

5th SURANA & SURANA AND ARMY INSTITUTE OF LAW
NATIONAL FAMILY LAW MOOT COURT COMPETITION 2024

BEFORE THE HON'BLE FAMILY COURT OF KOLKATA

ORIGINAL JURISDICTION

UNDER SECTION 7 OF THE FAMILY COURTS ACT, 1984

IN THE MATTER OF

Mrs. AMBIKA.....APPLICANT

v.

Ms. SAKSHI.....RESPONDENT

WRITTEN SUBMISSION ON THE BEHALF OF RESPONDENT

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2. The Hindu Minority and Guardianship Act, 1956.
3. The Hindu Widows Remarriage and Property Act, 1989.
4. The Hindu Succession Act, 1956
5. The Constitution of India.
6. The Juvenile Justice (Care & Protection) Act, 2015.
7. The Juvenile Justice (Care And Protection Of Children) Rules, 2007.
8. The Family Courts Act, 1984.

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2. LIST OF ABBREVIATIONS

LIST OF ABBREVIATION	FULL FORM
AIR	All India Reporter
All	Allahabad
AP	Andhra Pradesh
Art.	Article
CRC	Convention on Rights of Children.
Del	Delhi
GWA	Guardians and Wards Act
GOVT.	Government
HC	High Court
HAMA	Hindu Adoption and Maintenance Act
HMGA	Hindu Minority and Guardianship Act
HMA	Hindu Marriage Act
HWR	Hindu Widow Remarriage
HWRP	Hindu Widows Remarriage and Property
HP	Himanchal Pradesh.
Hon'ble	Honourable
J.	Justice
JJ.	Juvenile Justice (Care & Protection) Act
KANT	Karnataka
Ker	Kerela
Mad	Madras
MP	Madhya Pradesh
Ors.	Others
Para	Paragraph
RCR	Recent Civil Reports
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports

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NATIONAL FAMILY LAW MOOT COURT COMPETITION 2024

Sec.	Section.
TC	Team Code
UOI	Union of India
UP	Uttar Pradesh
Vol.	Volume
vs.	Versus
v.	Versus

3. STATEMENT OF JURISDICTION

The counsels on behalf of the Respondent have endorsed their pleadings in response to the Petition filed by the Applicant under the aegis of **Section 7** the Family Courts Act, 1984¹. The respondent will humbly contest the grounds that have been invoked under the aegis of aforementioned section of the Family Courts Act, 1984.

¹ **Jurisdiction.** —

(1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation. —The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely: —

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

4. STATEMENT OF FACTS

Backdrop

Siddhant and Ambika, colleagues turned spouses, faced strains in their marriage. Ambika, seeking solace from friend Akaash, was burdened by household duties and Siddhant's indifference. Their son Armaan's illness exacerbates tensions between the couple. Siddhant, has an unmarried elder sister named Sakshi who works as a lecturer in a private college. Following their parents' passing away, Siddhant battled depression, seeking help from a psychiatrist. He possesses a century-old ancestral bungalow, alongside a grand residence and a showroom generating a monthly rent of Rs 2 lakh. Their father's unregistered will dictates the inheritance of all properties to Siddhant, Sakshi, and the offspring of Siddhant and Ambika.

Sequence of Incidents Leading to the Conflict

On November 20, 2022, Sakshi visited Bangalore for a friend's wedding and met Ambika, who confided in her about struggling to balance work and childcare. Sakshi offered to care for Ambika's son, Armaan, temporarily. On December 28, 2022, while caring for Armaan at the hospital, Siddhant expressed to Sakshi that she was Armaan's true mother and urged her to always care for him. Tragically, Siddhant died later that night due to alcohol and sleeping pill consumption. On December 31, Ambika asked Sakshi to continue caring for Armaan in Kolkata, as she needed to focus on her job in Delhi. Ambika planned to take Armaan permanently once settled. However, when Ambika attempted to take Armaan with her on March 11, 2023, he clung to Sakshi, causing tension. In June 2023, Akaash proposed to Ambika, intending to adopt Armaan after marriage, which took place on July 30, 2023. In October 2023, Ambika learned she was pregnant. Financial struggles led Akaash to pressure Ambika to retrieve Armaan, culminating in a heated argument on February 5, 2024. Ambika agreed to bring Armaan back permanently on February 10, 2024.

Action taken by the Parties

Ambika informs Sakshi of her intention to pursue legal avenues to regain custody of Armaan, whom she claims as her biological child. Ambika initiates legal proceedings seeking custody based on her status as the natural guardian to which Sakshi declines to return Armaan and takes the defense to be appointed as the Legal guardian of Armaan in the best interest and welfare of the child.

5. STATEMENT OF ISSUES

ISSUE 1:

WHETHER THE HON'BLE FAMILY COURT OF KOLKATA HAS JURISDICTION TO HEAR AND DECIDE UPON THE PRESENT MATTER?

ISSUE 2:

WHETHER AMBIKA'S CLAIM AS THE NATURAL GUARDIAN OR SAKSHI'S DEFENSE TO BE APPOINTED AS THE LEGAL GUARDIAN IS IN THE BEST INTEREST AND WELFARE OF THE CHILD?

