

# **NATIONAL JUDICIAL ACADEMY**



## **ANNUAL NATIONAL SEMINAR ON WORKING OF THE FAMILY COURTS IN INDIA (P-1000)**

12<sup>th</sup> – 13<sup>th</sup> November, 2016

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A two day *Annual National Seminar on the Working of Family Courts* was organized for Judges of Family Courts by The National Judicial Academy, Bhopal on 12th and 13<sup>th</sup> November, 2016. The conference was organized under the guidance of Dr. Amit Mehrotra, Assistant Professor, National Judicial Academy, and Bhopal.

The objective of the conference was to help the Family Court Judges to address the burning issues of family law jurisprudence and get new approaches by way of experience sharing of resource persons and fellow participants so as to tackle effectively the various issues that arise out of matrimonial disputes.

The entire conference was spread over 6 sessions. Distinguished resource persons were invited to address the gathering and to share their experiences on various issues under Family Law.

**Objectives of the course:**

- Understanding the new approaches to settle matrimonial disputes with special focus on child custody issues.
- The implications of matrimonial disputes on the growth and development of the child.
- Discussing the role of judicial officer in addressing the family law issues and in providing the healing touch to the parties approaching the Court.

**DAY-1**

**Session-1: Protecting Constitutional Rights in Family Court proceedings**

**(10:00 am to 11:10 am)**

**Speaker:** Ms. Geeta Ramaseshan, Advocate

**Chair:** Hon'ble Mr. Justice K. Kannan, Chairman, Railway Claims Tribunal

The programme commenced by the Introductory Address by Justice G. Raghuram, Director, National Judicial Academy, Bhopal. In his address Justice Raghuram discussed the history of the academy as to when this idea of establishing National Judicial Academy was thought of and how the idea took momentum in the year 2004 and since then over one thousand programs have been organized by the Academy and over thirty thousand judges have been trained. Since then it has

been conducting various conferences for judges and judicial officers of India and also of other SAARC countries. Justice briefly dwelt on the role played by NJA in judicial education and the vision of NJA in the enrichment of the justice delivery system. It was stated that there is no genetic contribution to judging and at NJA the object is not to teach law but to share the experiences of judges. Judicial education exposes the judges to evolving dimensions of law. Justice Raghuram then set the context of the present programme and introduced the speakers. Thereafter Hon'ble Mr. Justice K. Kannan made the opening remarks and introduced the theme of the session by stating that the assumption is that Constitution is taken care of by the High Courts and the Supreme Court. Every law is tested for its validity on the touchstone of constitutional provisions. The most important provisions are found in Part-III of the Constitution under Fundamental Rights. Article 14 & 15 of the Constitution of India ought to orient us to understand every other law including family law. Protecting family law is not only to protect the matrimonial ties but also to protect the decency, child rights etc. It was stated that family courts are known for the informality in the procedure.

After the brief introduction, Dr. Amit Mehrotra, Assistant Professor, National Judicial Academy discussed the thematic context of family court jurisprudence wherein he started with discussing the 59<sup>th</sup> Law Commission of India Report whereby it was recommended that family court ought to adopt a radical approach different from other Courts. The same was reiterated by 230<sup>th</sup> report of the Law Commission. The Preamble for the establishment of the Family Court is for conciliation and speedy settlement. High Courts have reiterated the purpose of family courts time and again through the following case laws:

- In *Balwinder Kaur vs Gurmukh Singh*<sup>1</sup> where the court held that at the first instance the family court should try to reconcile the matter before going for adjudication.
- In another case the Court held that at the first instance the matter or dispute should be referred to the mediation centers and the family courts particularly when the matter is related to child custody should be assisted by the counselors.

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<sup>1</sup> AIR 2007 P&H 74

- In *Bhuwan Mohan Singh v. Meena*<sup>2</sup>, the Supreme Court held that adjournment should not be granted in routine manner and judge is expected to be sensitive in dealing with family issues.
- In family disputes there is hardly any instance of entire fault of any side but before the dispute assumes alarming proportion, someone must make an effort to make the parties see the reason. If the counselor fails to bring the matter to reconciliation then refer the matter to mediation center and mediation centers should set up pre-litigation clinics.
- In the *Afcons infrastructure and Ors. V. Cherian Verkay Construction and Ors.*<sup>3</sup>, it was held that the ideal stage for mediation would be before the filing of objections and written statements.

This discussion ended with the suggestions and way forward which were given in the previous conferences on the same subject. They are as follows:

- 1) Effective disposal of interim maintenance.
- 2) Judges should be gender sensitized.
- 3) Family Courts should take the help of NGOs.
- 4) Counselors should be permanently appointed and should be given proper training.
- 5) There should be a good coordination between the stakeholders.
- 6) Family Courts should follow simple procedure and there should be an informal atmosphere in the court.
- 7) There should a uniform civil code.
- 8) Every district to have a family court.
- 9) The requirement of necessary infrastructure should be fulfilled.
- 10) There should be separate children complex in every Family Court.
- 11) Judges should also act as counselors.
- 12) There should be minimum interference from the advocates so as to make the system non-adversarial.

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<sup>2</sup> AIR 2014 SC 2875

<sup>3</sup> (2010)8 SCC 24

- 13) There should be some specific training with respect to understanding family, relationships and individual personalities so that they can understand the dispute in a better manner.

Thereafter the Speaker Ms. Geeta Ramaseshan commenced the discussion on protecting constitutional rights in family courts. The purpose of the theme is not to go through the constitutional principles but to understand the concept of equality and the development of these rights and how these rights have translated to family law. The boxing amount of emotions in the family disputes and range of disputes that come before the Court is extremely wide. It was stressed that nowadays the disputes are far more complex than those which existed in the earlier times as earlier the women usually suffered from cruel treatment and cruelty and now the men are filing cases for adultery against their wives. This branch of law is certainly going to get broad with the passage of time. Article 14 of the Constitution of India provides for equality and Article 15 talks about prohibiting discrimination.

*Article 14- "The State shall not deny any person equality before the law or equal protection before the law."*

*Article 15- "The State shall not discriminate against any citizen on grounds of only of religion, race, caste, sex, place of birth or any of them."*

*(5) Nothing in this article shall prevent the state from making any special provisions for women and children"*

It was stated that on a plain reading, Article 14 only talks about treating likes alike meaning equal treatment to all irrespective of the outcomes. It does not take into account the biological difference between man and woman. The focus is on "equal treatment" rather than on equality of outcomes. It was emphasised that the law is expected to be gender neutral thus it does not take into account biological and gender differences, so an additional burden on women when in fact the social and economic reality of women is not similar to that of men. In family law Section 24 and 25 of the Hindu Marriage Act, 1955 provides for this kind of equality which is also known as formal equality and it provides that even husband can claim maintenance from wife.

