

The hunt for a fair and equitable approach law family essay

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TOPIC: CHILD CUSTODY, INTER PARENTAL CHILD ABDUCTION: THE HUNT FOR A FAIR AND EQUITABLE APPROACH TO THE PROBLEMS IN NRI MARRIAGES

ABSTRACT

Child custody and Inter Parental Child abduction is one of the current problem of the modern contemporary world. Child custody and Inter Parental Child abduction laws and policies stay among the most litigious areas of family law and family practice. A rights-based dissertation dominates the field where the paramount interests of the child standard has traditionally reflected a struggle between mothers' and fathers' rights, with children's requirements considered to be proportionate in either situation. Children are visualized at different times as fathers' assets, as necessitating the affectionate care of mothers, and as lawfully belonging to one or the other parent. The research gives an account of populace mobility in integral and estranged families, and mull over meanings of relocation in the context of parental separation. The experiential explorations done in the USA, Australia and England on post separation relocation disputes are reviewed under this article. A general idea of key facets of the law overriding relocation in quite a

few jurisdictions, including Australia, England/Wales, Canada and the USA, is also provided. In recent years, conversely, with increasing inquiry of the indeterminacy of the best interests of the child standard, a new ethic has materialized, one that identifies the fact that children's needs and interests are disconnected from the rights of their parents. Thus a new-fangled parental accountability discussion is steadily being introduced into legal orders, public policy and, at the level of practice. Any psychoanalysis of child custody and admittance policy, then, must take into consideration both the limitations of the dominant parental rights discourse and the materialization of the new parental responsibility structure.

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FULL PAPER

INTRODUCTION

Parental abduction is defined as the " taking, retention, or concealment of a child or children by a parent, other family member, or their agent, in derogation of the custody rights, including visitation rights, of another parent or family member" (Forehand et al., 1989). Intercontinental abduction of children by parents is now a contemporary legal issue which baffles and mesmerizes different legal systems of nations whose inter-se conflicting positions prevents return of children to the country of their habitual residence. Solace can be found inter-se between countries which are signatories to The Hague Convention on Civil Aspects of International Child

Abduction, 1980. But what happens to those aggrieved parents who are not a part of this global conglomerate of like-minded nations who honor each other's laws? No global family law governs them. Defiant stands in different courts of such jurisdictions create deadlocks. The sufferers are innocent children who are victimized by legal systems. The world is a far smaller place now than it was a decade ago. Inter country and inter-continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Logically, the world in which we and our children live has grown immensely complex. It is filled with opportunities and risks. International mobility, opening up of borders, cross border migration and dismantling of inter cultural taboos have all the positive traits but are fraught with a new set of risks for children caught up in cross border situations. Caught in cross fire of broken relationships with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross frontier child support. In a population of over 1.1 billion Indians, about 30 million are non-resident Indians living in 130 countries overseas, who by migrating to different jurisdictions have generated a new crop of spousal and family disputes.

Definition of child removal

Families with connections to more than one country face unique problems if their relationship breaks down. The human reaction in this already difficult

time is often to return to one's family and country of origin with the children of the relationship. If this is done without the approval of the other parent or permission from a Court, a parent taking children from one country to another may, whether inadvertently or not, be committing child removal or international child abduction. This concept is not clearly defined in any relevant legislation. As a matter of convention, it has come to mean the removal of a child from the care of the person with whom the child normally lives. A broader definition encompasses the removal of a child from his / her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers to removal by parents or members of the extended family. It does not include independent removal by strangers. Child removal does not find any specific definition in the Indian statute books and since India is not a signatory to the Hague Convention, there is no parallel Indian legislation enacted to give the force of law to the Hague Convention. Hence, in India all interpretations of the concept of child removal are based on judicial innovation in precedents of case law decided by Indian courts in disputes between litigating parents of Indian and / or foreign origin.