ISSUE 3:

WHETHER REMARRIAGE OF AMBIKA AMOUNT TO THE TERMINATION OF GUARDIANSHIP OVER HER SON AND HER SHARE IN PROPERTY?

6. SUMMARY OF ARGUMENTS

[I] WHETHER THE HON'BLE FAMILY COURT OF KOLKATA HAS JURISDICTION TO HEAR AND DECIDE UPON THE PRESENT MATTER?

It is humbly submitted before the Hon'ble Court that the Applicant, Ambika, lacks **locus standi** in the Family Court of Kolkata for custody and property claims. Jurisdiction, as per the Family Courts Act, is based on the child's residence. Kolkata being a temporary arrangement for Armaan, custody jurisdiction is inappropriate. Additionally, property disputes fall outside the Family Court's purview, and Ambika's remarriage further voids property claims under the Hindu Widows Remarriage and Property Act, 1989.

[II] WHETHER AMBIKA'S CLAIM AS THE NATURAL GUARDIAN OR SAKSHI'S DEFENSE TO BE APPOINTED AS THE LEGAL GUARDIAN IS IN THE BEST INTEREST AND WELFARE OF THE CHILD?

It is humbly submitted before the Hon'ble Court that Sakshi's claim to be appointed as the legal guardian of Armaan, based on his best interest and welfare, outweighs Ambika's claim as the natural guardian. The proposition exposes Ambika's irresponsible behaviour, prioritizing her career and new marriage over Armaan. Legal provisions, including the Juvenile Justice (Care & Protection) Act, 2015 and International human rights standards, emphasize the child's well-being. Sakshi's consistent care, financial stability, Armaan's intelligent preference, Siddhant's will, and the absence of emotional connection with Ambika strengthen Sakshi's case, urging the court to prioritize Armaan's welfare and appoint Sakshi as his legal guardian.

[III] WHETHER REMARRIAGE OF AMBIKA AMOUNT TO THE TERMINATION OF GUARDIANSHIP OVER HER SON AND HER SHARE IN PROPERTY?

It is humbly submitted before the Hon'ble Court that Ambika's remarriage with Akaash does not automatically terminate her guardianship over Armaan. However, it is argued that Armaan's welfare is better served with Sakshi, owing to Ambika's negligence and Sakshi's stable environment. Regarding property rights, it is contended that Ambika's remarriage extinguishes her claims under the Hindu Widows' Remarriage and Property Act of 1989. There are potential risks associated with stepfamilies. For this reason, Armaan should be handed over to Sakshi.

7. ARGUMENTS ADVANCED

[1] WHETHER THE HON'BLE FAMILY COURT OF KOLKATA HAS JURISDICTION TO HEAR AND DECIDE UPON THE PRESENT MATTER?

1. It is humbly submitted before the Hon'ble Court that the petition is **not maintainable** before the **Hon'ble Family Court of Kolkata**. This is explained by following sub-issues

[1.1] Ambika has no locus standi to file the petition:

2. Ambika's legal right over Armaan's custody is not violated as this right is not absolute and is subjected to the **Section 13** of the HMGA² which lays down that welfare of the minor is of paramount consideration. She fails to satisfy any prerequisites to be granted the custody of Armaan. Further, since Ambika has been remarried to Aakash she loses all claims of her property rights in the property of Siddhant under the provisions of the Hindu Widows Remarriage and Property Act, 1989³. Therefore, it is submitted that her petition is frivolous.

[1.2] Ambika's claim for Armaan's custody is not maintainable in the Hon'ble Court:

3. It is humbly submitted that the claim of Ambika is not maintainable in the Family of Kolkata, as per **explanation (g) of sub-section (1) of Section 7** of the Family Courts Act, 1984 since - it provides that the family court has jurisdiction to grant the custody of the child to a proper person and to make that right person the guardian of a minor. The cases related to the custody of the child are filed before the family court where he usually resides.⁴ The Family Courts have jurisdiction in the place **where the minor ordinarily resides**. It was highlighted

² *Welfare of minor to be paramount consideration. —*

(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration. (2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

³ *Rights of widow in deceased husband's property to cease on her re-marriage.— All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, 660 HINDU WIDOWS' REMARRIAGE AND PROPERTY ACT, 1989 with no power of alienating the same, shall upon her re-marriage cease and determine as if she then died ; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same : Provided always that, if in any caste, of Hindus, widow remarriage was permitted prior to the passing of this Act and a widow was not thereby deprived of rights mentioned in this section, its provision shall not operate to deprive her of such rights.*

⁴ Harshita Varshney, 'Types of cases addressed in family courts'(Ipleaders, 8 January 2021) < <https://blog.ipleaders.in/types-cases-addressed-family-courts/>> accessed 20 February 2024

in the case of KC Sashidhar v. Roopa that the legislature by the expression ‘ordinarily resides’ meant that it is something more than a temporary residence. A temporary residence at a particular place under compulsion however long cannot be termed as a place of ‘ordinarily residing’. The term ‘ordinarily resides’ does not mean casual or factual residence of the minors.⁵ From the 11th para of the proposition, it is clear that Kolkata was not Armaan's usual place of residence but rather a temporary arrangement. On 20.11.22, Sakshi visited Bangalore for a friend's wedding and met Ambika, who shared her struggles with job and child management. Sakshi proposed temporarily taking care of Armaan. Hence, considering Kolkata as only a temporary dwelling for Armaan, the petition for guardianship is not maintainable in the Family Court of Kolkata in accordance with **explanation (g) of Section 7(1)** of the Family Courts Act, 1984.