It was deliberated that the most approved model of equality is substantive equality which recognizes that women were historically disadvantaged. This is called the corrective approach that

recognizes that women were historically disadvantaged and corrective measures ought to be taken in order to address this discrimination. It focuses on diversity, difference, disadvantage and discrimination. Its principal concern is to ensure that the law corrects the imbalance and impacts on the outcome by assuring equal opportunities, access and benefits for women. In doing so it seeks a paradigm shift from “equal treatment” to “equality of outcomes.” For example, Protection of Women from Domestic Violence Act, 2005 that benefits women who have been in long relationships under the assumption that they were married, addresses violence independent of the institution of marriage.

It was further stressed that The Protection of Women from Domestic Violence Act, 2005 provides for a comprehensive support system that is to be provided by the state to address domestic violence such as provision of service providers, shelter homes etc. That is to address the structural problems associated with the issue and not to just look at it as a private wrong. It was stated that if there were no Article 15, it would have been difficult to interpret Article 14 and to interpret many other laws. The concept is not to treat everyone equal but to give quality to all. For example, Protection of Women from Domestic Violence Act, 2005 is more concerned in addressing outcome, the equality of protection. Sexual Harassment Act aims at providing hassle free environment where there is no fear. Protection of Women from Domestic Violence Act, 2005 provides for a comprehensive support system.

With regard to understanding discrimination in family law following points were discussed:

- 1) De Jure Discrimination: Indicates formal or legal position of women and includes discriminatory law.
- 2) De Facto Discrimination: Informal practices that are not sanctioned by law but regulate women’s freedoms. It could be outside in the form of khap-panchayats and other bodies.

In a dispute a man is often considered stronger because he is in a better financial position and he can engage a better lawyer and can afford better services. It is often a great disadvantage to women.

Judicial Precedents that were discussed during the discourse:

- *Chanmuniya vs Virendra Kumar Singh*<sup>4</sup>: Strict proof of marriage not required, this position has been accepted by the Courts which is nuanced reading of Section-7 of Hindu Marriage Act, 1955.
- *Madan Mohan Singh vs Rajanikant*<sup>5</sup>: Presumption of marriage in live in relationships subject to proof
- *Shobha Hymavathi Devi vs Setti Gangadhara Swamy*<sup>6</sup>: Presumption in favour of marriage): Presumption of marriage, accepted in the form of law, tilting the balance in the favour of women.
- *Shamim Ara vs State of U.P*<sup>7</sup>: Nuanced judgments addressing equality: Principles governing *talaq*. *Shamim Ara case*<sup>8</sup> of triple talaq, reading it down in such a way that it did not cause the controversial or protests that *Shah Bano case*<sup>9</sup> caused, this is one example of good example how judgements have addressed the issue of equality.

Understanding Family law through the prism of equality and non-discrimination were discussed.

It was stated that marriage laws in India are based on the fault finding approach and adversarial in nature. Very few countries have got the adversarial process today where a party has to prove matrimonial wrongs. This process which is termed as the fault finding approach is no more the law in many countries. The spouse has to prove a matrimonial wrong. It was emphasised that Family Courts Act has done away with strict rules of evidence, the practice is still to go through a process of trial with all its inherent problems. When the family court is done with recording evidence, it has to go for trial.

Islamic law is based on the “irretrievable breakdown of marriages” where there is no requirement of proving a matrimonial wrong. It was highlighted that the woman has to seek reliefs by filing multiple proceedings under different laws if she wants divorce, custody or maintenance. She has to file multiple cases under Criminal Procedure Code, 1973 Guardians and Wards Act, 1890 etc.

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<sup>4</sup> JT 2010 11 SC 132

<sup>5</sup> AIR 2010 SC 2933

<sup>6</sup> 2005 2 SCC 244

<sup>7</sup> AIR 2002 SC 3551

<sup>8</sup> AIR 2002 SC 3551

<sup>9</sup> AIR 1985 SC 945

Criminal Procedure Code, 1973 is the most relied by women as they can negotiate under that provision.

It was expressed that understanding evidence is very important for determining the cases. Understanding the negative impact of stereotyping and gender bias which may get reflected in cross examination- such as questions relating to how a “Hindu” wife should behave, if a woman is accused of consuming alcohol etc. It was stated that such kinds of biases need to be addressed.

It was delineated that reconciliation at any cost can often be a problem where there is a lot of violence. Reconciliation just because the Act says does not make it always the best idea. Mediation need not necessarily be at the first instance. When one party files the pleading the other party wants to file the response to it otherwise they feel that they are not on equal footing.

Thus, there are instances where adversarial system is fine but our endeavour is that:

- 1) The institution of family needs to be protected.
- 2) Matrimonial disputes should not necessarily end up in reconciling the relations. If there is dignity restored to each individual from separation, to move on with their lives.
- 3) Truth has to be found believable.

Section-165 gives right to the Court to ask questions, related or unrelated to do complete justice to the parties.

## **Session-2: Judicious Approach by Family Court Judges in Maintenance and Divorce Proceedings (11:30 am to 1:00 pm)**

**Speaker:** Hon’ble Mr. Justice K. Kannan, Dr. Aman Hingorani

Justice Kannan commenced this session with the expression that judicious approach itself is not just law but it is law plus something more and as family courts are special types of courts, having different approach, it is not just the application of law that is important but how we conduct ourselves and what kind of approach we have in matrimonial proceedings of divorce and maintenance. In some of the provisions, the attempt has been to secure an informal atmosphere in the Family Courts.

It was delineated that as per Section-9 of the Family Courts Act, 1984 the duty of Family Courts is to make efforts for settlement itself shows that Courts to do not get into the technical provisions of law at the onset such as administrative laws and the principles of evidence law. The provision under Order 32 of the Civil Procedure Code, 1908 and provisions under the Hindu Marriage Act, 1955 relating to settlement, marriages and the mutual consent was discussed.

It was delineated that the Family Court judges adopt different positions for an obvious reason that it is just not dispute between two persons like in a civil litigation of right over property, it is something which has a bearing to how the society is built and how the family relationships are so important that different approach is necessary is what the endeavour is. Apart from the situation where parties want to know what is being stated, how it is to be litigated, the Court should at all times endeavour that there is sufficient space for settlement that the Courts allow, it should be done at the earliest.

