

**5th SURANA & SURANA AND ARMY INSTITUTE OF LAW**

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**NATIONAL FAMILY LAW MOOT COURT COMPETITION 2024**

**15<sup>th</sup> March, 2024 to 17<sup>th</sup> March, 2024**

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***IN THE HON'BLE FAMILY COURT OF KOLKATA***

***Original Jurisdiction***

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In the Matter of

**Ambika**

(Petitioner)

v.

**Sakshi**

(Respondent)

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**Filed under Section 7 of the Family Courts Act.**

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Upon Submission to the

Hon'ble Family Court

**Memorandum on Behalf of the Respondent**

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### **Statutes**

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19. Vikram Vir Vohra v. Shalini Bhalla, AIR 2010 SC 1675.
20. Vivek Singh v. Romani Singh, (2017) 3 SCC 231.

### **Reports and Conventions**

1. Committee on the Rights of the Children, General Comment No. 14 (2013).

2. Declaration of the Rights of the Child, 1959.
3. Report No. 257, *Reforms in Guardianship and Custody Laws in India*, LAW COMMISSION OF INDIA, May 2015.
4. United Nations Convention on the Rights of the Child, 1989.

### **Books**

1. SIR DINSHAW FARDUNJI MULLA, *MULLA HINDU LAW* (LexisNexis 2015).
2. DR. PARAS DIWAN, *LAW OF ADOPTION, MINORITY, GUARDIANSHIP AND CUSTODY* (LexisNexis 2017).

### **Journal Articles**

1. Archana Parashar, *Welfare of Child in Family Laws - India and Australia*, 1(1) NALSAR L. REV. 49, 49 (2003).
2. Asha Bajpai, *Custody and Guardianship of Children in India*, 39 FAM. L. QUARTERLY 441, 444 (2005).
3. Daniel R. Victor & Keri L. Middleditch, *When Should Third Parties Get Custody or Visitation*, 31 FAM. ADVOC. 34 (2009).
4. James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1374-76 (1994).
5. Jeff Atkinson, *Custody: It all comes down to the best interest of the child*, 12 FAMILY ADVOCATE 34, 35 (1990).
6. John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 OXFORD J. OF LEGAL STUDIES 159, 1994.

**TABLE OF ABBREVIATIONS**

High Court	HC
Hindu Minority and Guardianship Act, 1956	HMGA
Honourable	Hon'ble
Guardians and Wards Act, 1890	GWA
Hindu Succession Act, 1956	HSA

### **STATEMENT OF JURISDICTION**

This Hon'ble Court has been approached for custodial right, legal guardianship for the minor and the properties of the minor through Section 7 of Guardianship and Wards Act. The minor child is residing at Kolkata for two years and thus the jurisdiction of the court is not contested by virtue of Section 7 of the Family Courts Act and Section 9 (1) of the Guardianship and Wards Act.

**STATEMENT OF FACTS**

<b>DATES</b>	<b>EVENTS</b>
2017	Sidhant and Ambika got married with their families approval.
2018	Birth of Armaan and Sidhant's parents passed away in an accident leaving behind an unregistered will directing their property to Sidhant, Armaan and Sakshi (sister of Sidhant).
July 2022	Ambika connected with Akash, her college peer and friend.
September 2022	Sidhant and Ambika left him with house help. Armaan slipped and was admitted to the Hospital.
20 November 2022	Sakshi suggested to Ambika that she would take care of Armaan.
3 December 2022	Ambika joined Akash's new venture at Delhi without informing her resignation and plan to Sidhant.
22 December 2022	Armaan was hospitalized for food poisoning and Sakshi took care of him the whole time. Sidhant recognized her as Armaan's true mother. He passed away six days later from substance consumption.
31 December 2022	Sakshi starts keeping Armaan with her.
11 March 2023	Sakshi extended financial help to Ambika and Ambika returned back to Delhi without Armaan as he refused to go with her.
June 2023	Akash proposed to Ambika for their marriage. They got married next month and Ambika is pregnant again in October.
10 February 2024	Ambika comes to Kolkata as Akash compelled her to get back Armaan. Case for custody was filed by Ambika.

**ISSUES RAISED**

- I. WHETHER THE RESPONDENT IS DISQUALIFIED TO CLAIM THE CUSTODIAL RIGHTS OF THE MINOR CHILD?
  
