


Family Law - Marriage and Guardianship

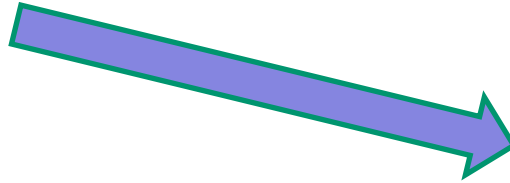
- Roshan Dalvi



**A happy marriage
is the union of
two forgivers**

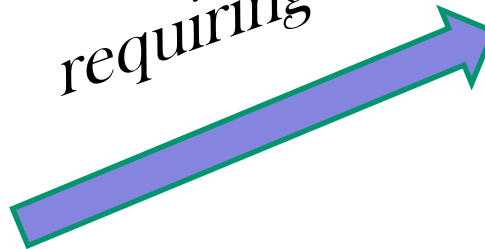
Ambit of Family Law

- Procedural



Infrastructure

requiring



Sensitivity

- Substantive

Human mind is like a parachute;
It works only when it is open

Legislations

- Constitution of India – Arts. 39, 45
- United Nations Covenant on Rights of the Child
- Indian Divorce Act, 1869 – S. 41
- Guardian and Wards Act, 1890 – Ss. 7, 17
- Parsee Marriage and Divorce Act, 1936 – S. 49
- Dissolution of Muslim Marriages Act, 1939/2019
- Special Marriage Act, 1954 – S. 38
- Hindu Marriage Act, 1956 – S. 26
- Hindu Minority and Guardianship Act, 1956– S.6
- Juvenile Justice Act, 2015 - Ss. 2 (9) and (14)

Objects of Family Law

- ❑ To promote conciliation / settlement
- ❑ To resolve disputes promptly

Wide belief is that the FCs show a harming, not a healing process. Need for organizations outside the FC system to deal with litigants gently without making FCs extinct

Agencies for realizing the objects

NGOs for Social and Family Welfare – S. 5

- ❖ Marriage and Child Counsellors (for interview and advise) (*e.g. Muskaan, TISS*)
- ❖ NGOs for Women Empowerment (*e.g. SEWA, Swayam Siddha*)
- ❖ Lawyers' NGOs for Women Protection (*e.g. Majlis, Lawyers' Collective*)
- ❖ Bar Initiatives (*e.g. Sensitization of custodial and Non-custodial parents, films - voice of child who went through Court to help children who have to go through court*)

Agencies for realizing the objects

Medical and Welfare Experts – S. 12

- Psychologists
- Psychiatrists
- Experts in Social Work (MSW)
- College Initiatives
- Mediators / Pre-litigation Mediation
- Child Independent Lawyers (CIL)
- Legal Expert as *amicus Curiae* (S. 13)
- Social Service Unit in Israel

Evidence

Oral and Documentary

No usage of the Evidence Act (S. 14) *but basic principles to be followed*

Oral evidence – affidavit of evidence / pleadings, Cross examination (O. 18 r 4 CPC)

Only a memorandum (S. 15)

Formal evidence on affidavit, but summoning the witness if required (S. 16)

Documentary evidence – *e.g. rent receipts, salary slips, electricity bills in bulk*

Decree / Order

Executable under the CPC (S.18)

- ✓ Monetary decree by attachment and arrest
- ✓ Declaratory decree by possession or eviction
- ✓ Other orders *e.g. if the maintenance is not paid for 3 months, deduction from salary by the employer*