It was stressed that the earliest does not mean that once a settlement process is failed and the matter come back to court and then again at the course of trial something else emerges and if court thinks that there are certain areas still need to be considered, it should be put back again for settlement, if it is necessary. It was deliberated that to what extent a judge can act as a mediator and settle the dispute depends upon the case to case basis.

It was emphasized that where there is a case dealing with divorce or maintenance a judge should always look at the parties and not just to the advocates. A judge should always have a soothing appearance and maintain a posture which is correct and required.

In Matrimonial matters typically in maintenance and in divorce a judge should provide some ventilating space to the parties and should try to find out a solution through counsellors which may work at times. The another important point which was pointed out that party should not be threatened from approaching the Court and can able to represent his or her case independently without any fear and with a hope of getting justice. In family court proceedings the party itself should be encouraged to express something, in order to know the exact feelings and anxiety of the party.

It was delineated that the person who comes to the Court should have adequate resources for the trial.

With regard to the maintenance allowance *Latifi case*<sup>10</sup> and *Shah Bano case*<sup>11</sup>, *Shamim Ara case*<sup>12</sup> was discussed during the discourse. It was stated that full maintenance should be given within the period of Iddat and while deciding issues relating to maintenance a judge should always think it is just not for the wife but also for children if the children are with her.

Section-24 and 25 of the Hindu Marriage Act, 1955 and gender equality was discussed during the discourse. It was stated that in ordinary practice it is the woman who claims maintenance. It should be ensured that it is provided throughout the proceeding.

It was highlighted that gathering evidence is very crucial. It was stated that if wife files a case for maintenance but has no means to present the document to show husband's income, in such cases the claim should also not be denied on the ground that since no document is presented, husband cannot be compelled to provide maintenance where he says that he has no means. Protection of Women under Domestic Violence Act, 2005 provides for the appointment of protection officer who is allowed to go to the house and collect evidence. So in such a case the protection officer can do investigation and can give the report about the husband's income. Thus it was emphasised that burden of proof should not solely always be put on the plaintiff to establish the income of the other side. It is settled law that plaintiff bears the burden of proving but sometimes a judge need to play a proactive role to come to the judicious decisions with regard to the family dispute matters.

With reference to interim maintenance, it was delineated that interim maintenance is a tool which empower the aggrieved party at par during the trial proceedings. However, it was emphasized that interim maintenance can be granted only after weighing the relevant evidences.

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<sup>10</sup> AIR 2001 SC 3958

<sup>11</sup> AIR 1985 SC 945

<sup>12</sup> AIR 2002 SC 3551

In divorce cases it was expressed that parties living together is not always the best solution but what is most important is to restore the dignity of the aggrieved person.

It was deliberated that it is essential that in all divorce proceedings following aspects should be taken into considerations:

- 1) Matter related to maintenance allowance?
- 2) Are there children?
- 3) Are the issues of child custody addressed or not?

The importance of DNA test was discussed and may be performed where a person attempts to deny legitimacy. However, it was stated that this test must be allowed rarely. In *N.D. Tiwari case*<sup>13</sup>, the person wanted to assert that he was a legitimate son and therefore DNA test was done. Thus, for the DNA test to be done there should be strong reasons for believing that there is a need for DNA test. It was further stated that all the things should be kept open and it has to be ensured that the interim directions given should not affect the final disposal itself and keep it open ended so that the parties do not go in revision proceedings.

It was remarked that the judge should ensure that in every ex-parte order should be served because one may never know the reason as to why the party was not able to appear before the Court. There could be some disruptions and somebody may have been prevented from appearing. There may be practical difficulties in serving the notice in certain cases, however, every attempt should be made by the Court to ensure service and the importance of service should not be underestimated.

It was stated that understanding personal law issues relating to divorce is also very significant and the Court should follow all the laws pertaining to matrimonial matters. It was further stated that the judges need to get themselves acquainted with the law.

These are some of the important things that need to be addressed in the divorce proceedings. This session was about how the judges need to conduct themselves while dealing with the family courts.

**Speaker:** Aman Hingorani, Advocate on Record and Mediator

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<sup>13</sup> AIR 2012 Delhi 151

The speaker emphasized the purpose for which family courts are established. He stated that there are certain practices that must be brought out in open and must at least be acknowledged so that we can do something about it.

It was expressed that as shocking as it may seem but there are some family courts that are not letting people file cases because it is voluminous even if they do allow, they ask the parties to limit the petition to a certain page limit. They misconstrue the provision of the Act which lays down simple procedure.

It was delineated that The Hindu Marriage Act, 1955 and Special Marriage Act, 1954 talk about day to day hearing and to finish off the case within six months. However, the practice is such that many family courts provide a hearing after six months thus the provision of law for finishing it within six months can never be met. The application under Section-24 of Hindu Marriage Act, 1955 itself takes time, may be months or years. It was emphasised that when the decision comes, the liability becomes huge overnight and at times people had to go to jail because they are not able to pay huge sum of money that have come up in those arrears.

It was expressed that when comes to divorce many family courts have an approach that, even if one person wants divorce, a judge cannot force someone to live with a person he/she is not comfortable living with. The approach cannot be to force to love someone rather to let them go. There is nothing wrong with this approach provided the other side takes it. There is an emotional component attached to it.

It was stated that the entire justice system around the world is factored on children more than the husband and the wife as they are most vulnerable. It was expressed that usually the one who has the custody of the child is more benefited. Since the system is slow it gives ample time to one party to poison the child against the other side to such an extent that by the time matter comes up for hearing the relationship may not be worth preserving. It was narrate that there are also situation where the adversarial system requires the parents to maximize their own possession over the child and their aim is to get child custody and for this the parties make allegation against each other and question their character.

It was remarked that the child has the right to equal sharing unless it is proved that custody to a party would be detrimental to the child interest. The assumption is that both sides must have access

to the child. Children must have equal sharing time with each parent and time must be a quality time.

It was expressed that family justice system talks about relationships and judges are meant to decide issues in accordance with law. The role of the judge should be to create an umbrella of service to find out what the real problem is, keeping in mind the underlying interest of the parties.

It was suggested that one must realize that we need to reform the manner in which these cases are treated. The parties approaching the Court are already traumatized and the existing procedure adds to their trauma.