[1.3] Ambika's claim for her share of property is not maintainable in the Hon’ble Court:

4. **Section 7(1) explanation (c)** of the Family Courts Act, 1984 is the sole provision addressing property-related disputes in the Family Courts Act, 1984. As per this provision, the family court can entertain *a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them*, when two conditions are duly satisfied: a) *Such a dispute must have arisen between the parties to the marriage only;* b) *Such a dispute must have arisen due to the property of either party.*⁶ It is submitted that the aforementioned prerequisites are not fulfilled as the dispute has not arisen between the parties to the marriage due to the fact that Siddhant is no longer alive. It has been held in Suprabha v. Sivaraman⁷ that the meaning of ‘the parties to the marriage’ cannot be given such a wide interpretation so as to include all those who are interested in the welfare of the couple or those who take part to the marriage ceremony. Thus, **explanation (c) of Section 7(1)** is not attracted. Further, Ambika’s claim of a share is in the ancestral property of Siddhant which also poses a ground to oust the jurisdiction of the Family Court⁸. In the case of Anitha D. S. vs. P. Rajeswari Thankachy⁹, it was ruled that the Family Court does not have jurisdiction in the partition of the property. The civil court is the appropriate forum to decide the property rights. Thus, it is evident that the present court does not have the requisite jurisdiction to hear and decide both the matters.

⁵ [1993] AIR Kant 120.

⁶ Ramakrishna S/O Vishnusa Pujari vs Smt. Vidya W/O Ramakrishna Pujari [2022] Latest Caselaw Kant 7675.

⁷ [2006] AIR Ker 187.

⁸ Genu v. Jalabai [2008] LawSuit Kant 546.

⁹ [2022] LawSuit Ker 39.

[2] WHETHER AMBIKA'S CLAIM AS THE NATURAL GUARDIAN OR SAKSHI'S DEFENSE TO BE APPOINTED AS THE LEGAL GUARDIAN IS IN THE BEST INTEREST AND WELFARE OF THE CHILD?

1. It is humbly submitted before the Hon'ble Court that Sakshi's defense to be appointed as the legal guardian weighs its significance against Ambika's claim as the natural guardian of Armaan because it is in the best interest and welfare of the 5 years old child. When the past acts of both Sakshi and Ambika are taken into consideration, it becomes evident that Armaan's welfare lies with Sakshi alone.

2. All the instances mentioned in the proposition reveal Ambika's clear-cut irresponsible behaviour towards the boy. She has never been bothered about the child and demands his custody merely out of malafide intentions, influenced by her second husband Aakash who now perceives Armaan as a gold mine. They are aware of the properties to which Armaan is a legal heir out of which they want to satisfy their selfish demands. They have no emotional connection with the child.

3. Several provisions of Juvenile Justice (Care & Protection) Act, 2015 can be relied upon, to understand the content and meaning of the expression "the best interest of child". The said expression - employed by Courts in determining the issue of whether the child should be directed to be returned to his country of origin, or not, is legally defined in the JJ Act. The said statutory definition, it is argued, can be useful in understanding the meaning of that expression even for the present purpose. *“Best interest of the child” is a decision taken to ensure the physical, emotional, intellectual, social and moral development of juvenile or child.*¹⁰

4. Specific reliance is made on **Section 2 (9)** and **Sections 3 (iv), (v), and (xiii)** of the JJ Act. **Section 3(iv)** of the JJ Act mandates that all agencies should base their decisions in respect of a child on the primary consideration that they are in the best interest of the child, and to help the child to develop his full potential. The best interest of the child is of paramount consideration and should involve the fulfilment of his/ her basic rights and needs - socially, physically, and emotionally for the overall development of the child.

5. While the “welfare of the child” principle dominates the domestic legal framework, a comparable legal standard is found in International Human Rights Law. According to the

¹ The Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 2(c)

United Nations Convention on the Rights of the Child (CRC), *“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.”*¹¹ In a case where the child was brought up by the maternal grandparents after the death of the mother, the Andhra Pradesh High Court held that, in view of **Article 21** of the Constitution,¹² children cannot be treated as chattel and the father’s unconditional right to the custody over children and their property cannot be enforced, even if the father was not unfit to act as the guardian.¹³

6. In K.G. Vs. State of Delhi¹⁴, the Delhi High Court has held that the expression "best interest of child" is wide in its connotation. It cannot be read as being only the love and care of the primary caregiver, i.e. the mother in the case of an infant, or a child who is only a few years old. Thus, Sakshi being the real caregiver to Armaan should be appointed as his legal guardian. The Hon’ble Apex Court has elucidated the principles governing the question of child custody in the case of Gaurav Nagpal vs. Sumedha Nagpal.¹⁵

7. The general principle governing the award of custody of a minor is succinctly stated in the following words in Halsbury's Laws of England, Fourth Edition, Vol. 24, **Article 511** at page 217: *...Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration.*

8. In the American Jurisprudence, Vol. 39, Second Edition, Paragraph 148 at pages 280-281, the same principle is enunciated in the following words: *.....a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require.*

[2.1] The past acts of Sakshi as compared to those of Ambika suggest that Armaan’s best interest and welfare are secured in her custody:

¹¹ The Convention on the Rights of the Child 1989, ART 3.