Areas of Work

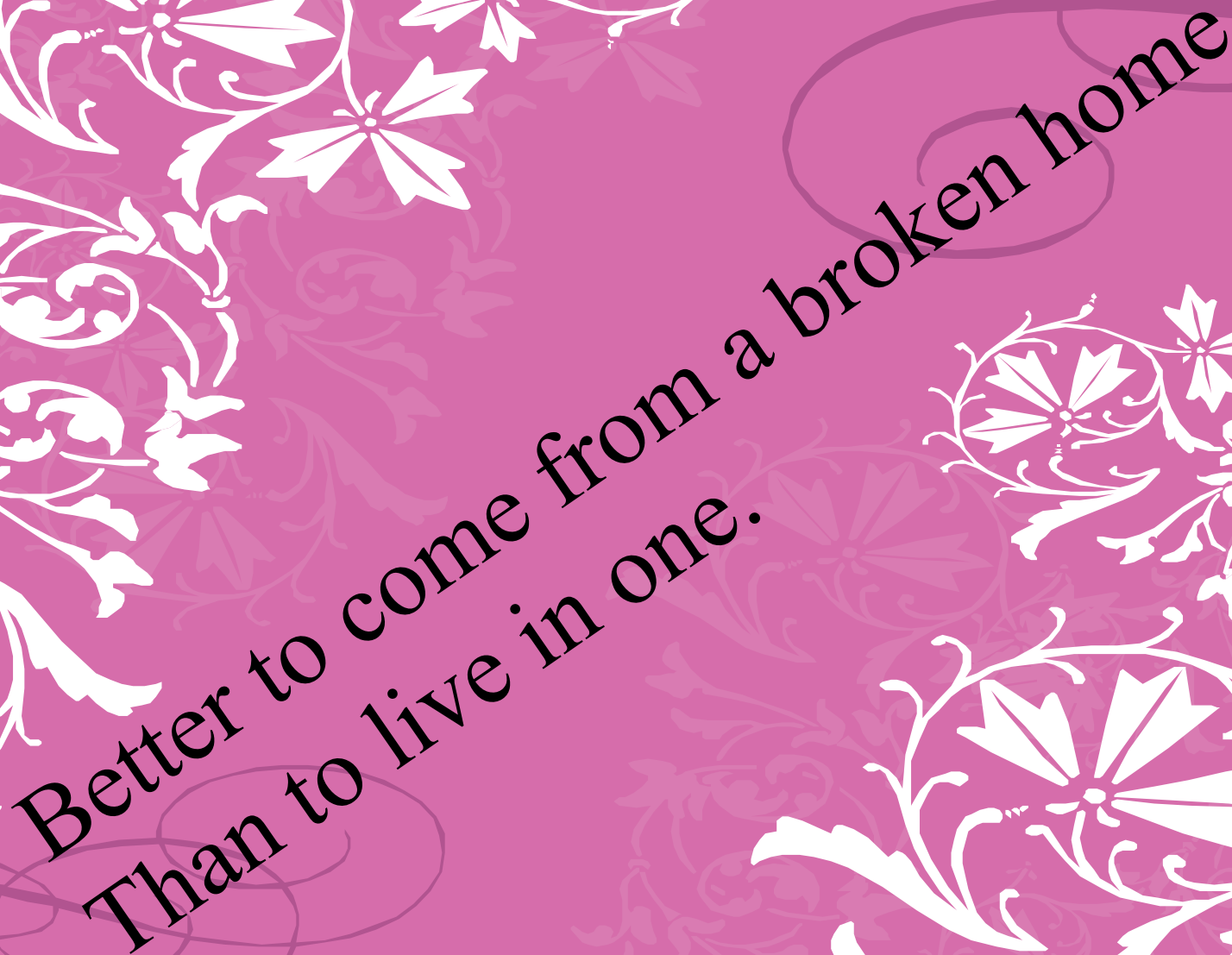
- Dissolution and continuance of Marriage
- Injunctions
- Maintenance and alimony
- Custody / care and contact with children
- Stridhan
- Others

Way of Work for the Parties

Collaborative, not competitive

Involving:

- Client Counselling }
▪ Negotiation and Facilitation } POS
▪ Mediation and Conciliation }