- II. WHETHER THE APPOINTMENT OF RESPONDENT AS THE LEGAL GUARDIAN TO TAKE DECISION IS IN THE BEST INTEREST AND WELFARE OF THE MINOR CHILD?
  
- III. WHETHER CUSTODY OF THE CHILD WITH THE RESPONDENT IS IN THE BEST INTEREST OF THE CHILD?



## SUMMARY OF ARGUMENTS

### **I. WHETHER THE RESPONDENT IS DISQUALIFIED TO CLAIM THE CUSTODIAL RIGHTS OF THE MINOR CHILD?**

It is argued that an absent and uncaring mother shouldn't be deemed the natural guardian, especially given the child's preference and the paternal aunt's long-standing care. The Respondent has displayed her worthiness to claim his custodial rights through various instances when she has displayed care and affection towards him like a true mother.

### **II. WHETHER CUSTODY OF THE CHILD WITH THE RESPONDENT IS IN THE BEST INTEREST OF THE CHILD?**

As per section 13 of the Hindu Minority and Guardianship Act, the welfare of the minor is the paramount consideration in appointing a guardian. Due to various factors and criteria met by the Respondent, such as the ability to take care of the minor child, ensuring his health, education, overall wellbeing, and happiness, preference of staying with the Respondent, etc., it is humbly submitted that granting custody to the Respondent aligns with the principles of *parens patriae* and serves the best interests of the minor child, Armaan.

### **III. WHETHER THE APPOINTMENT OF RESPONDENT AS THE LEGAL GUARDIAN TO TAKE DECISIONS REGARDING THE PROPERTY OF THE MINOR IS IN THE BEST INTEREST AND WELFARE OF THE MINOR CHILD?**

Considering the Dayabhaga system that the minor belongs to, he became entitled to his ancestral property on the demise of his father. Since his birth mother and her husband are undergoing financial strain, they want the custody of the minor child so that they can gain out of the arrangement monetarily, considering they are followers of the Mitakshara system, where the property is jointly pooled in and held.

## ARGUMENTS ADVANCED

### **I. WHETHER THE RESPONDENT IS DISQUALIFIED TO CLAIM THE CUSTODIAL RIGHTS OF THE MINOR CHILD?**

#### **I.A. Whether a third party who is a biological relative is entitled to the custodial rights of a minor child?**

1. It is humbly submitted that as per the Hindu Minority and Guardianship Act, 1956, which is supplemental to the Guardians and Wards Act, 1890, the natural guardian of a Hindu minor who has not completed the age of 5 years shall 'ordinarily' be with the mother.<sup>1</sup> But in the present circumstances, where the child has completed the age of 5 years by December 2023, and has an absent and uncaring mother and a deceased father, the mother's actions over the past few years make her ill-suited to be declared the natural guardian of the minor child.
2. We place reliance on the notable case of *Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi*<sup>2</sup>, where the Hon'ble Apex Court, upon assessing the children's intelligence and considering their preferences regarding their welfare, determined that it would not be beneficial for them to be placed under the custody of their father, despite his natural guardianship rights. Instead, custody was awarded to the appellant, Kirtikumar, who was the maternal uncle of the children.
3. In the case of *Shakuntala Sonawane v. Narendra Khaire*<sup>3</sup>, the Bombay High Court, while granting custody of the child to the maternal grandmother, observed that under the provisions of the GWA, the court has the authority to appoint a suitable individual as the guardian, even if a natural guardian is present and asserts their right. This decision was made with the paramount consideration being the welfare of the minor, further reiterating the ratio decidendi pronounced by the Kerala HC in the case of *Baby Sarojam v. S. Vijaykrishnan Nair*<sup>4</sup>, and by the Bombay HC in *Mohammad Shafi v. Shamin Banoo*.<sup>5</sup>

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<sup>1</sup> Hindu Minority and Guardianship Act, 1956, § 6 (a): Natural guardians of a Hindu minor.

<sup>2</sup> AIR 1992 SC 1447.

<sup>3</sup> AIR 2003 BOM 323.

<sup>4</sup> AIR 1992 KER 277.

<sup>5</sup> AIR 1979 BOM 156.