¹² **Protection of life and personal liberty:** No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹³ *L. Chandran v. Venkatalakshmi* [1981] AIR AP 1.

¹⁴ [2017] SCC OnLine Del 11726.

¹⁵[2008] AIR SCW 7687.

9. The chronicles of Sakshi's responsible character in taking care of Armaan are suggestive of the fact that Armaan's best interest and welfare rest in her hands. The proposition highlights that since the initial years of Armaan's birth, Ambika has been irresponsible in taking proper care of Armaan. In August 2020 when Armaan was diagnosed with a severe case of Rickets and needed extra care on a 24/7 basis, Ambika failed to provide the same which led to arguments and fights between Siddhant and her.

10. Ambika tarnishes the concept of motherhood as she considers herself Sidhant's maid when she has to care for her child and look after her household. It is a natural consequence that after marriage a woman's life gets more centered around taking care of her family. This does not mean that her identity suffers loss.

11. Ambika has always preferred maintaining cordial relations with Aakash over her own family. And in the process, she neglected Armaan on 20 September 2022. Even though she said she would be back in two-three hours and she knew that Siddhant would be out with his friends, she stayed out with Aakash for the whole night. While trying to walk, the ricket-stricken poor Armaan, fell down from the stairs and cried in pain the whole night. And that night she became the epitome of irresponsibility when she did not respond to the frantic calls of the house-help with whom the desperate child was left alone. It has been held that in case mother of minor is in the habit of attending night clubs and coming late at home during which period the minor has to be left in some care house, there is likelihood of his coming into contact with undesirable elements due to the negligence of mother. Therefore, in the interest of child it will be proper that he is not left with his mother.¹⁶

12. On 20.11.22, Armaan was handed over to Sakshi by Ambika as it had become impossible for Ambika to balance her job and child. She preferred her career over motherhood. Soon after this, Ambika's expeditious decision to accept Aakash's offer, resign from her job in Bangalore and go to Delhi without even informing her husband strengthens the claim that all she wanted was to reunite with Aakash and was just looking for an opportunity to do away with Armaan and Siddhant.

13. On 22.12.22, while in Kolkata with Sakshi and Siddhant, Armaan was hospitalised due to food poisoning. In the meanwhile, Ambika could find no occasion to come and meet Armaan or be concerned about his wellbeing. Even when Ambika came for Siddhant's last rites she had

¹⁶ *Amit Beri v Sheetal Beri, wife of Amit Beri* [2003] AIR All 18.

no time to devote for Armaan. She left for Delhi the very next day asking Sakshi to continue to keep Armaan with her at Kolkata. Sakshi readily accepted to do the same. This shows that Sakshi enjoyed his company and did everything possible to ensure him a better life without letting him feel lonely.

14. Courts have held that in deciding custody, children should not be uprooted from their familiar surroundings just to give effect to the father's (or mother's) right to natural guardianship.¹⁷ Since Armaan had adjusted well with Sakshi it can be inferred that Sakshi was looking after him in a desired manner. The proposition portrays how Sakshi worked hard for trying to improve Armaan's health. As a result, Armaan's health showed considerable improvement. Sakshi's hard work was recognized and received appreciation from the doctors as well. This proves that she had done a commendable task. Eventually, Sakshi's efforts bore fruits and Armaan started to walk and even started going to school. This signifies that Sakshi was looking after the overall development of little Armaan. It would be traumatizing for the child if he were removed from Sakshi's custody.

15. Over the years, the non-negotiable principle on the basis of which cases of custody of children are decided is that of the 'best interest and welfare of the child' which attempts to enable each child to survive and reach his or her full potential.¹⁸ All the points regarding the comparative analysis of the conduct of both parties speak volumes about Armaan's best interest and welfare being protected by Sakshi.

[2.2] Other factors that solidify Sakshi's claim to be appointed as the legal guardian of Armaan:

16. Apart from the conduct of both the parties, various other factors are in favour of Sakshi as they support her claim to be appointed as the legal guardian of Armaan in his best interest and welfare. The Hon'ble Supreme Court has held that the controlling consideration governing the custody of the children is the welfare of the children and not the right of the parents.¹⁹

17. Financial Conditions of both the parties and evaluation of its impact on the upbringing of the child: Ambika's financial condition is not stable enough to support the child. She has no fixed source of income. She has already resigned her job at Zebra Solutions, an IT company at Bangalore to take up fresh job in Akaash's newly started venture. But, unfortunately her job at

¹⁷ *Vegetina Venkata Narasiah v. Chintalpati* [1971] AIR AP 134.

