

LEGALFOXES LAW TIMES

BEST INTEREST THEORY OF CHILD: APPLICATION AND PROBLEMS IN INDIA

BACKGROUND

The events occurring in childhood leave an undeniable imprint and have a lasting effect upon an individual's life. In cases of divorce and other family breakdowns, the child rather than the parties involved themselves, is the worst affected by the proceedings. Thus, in matters of custody, visitation, maintenance or any other matter relating to the change in the familial circumstances of the child, court proceedings are now centred around the "Best interest and welfare of child principle" which aims at resolving family disputes relating to the child by taking into consideration where the best interest of the child lies.

MEANING AND CONCEPT

The concept of the best interests of child, as stated in Article 3.1 of the United Nations Convention on the Rights of the Child, has caused many controversies and debates amongst policy makers, experts and practitioners. Although central to a child's full enjoyment of his or her rights, the meaning of the concept in practice and how it should be interpreted and applied, is still part of today's debate.

Originally as per the doctrine of common law, the father was considered the only guardian of the child and no authority or right of the mother over the child was recognized as women at the time did not have any independent legal status and were viewed as the property of their husbands. In addition to this, the father was given paternal preference as it was believed that he was capable of raising the children properly. With the introduction of divorce in law and the resulting independent status granted to women, courts were compelled to take into consideration the authority and right of the mother over the child as well. In 1839, the British parliament modified the existing judicial paternal preference in granting custody by the 'tender years doctrine', which holds that children under seven years of age should not be separated from their mothers on the premise that mothers are very important for younger children due to the special natural bond existing between them and due to the fact that young

children are often looked after by their mothers.¹ This was reflected in the Custody of Infants Act, 1839 which allowed a mother to claim custody over minor children. In addition to this, in a number of judicial decisions including Falkland v. Bertie in 1696², Eyre v. Shaftsbury in 1722³, and Shaftsbury v. Shaftsbury in 1725⁴, the courts claimed the *parens patriae* jurisdiction which superseded the natural guardianship of the father over the child. It was accepted that the courts had a right to interfere on behalf of children and award custody directed towards fulfilling the best interests of the child. The Guardianship of Infants Act, 1886, granted a mother equal rights over matters including custody of and access to the child. The Guardianship of Infants Act recognized the claims of the mother and the father in a custody dispute as equal and provided that "welfare of the infant shall be the first and paramount consideration"⁵. "Lastly, the Guardianship of Minors Act, 1973, provided equal rights to the mother with respect to the rights granted by the common law to the father and the mother was allowed to exercise these rights without the concurrence of the father."⁶

BEST INTEREST THEORY AND INDIAN LAW

In India, the Guardians and Wards Act was enacted in 1890 by the British empire under colonial rule, which continued the trend of the supremacy of the paternal right in guardianship and custody of children. The Hindu Minority and Guardianship Act, 1956, enacted by the independent Indian state provides that for the best interest principle- the principle that the welfare of the minor shall be the paramount consideration superseding all other factors.

The prevailing law on this subject in the international law sphere, to which India is subject to is the United Nations Convention on the Rights of the Child (CRC), 1989, Article 3 of which states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts

¹ Lenore J. Weitzman (1987), *The Divorce Revolution : The Unexpected Social and Economic Consequences for Women* (The Free Press: Macmillan Publishing Group), p. 219

² 23 Eng. Rep. 814 (Ch. 1696)

³ 24 Eng. Rep. 659 (Ch. 1722)

⁴ 25 Eng. Rep. 121 (Ch. 1725)

⁵ The Guardianship of Infants Act, 1925.

⁶<http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody>

of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁷

ANALYSIS

A significant analysis of the convention is that according to the Convention, the best interests of the child are given an essential thought and not the vital thought. Also, the provisions of the convention are uncertain and theoretical in nature. This uncertain nature is a characteristic consequence of an absence of agreement among nations with respect to esteems hidden its application yet additionally the absence of lucidity about what precisely are the best interests of a child.