4. The paternal aunt of the child, who is the Respondent in the present case has always taken care of the minor child from the position of an unofficial, *de facto* legal guardian, carrying out all acts which are “necessary, reasonable and proper for the benefit of the minor”<sup>6</sup>. The biological mother did not even care about taking care of her son or missing him when she impulsively decided to shift to Delhi for a new job without informing her husband. When the minor child was admitted to the hospital for food poisoning in December 2022, it was the Respondent who stayed at the hospital every night while the absent mother was busy with her job in Delhi, which led to even the minor’s father declaring that the Respondent was the mother of Armaan in the true sense.<sup>7</sup> She was bestowed the duty of taking care of Armaan as the last wish of his father before his death, where he had asked her to “always take care of his son, especially if he is not there.”<sup>8</sup>
5. Not only to fulfill this duty promised to her brother, but the unmarried Respondent voluntarily takes care of Armaan like her own son ever since he was born, out of complete love and affection and no ulterior motives. It is submitted that the Respondent considers Armaan as her life which is reciprocated by Armaan as well, who declared in the presence of Ambika that Sakshi is his ‘Mumma’<sup>9</sup> and is more attached to her than his biological mother. Even the Petitioner has acknowledged this when she once remarked that “*Surely he is Bua’s life*”.<sup>10</sup> This reveals his preference<sup>11</sup>, and it is humbly submitted that the court take into consideration this preference of the minor to appoint the Respondent as the guardian.
6. It must be noted that it was the caring act of the Respondent, who is also working, in November 2022, to voluntarily initiate to take care of Armaan when she noticed that Ambika found it impossible to balance her job and child on her own. Furthermore, Ambika herself had requested Sakshi to continue keeping Armaan at Kolkata as she fled back to Delhi within a day of her husband’s last rites, citing the excuse of her work. Placing reliance on the case of *Gita Hariharan v. Reserve Bank of India*<sup>12</sup>, where the Hon’ble Apex Court had specified that

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<sup>6</sup> Hindu Minority and Guardianship Act, 1956, § 8 (1): Powers of natural guardian.

<sup>7</sup> Moot proposition ¶ 14.

<sup>8</sup> *Id.*

<sup>9</sup> Moot proposition ¶ 20.

<sup>10</sup> *Id.*

<sup>11</sup> Guardians and Wards Act, 1890, § 17 (3).

<sup>12</sup> (1999) 2 SCC 228.

‘absence’ of parent (in that particular case, of the father) could be understood as “*temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise.*,” it is submitted that the biological mother who is supposed to be the natural guardian of the minor was an absent parent.

7. Noting that the right of parents to the custody of children is a natural right but not absolute, a legal scholar writes that grandparents and other third parties may obtain custody of a child even without demonstrating parental unfitness. This typically happens when the third party has raised the child for an extended period and the child expresses a desire to stay with them. They further note that in such cases, courts are hesitant to disrupt the current arrangement. However, courts may be more inclined to return the child to the parent if the parent has consistently maintained significant contact while the child resided with the third party, which is not the case with Armaan and the Petitioner.<sup>13</sup>

#### **I.B. Whether an unwed woman is entitled to the custody of a minor child?**

8. The society operates in its own morals and judgements on an unwed woman with a child. However, this cannot be taken as a means of not awarding custody. In the pertinent case of *Jai Prakash Khadria v. Shyam Sunder Agarwalla & Anr*<sup>14</sup>, the Supreme Court had held that the minor, who had been given by the widowed birth mother in adoption to her father (the minor’s maternal grandfather), had a lot of attachment with his maternal grandfather. Furthermore, the court refused to allow her special leave petition that contended that she be appointed as the guardian of the minor Ankur while her appellant father’s Special Leave Petition was pending. A widowed mother giving her child in adoption cannot reclaim guardianship is a significant takeaway from the court’s decision. It must also be noted that the widowed mother had remarried, much like the petitioner in the present case.
9. In the landmark case of *ABC v. State (NCT of Delhi)*,<sup>15</sup> the Supreme Court gave an unwed mother the sole legal guardianship of her child. Even the recently released Handbook on

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<sup>13</sup> Jeff Atkinson, *Custody: It all comes down to the best interest of the child*, 12 FAMILY ADVOCATE 34, 35 (1990).

