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Memorandum regarding Children's rights in matters of custody and visitation

Submitted to
Principal Judge,
Family Courts, Nyaya Degula, Bangalore.

Orders for Child Visitation

Long time taken just to grant visitation orders

It has been seen that up to 8-12 months or more are a routine in matters of granting visitation rights to non-custodial parents. The judges have to become sensitive and to treat children's interest first in all matrimonial cases. However it has been seen that children's rights are relegated to the background, while precious time is spent in process of mediation and further hearings, all the while when child lives with one parent and presumably also gets brainwashed and his/her mind poisoned against non-custodial parent.

Judges have been granting ex-parte orders to take away the custody of a child from the father on the sole basis of the self-serving affidavits of a complainant woman. In fact, false allegations of abuse are made and cases are filed under IPC Section 498a and Domestic Violence Act along with matrimonial cases as a means to strategically eliminate fathers from children's lives.

A father and SIFF member says: "My wife filed a divorce and child custody case in Jun 2010. Completely false allegations of child abuse have been made against me. A lot of time has been wasted in mediation, and subsequent adjournments, while I have seen my child for only 1 hour after she was separated from me. Why cannot the courts grant automatic shared access of children to both parents, as is now mandated by law in many foreign jurisdictions?"

Lack of enforcement of visitation orders

Several fathers have approached SIFF and said the problem of not being able to meet their children even after having been granted court orders for visitation. Since family courts are considered guardians of the child, they must take responsibility in ensuring that their orders are respected for the benefit of children. If the orders cannot be enforced, then there will be little meaning left for going to family courts to get visitation orders.

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It will be desirable for family court judges **to arrive at guidelines whereby custody of child can be given to non-custodial parent if the custodial parent is not allowing a child to meet non-custodial parent.** An example of such guidelines could be:

- If a parent prevents a child from having equal and meaningful contact with the other parent, they should be counselled first to understand the importance of equal parenting in the best interest of a child.
- If either parent repeatedly disobeys orders of equal access and meaningful contact with children, then the children should be placed in the full custody of the parent who will allow equal access to the other parent.

Even in foreign courts, such practices are considered normal to ensure that children get access to both parents. It also ensures that the custodial parent is unable to use the child as a pawn during matrimonial proceedings.

This was the practical experience of a father and CRISP member who was being denied access to his child even after family court's order: *"It has been 2 months since an Execution Petition was filed in the Family Court for the "expeditious enforcement" of the HC order. The Family Court is yet to give even a date for the first hearing!"*

Children deprived of love of both parents

Meaningless mediation without child access to both parents

It should be a customary practice to grant child visitation and access to both parents when a matrimonial case is filed in court. Further such an approach can actually lead to a **successful mediation** between warring couples. It is farfetched to expect that a warring couple who has gone to court will be in mood of settling differences through mediation, when one parent is not even allowed to see his/her child(ren)! To that extent, not allowing children access to both parents immediately after filing of a matrimonial case is against the whole rationale behind mediation. **Rather than allowing children to be a healing factor in matrimonial issues, the children are being allowed by courts to be made pawns** of one parent (mostly mothers) to vitiate marriage, and eventually affect children's life negatively, too.

Non-implementation of UN CRC (United Nations Convention on Rights of Child)

Just one excerpt from U.N's CRC Article 9 is extracted here:

"States Parties shall ensure that a child shall not be separated from his or her parents against their will."

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“States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis”

Going by some of actual visitation orders, it is unreasonable to expect that a child and non-custodial parent who are supposed to meet for 2 occasions for few hours each in a month will be able to maintain a loving, deep and sustainable parent-child relation. It is a form of child abuse that a biological and living parent of a child is relegated to status of a visitor / stranger in child’s life, who can meet the child under such conditions where normally parents and children would not.

Best interests of the child

Recently in a seminar in Mumbai on child rights, retired chief justice of Delhi high court AP Shah has said: “In family laws, we are almost 30 to 40 years behind. The world has gone far ahead,” Justice **Shah explained that the norm in Indian courts — to give the custody to one parent (mostly the mother) with the other parent getting visitation rights — is outdated.** At the same seminar, Dr Kersi Chavda, president of Bombay Psychiatric Society, spoke of the **overwhelming research that proves that a child who grows up with a single parent can exhibit criminal tendencies and other social diseases.** (Source: http://www.dnaindia.com/mumbai/report_judges-root-for-joint-custody-of-child_1362244).