Another issue with the principle is that in cases including child mishandle and some type of neglect, the state accept the *parens patriae*⁸ job and the child is generally expelled from such careless or harsh guardianship. There is no determinate standard of misuse or neglect required for the child to be expelled from his/her guardian or parent. Choices in such cases are made including the appointed authority's abstract individual qualities and convictions. There is no arrangement of survey for these choices that include an uncertain emotional standard and consequently it is hard to address any blunders in judgment and to keep them from happening in ensuing cases. Regardless of whether such survey instruments are depended on, the arduous suit and postponements unfavourably influence the child or make the child security capacity of the CWC⁹ repetitive by and by.

Perceiving the best interest principle as the determinant of the care of the child intrinsically implies that the two parents of the child must be on an equivalent balance and that the law can't be unjustifiably one-sided toward either parent. This paper looks to inspect the utilization of the best interest principle in Indian family debates and furthermore analyze through different case laws including the use of this principle whether there still stays any inclination towards any of the parents in issues identifying with the child in Indian family courts."

⁷Article 3 of the United Nations Convention on the Rights of the Child, 1989

⁸Dwarka Nath v. ITO AIR 1966 SC 81(vide paragraph 4) Supreme Court

⁹Ministry of Women and Child Welfare, Handbook on JJ Act, Juvenile Justice Monitoring Committee, 2015, pg. no.

CONCEPT OF BEST INTEREST THEORY OF CHILD IN DETAIL

Complete child assurance structures are expected to hinder and respond suitably to child misuse, negligence, abuse, and savagery. In India, the Juvenile Justice (Care and Protection of Children) Act¹⁰, 2000 (JJ Act) charges Child Welfare Committees (CWC) in every territory (authoritative division) with the commitment of ensuring the recuperation and insurance of "children requiring care and assurance." State governments name a five-section CWC for every locale that limits as a semi legal body. The law requires such advisory groups to choose their decisions in the "best interest of children."

Thoroughly, a child requiring care and insurance is any person under age 18 who has been or is presumably going to be ignored, manhandled or surrendered by the guardians or guardians. Normally, CWCs are overpowered with cases of deserted, poverty stricken, manhandled children, secured child laborers, children whose guardians are hanging on by a thread and that's just the beginning. Any individual can make such a child before the concerned CWC or the child may herself appear before the CWC. The CWC picks the fate of the child until she turns 18 years.

CWC decisions depend on a "best interests" affirmation, as commanded by the JJ Act. Article 3.1 of the United Nations Convention on the Rights of the Child¹¹ requires "the best interests of the child" to be the "fundamental idea" "in all activities concerning children, whether or not grasped by open or private social welfare establishments, official courtrooms, managerial pros or administrative bodies."

INVESTIGATING THE "BEST INTERESTS" PRINCIPLE

The best interests' principle in the Convention was not previously cloud to child rights law. Varieties of the Convention's best interests principle are contained in other general instruments. In all honesty, the principle as exemplified in Article 3.1¹² of the Convention is generally progressively debilitated in structure stood out from its past definitions. In the Convention, the best interests of the child are basically a basic idea and not the chief idea in exercises including children. Now and again, regardless, the Convention communicates that best interests must be the choosing variable—particularly where

¹⁰Act No. 2 of 2016

¹¹Office of Legal Affairs, UN, Convention on Rights of Child, volume 3.2

¹²Convention on Rights of Child, Freedom of Expression: The child has the right to obtain and make known information, and to express his or her own views, unless this would violate the rights of others, volume 3.2

children are gotten, or disengaged from guardians without needing to. Regardless, the Convention is an improvement over various definitions since it manufactures the augmentation for applying the principle — it is pertinent in "all exercises concerning children." In the Indian setting, for example, the CWC exercises would on a very basic level must be according to the best interests of the child.

The Principle as esteemed in Article 3.1 of Convention doesn't perceive the key parts that depict it. The travaux préparatoires of the Convention show that the substance of this principle was not discussed. The essential investigation levelled against it is that it is dubious and hypothetical in nature. Its dubious nature is a trademark aftereffect of not only a nonappearance of understanding among countries regarding its essential application yet moreover the weakness to make definite assumptions regarding what may energize the best interests of a child. Regardless, relationship, for instance, the United Nations Children's Fund¹³ (UNICEF) have seen that the principle isn't suggested as an omnibus plan whose interpretation or use can best or annul particular rights guaranteed by various articles of the Convention; it expect "explicit giganticness" exactly where other logically express game plans of the Convention don't have any kind of effect.