<sup>14</sup> (2000) 6 Supreme Court Cases 598.

<sup>15</sup> AIR 2015 SUPREME COURT 2569.

Combating Gender Stereotypes by the Supreme Court of India<sup>16</sup> had suggested that for the phrase ‘unwed mother’, the alternative language preferred is ‘mother.’

## **II. WHETHER CUSTODY OF THE CHILD WITH THE RESPONDENT IS IN THE BEST INTEREST OF THE CHILD?**

### **II.A. Whether the principle of *parens patriae* followed strictly for granting custody of a minor child?**

10. Custodial jurisprudence has two diverse notions. The first notion is more overt and emphasizes more on relational values to protect the interest of adults who have nurtured and cared for the child. Contrastingly, the implicit notion is based on the perception of the child.<sup>17</sup> Thus, in contemporary times, it is more correct to say that custodial rights are equally children’s rights, rather than being considered merely as adult rights that recognize the interest of the adults to maintain a relationship with the child in a legally protected manner.

11. The right of the parents to custody and visitation is a natural and inherent right and an identity of parenthood. The custodial rights of the parents are subject to the “best interest of the child”, which howsoever is not accurately applied in contemporary times. This notion appreciates and provides for the custodial rights of parents and non-parents including the non-custodial parent’s family. This illustrates the shift of the *parens patriae* principle to the welfare of the child principle.<sup>18</sup> In the case of *Ashu Dutt v. Aneesha Dutt*, the following was emphasized,

*“It is important to note that children cannot be treated as chattel or property where the parents would have absolute rights over the destiny and life of their children. The paramount consideration is the welfare of the child and not the legal rights of the parents.”*<sup>19</sup>

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<sup>16</sup> Handbook on Combating Gender Stereotypes, Supreme Court of India, [https://main.sci.gov.in/pdf/LU/04092023\\_070741.pdf](https://main.sci.gov.in/pdf/LU/04092023_070741.pdf).

<sup>17</sup> Daniel R. Victor & Keri L. Middleditch, *When Should Third Parties Get Custody or Visitation*, 31 FAM. ADVOC. 34 (2009).

<sup>18</sup> John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 Oxford J. of Legal Studies 159, 1994.

<sup>19</sup> 2023 LiveLaw (Bom) 189.

12. In the case of *Vikram Vir Vohra v. Shalini Bhalla*<sup>20</sup>, the court held that the custody of a child is based on the welfare of the child more than the rights conferred to the parents under the statute. In the case of *Gayatri Bajaj v. Jiten Bhallal*,<sup>21</sup> The court observed that the custody issue of a minor child should be decided from the angle of the welfare of the child and not what can better serve parents.

13. A deviation from *parens patriae* is thus observed. It is now not obligatory for the court to grant custodial rights to the parent especially when the circumstances of the case do not deem fit.

## **II.B. Whether the custody of the minor child with the Respondent in the best interest is for the welfare of the child?**

14. The HMGA stipulates that while declaring the appointment of any person as guardian of a Hindu minor by a court, it is the welfare of the minor that shall be of paramount consideration.<sup>22</sup> As stated by the GWA<sup>23</sup>, the court must appoint a guardian only when it is satisfied that the appointment is necessary for the welfare of the minor. Asha Bajpai, a noted legal scholar on child rights, considers this the cardinal rule for guardianship and custody determinations.<sup>24</sup>

15. While appointing a guardian, the court is to be guided by what is in the welfare of the minor, and for ascertaining the same, the court shall consider “*the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.*”<sup>25</sup> Additionally, it is mandated that if the child is deemed sufficiently mature to express a reasoned preference, the Court may take that preference into account, and no individual can be appointed as a guardian against their wishes.<sup>26</sup>

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<sup>20</sup> AIR 2010 SC 1675.

<sup>21</sup> AIR 2013 SC (Civil) 77.

<sup>22</sup> Hindu Minority and Guardianship Act, 1956, § 13.

<sup>23</sup> Guardians and Wards Act, 1890, § 7 (i).

<sup>24</sup> Asha Bajpai, *Custody and Guardianship of Children in India*, 39 FAM. L. QUARTERLY 441, 444 (2005).

