understand the tenets of Christian law, bench held:

India is a secular nation and it is a cardinal necessity that religion be distanced from law. Therefore, the task before us is to interpret the law of the land, not in light of the tenets of the parties' religion but in keeping with legislative intent and prevailing case law.

**Privacy must be respected**

Court held that woman's fundamental right of privacy would be violated if she is forced to disclose the name and particulars of the father of her child. It observed that any responsible man would keep track of his offspring and be concerned for the welfare of the child he has brought into the world and this did not appear to be so in the present case.

**Parent in Section 11 can mean a single parent**

Accepting the woman's contention of letting her alone be the parent, SC held:

Section 11 is purely procedural; we see no harm or mischief in relaxing its requirements to attain the intendment of the Act. Given that the term "parent" is not defined in the Act, we interpret it, in the case of illegitimate children whose sole caregiver is one of his/her parents, to principally mean that parent alone. The uninvolved parent is therefore not precluded from approaching the Guardian Court to quash, vary or modify its orders if the best interests of the child so indicate.

**Child may have a right to know his parents**

Referring to the Universal Declaration of Human Rights to which India is a party, court observed that right of a child to know the identity of his or her parents has found unquestionable recognition in the Convention. Court also obtained the name and available particular of the father in a duly sealed envelope.

**Father's name not needed for birth certificate, passport and school purposes**

It may be recalled that owing to curial fiat, it is no longer necessary to state the name of the father in applications seeking admission of children to school, as well as for obtaining a passport for a minor child.

Accordingly, we direct that if a single parent/unwed mother applies for the issuance of a Birth Certificate for a child born from her womb, the Authorities concerned may only require her

to furnish an affidavit to this effect, and must thereupon issue the Birth Certificate, unless there is a Court direction to the contrary.

### **Appeal Allowed**

Allowing the appeal of the woman, SC directed the Guardian Court to recall the dismissal order passed by it and thereafter consider the application for guardianship expeditiously without requiring notice to be given to the putative father of the child.

While deciding on an unwed mother's guardianship claim, courts need not seek a response from the child's father, said a bench headed by Justice Vikramjit Sen & consisting of Justice Abhay Manohar Sapre.

"In situations where the father has not exhibited any concern for his offspring, giving him legal recognition would be an exercise in futility. In today's society, where women are increasingly choosing to raise their children alone, we see no purpose in imposing an unwilling and unconcerned father on an otherwise viable family nucleus," the judgment by a Bench of Justices Vikramjit Sen and A.M. Sapre held.<sup>3</sup>

Any responsible man would keep track of his offspring and be concerned for the welfare of the child he has brought into the world; this does not appear to be so in the present case," the apex court held, allowing the mother to apply for guardianship without disclosing the name of the biological father.

The court agreed with the woman, who preferred anonymity and is known only by the acronym 'ABC' on court records, that it would be beneficial if the father's name is not disclosed now. She said the guardianship can be altered if the father raised any objections.

The court directed that if an unwed mother or a single parent applies for a birth certificate, the authorities should issue it after taking the affidavit from the applicant, unless there is direction to the contrary.

The Supreme Court said there was a need to have a uniform civil code because laws related to guardianship varied under different religious laws. For example, under Hindu law, the mother is the natural guardian of an illegitimate child by virtue of her maternity. Under Muslim law the custody of an illegitimate child is accorded to the mother and her relations. However, a Christian unwed mother does not have this right.

It would be apposite for us to underscore that our Directive Principles envision the existence of a uniform civil code, but this will remain an unaddressed constitutional expectation”, the bench said.

It seems that a man who has chosen to forsake his duties and responsibilities is not a necessary

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3. Hindustan Times, July 7, 2015.

constituent for the well being of the child” the court said relying on the principle that a child is not a chattel or a ball to be tossed between parents. The court analyzed the laws prevailing in different countries and observed that the predominant thought was to bestow guardianship and related rights to the mother of a child born outside of wedlock.

“Having received knowledge of a situation that vitally affected the future and welfare of a child, the courts below could be seen as having been derelict in their duty in merely dismissing the petition without considering all the problems, complexities and complications concerning the child brought within its portals”, the Supreme Court said, directing a trial court in Delhi to hear the petitioner’s guardianship application afresh.<sup>4</sup>

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4. The Hindu, July 6, 2015