¹⁸ Juvenile Justice (Care and Protection of Children) Rules 2007, Principle 4, Rule 3

¹⁹ *Rosy Jacob v. Jacob Chakramakkal* [1973] AIR SC 2090.

the new workplace is not going well. During her visit to Kolkata in March 2023, Ambika said that Aakash's venture had not been able to gain profits. She even asked Sakshi for financial help. Sakshi gave her Rs. 50,000. Ambika also fails to cut short her expenses owing to the financial crisis. She preferred to travel to Delhi via flight when she could have taken a train. After her marriage to Aakash, Aakash's company, their only source of income, has started to suffer financial losses. On the other hand, Sakshi being a lecturer at a private college and owner of joint family property has ample financial resources to cater to the needs of Armaan. Courts have considered financial well-being a significant factor in determining the custody of a child. The Supreme Court, in a case, gave custody of the children to the mother because she was economically well off and hence, would be able to take care of the children.²⁰ In Bhagya Lakshmi v. Narayan Rao,²¹ the Madras High Court gave custody to the father, since he had the means to provide the best comfort and education to the children. On similar grounds, considering Sakshi's affluence Armaan's custody should be given to her.

18. Armaan's Intelligent preference: "If the minor is old enough to form an intelligent preference, the Court may consider that preference in appointing a guardian."²² In line with this provision, it is argued that Armaan's act of voluntarily choosing to stay with Sakshi on 12.03.2023 when Ambika attempted to take him with her to Delhi clearly shows his strong emotional connection with Sakshi. He even refuses to call Ambika his mother because he shares motherly bonds with Sakshi. Therefore, his intelligence preference must be considered and he must be allowed to stay with Sakshi. Recently, the Supreme Court of India in the case of Smriti Madan Kansagra v. Perry Kansagra²³ relied on **Section 17** of the GWA, 1890 and stated that if a minor is old enough to form an intelligent preference, then the Court may consider the preference of that minor. As per **Section 17**, the preferences and inclinations of the child are of vital importance for determining the issue of custody of the minor child. When the minor child expressed her willingness to stay with natural grandparents. The Court considered interest and welfare of minor child and directed custody of child to her maternal parents.²⁴

²⁰ *Ibid.*

²¹ [1983] AIR Mad 9.

²² The Guardians and Wards Act 1890, s 17(3)

²³ [2021] 12 SCC 289.

²⁴ MK Hari Govindan v. AR Rajaram, [2003] AIR Mad 315.

19. Will of deceased natural guardian: **Section 17(2)** of the GWA stresses that in order to decide the welfare of the minor, the wishes of a deceased parent also holds a significant position.²⁵ On 28.12.22 Siddhant expressed his wish to Sakshi, who according to him was Armaan's mother in the true sense, to always take care of Armaan, especially in his absence following which he died. Therefore, taking in consideration his wish, Armaan's custody in his best interest and welfare should be given to Sakshi.

20. Emotional Factor: Apart from the aforementioned factors, the emotional connection of Ambika with Armaan cannot be ignored in determining the custody as the unavailability of the emotional connection of Ambika for her son has been highlighted in the proposition. Instances, such as Ambika readily agreeing to separate from Armaan without hesitation, reveal a notable emotional disconnection. This is evident in the lack of communication, phone calls, or visits when Armaan was away. Ambika showed minimal concern for Armaan's well-being, neither sending gifts nor providing financial support to Sakshi for his upbringing, emphasizing a significant emotional gap between them.

21. Constant Arguments: Ambika's frequent arguments, evident in clashes with Siddhant and Aakash, signify her argumentative nature. These conflicts create an unfavourable environment for Armaan's emotional well-being. In contrast, living with Sakshi offers a peaceful atmosphere, highlighting the potential psychological imbalance Armaan may face if placed under Ambika's care.

22. Malafide intentions: It is further submitted that Aakash and Ambika desire the custody of the person and property of Armaan because they find in him an opportunity to satisfy their selfish demands. It has already been explained how there is an inherent lack of emotional connection between Armaan and Ambika. After their company started to suffer financially, Aakash became furious and insisted Ambika to get Armaan back. This demonstrates that they have become greedy for the properties to which Armaan is a legal heir and demand his custody solely out of selfish motives.

23. The claim for custody of a child by any person should be for bona fide reasons, i.e., out of genuine love and affection for a healthy upbringing of the child in a congenial atmosphere.

²⁵ *In considering what will be for the welfare of the minor, the Court shall have regard to 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.*

It should not be for ulterior purposes, care and affection. The only consideration of the Court should be the welfare of the child.²⁶

24. In **sub-section (1) of section 13** of HMGA it is provided that Welfare of minor is of paramount consideration. — *(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.*

Also, the Supreme Court has held that the Welfare of the minor child is of paramount consideration in the appointment of a guardian. The term guardian has to be taken in its widest possible sense. It has to be measured not only in terms of money and physical comfort but also should include the moral and ethical welfare of the child. The welfare of the child depends on the facts and circumstances of each particular case.²⁷ Hence, Sakshi who fulfils all the aforementioned necessities should be appointed as the legal guardian of Armaan.