<sup>25</sup> Guardians and Wards Act, 1890, § 17(1).

<sup>26</sup> Guardians and Wards Act, 1890, § 17(3) & 17(5).

16. The “welfare of the child” principle derives much of its significance through its presence in international human rights law as well. The **United Nations Convention on the Rights of the Child** (1989) states 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.”<sup>27</sup>
17. The **Committee on the Rights of the Child**, in its General Comment No. 14 (2013), offered guidance on determining a child’s best interests, suggesting a comprehensive list of factors for decision-makers to consider. These factors include the child’s own perspectives, identity (including aspects like sex, sexual orientation, nationality, religion, culture, and personality), maintaining family connections, ensuring the child’s safety and well-being, addressing any vulnerabilities the child may face (such as disability or homelessness), and upholding the child’s rights to health and education.<sup>28</sup>
18. Legal scholar Archana Parashar, who examined Supreme Court rulings between 1959 and 2000 that applied the best-interest principle in custody disputes, found that due to the lack of legislative direction on the factors for assessing a minor’s best interests, courts offer diverse interpretations influenced by their individual perspectives on children’s welfare and ideals of parenthood.<sup>29</sup> The **Law Commission of India**, in its Report No. 257, suggested strongly that the determinants of the welfare standard must be explicitly defined to prevent judges from overlooking specific matters when deciding on custody and access arrangements.<sup>30</sup>
19. In the case of *Ram Kishore Singh v. Nirmala Devi Kushwaha and Anr*<sup>31</sup>, the following factors were laid down by the court for consideration in cases regarding minor’s custody:

*“(a) Ascertainable wishes and feelings of the child concerned, considered in the light of his age and understanding.*

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<sup>27</sup> United Nations Convention on the Rights of the Child, Art. 3 ¶ 1.

<sup>28</sup> Committee on the Rights of the Children, General Comment No. 14 (2013), [https://www2.ohchr.org/english/bodies/crc/docs/gc/crc\\_c\\_gc\\_14\\_eng.pdf](https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf).

<sup>29</sup> Archana Parashar, *Welfare of Child in Family Laws - India and Australia*, 1(1) NALSAR L. REV. 49, 49 (2003).

<sup>30</sup> Report No. 257, *Reforms in Guardianship and Custody Laws in India*, LAW COMMISSION OF INDIA (May 2015), p. 25.

<sup>31</sup> AIR 2006 MADHYA PRADESH 224.

(b) *His physical, emotional and educational needs.*

(c) *The likely effect on him on any change in the circumstances.*

(d) *His age, sex, ground and any characteristics, which the Court considered relevant and lastly.*

(e) *Any harm which he has suffered or is at risk of suffering.”*

20. In *Mumtaz Begum v. Mubarak Hussain*<sup>32</sup>, the High Court highlighted the significance of prioritizing the welfare of the child by citing the **Declaration of the Rights of the Child, 1959**, which was unanimously adopted by the United Nations General Assembly. The court elucidated that **Principle 2** of the Declaration required states to establish legislation for the “special protection” of the child, ensuring their holistic development encompassing physical, mental, moral, spiritual, and social well-being in a healthy and normative manner.

21. In the case of *Rajan Jairath v. Mrs. Monita Mehta*<sup>33</sup> has mentioned that the interest and desire of the child has to be taken into consideration for deciding the case. The term “welfare” must be interpreted broadly to encompass the material and physical well-being, education, upbringing, happiness, and moral welfare of the minor. It is settled law that the court must take into account all relevant circumstances pertaining to these factors. The Supreme Court in the case of *Surya Vadanam v. State of Tamilnadu*<sup>34</sup> had gone through several precedents including *Arathi Bandi v. Bandi Jagadrakshaka*<sup>35</sup>, *Dhanwanti Joshi v. Madhav Unde*<sup>36</sup> to hold that the best interest and welfare of the child are to be considered of paramount importance in deciding a case.

22. The custodial rights that are granted are not just a privilege but a responsibility and duty<sup>37</sup> and the Respondent is entitled to it. Armaan has had medical complications from the age of two and it is important to take account of the fact that the Respondent has always been an

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<sup>32</sup> AIR 1986 MP 221.