**Better to come from a broken home
Than to live in one.**



Attributes
of a
Broken
home

Anger

Anxiety

Confusion

Depression

Frustration

Insecurity

Child Problems

Violence

Domestic Relationships

- Husband and wife
- Live-in Partners
- Parents and Children
- Relatives
- Adoptive family
- Joint family members

Types of Cruelty

- Physical
- Mental
- Emotional
- Psychological
- Economic
- Social
- Sexual

Contribution of Counsellors

- Professional approach
- Home study – timely intervention
- Lawyer – Counsellor partnership
- Meeting with the Judge / Lawyer /
Child / Parents



Activities of Counsellors of Family Courts

IN COURTS

- Group Counselling – custodial parents and non-custodial parents
- CCTV
- Home study
- Painting, elocution, debating, essay writing competitions
- Children’s Day
- Father’s Day
- Mother’s Day
- Record, Recognise, Report, Reconcile
- Reconciled couples to share experiences



Activities of Counsellors of Family Courts

IN CHAMBERS

- Mediation techniques
- Communication skills
- College students / young lawyers as interns of counsellors and judges
- Guest sessions of NGOs
- Counselling advocates – if amenable to settlement
- Awareness programmes for litigants, college students etc.
- Client counselling



FAMILY

Father
And
Mother
I
Love
You

A decorative border with a repeating floral pattern in shades of pink, purple, and yellow, framing the central text.

Children are little people

Who need **big rights**

- Dr. Klaus Kankel




Clinical Psychology

Family Therapy:

1. Parent counselling – “our child” not “my child”
2. Joint custody – shared parenting
 - Child needs both, therefore, joint parenting plan
3. Quality time – purposeful access

**Children need our presence -
not our presents**



Untied \neq United



TEAM =

Together Each
Achieves More



Child's Rights

- Right to Justice, Liberty, Equality
- Right to a Family
- Right to get the best of both the parents and all the family members
- Right to maintain contact with all
- Right to be like all peers / friends

The perspective of the child, not the parents

Way of Work for the Children

Amiable, not Argumentative

- Interview the child
- Work out the access/contact
- Awareness Creation of Joint Parenting in the client – Parenting Plan

Tug-of-Peace, not Tug-of-War

Aspects of Custody

- Rights / Duties
- Parenting Plan
- Joint Custody
- Child Interview
- Child Counsellors
- Negotiation / Facilitation
- Mediation / Conciliation
- Child Independent Lawyer

Definition

Joint Custody refers to:

- ❖ **Shared physical custody** - with children spending equal or substantial amounts of time with both parents
- ❖ **Shared legal custody** - with primary residence being with one parent
- **Joint physical custody** implies ongoing close contact with both parents
- **Joint legal custody** implies shared decision making by both parents



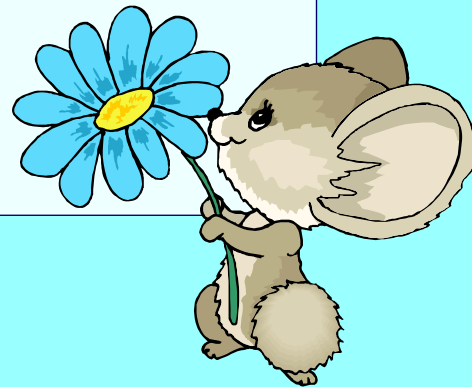
Shared parenting

- Joint physical/legal custody
(as Legal, Rebuttable Standard
Presumption)
 - Shared authority
 - Joint responsibility

INTERNATIONAL HUMAN
AND CONSTITUTIONAL
RIGHTS
UN CONVENTION ON THE
RIGHTS OF THE CHILD

Joint Custody

- when both parents are equally placed
- when both parents are good and cultured
- draw up a parenting plan
- give guidelines for access and custody





- See child needs – home study report
- Assess child wants – child opinion :
→Child welfare →Child wishes
- Purposeful access –
→quality time →parental responsibility
- Physical, mental, social counselling
- Counsel parents – no winning over
by gifts
- Monthly meetings – when
professional help is required to
assess short term effects