25. It has been held in the case of Mohini v. Virendra by the Hon'ble Supreme Court that though the natural guardians are enumerated in **section 6** of the HMGA the right is not absolute and the court has to give paramount consideration to the welfare of the minor.²⁸ According to Hindu Law, father is the natural guardian of a minor and in the next place mother is the natural guardian and mother too can be deprived of the guardianship if it can be shown that she is unfit to act as guardian.²⁹ Various factors are taken into account by a court while granting custody of a minor - such as, the degree of the child's mental development, the age of the child, the child's wishes, the environment, circumstances and atmosphere in which he or she had been living and the credibility of a person who is to be appointed, and whether such person would be able to properly look after the upbringing of the child. The facts and circumstances in granting custody differ from case to case and in such sensitive matters no hard and fast rule can be laid down to settle the right to custody. *Parens patriae* jurisdiction postulates formulation of opinion by a court hearing a child custody matter based on an analysis of the overall circumstances as the safest way for determining the question as to whom the custody of the minor child be entrusted till, he or she attains the age of majority or till such time that circumstances may require alteration in the orders of custody passed by a court.³⁰

²⁶ Dolku Nihal Singh v. Nihal Singh Karnail Singh [1992] AIR HP 3; See also Thrity Hoshie Dolikuka v. Hoshiam Dolikuka [1982] AIR SC 1276.

²⁷ Bimla Devi v. Subhash Chandra Yadav [1992] AIR Pat 76, see also Elizabeth Dinshaw v Arvand M Dinshaw [1987] SC 3.

²⁸ Mohini v. Virendra [1977] AIR SC 1359.

²⁹ Nirmal Jain v. The State [1983] AIR Del 120.

³⁰ Rosy Jacob v. Jacob A Chakramakkal [1973] 1 SCC 840.

[3] WHETHER REMARRIAGE OF AMBIKA AMOUNT TO THE TERMINATION OF GUARDIANSHIP OVER HER SON AND HER SHARE IN PROPERTY?

1. It is humbly submitted before the Hon'ble Court that the remarriage of Ambika with Akaash amounts to the termination of guardianship over her son and her share in property.

[3.1] The remarriage of Ambika amounts to termination of guardianship over her son.

2. It is humbly submitted that the remarriage of a parent does not amount to termination of the guardianship over the child as long as it is in the welfare of the child. According to **Section 6** of HMGA, 1956 in case of a boy, mother is a natural guardian after father, following which there is a proviso that custody of a minor, who has not completed age of 5 years shall ordinarily be with the mother. Therefore, after death of father, mother is the next person to have guardianship/custody of minor children but **Section 13** of HMGA, 1956 provides that apart from right of mother or grandparents or anybody else to have custody/ guardianship of child, paramount consideration at the time of deciding the entitlement for custody of minor child is welfare of the minor. **Section 7** of the GWA, 1890 provides that Court, on satisfaction that it is for welfare of a minor, allows the Court to appoint a guardian for a minor's person or property, or declare a person as a guardian.

[3.1.1] Remarriage of Ambika is not in welfare of Armaan:

3. **Section 17** of the Act³¹ talks about the matters to be considered by the Court in appointing guardian which includes the welfare of the minor. In Elizabeth Dinshaw v. Arvand M. Dinshaw³², the Court has emphasized that in cases involving minor child custody, the child's best interests and welfare should be prioritized over the legal rights of the parties involved. It is submitted before this Hon'ble court that Ambika, an emotionally absent mother, showed no interest in contacting Armaan or inquiring about his well-being while she was in Delhi. Armaan never felt valued as Ambika's child. Ambika, despite Akaash's death, failed to console Armaan during his illness³³, displaying a cold hearted and barbaric character. It is submitted that Ambika had lost her husband, Siddhant. Typically, widows experience longing, despair, physical and emotional pain due to lifelong separation from their companion. However,

³¹ The Guardians & Wards Act 1890, s 17

³² [1987] AIR SC 3.

³³ Moot Proposition Para 16

Ambika was insensitive towards Siddhant, even when he was alive. She left for Delhi without informing him, leading to his overdrunk state and death. After his death, Ambika showed no sympathy, as if she was not in pain. Ambika's job was more important to her than her husband's and child's well-being. It is submitted in this court that Armaan is staying with Sakshi for almost two years. It is imperative to acknowledge that the respondent has provided appropriate care and attention in raising the child, which is a crucial component to be taken into account for the child's wellbeing. Since Armaan has been with the respondent since he was three years old, the two have developed a close emotional attachment, and because the respondent is a woman, she is able to empathize with the needs of the child. The fact that the respondent holds ancestral estates in her name and works as a lecturer at a private college implies that she is also financially stable.

4. It is humbly submitted that in the judgments of Punjab and Haryana High Court in Neelam vs. Man Singh and another³⁴, and Madhya Pradesh High Court in Priya vs. State of M.P.³⁵, it has been contended that the welfare of minor children is the primary consideration when determining custody rights. In present case, keeping in view the negligence of Ambika and her financial condition, it is deemed in the Armaan's best interest to keep them with Sakshi, rather than handing over his custody to Ambika. The case of Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari³⁶ also emphasized the importance of ethical values contributing to the welfare of child.

[3.1.2] Challenges faced by children in stepfamilies:

5. The portrayal of step-parents as villains who mistreat children has been echoed in literature by famous authors such as **Shakespeare and Dickens**. Stepfamilies face unique challenges compared to biological families. These challenges can create a more stressful living environment, increasing the risk of child maltreatment. Some step-parents may not feel as connected to their partner's children as they do to their own, leading to weaker emotional bonds while some stepparents exhibit **higher rates of negative behaviours** (such as abuse) toward stepchildren. They also display **fewer positive behaviours** toward stepchildren as compared to biological parents. For instance, they invest less in education, play less with stepchildren,

³⁴ [2014] RCR (Civil) 291.