Another issue with the principle is with its usage in occasions of child misuse and negligence, where the state plays out its parens patriae occupation and attempts to remove the child from the authority of their guardian. In such cases, a best interest confirmation being case express and individualistic, makes state mediation into family progressively unusual. Moreover, where a questionable standard is used, the decision to make sure about the child is looked at by evaluating parental or guardian mindsets and feelings against the selected position's individual characteristics and feelings. Absence of convincing review segments in such cases leaves practically no augmentation for fixing any stumbles or preventing them in resulting cases. Whether or not such study instruments are gone to, the extended suit and deferments unfairly impact the child or make the child insurance limit of the CWC tedious before long.

THE RIGHT OF BEING HEARD IN THE CHILD'S BEST INTERESTS

The Committee on the Rights of the Child, blamed for checking use of and giving authoritative comprehension of the Convention, has rehashed that the best interests principle is interlinked to the

¹³ Brill/ Nijhoff, Children, Autonomy and the Court, 2016, pg. no. 50/467

following three articles raised to the status of general principles¹⁴ under the Convention—articles 2, 6, and 12. Article 12 courses of action with child speculation. Hereafter all of these articles must be deciphered considering each other. In its report of wrapping up observations to Lesotho, a particularly basic recognition was made by the Committee while assessing Lesotho's execution of the best interests principle. The Committee saw that the child's qualification to be heard is noteworthy in ensuring that their "best interests" are served, in this way drawing an association between the "best interests" of the child and the child's privilege to aid, guaranteed under Article 12 of the Convention. Where the decision is as for the unit of the child from their parents, each interested assembling should be permitted an opportunity to look into the techniques and make their viewpoints known. Thusly there is no vulnerability that a child should be heard during a legal proceeding, particularly a legitimate proceeding, for instance, a security hearing organized for choosing the child's best interest.

However, there are various questions that stay unanswered. Who should address a child's best interests in a given legal proceeding? Does the child's qualification to be heard essentially a procedural right or a substantive right? Furthermore, can the child be addressed by their guardian¹⁵, or should the child be addressed self-sufficiently?

Child's interest¹⁶ in investment as directed by Article 12 of the Convention requires state parties "to ensure to the child who is prepared for moulding their own viewpoints the choice to impart those points of view uninhibitedly in all issues affecting the child, the points of view on the child being given due weight according to the age and improvement of the child."

Further, after its multiday general discussion on "the benefit of the child to be heard," the Committee grasped a great deal of proposition. In these recommendations, the Committee settled that the benefit of interest is a general principle similarly as a "substantive right." This benefit of speculation changes children's status from minor inactive subjects getting assurance to dynamic rights holders – the Committee articulations this benefit of help the "picture for their [children's] affirmation as rights holders," and checking out children's points of view can't be "tokenistic."

¹⁴ Article: Four principles of the Convention on the Rights of the Child, Four principles that together form a new attitude toward children, UNICEF <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child> Last visited on 7 March, 2020

¹⁵ Joseph Goldstein, The best interests of the Child, Volume 3, page no. 54

¹⁶ Daniel J. Siegel, The whole brain child, pp. no. 32

BENCHMARKS FROM INDIAN CASES

Best interests of the child has been inspected with respect to guardianship inquiries between parents. Since there is yet a case that necessities to analyse best interests of the child viz-a-viz care by parents and authority by the state under the JJ Demonstration, these decisions may be extrapolated and examined with respect to the child assurance components of Child Welfare Committees in India¹⁷.