<sup>33</sup> 2013 (1) RCR (Civil) 546 (P&H).

<sup>34</sup> 2015 (2) SCC (Civil) 183.

<sup>35</sup> 2013 (3) RCR (Civil) 968.

<sup>36</sup> 1998(1) RCR (Civil) 190.

<sup>37</sup> James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CALIF. L. REV. 1371, 1374-76 (1994).



irreplaceable support for his survival and recovery.<sup>38</sup> To show the Petitioner's unfitness to be given custody of Armaan, it is submitted that the Petitioner has showcased her negligent attitude towards Armaan in many instances, including once when she left Armaan with house help and did not attend her calls of emergency which eventually led to the admission of Armaan to the hospital.<sup>39</sup> The Respondent has been appreciated by doctors for the hard work and care she has always shown Armaan which has enabled him to attain better health and start walking.<sup>40</sup>

23. The Respondent has been a constant support to the Petitioner, enabling her to leave for Delhi to concentrate on her career. Despite the Respondent also being a working woman - a lecturer in a private college - she still managed to take care of Armaan every day and night while he was admitted to the hospital for food poisoning on 22.12.22, while the Petitioner was conspicuously absent and indifferent during the entire incident. In fact, the Petitioner

24. The court in the case of *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari*<sup>41</sup>, held that various factors like ethical upbringing, economic well-being, child's comfort, health and education have to be considered for the purpose of examining the welfare of the child. The Respondent is more than capable of providing the needed financial assistance and care to Armaan considering the fact that she is a lecturer in a private college with a stable income and is also the entitled heir to the ancestral property and wealth left behind her by her parents and brother.

25. The Respondent and Armaan have developed a special emotional bond that is unbreakable. Armaan identifies the Respondent as "Mumma"<sup>42</sup> which portrays the emotional connection both of them mutually share. Separation of the Respondent and Armaan and the changed circumstances would put Armaan in a difficult and vulnerable situation. The preference of Armaan has to be considered as provided in the case of *Nil Ratan Kundu v. Abhijit Kundu*.<sup>43</sup>

26. The main consideration of the court is to ensure the best interest of the child to live and nurture thus a child-centric human jurisprudence has been developed in contemporary times. This was

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<sup>38</sup> Moot proposition ¶ 14, 17.

<sup>39</sup> Moot proposition ¶ 7.

<sup>40</sup> Moot proposition ¶ 17.

<sup>41</sup> (2019) 7 SCC 42.

<sup>42</sup> Moot proposition ¶ 20.

<sup>43</sup> (2008) 9 SCC 413.

also emphasized in the case of *Vivek Singh v. Romani Singh*<sup>44</sup>. However, this does not entitle any party to be termed as “disqualified”. As mentioned *supra* in the case of *Nil Ratan Kundu*, the claim that we put forth is to only focus on the positive attributes that would entitle the Respondent to custodial rights.

27. In *Re Kamal Rudra*<sup>45</sup>, it was observed that:

*“..a mother who neglects the infant child as she does not want to sacrifice the type of life she is leading can be deprived of custody.”*

Considering the health complications of Armaan, it will be in his best interest to remain with the Respondent, especially considering the Petitioner’s desire to be socially active and get a new family at the cost of neglecting Armaan.

28. The HMGA provides that the court has the power and discretion to decide what best fits the facts and circumstances of the case in matters related to custody<sup>46</sup> wherein the rights conferred by the statute to parents do not per se apply especially when the child’s welfare is in question.

29. Considering the facts and circumstances of the present case, it is therefore humbly submitted that the custodial rights of the minor child ought to be given to the Respondent considering the best interest, welfare and preference of the minor child Armaan.

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<sup>44</sup> (2017) 3 SCC 231.

<sup>45</sup> ILR (1949) 2 CAL 374.

<sup>46</sup> Hindu Minority and Guardianship Act, 1956, § 13(2).