ONGOING DEBATES

In debates and discussions about child custody and access, the following points have been largely overlooked in policy discussions: When divorces occur, a father's role often becomes extremely marginalized. Because of the bias and prejudices inherent in the sole custody system, resulting in sole maternal custody in the great majority of litigated cases, children's need for

a paternal influence has been overlooked. Fathers are no less " primary" than mothers in their children's lives, and an access-based " visiting" relationship in no way resembles " parenting," which requires routine involvement in the daily tasks of caregiving (Kruk, 1993; Arditti and Prouty, 1999; Kelly, 2000; Kelly and Lamb, 2000). The sole custody system exacerbates conflict, in which the more aggressive and privileged party in custody litigation holds a distinct advantage. Further, the language used in custody law has created expectations about ownership and rights, and who " wins" and " loses." Most important, the " winner take all" approach, in heightening conflict between former spouses, sometimes leads to tragic outcomes. It is critical that post-divorce living arrangements reduce conflict between parents, and that support services are available at the time of separation to shield children from any destructive parental conflict. Divorces involving severe marital violence are made worse if shared custody is ordered. It is thus important that a legal presumption of joint physical custody be rebuttable. In cases where there has been a criminal conviction or an investigated finding that a child is in need of protection from a parent (although such cases constitute a minority of child custody disputes), a judge clearly should have the authority to make a child custody determination, including sole custody. High-conflict cases not involving such violence, however, may lead to first-time violence subsequent to a sole custody order. Within the adversarial sole custody system, fully half of severe violence episodes occur after separation. For the majority of " high-conflict" cases, shared parenting is preventive of violence, particularly when ongoing post-divorce therapeutic support is available to parents. It is now increasingly

recognized that withholding a fit and loving parent from the life of a child is itself a form of child abuse. Such parental alienation is common in sole custody arrangements, but it is not clear whether shared parenting would reduce such incidents. Therefore it is important that there be some form of enforcement mechanism available to deal with breaches to shared parenting orders, in the absence of established family violence or a finding that a child is in need of protection.

CASE STUDIES: FOREIGN COUNTRIES

The most recent research strongly supports a shift away from the "one size fits all," "winner take all" sole custody framework toward the notion of shared parental responsibility. This report highlights the following research findings in this regard: Sole maternal custody often leads to parental alienation and father absence, and father absence is associated with negative child outcomes. Eighty-five per cent of youth in prison are fatherless; 71 per cent of high school dropouts are fatherless; 90 per cent of runaway children are fatherless; and fatherless youth exhibit higher levels of depression and suicide, delinquency, promiscuity and teen pregnancy, behavioral problems and illicit and licit substance abuse (Statistics Canada, 2005; Crowder and Teachman, 2004; Ellis et al., 2003; Ringback Weitoft et al., 2003; Jeynes, 2001; Leonard et al., 2005; McCue Horwitz et al., 2003; McMunn, 2001; Margolin and Craft, 1989; Blankenhorn, 1995; Popenoe, 1996; Vitz, 2000; Alexander, 2003). These studies also found that fatherless youth are more likely to be victims of exploitation and abuse, as father absence through divorce is strongly associated with diminished self-concepts

in children (Parish, 1987). Children of divorce want equal time with their parents and consider shared parenting to be in their best interests. Seventy per cent of children of divorce believe that equal amounts of time with each parent is the best living arrangement for children, and children who have had equal time arrangements have the best relations with each of their parents after divorce (Fabricius, 2003). A recent meta-analysis of the major North American studies comparing sole and joint physical custody arrangements has shown that children in joint custody arrangements fare significantly better on all adjustment measures than children who live in sole custody arrangements (Bauserman, 2002). Bauserman compared child adjustment in joint physical and joint legal custody settings with sole (maternal and paternal) custody settings, and also intact family settings, examined children's general adjustment, family relationships, self-esteem, emotional and behavioral adjustment, divorce-specific adjustment, as well as the degree and nature of ongoing conflict between parents. On every measure of adjustment, children in joint physical custody arrangements were faring significantly better than children in sole custody arrangements: "Children in joint custody arrangements had fewer behavior and emotional problems, higher self-esteem, and better family relations and school performance than children in sole custody arrangements." The positive outcomes of joint custody were also evident among high-conflict couples. Inter-parental conflict decreases over time in shared custody arrangements, and increases in sole custody arrangements. Inter-parental cooperation increases over time in shared custody arrangements, and decreases in sole custody arrangements. One of the key findings of the Bauserman meta