The following questions were discussed during the discourse:

- 1) Do we need to relook at the way the proceedings are conducted?
- 2) What is the role of a judge and what is the healing touch that the judges need to provide before the parties leave the Court?
- 3) Whether any efforts are made by the courts to make the parties confident about themselves post-divorce to overcome all the trauma that they faced in the past?

Some of the suggestions/ take a ways that came out from the discourse:

1. Family Courts should provide healing effect to the parties and for this family courts should be well equipped with the trained counsellors.
2. In custody matters and visitation rights, financial difficulties could also be taken care of.
3. The practice followed in the Aurangabad Family Court was discussed where the parties were called upon with their child on Children's Day for a drawing competition of their children and parents were asked to recognize the drawing of their child. It was stated that The Family Courts at Nagpur, Pune and Mumbai also organized a befriend program where people who have been separated for 10-15 years get reunited. It was advised that such practices should be followed by the courts of other jurisdictions also.
4. The help of conciliators and mediators should be taken at the right time to resolve the dispute.

### **Session-3: Determination of Best Interests of the Child vis-à-vis Court Proceedings (2:00 pm to 3:00 pm)**

**Speakers:** Hon'ble Mr. Justice K. Kannan, Ms. Geeta Ramaseshan, Ms. Padmaja Ramadu

With reference to the child custody issue 247<sup>th</sup> Law Commission Report was discussed Justice K. Kannan. The report points out how the child interest is paramount. It examines that what are the indicators to identify best interest of the child.

Article 39 (f) of the Constitution of India was emphasized where the State shall, in particular, direct its policy towards children so that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

It was delineated that parents do play an important role in both emotional and intellectual development of the child. The two concepts, custody and guardianship were discussed during the session. The former one refers to the physical presence and physical custody of the child and the latter to the child rights so as to make important decisions for the child.

It was emphasised that the global trend for custody is of joint custody of the child. Unfortunately, in India, the child is used as a bargaining tool by the parties.

The discussion was then passes on to Ms. Geeta Ramaseshan who spoke out the various theories which are relevant in deciding the best interest of the child. It was remarked that today we are no longer concerned with what personal law says with respect to child issues. The Courts have started considering the best interest of the child while granting custody and what exactly is the best interest depends on case to case basis. It was stated that we started with the tender age theory which talks about five years preferential right to the mother, from there we moved to the welfare theory and today in the present time we have best interest theory in application.

The concept of co-parenting was discussed. It was deliberated that even though the law does not use the word joint custody, parents may enter into an arrangement by which they are able to resolve the issue of joint custody. It was stated that the concept of joint custody is well prevalent in western State where the state also supervise the interest of the child.

It was stated that five stages of grief has often been highlighted in understanding relationships which are as follows:

- 1) Denial
- 2) Anger
- 3) Bargaining
- 4) Depression
- 5) Acceptance

It was deliberated that when parties approach the Court they are in the stage of denial and anger, slowly they move on to a bargaining position after which once the marriage is annulled there is obviously a feeling of loss and the parties go into depression and finally maybe there is an acceptance. When the battle is alive between the spouses, the insecurity is very high and when the divorce is done and the custody is granted, the parent who has the child is in more accommodating position to share. It is very hard for Courts to address the same, thus many times Courts need the assistance of the experts. It was stated that many times there is tremendous stress on the child to please the parent with whom he/she child is. Most of the times the child were tutored which is a challenging task for the judge to award right custody. Some of the examples that were discussed are:

- A Child was in stress and was tutored by his mother. When the father took the child in his car, the child threatened that he would jump off. Two years down the line the child turned out on his mother saying that it was her fault and the child went into depression.
- Child was 6 years was living with his father and the mother had visitation rights. The child upon visiting his mother told her that he would scream and shout in front of his father but she must send him back. The order was passed giving the custody to the mother and he again cried to go back to his father.

It was stated that when one parent accuses the other of child abuse or child sexual abuse, it becomes very problematic to find the reality of it. So how does one find out the right solution in such cases is a great challenge. The solution to it is to have workshops with psychologist where best interest of the child can be sought out.

Thereafter, Ms Padmaja Ramadu carried forward the discussion from a psychologist point of view. She stated that child should never ever be made to undergo such trial.

It was delineated that there are many cases in which people approach with a different issue, however after analysing the problem the cause of issue would be something very different. She shared various real life experience of family dispute as a psychologist which are as under:

A 40 year old Doctor and the complaint were aggrieved from depression approached her. They had problem with marriage. The wife kept visiting for counselling and improved but there was no improvement in the husband (who is a doctor) condition. As part of the deeper therapy, it was found that in his childhood his parents never got along and they eventually separated and a bitter battle went on. When he was taken down the memory lane it was found that every day he would come home and bang his head against the wall in the night and then his mother took him to a psychiatrist. In this case, the person was successfully settled as a Doctor and everything was fine outwardly but deep down he was still bruised. It is such a sensitive thing that it can scar the human being for life.

It was suggested that as far as children are concerned, the Court has to see what more can be done to minimize the effect of the scar. The Court should appoint more and more counsellors to deal with such cases and these cases should be handled gently in a non-threatening atmosphere.

In another case, it was stated that husband came for counselling. He loved the child and wanted the marriage to work but the wife did not agree for counselling. The girl thought that since she had the child husband would conceit to all her demands. The husband communicated that he wants to go for divorce and would not fight for child's custody. Within a month the wife came around and they both got counselling done and resumed their normal family life.

It was deliberated that during the proceedings if there is an intervention a lot can be done about it. More holistic approach need to be adopted between lawyers, judges, parties and the counsellors to

make things work. Maybe having the counsellor while the trauma is going on would really help the child and would prevent him/her from any forthcoming depression.

It was emphasised that children have their own amount of psychological baggage that they carry. If this is not taken care of then they will definitely face disorders. They may get into substance abuse because emotionally they are disturbed. Children will not be able to develop a good E.Q. (Emotional Quotient) because every child needs both male and female energy.

If they are raised by a single parent then they will have excess of one energy and they may not end up being a psychiatric case but they may have borderline personality, they can develop anxiety or anger that would manifest as OCD (Obsessive Compulsive Disorder), Depression, violence because they don't have proper anchoring or a family comfort zone. They create a group of friends who will become family to them and would do whatever their friend does. They will depend on their friends and the friend will become their emotional anchor. If the friend smokes, they will also start smoking. It was stated that most of the times the single parent is himself or herself disturbed and they are unable to pay much attention to the child.