The Supreme Court starting late held that in choosing the government help of the child, "The subject of government help of the minor child has again to be considered far out of the huge real factors and conditions. Each case must be chosen its own real factors and other finished up cases can scarcely fill in as limiting perspectives to the degree that the evident pieces of the case are worried." Along these lines each case should be picked according to its own advantages depending upon the genuine elements put before the child government help advisory groups. An equivalent may be drawn between the child insurance locale of child government help advisory groups and habeas corpus¹⁸ purview of the state. In Kamla Devi v. Himachal Pradesh¹⁹, the High Court held that "It is settled that in giving the writ of Habeas Corpus by virtue of new-conceived children the ward which the Court rehearses is an inherent locale as undeniable from a statutory purview gave by a particular game plan in any unprecedented goals. In a manner of speaking, crafted by the writ of Habeas Corpus in child authority cases isn't as per, anyway liberated from, rule. The purview rehearsed by the Court rests in such cases on its inherent impartial powers and applies the intensity of the State, as parens patriae, for the insurance of its in fact ward, and the very nature and degree of the solicitation and the result attempted to be developed require the movement of the locale of a court of significant worth. The basic object of a habeas corpus bid, as applied to new-conceived children, is to choose in whose guardianship the best interests of the child will probably be advanced. In a Habeas Corpus proceeding brought by one parent against the other for the authority of their child, the Court has before it the subject of the rights of the get-togethers as among themselves, and moreover has before it, at whatever point presented by the pleadings and the evidence, the subject of the interest which the State, as Parens Patriae, has in propelling the best interests of the child."

¹⁷ Organisation Structure, SBT, Megan Shattuck, Chair, Committee on Rights of Child, 2014

¹⁸ Rasul v. Bush- 542 U.S. 466 (2004)

¹⁹AIR 1987 HP 34

In Carla Gannon and anr. v. ShabazFarukhAllarakhia and anr.²⁰, the Bombay High Court was hearing a habeas corpus claim recorded by the mother to convey the child taken by the father. The court alluding to American Law expressed, "... The Court in passing on the writ in a child care case, deals with a matter of a reasonable sort, it isn't bound by any irrelevant genuine right of parent or guardian, yet is to give their case to the care of the child due weight as a case set up on human impulse and generally unbiased and just...in short the child's government help is the Supreme idea, autonomous of the rights and wrongs of its battling parents, regardless of the way that the normal rights of the parents are equipped for thought."

Drawing from this, one can say that parents are equipped to have their rights presented during child insurance hearings and that these should be self-sufficiently considered while surveying what is to the best favorable position of the child. In any case, while these are determined in, the best interests of the child should be the "Supreme idea."

In PunnakkattuHidayathulla v. CherussolaSoudath²¹, the Kerala High Court offered weightage on account of "upsetting the care of the child was in the best interests" of the child. Herein, the parents were separated and the female child was living with her mother. The father had recorded a solicitation searching for guardianship of the child considering the way that he would be shrewd to pay and had the alternative to give a better life to the child. The Court declined to recognize the father's dispute and held guardianship of the child with the mother. The two principle considerations on which the decision turned was a) on account of upsetting guardianship of the child was in the interests of the child and b) that an infant should be given basic care of the mother. The father was given appearance rights. The principle to be drawn from this case, for instance, is on account of ousting the child from its present conditions and setting the child in the children's home is the child's best interest rather than if the child continues abiding with its parents.

In Nil Ratan Kundu v. Abhijit Kundu²², the Supreme Court, in picking an authority question, alluded to a huge assembly of English decisions. In Re Mc Grath²³, it was held that "the government help of the child isn't to be assessed with money just nor just physical comfort. The word government help must be taken in its most broad sense...Nor can the tie of adoration be expelled." Without overstating the criticalness

²⁰Carla Gannon &Anr vs ShabazFarukhAllarakhia&Anr on 10 July, 2009

²¹LAWs(KER)-2009-10-134

²²F.M.A.T. No. 3185 of 2006 on December 7, 2007

²³ 1893 (1) Ch 143

of the "tie of affection," the makers should emphasize that the benefit of the child to parental contact is a huge one and that should be determined into dynamic about the best interests of the child.

The Supreme Court reaffirmed the Himachal Pradesh High Court's choice that while choosing the best interests of the child, "child's typical comfort, fulfillment, academic, great and physical improvement, his prosperity, guidance and general upkeep and the extraordinary condition" should be considered.