Child Access

- Why ?
 - Child needs both parents
- Where ?
 - At a congenial venue
 - Ultimately at home
- How ?
 - By discussion, counseling, deliberation, agreement with parties
 - Interview of child ?
 - The whole range of access to be worked out at one time.
 - Yet, it is a temporary arrangement, amenable to change.
 - without recording evidence
- How much ?
 - Variable - depending upon the age, time, circumstances, child's needs and time
 - - depending upon which parent is the primary care taker
- When ?
 - After the non-custodial parent deserves what he desires
 - If the custodial parent persistently defaults / disobeys

Parenting Plan - Imperative

- To be submitted along with the Petition for custody
- Stability in access – dates known
- Parents can plan in advance
- Child knows what is to be expected
- Fewer applications
- Saving in judicial time

*Parent privilege has autonomy. Hence,
Court is a therapeutic body*

Factors for Parenting Plan

- Time / Place
- School activities
- Access to school records ? PTA / Progress
- School calendar
- Vacations / Festivals / Extended family
- Birthdays (English – Indian calendars)
- Medical Insurance
- Contact info / Video – audio calls
- Transportation

Types of Parenting

- Co-operative Parenting – Best for the child
- Parallel Parenting – Also good, adaptive
- Single Parenting – Avoidable if both available
- Joint/ Shared Parenting – Good for the child
- Santa Parenting - Worst for the child

Maladaptive Parental Gatekeeping – Judge Philip Marcus

Supervised visitation only in cases of violence and sexual abuse

Parenting Skills for a Business Leader

- ❖ Patience
- ❖ Communication
- ❖ Flexibility
- ❖ Resilience
- ❖ Empathy
- ❖ Leadership
- ❖ Life-long Learning

*Parenting skills one has and hones can
translate directly into the business world*

Merits of Shared Parenting

- Child gets the best of both the worlds
- Good for mothers; father contributing in kind
- Good for fathers; become responsible
- Decrease in Judicial work; parties deciding
- Enhancing the image of the lawyers; client counselling and negotiation for best results

Not Yours, Mine, but Ours

When No Shared Parenting

- Physical violence
- Sexual abuse
- Unwilling parent
- Psychologically unfit parent

Demerits of Joint Custody

– Another Perspective

- ❖ Tug of War between parents
- ❖ Sometimes enhances Parental Alienation
- ❖ Does not consider the Mother-Child bond
- ❖ Increased viciousness of custody battles
- ❖ Viewed as disservice to women
- ❖ Fathers viewed as predators because of GBV

If the child continues with the primary caregiver, she/he may be less hostile

Petitioner Status

As it should be:

- ❖ Equal Parent
- ❖ Not a visitor
- ❖ Not a guest?

Therefore:

- ❖ Parenting Time / Contact / Access
- ❖ Not only 'Visitation Rights'

As it often is:

- ❖ Non-custodial Parent
- ❖ Absent Parent
- ❖ Alienated Parent
- ❖ Targeted Parent
- ❖ Hated Parent
- ❖ Misunderstood Parent

Contact Issues

- Absence of any contact
- Interference with contact
- Abduction
- Plans to move away
- Child abuse - Order of injunction restraining entry in the house

'Birdnesting'

- Child is not shifted – home, school, friends, play remain the same
- Parents take turns to stay with the child
- Stability for the child; adjustability by the parents

May be used for some years until the child grows up to face reality



Parental alienation

(called Child Protection Issue
by mental health experts)

- Mild – modifying custody
- Moderate - refusing visits
- Extreme - denying child info,
cutting access/phone/isolation
brain washing and tutoring the
child

MATRIMONIAL CRUELTY

**PSYCHOLOGICAL
KIDNAPPING**

Parental Alienation Syndrome (PAS)

- Destroying half the roots of the child
- Worse than the loss of a parent by death
- Emotional Child Abuse
- Emotional / Mental Cruelty
- Generally *Fatherlessness*

*Divided in Matrimony,
but united in Parenting*

How is the Child alienated?