It was remarked that when the child is brought from the Interim custody of one parent before the Court, the allegation is usually made that the child many a times develops the comfort with the parent he or she was residing with and this fails to show the true opinion of the child. It was suggested that since the child is malleable and can get influenced easily, to establish the intelligible preferences a judge must factor the bias which the child might have if he or she was conditioned by the father or mother. The advocate may be present but may not be allowed to intervene during the interview. The Court can also appoint guardian for the child to determine the best interest of the child.

Justice Kannan discussed following six points that would help in determining the best interest of the child:

- 1) On the basis of age some value can be assigned to Child's preferences.
- 2) Child's welfare in the best interest can be determined depending on the child's identification, sexual orientation, national origin, relation, beliefs, identity and personality.
- 3) Kind of protection the child gets.

- 4) Vulnerability of the child, homelessness, victim of abuse and other factors.
- 5) Child's right to health and education

The welfare aspects of the child with regard to the provisions provided in the Guardians and Wards Act, 1890 and Hindu and Minority Guardianship Act, 1956 were discussed during the discourse.

There was a Court order in *K.M. Vinaya v. B. Srinivas*<sup>14</sup> which stated the following:

- 1) For the sustainable growth of the child joint custody is granted. The minor child shall be with the father first and then with the mother.
- 2) Parents shall share the expenditure equally.
- 3) Each parent will have visitation rights on weekends.
- 4) The child shall use phone call and video conferencing with each parent while living with the other.

It was emphasised that parenting plan is an important thing for the welfare of the child. Plan should address the major issues of decision making including the child's education. Thus, while deciding the best interest of the child, the consequences of the decision should also to be looked into.

### **Session-3: Survey of Family Courts in Other Jurisdiction (3:30 pm to 4:15 pm)**

**Speaker:** Prof (Dr.) Geeta Oberoi

The speaker initiated the discussion with a suggestion that all the Family courts should have an integrated jurisdiction over all the legal problems with respect to the family disputes. They should be assisted by a professional staff trained in the social and behavioural sciences.

It was emphasized that when the marriage gets sick, instead of determining "punishing" the aggrieved spouse with a divorce decree a Judge should first endeavour to diagnose the fundamental cause of dispute and then bring to bear all available resources to remove or rectify it.

The functions and the jurisdictions of the family court of other countries were discussed in detail and are as under:

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<sup>14</sup> MANU/KA/1714/2013

## GERMANY

The Constitution of Germany talks about provisions with respect to marriage, divorce and custody. Germany does not have any family court till date, the family disputes are taken up by the Supreme Court of Germany and the Federal Constitution Court (FCC). In 2005, reforms planned called for establishment of separate Family Court. Since it is a civil law country people enter into contract of marriage.

The court decides the question of validity of premarital contract. In 2001, Federal Constitution Court dealt with premarital agreement in which the pregnant wife was made to sign an agreement that if there is divorce, she cannot claim maintenance thus she was made to waived her right to maintenance after divorce as provided under the Constitution. Federal Constitution Court held that it violates equality and other provisions of the Constitution. The Federal Constitution Court held that where an agreement does not reflect equality of partners but results from one partner's unilateral dominance, the state must limit he spouse's freedom to stipulate economic consequences of a divorce. The freedom to marry as protected by the Constitution does not authorize the parties to agree freely upon any consequences of divorce, especially if the terms are clearly disadvantages to one party.

In Germany, property division happens after marriage so the Courts try to equalize both the sides after divorce. 2005 law provides that during the marriage each spouse to own and administer independently his/ her own property, being liable for debts only for those incurred by himself/ herself. On termination of marriage by divorce, both spouses' assets are to be compared. The gains accrued by each spouse in her/his assets are equalized. On termination of marriage the spouse having more income has to maintain the other. The spouse having the higher amount of 'accrued gains' must pay to his/her spouse/partner half to difference between their accrued gains as compensation.

## CANADA

The survey amongst the matrimonial lawyer shows that most of the evidence is available online on social media. 81% of surveyed matrimonial lawyers used information from social media sites to build evidence for cases in family disputes between parties.

An example of social media being used in custody battles was discussed:

*Bekeschus v. Doherty*<sup>15</sup>: In this case the father filed application to increase his supervised access to children. The same failed as the father uploaded a video of his 8 year old daughter dancing in which his daughter was positioned next to a movie advertisement with sexual content on YouTube which was used to show the father's poor judgment.

*MJM v. AD*<sup>16</sup>: The father filed application to gain guardianship over his daughter to prevent mother from moving with her to Seattle. The same was denied due to posts from the father's Facebook account in which he spoke ill of the mother. Furthermore, a comment posted on his Facebook page about an adult film actress was used as character evidence.

*Kolodziejczyk v. Kozanski*<sup>17</sup>: The father failed in his attempt to reduce the amount he was paying in lieu of supporting his child support, as photos from his Facebook account showed him posing with motorcycles, powerboat and skydiving with partner and those pictures were used as evidence that he could afford to support the child given the comfortable lifestyle he displayed on social media.

Court has relied on social media evidences to allow divorce and also for the grant of maintenance in Canada.

## AUSTRALIA

In Australia, the biological and social infertility affecting family life and due to the biological and social infertility matrimonial relationships are jeopardized. Couples importing children from India through surrogacy arrangements. They carry out surrogacy through Indian surrogates and automatic Australian citizenship is granted to surrogate babies if they are genetically related to Australian parents. However, the citizenship does not automatically translate into legal parentage once a child is in the country. Parentage orders are made under the state and territory surrogacy legislations and since cross-border surrogacy is unlawful in most states, parents have to apply to

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<sup>15</sup> 2011 ONCJ 232, 2011 CarswellOnt 2969

<sup>16</sup> 2008 ABPC 379, 2008 CarswellAlta 2121

<sup>17</sup> 2011 ONCJ 6, 2011 CarswellOnt 165

Family Court for getting parenting orders in their favour. Thus, parenting orders determine parental responsibilities and do not establish legal parenthood.

### Parentage v. parenting orders

It is estimated that hundreds of children have entered Australia as a result of overseas commissioned surrogacy arrangements. However, only in 20 cases, parenting order till December 2015 were made by Family Courts. Family Courts, instead of granting a declaration of parentage, grants parenting orders that are confined to shared parental responsibility until the child is 18. In several cases Family Courts have referred cases to the Director of Public Prosecutions stating that what the applicants have done is illegal. These references have resulted in decrease in number of applications for declaration of legal parentage.