### **III. WHETHER THE APPOINTMENT OF RESPONDENT AS THE LEGAL GUARDIAN TO TAKE DECISIONS REGARDING THE PROPERTY OF THE MINOR IS IN THE BEST INTEREST AND WELFARE OF THE MINOR CHILD?**

#### **III.A. WHETHER THE RESPONDENT IS ELIGIBLE TO BE A GUARDIAN TO PROTECT AND TAKE DECISIONS ON THE PROPERTY OF THE MINOR?**

30. The Respondent's father executed an unregistered will that provides for inheritance of property by the Petitioner's husband, Respondent and the Petitioner's unborn child. Post the demise of Armaan's father, as per the system prevalent in West Bengal, Armaan becomes the sole legal heir to the property on his father's death, as per the dictates of the Dayabhaga practice. Thus, Armaan is entitled to a definite share in the ancestral property of the Respondent. Furthermore, Section 20 of the HSA, 1956 also recognizes the rights of a child in the womb to inherit property,

*"A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born, before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate."*<sup>47</sup>

31. It is submitted that the knowledge of the property rights of Armaan is the reason behind the sudden motivation of the Petitioner to fight for Armaan's custody. The Petitioner needs money as her husband's venture is not financially sound.<sup>48</sup> Also, the Petitioner is aware of the fact that the properties of her deceased husband will now be succeeded by Armaan as per the laws in Dayabhaga school, and this is the reason behind her suddenly wanting back Armaan's guardianship and custody when it is convenient for her. It must be noted that the Petitioner got married on 30.07.23, but it took her nearly seven more months to make an attempt to reach out to Armaan<sup>49</sup>, despite her alleged intention to retrieve him since a long while.

32. Unlike the Petitioner, the Respondent has no motive to deceive Armaan for his rights over the ancestral property as the Respondent is also an heir who has inherited her definite share of

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<sup>47</sup> Hindu Succession Act, 1956, § 20.

<sup>48</sup> Moot proposition ¶ 23.

<sup>49</sup> Moot proposition ¶ 24.

ancestral property. The Respondent, familiar and well acquainted with the ancestral properties and through her years of experience, has a comparatively better sense of knowledge and responsibility to protect and safeguard the ancestral property that belongs to her lineage. She thus has the capability to maintain the properties and employ the properties to the best use.

33. The rights of the guardian recognized by the court with regard to the property are limited in such a sense that it cannot be used by the guardian for his benefit unless the court's permission is obtained. This has been the law and application including cases for instance, *Keshavram and Ors. v. Kubercharan and Ors.*<sup>50</sup> Thus flows the idea that manipulation is nearly impossible, what with courts acting as regulators and the Respondent being well aware of the law and further willingly signing to be the guardian.

### **III. B. Whether the Petitioner's remarriage would affect the minor child in terms of his property rights?**

34. As judicially recognised in various cases<sup>51</sup>, the 2 main systems of inheritance amongst Hindus in India are the Mitakshara system which is applicable to other parts of India except Bengal, and Dayabhaga system which prevails in Bengal. As per Sir Dinshaw Fardunji Mulla, the main difference between both is that under Dayabhaga, the guiding principle is the "doctrine of religious efficacy", which focuses on the capacity for conferring spiritual benefit while Mitakshara has no such definite guiding principle.<sup>52</sup> The property of a deceased Hindu governed by Dayabhaga law passes by succession, including his share in undivided property. Meaning, sons under the Dayabhaga law do not inherently possess any claim to ancestral property upon birth; their rights materialize only upon the demise of the father.<sup>53</sup> In the present case, the minor's share in the undivided property worth several crores has been passed to him on his father Sidhant's untimely demise.

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<sup>50</sup> MANU/CG/0748/2019

<sup>51</sup> *Vineeta Sharma v. Rakesh Sharma & Ors.*, (2020) 9 SCC 1.

<sup>52</sup> SIR DINSHAW FARDUNJI MULLA, MULLA HINDU LAW 109-110 (LexisNexis, 2015).

<sup>53</sup> SIR DINSHAW FARDUNJI MULLA, MULLA HINDU LAW 432 (LexisNexis, 2015).