THE RIGHT TO BE HEARD: INDIAN LAW CONTEXT

In picking custody discussions or habeas corpus petitions concerning children, courts in India, including the Supreme Court have again and again held that the points of view of the child should be given weightage. By and by, the degree and method wherein children are allowed to partake in security hearings vacillate exceptionally depending up upon the individual CWC part. The request, regardless, is dynamically essential – whether or not the substantive right of child participation guaranteed under worldwide law can be invoked under Indian residential law. The JJ Act hushes up on how a child should be addressed before the CWC and whether this is a right, yet the JJ Rules acknowledge the benefit to interest in its preface, and further keep up the principle of child collaboration. Principle III of Rule 3 expresses that "Every child's qualification to impart his points of view uninhibitedly in all issues affecting his interest will be totally respected through each period of the methodology of juvenile justice."²⁴ The technique of juvenile justice, anyway not described, would consolidate child assurance hearings before the CWC. Such right consolidates "creation of developmentally appropriate instruments and strategies of collaborating with the child, propelling children's dynamic relationship in decisions concerning their own lives and offering opportunities to discussion and conversation." explicitly, the rules establish that juveniles in difficulty with the law save a choice to a guardian promotion item during the techniques.

Starting late, in a fantastic triumph for child rights' parties in a long and hard lawful battle in the Jain Sadhvi case²⁵, the Bombay High Court by suggestion kept up the child's privilege to unreservedly convey her viewpoints in proceeding before the Child Welfare Committees²⁶. The specialists for the circumstance, the guardians of a youngster child who had permitted the Jain society to begin her into

²⁴Jessica Pearson and Paul Munson, The Child's Best Interest Principle: Theory and Practice, Volume 22 Number 1/ June 1984, pp. 84

²⁵ R. Kochhar, 2001 (1) MhLJ 572

²⁶Child Welfare Committee, ICPS Structure, Statutory Bodies, 2016

the group at age eight, had tried in 2004, the need to convey the child cleric before the CWC. In 2008, the Bombay High Court ruled:

In spite of the way that the court bewildered the issues of right of help and the weight to be given to such points of view, it by suggestion kept up the benefit of the child to convey her viewpoints self-rulingly under the attentive gaze of the Court, and not be addressed by her parents or guardians. The Court opined that by all appearances it gave the possibility that a child at age eight "can't appreciate" the consequence of disavowing the world (that is getting commonly dead, not having the choice to marry or have or guarantee property, and so forth), anyway held that it was the commitment of the court to find "whether the child was in a circumstance to understand the results of such a decision," and from this time forward set up an advisory group to deliver the child to decide her points of view. Right now Court abstained from using a stringent least age for child bolster criteria subject to a conventional or man driven point of view on children's ability to convey their viewpoints. Or maybe the Court kept up the benefit of the child to at any rate independently check out the methods and address her viewpoints to the CWC.

Simply finding a child's privilege to help doesn't help make an understanding of all-inclusive law into household legitimate practice. Various concerns remain. These stresses are best spoken to verbosely. As referred earlier, while it is fair that various CWCs grant free depiction (sometimes by legitimate counselors) now and again, the reality remains that the CWC approach to manage such depiction remains unregulated, uniquely named, and guided by factors, for instance, its impression of "the multifaceted design of the case" and "whether the CWC people need lawful advice." One CWC part for example felt that "there was no prerequisite for lawful depiction in endeavored and attempted cases."

METHODS OF REPRESENTATION

As stated beforehand, the Committee on the Rights of the Child has expressed that if there ought to be an event of children in their childhood, they should be uninhibitedly addressed. Inside the present child assurance instrument including CWCs and related bodies, it is vague who addresses the interests of the child before the CWC. As a rule, nongovernmental affiliations or social masters who rescue a child, present the child before the CWC and battle to support the child. In any case, here again, the wants of the child and the wants of the non-governmental affiliation are not treated as discrete classes.