### UNITED STATES

In the year 1970, US Courts removed the fault concept in family and matrimonial disputes. Even though as early as 1970, "The Uniform Marriage and Divorce Act (UMDA)" was promulgated to rid fault from the divorce process by substituting the term "irretrievable breakdown" for fault-based grounds to potentially eliminating the emotion and drama from the litigation process and for helping reduce the hostility, bitterness and distress of the divorcing couples, social media has opened up possibility for showing poor side of the other in Family Court proceedings. Therefore in 1986, Congress enacted the Stored Communications Act (SCA), which prohibits social media sites from disclosing personal information to nongovernment entities without the user's consent, thus prohibiting the evidences obtained from the social media.

The importance and the admissibility of social media evidence and its prohibition by Stored Communications Act was discussed during the discourse. Some of the case laws that were deliberated:

- *Jennings v. Jennings*<sup>18</sup>: Daughter-in-law accessed the documents and emails of father-in-law from where she tracked down the information that he was cheating on her mother-in-law.

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<sup>18</sup> [697 S.E.2d 671, 678 (S.C. Ct. App. 2010).]

- *White v. White*<sup>19</sup>: Husband and wife shared the computer and the wife had access to husband's account and thus she presented his statement of account before the Court. The Court held that maintenance cannot be granted on the basis of the evidence produced as they both were staying together and she had access to his accounts.
- *In re Marriage of Tigges*<sup>20</sup>: Husband installed a secret video camera in the bedroom. The Court held it to be intrusion to privacy, not acceptable to any reasonable person.

It was deliberated that usually in custody orders, the party in whose favour the evidence is not passed brings the evidence from social media before the Court.

## JAPAN

Family Courts in Japan was set up in 1949 as a nation-wide special court. Family court Japan provides various services like in-court mediation to the parties related to disputes over divorce, custody, adoption and succession, etc. It was stated that family Court is a constituent part of the organised judiciary, placed on the same level as the district court. It is the court of first instance. Wherever there is a district court, there is a Family Court. Judges to the Family Court are appointed by the Cabinet from a list of candidates supplied by the Supreme Court. A certain number of probation officers are assigned to Family Court to carry out pre-hearing investigations. These are chosen from among university graduates in sociology, psychology and education. It was delineated that some court clerks are also attached to the Family Court to carry out the task of preparing documents and case records. At the clinic attached to the court, services are provided by medical officers.

It was emphasised that the Family Councillors and Conciliation Commissioners constitute an indispensable organ of the court. They are appointed by virtue of their "social conscience and moral spirit" to participate in the determination and conciliation of family disputes. Majority of families still tend to resolve their conflicts in out of court settings, a lesser number settle their disputes at Family Court.

Article 24 of the Constitution, it spells out that a marriage shall be valid based on the free will of both parties on an equal basis. If the parties agree over divorce and related issues, including the

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<sup>19</sup> [781 A.2d 85, 86-87 (N.J. Super. Ct. 2001).]

<sup>20</sup> [758 N.W.2d 824, 826 n. 2 (Iowa 2008)]

distribution of property and arrangements for custody, they are required merely to file for a notification form with the family registry section of the relevant local authority. In this respect, divorce by consent is not a judicial, but an administrative process.

Approximately 90% of all divorce cases are divorce by consent. In a contested case, the parties have to go for in-court mediation at the FC under the "system of compulsory in-court mediation prior to litigation". If an agreement is reached, it is incorporated in an "in-court mediation document on divorce"; its binding force is equivalent to a court decree. These cases occupy about 9% of the total number of divorces.

Important features of procedure followed by the Japanese Family Court were discussed:

- Upon application of the person concerned, conciliation proceedings are commenced. All hearings involved are informal and in private.
- Family Court has to conduct a conciliation hearing in any case relating to personal rights and family rights. Only when conciliation is unsuccessful, an application for a divorce decree is deemed to have been made at the time when conciliation was applied for.
- Conciliation must be undertaken by a conciliation committee, whose members must include a Family Court judge and other members
- Family Court judge can pronounce judgment only after consultation with counsellors. They are normally present during the hearing.

## TAIWAN

Family Court is a specialised division of the district court which deals exclusively with family matters. In order to maintain the basic objective of upholding domestic harmony, attempts are made to resolve family conflicts by means of discussion or conciliation in the privacy of the court. This procedure is informal and readily adjustable to the circumstances of the persons concerned. In the Family Court, the principles of law, of community-awareness and of the social sciences particularly those dealing with human behaviour and personal relationships-work together.

Family Court has a varying number of judges at its disposal who assume the tasks of conciliation and of pronouncing judgment in each case. Where there are more than three judges, one of them

is to be appointed head of the court to manage all the administrative affairs. Family Court judges are selected according to their understanding and the amount of experience they have of dealing with family cases. Unmarried judges, as a rule, may not be appointed to the Family Court Family Court.

### **Procedure adopted at the Family Court in Taiwan:**

All hearings in family cases are informal and in private. Before any conciliation procedure begins, the court may either *motu proprio* or on the application of the parties involved, appoint a court clerk to investigate and discuss their domestic problems with the parties concerned, in the court's consultation room, in order to attempt to resolve them. In addition, the court may invite an "honourable and just person" having legal or other relevant specialised knowledge to assume this task. In proceedings relating to divorce, cohabitation of husband and wife and dissolution of an adoptive relationship, the Family Court must try to effect a reconciliation between the parties before opening the hearing. Family Court may appoint a mediator to co-operate in the conciliation procedure, whether or not the parties have chosen their own mediator. Family Court when necessary, may consult the friends of the parties, or specialists in family matters, or representatives of child welfare centres or other organisations or request them to cooperate in reconciliation attempts

For their contribution towards conciliation, the mediators receive fees from the court. Family Court may compel third parties with an interest in the result of the conciliation to take part in the conciliation process. In an attempt to bring about a compromise, Family Court may order a stay of the proceedings for a period not exceeding six months, provided that the proceedings are not discontinued for that purpose on more than one occasion.

### **BANGLADESH**

Family Courts were established by the Family Courts Ordinance, 1985 and follows procedures as laid down therein. Family matters include suits for dissolution of marriage, restoration of conjugal rights, custody of children, recovery of dower money and maintenance. Though Family Courts were empowered to exercise mediation in suits pending before it both at the pre-trial stage under Section 10 and after closure of evidence following framing of issues and fixing a date of

preliminary hearing under Section 13, working from past 2 decades show that Family Courts failed to take cognizance or to apply these provisions to mediate disputes in pending suits before them.