35. Under Mitakshara system, which is followed by Akaash and now the Petitioner on account of her marriage to him, the right to inherit arises from propinquity, that is the proximity of relationship, which recognizes the right of survivorship as between coparceners.<sup>54</sup> In the case of *State Bank of India v. Ghamandi Ram (dead) through Gurbax Rai*<sup>55</sup> it was observed that:

*“A coparcenary under the Mitakshara School is a creature of law and cannot arise by Act of parties except in so far that on adoption the adopted son becomes a coparcener with his adoptive father as regards the ancestral properties of the latter.”*

It is to be noted that interests of a Mitakshara coparcener are unspecified and unascertained, while that of the Dayabhaga coparcener it is certain and specified share.<sup>56</sup> Considering the intentions of the Petitioner’s new husband to adopt the minor child from her earlier marriage, it is submitted that on the basis of the above mentioned averments, all the property of the minor child running into crores of worth, would become part of the Hindu Undivided Family led by Akaash that follows Mitakshara system.

36. Section 12 of the HMGA states that when the joint family property is under the management of an adult member of the family and a minor has an undivided interest in said property, no guardian is to be appointed in respect of such undivided interest. This section is *“obviously confined to the Mitakshara joint family and does not relate to the Dayabhaga joint family, since words in the section are ‘an undivided interest’”*<sup>57</sup>

37. In the *Ghamandi Ram* case cited *supra*, it had further been acknowledged that:

*“According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and **thereafter to be born.**”*

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<sup>54</sup> SIR DINSHAW FARDUNJI MULLA, MULLA HINDU LAW 109-110 (LexisNexis, 2015).

<sup>55</sup> (1969) 2 SCC 33.

<sup>56</sup> DR. PARAS DIWAN, LAW OF ADOPTION, MINORITY, GUARDIANSHIP AND CUSTODY 504 (LexisNexis 2017).

<sup>57</sup> *Id.*

Here we supply emphasis to submit that the unborn second child of the Petitioner will also be getting a share of the property of the minor child if he is given to his mother for custody.

### **III. C. Whether the Respondent is eligible to be a guardian to take legal decisions for the minor?**

38. The birth father of the minor child had mentioned that the Respondent is the mother in the true sense and has accorded his oral will to let the Respondent take care of Armaan before passing away on the night of 28.12.22.<sup>58</sup> As per classical Hindu law, the power of appointing a guardian under testamentary will, is decided by the father. The guardian appointed in this way will be the guardian post the death of the father. The testamentary will of the natural guardian of the minor child should be given its due and rightful consideration. In Section 7 of GWA, it has been provided that an order cannot disturb the guardianship powers of a person appointed by will until the powers cease.<sup>59</sup> The court, considering the above-mentioned circumstances should award custodial and guardianship rights to the Respondent.

39. The minor child by virtue of the factor of his age can be considered to be appointed a next friend for being represented before the court of law. Considering the Respondent's ability to act in the best interest of the child, it is hereby humbly submitted that the Respondent be appointed as the next friend of the minor child to represent his legal interest in the court of law.

40. In consideration of the previous contention of the Petitioner bearing a malafide and monetary interests, it is submitted that awarding 'next friend' rights to the Respondent would be in the best interest of the minor child. In the case of *Nagaiyah and Ors. v. Chowdamma (dead) by L.Rs. and Ors*<sup>60</sup>, the Supreme Court had held:

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<sup>58</sup> Moot proposition ¶ 14.

<sup>59</sup> Guardians and Wards Act, 1890, § 7.

<sup>60</sup> 2018/INSC/6.

*“If the natural guardian or the duly constituted guardian has adverse interest against the minor in the lawsuit, then a next friend or guardian ad litem, as the case may be, would represent the minor in the civil litigation.”*

41. Thus, it is humbly prayed that the Respondent be identified as the ‘next friend’ for the purpose of legal representation, and that she is appointed as the trustee for the minor’s property to prevent futile attempts of the Petitioner to usurp their family property by such roundabout ways.

**PRAYER FOR RELIEF:**

Wherefore, in the light of the issue raised, arguments advanced, cases and authorities cited above, the Respondent humbly requests the Hon'ble Family Court of Kolkata to adjudge and declare that:

1. The Respondent is not disqualified to get the custody of the child due to her marital status
2. The custodial rights of a guardian are granted to the Respondent.
3. The right of being the minor child's next friend and trustee of his property be granted to the Respondent.

**AND/OR**

Pass any other order, direction, or relief that it may deem fit in the best interests of justice, fairness, equity, and good conscience.

**And for this, the Respondent shall be duty-bound, forever pray.**

All of which is humbly prayed by,

*Counsels for the RESPONDENT .*