³⁵ [2006] AIR SCC 263.

³⁶ [2019] AIR SC 2318.

and take them to the doctor less frequently.³⁷ In *Besant v. Narayaniah*³⁸, the court ruled that a father's second marriage may not deprive him of custody of his minor child but the court considered all circumstances and emphasized that a step mother may not be interested in the welfare of a minor step-son, nor likely to give him the attention, love and sympathy which the child naturally requires. So, the court prioritized the welfare of the minor, not the father or mother and denied him the custody of the child.

[3.1.3] Cinderella effect:

6. Psychologists Martin Daly and Margo Wilson introduced the term “Cinderella effect” to describe the phenomenon where stepchildren are more likely to experience neglect from their step-parents³⁹. It arises from **parental investment theory** and **inclusive fitness**. Studies from **Canada, Great Britain, and the United States** consistently show that stepchildren face **elevated risks of child maltreatment**, including lethal beatings.⁴⁰

[3.1.4] Theoretical perspectives on violence against children by stepparents:

7. The normative theory suggests stepfathers, as non-genetic relatives, face weaker incest taboos than genetic fathers, leading to increased sexual exploitation of stepchildren.⁴¹ Another theory, known as the stress theory, holds that stepfamilies face higher conflict and stress due to divorce, economic strain, and loss of parental support, potentially leading to family violence or substance abuse.⁴²

[3.1.5] Empirical research findings on child abuse in stepfamilies:

8. Children living with unrelated adults may be at an increased risk of physical abuse compared with children living with biological parents. This association has been supported by many empirical investigations. For example, in Creighton's (1985) epidemiological study of abused children and their families in the United Kingdom between 1977 and 1982, father

³⁷ Crawford and others, *'Foundations of evolutionary psychology'* (Taylor & Francis Group 2008)

³⁸ [1915] AIR MADRAS 157.

³⁹ Lidija Misić, 'Tackling the issues of violence against children by their step-parents' (*Humanium*, 2 May 2023) <<https://www.humanium.org/en/tackling-the-issues-of-violence-against-children-by-their-step-parents/>> accessed 29 February 2024

⁴⁰ Daly and others, *'An assessment of some proposed exceptions to the phenomenon of nepotistic discrimination against stepchildren'* (Finnish Zoological and Botanical Publishing Board 2001) Para 3

⁴¹ Agata Debowska and others, *'Violence against children by stepparents'* (SAGE 2020) page 5

⁴² Adler-Baeder and other, 'What do we know about the physical abuse of stepchildren?' (2006) 44 *Journal of divorce and remarriage* <https://www.tandfonline.com/doi/abs/10.1300/J087v44n03_05> accessed 28 February 2024

substitutes were significantly more likely to physically abuse children than genetic fathers⁴³. Additionally, males were responsible for 92% of all step parental child killings.⁴⁴ Gil (1970), in his seminal study of reported cases of abuse, demonstrated that 13.6% of all abuse perpetrators were stepparents, with stepfathers being particularly prone to abuse their stepchildren.⁴⁵ In some cases, however, the abuse was primarily perpetrated by biological mothers, rather than stepfathers. This is supported by the fact that mothers painting an overly positive picture of their new partners and disbelieving true claims of abuse against stepfathers made by their own children.⁴⁶

9. In India, this problem is particularly concerning, with **one in every two children** experiencing sexual abuse before turning 18, often at the hands of family members or individuals known to them⁴⁷. Alarming statistics show that stepchildren are 40 times more likely to be sexually or physically abused than those living with biological parents⁴⁸. This may indicate that men or women do not want to invest resources and time in children to whom they did not give birth. Thus, it is argued that given Akash's conduct⁴⁹ and the fact that Ambika is already expecting her second child with him, Armaan is in danger of being ignored because the pair would be spending a lot of time with their baby who has not been born yet. It is also submitted that it is the right of a child under **Article 21** of the Indian Constitution⁵⁰ to develop his personality and intelligence. And it is achievable only in a favourable environment, which will be unattainable if Armaan lives with Ambika.

[3.2] AMBIKA IS NOT ENTITLED TO HER SHARE IN THE PROPERTY:

3.2.1] Right of Ambika in Siddhant's property cease on her remarriage:

⁴³ Agata Debowska and others, 'Violence against children by stepparents' (SAGE 2020) page 10

⁴⁴ Agata Debowska and others, 'Violence against children by stepparents' (SAGE 2020) page 17

⁴⁵ Agata Debowska and others, 'Violence against children by stepparents' (SAGE 2020) page 9

⁴⁶ Agata Debowska and others, 'Violence against children by stepparents' (SAGE 2020) page 12

⁴⁷ Megha Chaturvedi, 'Child Sexual Abuse in India: Alarming statistics, lifelong impact, how to heal' (*India today*, 4 August 2023) <<https://www.indiatoday.in/education-today/featureophilia/story/child-sexual-abuse-in-india-alarming-statistics-lifelong-impact-how-to-heal-2416285-2023-08-04>> accessed 28 February 2024