One of the innovations of the Family Court judges in cases involving a big amount of money, has been that they allowed payment by instalment but in case of default extra payment by the defaulting parties is made a term of settlement. Another innovation of Family Court judges is to have the two lawyers, representing the litigants, draft the language of the judicial order to help the judges to spend more time judging and not getting bogged down drafting compromise decrees which the lawyers can very well do.

## PAKISTAN

Family Courts Act 1964 established FCs in Pakistan for the decisions of matters relating to disputes relating to marriage and family affairs and other matters connected therewith. This Act gives a special procedure through which Family court regulates its own proceedings in accordance with the provisions of this Act. Appeal lies to High Court where family court is presided over by a district judge or additional district judge in other cases. However, in following cases no right or appeal is given from decision of Family Court:

- Dissolution of marriage,
- Dower or dowry not exceeding Rs. 50,000/
- Maintenance not exceeding Rs. 1000/- per month

The appellate court is bound to dispose of the appeal within 4 months. There is no right of appeal or revision against an interim order passed by a Family Court. It must be noted that no 2nd appeal is allowed and only in extraordinary circumstances writ petition can be filed.

Any person who insults, causes an interruption in the work of the Family Court, misbehaves with any person in court premises or uses abusive language, threats or uses physical force or refused to answer any question put by Family Court, refuses to take oath is liable for contempt and in such a case Family Court can forthwith try such person and sentence him to fine up to Rs. 2000. Issuance of Commission to examine any person, make a local investigation, inspect any person or inspect any document.

In matters of custody, FCs mostly presumed that the welfare of the minor lies giving custody to the mother, subject to supervision and control of the father. The grounds for disqualification of right of mother to custody are strictly followed if the same are not affecting the welfare of the minor. In *Muhammad Tahir Vs. Raaes Fatima*, the Supreme Court disallowed the father's petition for custody of the minor children and disagreed with his contention that he was allowed to take custody from the mother because the mother was illiterate, had no source of income and that she had developed an illicit relationship with another person.

Similarly, Family Courts have held that a wife is entitled to maintenance and an independent residence, and is under no obligation to live with the parents of the husband in the case of *Muhammad Siddique Vs. Shahida Parveen (1991)* ; *Muhammad Tauqeer Vs. Additional District Judge (2001)*.

## UNITED KINGDOM

New Reforms of 2011 of UK were deliberated during the session:

- Care cases are to be completed within six months in a single Family Court, which replaces the current three-tier court system in family cases.
- Separating couples attend a mediation awareness session before taking disputes over their finances or their children to court.
- Expert evidence in cases involving children, only being permitted when it is necessary to resolve the case justly.
- Right level of judge to be appointed for a particular Family Court case, and proceedings to be held in the most suitable location.
- 26-week time limit to decide custody cases of children.
- Family Court to allow foster carers to go on to adopt children they are looking after.

### **Media access to Family Court proceedings**

The Family Procedure Rules 2010 (FPR) followed sustained campaigning from pressure groups, influential media spokespersons and judges. The Rules are intended to increase confidence in both Family Court and family lawyers. Rule 27.11(2) FPR contains a presumption in favour of accredited media representatives attending hearings held in private. Furthermore there is a

mechanism contained within Rule 27.11(3) FPR to exclude the media in the case of necessity, for the purposes of justice or to protect the welfare and safety of a party, witness or connected person. The burden to prove that exclusion of the media is appropriate is firmly placed on the party wishing to exclude; it is not for the media to justify its attendance. That being said, the court retains ultimate discretion to exclude the media on any of the grounds specified in R. 27.11(4) FPR even if it is not upon an application to restrict media access.

### **Applications to exclude the media**

- In *Spencer v Spencer*<sup>21</sup>: In application to exclude the media, Family Court judge considered whether the judiciary was being asked to endorse a two-tiered system; granting media exclusion for high-profile celebrity and public figure applicants, but not for those out of the public eye (and theoretically less "newsworthy"). It was held that, though the public standing of the parties was relevant, it was not a sufficient reason in itself to lead him to exclude the media.
- *Re X [X (A Child) (Residence and Contact: Rights of Media Attendance)]*<sup>22</sup>: The concerned child arrangements in which the "celebrity" parties applied to exclude the media from accessing the hearing or reporting on the nature of the dispute. Family Court held that the child's interests would not be sufficiently protected by implementing reporting restrictions only. As the court found media access to be a risk to the child's health, the court wholly excluded the media. However, the court made clear that cases concerning children of celebrities are no different in principle to those concerning children of anyone else since the court's primary concern is the child, not the parents.
- In *Cooper-Hohn v Hohn*<sup>23</sup>: Mr. Hohn applied for a reporting restriction of the couple's financial disclosure in the proceedings. Judge ordered that only confidential and commercially sensitive information, in addition to details of the couple's children, be restricted.
- *Fields v Fields*<sup>24</sup> and *Luckwell v Limata*<sup>25</sup>: The Court held that "there is a pressing need for more openness. Family Court must be more transparent and there is not good basis for making an exception of financial cases. Whilst Holman J. acknowledged that permitting media access but

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<sup>21</sup> [2009] 2 F.L.R. 1416

<sup>22</sup> [2009] 2 F.L.R. 1467]

<sup>23</sup> [2015] 1 F.L.R. 19]

<sup>24</sup> [2015] Fam. Law 883

<sup>25</sup> [2014] 2 F.L.R. 168

then tightly restricting reporting creates only an illusion of transparency. Holman J. expressed regret for distress caused by the widespread reporting of the case, he explained that this could not override the need for transparency.

### **Alternatives to court proceedings**

Media applications for access to family law proceedings and recent surrogacy case of *S v H B*<sup>26</sup> wherein Associated Newspaper Ltd funded a biological mother's application to vary particularly restrictive reporting restrictions relating to her child demonstrated the lengths the media may go (to fund litigation) so as to achieve the end result of obtaining a story to boost the sale of newspapers.

Parties are given option for non-court dispute resolution (NCDR), which offers a private forum for negotiation to reach resolution in financial matters. NCDR in all forms, including mediation, arbitration, neutral evaluation and the collaborative law process is conducted in private, with neither the public nor the media permitted to attend. Indeed, information that an individual is involved in arbitral proceedings will not usually enter the public domain.