With such overwhelming research to prove that child welfare is best served by child having access to both parents, the courts are still following old precedents of giving custody to one parent (usually the mother) and giving visitation rights to other parent. Family courts should go by established research on child welfare, rather than going by judicial precedents of awarding full custody to one parent, and meagre visitation time to the other. It is time that interpretation of best interests of the child is done by keeping children’s interests in mind first, and not merely following judicial precedents of a bygone era.

It is also a fact that giving sole custody to one parent only increases more litigation, and trauma for both parents and children involved. Whose interest is being served by such an approach, is a question that children and their parents would like to ask?

Who will take responsibility in future for children growing without fathers?

In India, till today a study on children of divorced or separated parents has not been done (source: from reply to an RTI application from NCPCR, National Commission for Protection of Child Rights, Delhi). However, given high rate of divorces and single parenting in foreign countries, there is a lot of historical data and studies available

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on this matter from foreign countries. Statistics from a study done in the United States reveal that, compared to children in intact families, children in fatherless homes are:

- * 5 times more likely to commit suicide
- * 32 times more likely to run away from home.
- * 20 times more likely to have behavioural disorders
- * 14 times more likely to commit rape.
- * 9 times more likely to drop out of high school.
- * 10 times more likely to abuse chemical substances (become drug addicts)
- * 9 times more likely to end up in a state-operated institution
- * 20 times more likely to end up in prison.

In addition, 3 million teenage girls have sexually transmitted diseases, and at least 1 out of 4 teenagers in the age bracket 14-19 suffer from sexually transmitted diseases.

Given such overwhelming evidence from studies abroad, action must be taken now to avoid repeating the same disaster for Indian children of parents going through marriage dispute or divorce.

Justice for Fathers and Children

Loving fathers are reduced to status of sperm donors and a Free ATM machine!

When it comes to granting child support, fathers are held to be responsible as fathers, who must bear cost of children's upbringing. But simultaneously, by giving few hours or no visitation to fathers, they are in practice treated simply as sperm donors, who legally have no rights over their children.

A father is supposed to take care of the child in financial matters but when it comes to custody or visitation it is opposed by the mothers that father will do harm to the child. When the father is considered fit parent to take care in every possible way by the way of maintenance and other requirements, then while visitation and parenting also father must be considered fit parent and be given shared custody rights by default.

The family courts should be objective in their approach, and either treat all fathers as sperm donors, and thereby not ask them for any child support either; or treat them as fathers, and grant meaningful visitation rights along with child support orders.

Child's input and time taken in custody cases

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It is seen as a trend in the family court that, after years of litigation in deciding the child custody cases, where the all the stages of litigation such as evidence, cross examination, arguments etc are completed, finally while deciding the matter the judge asks the child with whom you want to stay. Obviously the child will prefer the parent with whom he/she is staying for a certain time, unless the parent is really cruel to child and neglects child, and the child is independent enough to assert his/her choice. If child's input is the only important thing in such matters, then going through years of litigation process seems to be waste of time!

Administration and Infrastructure

Full utilization of working hours of family courts

It has been seen that on some days family courts are over-crowded and on some days it is almost empty. This is due to the allocation of dates in an un-scientific way. This practice must be stopped and dates must be given like Supreme Court by the computer section so that the work load on the family court is uniform and it works in an efficient way. It has been reported by many members of SIFF who have cases in family courts that on many of the days the family courts are almost empty in afternoon from 3:30 pm onwards. The afternoon sessions of family courts are meant for hearings, arguments when the important work of the courts is done, which ultimately leads to closure of cases. But for whatever reasons, it seems that the afternoon sessions are not being fully utilized. That cannot be said to be acceptable when there are long pending cases in courts regarding children waiting to meet parents.

Computerization and records maintenance

There is no data available in the family court regarding the child custody and related cases. This is found by RTI applications to the family courts by various NGOs in the past. **An RTI application to find out the number and time taken to dispose off visitation rights cases in Family court was rejected as "diverting court's resources" and "having no value of public interest"!** It is certainly a matter of interest to people who have child custody and visitation cases pending in courts. This shows the casual attitude of the administration and family court. Children are the future of our country and in particular children whose parents are engaged in litigation need special attention because if not groomed properly then they are prone to various criminal activities and these children may become a liability on the society. To avoid this, **all data related to court cases must be computerized so that NGOs and government can study the trends especially related to cases involving children and any precautionary measures can be taken up in the interest of children.**