analysis was the unexpected pattern of decreasing parental conflict in joint custody families and the increase of conflict over time in sole custody families. The less a parent feels threatened by the loss of her or his child and the parental role, the less the likelihood of subsequent violence. Both U. S. and Canadian research indicates that mothers and fathers working outside the home now spend comparable amounts of time caring for their children. According to the most recent Health Canada research (Higgins and Duxbury, 2002), on average, each week mothers devote 11.1 hours to child care, fathers 10.5 hours. According to Statistics Canada (Marshall, 2006), men, although still less involved in primary child care, have significantly increased their participation in recent years. As the gender difference in time spent in child care has diminished, shared parenting after separation has emerged as the norm among parents who are not involved in a legal contest over the custody of their children (Statistics Canada, 2004). Although recent research on Canadian child custody outcomes in contested cases is largely lacking, court file analysis data (Department of Justice, 1990) reveal that in 77 per cent of contested custody cases, child custody is awarded solely to the mother, and solely to the father in only 8.6 per cent of cases. The fact that sole maternal custody is the norm in contested custody cases in Canada is obfuscated by the fact that the label of "joint custody" is often applied by both judges and researchers to post-separation living arrangements in which children remain in the primary care of one parent.

CHALLENGES AND SUGGESTIONS

The Hague Convention on Civil Aspects of International Child Abduction came into force on December 1, 1983 and has now 75 contracting nations to it.

The Convention secures the prompt return of children wrongfully removed to or retained in any Contracting State and ensures the rights of custody and access under the laws of such Contracting States. India unfortunately, is not a signatory to the Hague Convention and from practical experience it can be stated that the principles laid down in the Convention are not applicable in India. The above situation promotes and encourages child removal to India by an offending parent and deprives the child's custody rights to be determined by the laws of the country where the child was normally resident. It also diverts the best interest of the child as the litigation in India gets converted into a fight of superior rights of parents whereas the real issue of the welfare of the child becomes subservient and subordinate. Practical experience also shows that foreign courts now largely disallow children from overseas jurisdictions to be brought to India apprehending that children will not be returned to the country of their residence. Instances are abound from US and UK where Non Resident Indian parents desperately seek advice and opinion on what to do as Courts of Law in these jurisdictions deny permission for children to be brought to India in child custody dispute. This perspective of conflict of jurisdictions needs immediate resolution.

CONCLUSION

In the totality of the emerging scenario, it is now practically seen that in the absence of any Indian legislation on the subject, there is no uniform pattern

of decisions to resolve issues of custody and contact which arise when parents are separated and live in different countries. The recent decisions quoted above and another child custody dispute agitated in the Supreme Court of India where a US Court declined the return of children to India despite the Supreme Court's directions shows that a time has now come for some international perspective in this regard. Situations also exist that whilst the parent in India moves the Court and seeks Habeas Corpus relief, the parent with the child abroad moves the foreign Court there and gets a restraint order. Both parents get equipped with judicial orders and the bi-continental custody battle picks up in two jurisdictions. In January 2005, the British government appointed Lord Justice Thorpe as Head of International Family Law in the UK judicial system for promoting development of international instruments and conventions in the field of family law with greater International judicial collaboration. Pakistan has signed a judicial protocol between the President of the Family Division of the High Court of London and the Chief Justice of the Supreme Court of Pakistan for cooperation between judicial authorities of the two countries on such issues.