- Create fear (Zoo story)
- Poison ears
- Carrot and stick policy
- Isolate the child
- Consequences for loving the targeted parent
- Passive attitude – (traumatic)
- Tutor / Prepare for the access – *4 days of torture; 2 by indoctrination, 2 by interrogation*



Signs of Parental Alienation

- Anger / Anxiety / Hate
- Fear / phobia
- Depression
- Sleep disorders
- Eating disorders
- Post traumatic stress disorder
- Problems in school
- Drug and alcohol abuse
- Lack of self esteem
- Lack of impulse control



Results of Parental Alienation

- Serious Psychological Damage
- Emotional Child Abuse
- Isolation
- Fear of Retribution
- Survival Instincts
- Betrayal / Bitterness / hatred
- Delinquency
- Personality Disorder

Interviewing the child

Questions for CIL and Judges

Simple - what, where, how, who?

- No questions requiring Yes / No
- No question: Who do you want to live with?
- No promises of secrets
- No threat of disciplinary measures
- School attendance by parents
- Recalling earlier good memories
- Anything the child wishes to talk about

Inquiries

- Age of the child
- Contact arrangements by Court order or agreement
- Distance between the houses of parents
- Travelling time
- Whether contact willing, reluctant or non-existent
- Duration of problems
- Conduct of child during contact or transfer
- Frequency of contact
- Type of contact – emails, phones, meetings, social media
- Need for immediate orders or therapeutic intervention
- Need for orders against leaving the jurisdiction

Whose right is it anyway ?

- Parental rights ?
- Parental responsibility.

Section 3 of the Children Act, 1989 in the UK

Allows the non-custodial parent to show a responsible attitude towards child rearing

International Illustrations

- Birdnesting in the US
- Parental Responsibility in the UK
- 1 Family; 1 Court in Israel
- Legislation for Care and Contact disputes in Belgium
- Letter to the Child by the Judge in Scotland
- Specialty Court in Massachusetts, US – of Judge Linda Fidnik

Family in the future - different, but still Family

Specialty Court, Mass., US

Judge Linda Fidnik

- ✓ Couple assigned a team; family (or legal) consultant, Mental health professionals – with speciality of working with children
- ✓ Series of meetings for agreement on parenting
- ✓ Talk to the child's teachers
- ✓ Functional schedule, not a percentage of time
- ✓ Court conference, if required, to develop communication – Judge at the table (parents talk about their fears, hopes)
- ✓ Confidential proceedings
- ✓ Binding agreement

Child-focused, friendly, less adversarial, confidential, hand-holding, but giving out a binding, individual, activized plan

New Initiatives

Family Court Bill and National Family Justice Strategy

By '2 Wishes – because not all children get their 1st wish'

- Creation of a new dedicated FC within the existing system
- Faster, less adversarial, more efficient, user-friendly,
- Minimizes conflicts and costs
- Best interest of the child
- Active case management and ADR
- Range of support services

