



REVIEW ARTICLE

**UNWED MOTHERS AND PUTATIVE FATHERS VIS-A-VIS GUARDIANSHIP
RIGHTS OF CHILDREN: A STUDY**

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ABSTRACT

In the competing interests of unwed mothers, putative father and the child regarding guardianship, the interests of the child is conclusive and gets primacy over the interests, since the parent's interest relates only to the legal obligation towards the child. The law as contained in Sec 7 of the Guardians and Wards Act to declare mother as the sole guardian of her child, subject to notice being given to putative father and mother's refusal to name the father resulted in the rejection of claim to guardianship. However, the disclosure of the name of the father might lead to several difficulties in safeguarding the future welfare of the child, if putative father is already married to another woman. The interest of the minor is subservient to the rights of the child, more so in the case of parent who forsakes his / her duties and responsibilities for the well-being of the child. The need for divorcing religion from law has become a necessary imperative in the interpretation of law by the courts and emphasis being legislative intent and existing case-laws. In this context, the unwed Christian mother requires a status on par with Hindu counter-part. Any decision by the court on the issue of guardianship never acquires finality, more so when any interested party, interested in the welfare of the child can question the decision, when the child's future is in peril. The child has the right to know his paternity as the universal declaration of Human rights and the convention on the rights of the child provides. Thus, it may be a sufficient to safeguard the rights of the child, if the mother gives the name of the putative father in a sealed cover to be opened when a controversy arises on the issue. The duty of the State is to issue a birth certificate to the mother of the child without insisting for disclosure of father's name.

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INTRODUCTION

Conclusions emerging out of studies are given for consideration of authorities, such as the ratio in ABC Vs. State (AIR 2015 SC P.2569 be incorporated in the Statute)

1.Unwed mothers and putative father's rights over the children gives rise to three competing interests namely mother, father and child.¹ Among the competing interests, the interest of the child is conclusive and gets primacy over other interests, as the parent's interest relates only to the legal obligations towards the child. As the Supreme Court observed:

"A child as has been ubiquitously articulated in different legal forms, is not a chattel or a ball to be shuttled or shunted from one parent to another.

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The court exercises *paren patriae* jurisdiction in custody or guardianship wrangles, it steps in to secure the welfare of the hapless child of two adults whose personal differences and animosity has taken precedence over the future of the child"²

2.Unless Section 7 of the Guardians and Wards Act (8 of 1890) for declaring mother as the sole guardian of her son, "a notice is required to be sent to parents of the child before a guardian is appointed".³ For entertaining the application of the mother, it is necessary for her to disclose the name and address of the father of the child so that necessary process could be issued to the father. In case of her refusal to name the father, the court had dismissed her application (as the mother was unwed). However, she gave an affidavit that if at any time in the future, the father of her son raised any objection regarding guardianship, the order of the court may be revoked or altered, as the situation may require. Even the High Court also dismissed her claim, as she was unwed (single mother), the claim could be decided only after notice to the father, as a natural father has an interest in the welfare and custody of the

² Ibid Para 1.

³ See Section 11 of the Guardians and Wards Act.

¹ ABC Vs. State (NCT of Delhi) AIR 2015 SC P.2569.

child even if there was no marriage and no case can be decided in the absence of a necessary party.

3. The unwed mother desired that the future of the child to be marred by any controversy regarding his paternity, which could have considerably damage the interests of the child, if the father refused to acknowledge the child as his own. More so, if the putative father is already married, the publicity regarding the fathering of a child out of wedlock would have pernicious repercussions to his present family, resulting in severe complications for her and her child.

4. Under Sec 7 of the Act,⁴ the interest of the minor is the only relevant factor for appointing a guardian and the rights of the parents are subservient to the rights of the child. The unwed mother contended that her fundamental right to privacy would be violated, if she was compelled to disclose the name and particulars of the father of the child.⁵ The court affirming that priority should be given to mother over father with regard to guardianship rights in the case of illegitimate child,⁶ observed thus:-

“the predominant legal thought in different civil and common law jurisdictions sparring the globe as well as in different statutes within India is to bestow guardianship and related rights to the mother of the child born outside of wedlock. When the father has not exhibited any concern for his offspring giving him legal recognition would be an exercise in futility. It seems to us that a man who has chosen to forsake his duties and responsibilities is not a necessary constituent for the well-being of the child. The mother’s interest in insisting that the father shall not be publicly notified seems to us not to be unreasonable”⁷

5. The Supreme Court further observed the need to separate religion from law, there is a cardinal necessity to distance law from religion and the task of the court lies in “interpreting law of the land in the light of the tenets of the parties religion but keeping in view the legislative intent and existing case-laws”.⁸ Under the Hindu law, unwed mothers are the natural guardian of their children by virtue of maternity alone, without any notice to the putative fathers. However, such a position does not exist in the case of unwed Christian mothers. A change in the Christian law in this regard is necessary to place them on par with Indian Hindu unwed mothers.