Further, a couple of elements impact the way wherein a child can take an interest – arrangement of a good circumstance to coordinate a child-pleasing air; case-store of CWC people and time available to accommodate the child and other concerned gatherings for each case.

Further, there are some lawful deterrents to the quick and free lawful speculation of the child before the CWC – Indian law really requires that the child be addressed through a guardian in lawful methods. It is basic to join a greater conversation to ensure that such procedural hindrances are pulled back in child security hearings.

DISADVANTAGES OF THE PROCESSES AND REFORMS BROUGHT THEREAFTER

1. Absence of coordination with various laws and welfare programs

The biggest impediment of the current CWC structures is discontinuity of parent-child contact even in circumstances where there is no apparent maltreatment or dismiss or a brief threat to the child's life. Additionally, the CWC system in realities achieves a moving back of children's rights instead of a brief up-scaling of rights. For example, where children were being educated before setting off to the Children's House, being systematized realized suspended guidance, a grave issue since once a child is ousted from school, readmission and continuing with preparing become an intense endeavor for parents from a lower money related establishment.

At an operational level, consolidation of administrations that can improve the individual fulfillment for parents and children is fundamental to the flourishing of the child. It is interesting to observe that one of the principles involved in the UN Declaration on Social and Legal Principles²⁷ relating to the Protection and Welfare of Children, with uncommon reference to Foster Arrangement and Reception Broadly and Universally²⁸, states that "child welfare depends on extraordinary family welfare." It is right now to ensure that before articulating poor families unfit considering ignore, improving the states of the parents be researched before the child is secluded from the parents. There are numerous foggy territories and linkages. In particular, two domains that legitimacy referencing are rights of children viz-a-viz rights of disabled parents and rights of parents with prosperity conditions.

2. Requirement for a benchmark to separate child from parents in cases of "neglect"

²⁷ OHCHR, Declaration, pp. 456

²⁸ Paul Millar, The Best Interests of Children- An evidence based approach, 3-2011, Noel Semple, pp. 4

As seen, from the Social Examination Report in India, the law upto a certain degree, has to develop an "enrolment" or edges that ought to be figured into dynamic. But circumstances where there are charges of physical or sexual maltreatment, in occurrences of "dismissal" or "wrong consideration," these plainly rely upon interpretation of those related with surveying the conditions. For example, in the Indian setting, the post-preliminary operator or the social worker drawing up the Social Examination Report – their value structures and great choices authentically impact the decisions taken. Further, the CWC's own perception and characteristics will genuinely affect the possibility of the decision made. While caution is a critical gadget for pioneers to figure out how to make sure about children, such watchfulness should in like manner be guided to ensure that decisions concerning the child are furthermore not concealed by inclination.

CONCLUSION

In explaining and soliciting into the substance from the "best interests" principle, the Alston approach²⁹ is certainly noteworthy in light of the fact that each other philosophy is truly or in an indirect manner dependant on the theory planned by him – that there is a middle course of action of hallowed continuance and progression rights that should be actualized paying little heed to the social setting. This may be an evidently clear proposal of law. Nevertheless, the test used to judicially choose if such rights have been dismissed, structures the quintessence of this proposal. In cases including potential maltreatment to the child, child security law ought to use the preliminary of critical risk of physical damage or dynamic disregard to the child. The huge physical mischief test would convey the benefit to adequacy of the child; while the dynamic disregard test would convey the benefit to sustenance, water and guidance of the child. These rights may be said to frame the middle plan of the rights which are basic to the perseverance and improvement of the child, which should be executed in some arbitrary social setting. The impressive danger of physical harm or dynamic disregard in like manner restrains the expansion for inclination in decisions of child insurance masters³⁰.

CWCs should be given legitimacy, to grasp the criticalness of association of different administrations to help parents in obliging to better consideration for children³¹ rather than segregating the child and further CWCs should think about the extent of laws that ought to be considered while choosing the best interests of the child.

²⁹Jullian Willard, Alston's Epistemology, 2001, pp. 34-40

³⁰Published in the Gazette of India, Draft Model Rules, 2016 under the JJ Act, 2015

³¹ John Maynard Keynes, The General Theory of BIT, 2001, pp. 45