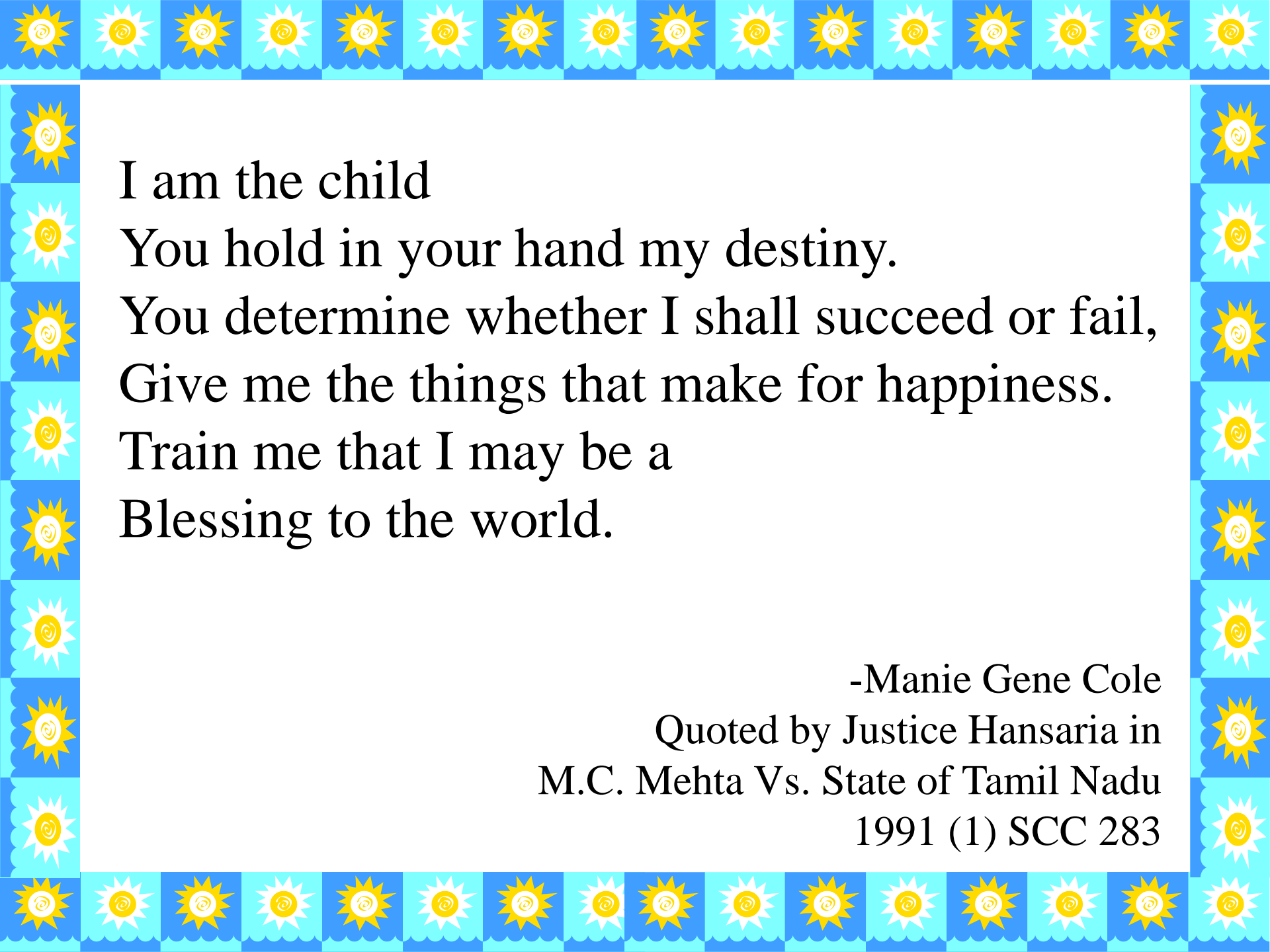
Booklet of Child Alienation

By Child Rights Foundation

Therefore, what lessons????

PRIMARY PREVENTION & EARLY INTERVENTION

- Nipping in the bud – Early intervention by Courts and Counsellors
- Secondary and Tertiary Intervention
- Advise/Treatment for parent; therapy for child
- Expeditious orders – Time of the essence
- Timely reports of compliance of access orders
- Public Awareness



I am the child
You hold in your hand my destiny.
You determine whether I shall succeed or fail,
Give me the things that make for happiness.
Train me that I may be a
Blessing to the world.

-Manie Gene Cole
Quoted by Justice Hansaria in
M.C. Mehta Vs. State of Tamil Nadu
1991 (1) SCC 283

The Judiciary must

Hear those who cannot shout,

Listen to those who cannot speak.