6. Consistent with the status of a responsible man, one would naturally expect that he would keep track of his off-spring and be concerned about its welfare. In the absence of such an attitude the unwed mother may be unwilling to disclose the name and particulars of the father of the child. Besides, creating several problems to the parents of the child, there is a need to look at Sec 11 of the Act⁹ in such a manner that in a given case like the one,¹⁰ that no notice be given to the putative

father where he lacks involvement in the child’s life, as the ‘welfare of the child takes priority above all, including the rights of parents’¹¹ compelling the unwed mother to disclose the identity of the putative father may not be able to protect the child “from social stigma and needless controversy”.¹² There is a need to reconsider the decision of the Reserve Bank of India.¹³

The Supreme Court observed”

“In all situations, where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (either oral or written) and the minor is in the exclusive care and custody of the mother or the father for any reason is unable to take care of the minor, because of his physical and / or mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid even during the life-time of the father who would be deemed as ‘absent’”.¹⁴ In other words, the apex court felt the need to interpret Sec 6 of the Hindu Minority & Guardianship Act and [Sec 19 of the Guardian & Wards Act in a manner to grant to the mother, who was the only involved parent, guardianship rights over the child. An amendment to the Statute may be necessary to incorporate the ratio in RBI’s case.¹⁵ This decision makes it clear that the uninvolved father’s right “are not essential to protect the interests of the child born out of wedlock,¹⁶ when he is solely taken care of by his mother.

7. Custody orders or guardianship decision never attains permanency or finality, as it is open at any time to any person genuinely concerned with the minor’s welfare, in the event of the welfare aspect of the child is in peril. In other words, the uninvolved parent can at any time approach the court for varying or modifying such orders, in the best interests of the child. No mandatory or inflexible procedural requirement of notices to the putative father, more so when the child is under the care of natural mother.

8. In accordance with the convention “on the Rights of the child”¹⁷ and the universal declaration of Human Rights, “the welfare of the child is of paramount consideration vis-a-vis the perceived rights of parents not only so far as the law in India is concerned but pre-dominantly in all jurisdictions across the globe”.¹⁸ However, the child has the right to know the identity of the parent, there is necessity to disclose the name of the father. The Supreme Court stated that if the particulars are given by mother to the court in a sealed cover which could be red only pursuant to a specific order or direction of the court, it may be sufficient to protect the rights of the child. Such a recourse will not only eliminate the delay in deciding the

⁴ See Para 2 of this work.

⁵ See Foot Note 1 Para 4.

⁶ Ibid Para 7.

⁷ Ibid Para 9.

⁸ Ibid Para 10.

⁹ See Foot Note 3.

¹⁰ See Foot Note 1.

¹¹ See for details Lakshmi Kant Pandey Vs. Union of India, AIR 1986 SC P.272. Also Foot Note 1 Para 13.

¹² Foot Note 1, Para 13.

¹³ G.Hariharan Vs. Reserve Bank of India, AIR 1999 SC P.1149. In this case the RBI refused the application for a Fixed Deposit in the name of the child when it was signed only by the mother.

¹⁴ Ibid.

¹⁵ Note 1 Para 12.

¹⁶ Note 1 Para 15.

¹⁷ India has acceded to this convention on 11-11-1992.

¹⁸ Note 1 Para 18.

guardianship issue and also relieve the party of hardship being caused (which may be avoided, if this procedure is adopted).

9. The identity of the mother is not in doubt at all. It may not be necessary to state the name of the father in applications for any matter whatsoever like admission in schools, or obtaining passport for the child. But it is “essential to furnish the birth certificate”.¹⁹ It is the duty of the State to take requisite steps for giving a Birth Certificate for every citizen, in all cases where a single parent / unwed mother applies for a birth certificate.

10. In conclusion, the following suggestions are made:

- The competing interests of unwed mother, putative father be settled in the light of ratio in the case;²⁰
- Mother’s rights over guardianship rights over the illegitimate child shall be given top-priority and such a provision of Hindu Law be extended to Christian unwed mother;

- The future of the child born out of wed-lock should be protected;
- Consistent with the rights of the child, the mother who has exclusive rights of guardianship, need to give particulars in a seal cover to the court regarding the putative father, so that any claim to the guardianship rights be settled in future;
- Distance shall be maintained between law and religion by interpreting law of the law in the light of the tenants of the parties, keeping in view the legislative intent and existing case-laws. This would protect the child from social stigma and needless controversy;
- Suitable amendment to the existing law be made to confer exclusive guardianship rights to the involved parent, who is the sole person taking care of the child and concerned with the welfare of the child;
- Notice to the putative father be dispensed with;
- Birth Certificates be given in all the cases of children to a single parent / unwed mothers.

¹⁹ See Foot Note 1 Para 19.

²⁰ See Foot Note 1.