⁴⁸ Lidija Mistic, 'Tackling the issues of violence against children by their step-parents' (*Humanium*, 2 May 2023) <<https://www.humanium.org/en/tackling-the-issues-of-violence-against-children-by-their-step-parents/>> accessed 29 February 2024

⁴⁹ Moot Proposition Para 21 & 23

⁵⁰ ***Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.***

10. The HWR, Act 1856 deals with rights of widow in deceased husband's property to cease on her marriage.⁵¹ However, in **1983**, the **Hindu Widows Remarriage Repeal Act** came into effect, repealing the original act. In 1989, **HWRP Act** was enacted which mentions: *Rights of widow in deceased husband's property to cease on her re-marriage.— All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she then died ; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same : Provided always that, if in any caste, of Hindus, widow remarriage was permitted prior to the passing of this Act and a widow was not thereby deprived of rights mentioned in this section, its provision shall not operate to deprive her of such rights.*⁵²

11. It is humbly submitted that Ambika, who remarried Akaash in June 2023⁵³, is no longer a widow and, as per **section 4** of the Hindu Widow Remarriage and Property Act 1989, cannot claim any right in the ancestral property from Siddhant.

[3.2.2] Ambika's right ceases as her remarriage with Akaash appears legally valid:

12. After the death of Siddhant, Ambika remarried to Akaash and her marriage was legally recognized under **Section 3** of THE HWRP ACT, 1989. The Chhattisgarh High Court in Loknath v Shribachahh Kumar Bhoi & Ors⁵⁴ has clarified that a woman's right over her deceased husband's property **ceases** if her remarriage is strictly proven as per the law. According to **Section 6** of the Hindu Widows' Remarriage Act, 1856, all the formalities for marriage must be established when remarriage is claimed as a defense. The effect of valid remarriage is that the widow loses her right to the property inherited from her previous husband. It is humbly submitted before the Hon'ble court that Ambika having remarried as stated in paragraph 22 of the proposition loses all claims in Siddhant's property in accordance with **section 4** of the HWRP Act, 1989.

⁵¹ Hindu Widow Remarriage Act 1856, s 2

⁵² The Hindu Widow Remarriage and Property Act 1989, s 4

⁵³ Moot Proposition Para 22

⁵⁴ [Second Appeal No. 356 of 2001].

[3.2.3] Validity of a marriage not contingent upon the public nature of the wedding ceremony:

13. It is humbly submitted before this court that Ambika had married Akaash in a private wedding.⁵⁵ A private wedding, conducted in adherence to the legal requisites, can still be recognized as a valid marriage in India. The HMA, 1955, which governs Hindu marriages, does not specify any particular requirement regarding the public nature of the wedding ceremony. It primarily focuses on essential elements such as age, consent, mental capacity, and the presence of witnesses. As long as these requirements are fulfilled and the marriage is solemnized according to the provisions of the Act, the marriage should be deemed valid, irrespective of whether it was a private or public affair. And it can be inferred from the proposition that that Akaash and Ambika's marriage was not hindered in any way. In the case of Ravi Kant Sharma v. State of U.P. (2007)⁵⁶, the Supreme Court of India observed that the essential requirement for a valid marriage is the fulfilment of the conditions prescribed by personal laws. The court further emphasized that the privacy or public nature of the ceremony is not a decisive factor in determining the validity of the marriage. In another case, Hardev Singh v. State of Punjab (2014)⁵⁷, the Punjab and Haryana High Court held that the presence of a public audience or the performance of religious ceremonies in the presence of a large gathering is not a mandatory requirement for the validity of a marriage under the Hindu Marriage Act.

[3.2.4] The castes of Ambika and Siddhant are unstated:

14. It is submitted that **Section 4** of the HWRP Act, 1989 has a proviso which says, *Provided always that, if in any caste, of Hindus, widow re- marriage was permitted prior to the passing of this Act and a widow was not thereby deprived of rights mentioned in this section, its provision shall not operate to deprive her of such rights.*⁵⁸ But in the present case, the castes of the parties have not been mentioned anywhere in the proposition. Thus, it cannot be presumed that Ambika belongs to a caste by virtue of which she gets the benefit of the proviso. Hence, she is not entitled to any claims in the property that belonged to Siddhant.

⁵⁵ Moot Proposition Para 22

⁵⁶ [2007] AIR SC 1135.

⁵⁷[2014] RCR (Criminal) 578.

⁵⁸ The Hindu Widow's Remarriage and Property Act 1989, s 4

8. PRAYER

WHEREFORE it is prayed, in the light of the issues raised, arguments advanced and authorities cited, it is most humbly submitted that this Hon'ble Family Court of Kolkata may be pleased to adjudge, hold and declare that:

1. The present petition is not maintainable in the Family Court of Kolkata.
2. The legal guardian of the person and property of Armaan in his best interest and welfare is Sakshi.
3. Ambika having remarried loses all claims in the ancestral property of Armaan.
4. The interim custody of Armaan be given to Sakshi.
5. The cost that Sakshi has spent in defending the case be paid to her by Ambika.

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. For this act of kindness, the respondent shall duty bound forever pray.

All of which is humbly prayed,

Date: ___06.03.2024___

Sd/-

TC-14R

Counsel for Respondent