### **New Law to stop forced marriages**

As about 5,000 to 8,000 forced marriages occur each year and 41 % of victims are u/18, UK Government brought Forced Marriage (Civil Protection) Act 2007. Prior to the 2007 Act, Family Courts were unable to seek orders to protect individuals from being forced to marry; apart from non-molestation orders under s.42 Family Law Act 1996. From 25 November 2008, Family Courts issue injunction: the Forced Marriage Protection Order (FMPO). Those who disobey this order may be found in contempt of court and sentenced up to two years imprisonment.

Examples of forced marriages:

- The high-profile case of the Dr Humayra Abedin, who issued an injunction against her family when she was kept captive in Bangladesh and forced to marry.

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<sup>26</sup> [2015] EWHC 3313 (Fam)

- Other FC case was *NS v MI*<sup>27</sup>, where the victim was forced to marry her cousin when she was aged 16 after being persuaded that she was going on a holiday to Pakistan. The FC had to decide when an arranged marriage becomes forced upon the individual.

### **Criminalisation of forced marriages**

As high-profile murder case of Shrien Dewani and Anni Dewani demonstrates that the victim was unable to escape her marriage due to high expectations. The defendant and victim were both very unhappy in their marriage and the victim was murdered on their honeymoon in South Africa, which was claimed to be settled by her husband. This case led to another statute being enacted.

Although the Forced Marriage (Civil Protection) Act, 2007 permitted FCs to seek orders to prevent victims of forced marriages, it allowed those guilty of practicing forced marriages to escape criminal liability.

The Anti-Social Behaviour Crime and Policing Act 2014 now criminalises such an offence, protecting civilians in England and Wales and those taken overseas “who are at risk becoming the victims of forced marriage:” Those who disobey the law can receive sentence up to seven years.

### **RUSSIA**

In *Nazarenko v Russia*<sup>28</sup> the Court held that the concept of "family life" was not confined to marriage-based relationships. Nor was existence or non-existence of "family life" dependent on a biological relationship. Therefore, the question depended upon the "real existence of close personal ties". Here, "A" had been born during the applicant's marriage to her mother. Until the disputed custody proceedings, there had been no doubts about the applicant's paternity. As such, the applicant had raised A as his daughter for more than five years, by the time of the hearing, and there was expert evidence of the close emotional bond between them. Where the existence of close personal ties had been established, the state must, in principle, act in a manner calculated to enable those ties, which constitute a fundamental element of "family life" for both child and "parent", to be maintained. This amounted to a positive duty on the state to adopt effective measures to secure respect for "family life", even between individuals. In this case it had never been suggested that A

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<sup>27</sup> (2006) EWHX 1646 (Fam)

<sup>28</sup> (39438/13) [2015] 2 F.L.R. 728 (ECHR)

having contact with the applicant would be detrimental to the child. On the contrary, the childcare authority and expert psychologists deemed there to be a "strong mutual attachment" between them and that the applicant had been "taking good care of the child". As such, there was no relevant reason which justified this result.

## NEW ZEALAND

Recent case law has brought about several significant changes to the division of relationship property between parties who have chosen to end their relationships. These changes have impacted upon the kind of assets that can be classified as relationship property and the degree of additional relationship property one party may receive as a result of an economic disparity between the parties as a result of the division of functions during their relationship.

Two recently decided New Zealand relationship property cases have significant ramifications for future cases in terms of determining what counts as relationship property for the purposes of the Property (Relationships) Act 1976.

*Thompson v Thompson*<sup>29</sup>: Couple married in 1971 established a health and fitness company called 'Nutra-Life' in 1984. The shares in Nutra-Life were held in Health Foods International Ltd. ('HFI'), another company created by the parties in 1989. In 1994 the shares in HFI were sold to the ML Thompson Family Trust of which Mr. Thompson was one of the three trustees for \$1.11m. The parties separated in August 2002. In December 2006, NEXT bought the Nutra-Life business for \$72.3m (including goodwill) and paid Mr. Thompson an additional payment of \$8m in exchange for a 2-year restraint of trade. The parties agreed on all divisions evenly according to the Property (Relationships) Act 1976 but could not agree on how \$8m restraint of trade payment should be treated. H called his own separate property because it was acquired as a result of his own personal attributes. Therefore, it should not be divided as relationship property. However, Wife argued that the restraint of trade payment would not have been paid but for the existence of the Nutra-Life business itself, and that therefore the payment was not because of personal attributes. Family Court, High Court and Supreme Court, all held it to be separate property because it was solely to prevent Mr. Thomson from doing the same business for next couple of years.

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<sup>29</sup> [2015] NZSC 26

## **Family trusts**

New Zealand is estimated to have approximately 5 lacs family trusts, which is likely to be more trusts per capita than any other country in the world. Trust have become an important part of relationship property disputes because, in general terms, when property is put into trust it is no longer owned by the parties jointly or by either party to a relationship, and so it is not generally available as relationship property. This can significantly affect the amount of relationship property to be divided between the parties and therefore the amount of money each party ultimately receives upon the breakdown of the parties' relationship.

*Clayton v Clayton*<sup>30</sup>: In this case the parties had two children and married for 17 years, before separating in 2006. The vast majority of the parties' assets (except for the family home) were held in various trusts and companies associated with Mr. Clayton, who was a 'successful businessman with significant sawmilling and timber processing interests'. The shares in Mr. Clayton's companies were all owned by Mr. Clayton directly, 'or through trusts in which he is a trustee and/or beneficiary'. This case demonstrates how financially significant relationship property issues can be when trusts are involved and the extraordinary amount of relationship property that can be disposed of into trusts to defeat one partner's access to those assets.

## **Compensation to home maker spouse**

- In *Jack v Jack* both the Family Court and the High Court awarded the wife 70 percent of the parties' relationship property on the basis that she had given up her career to support her husband's career as a surgeon.
- In *Williams v Scott* the wife had also given up her career to support her husband in establishing a successful law firm. The wife was trained professional in both accountancy and law. When the couple separated after a long 26-year marriage, the Family Court awarded the wife an extra 10 percent of that property, as compensation for the fact that she had lost the opportunity to develop her career fully and had supported the husband in his career.

## **SINGAPORE**

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<sup>30</sup> [2015] NZCA 30

Family Court was established in 1995. Family Court is litigant friendly. There is a waiting area for parties to sit while waiting for their case to be mentioned or mediated. A television set screens programmes on family related matters for the benefit of waiting parties. A children's room is available for parties to leave their children while they attend to their matter in court. There is a supervisor present in the room who assists in keeping an eye on the children. Inside the children's room, story books and games are provided. A television set is also provided which screens children's programmes for the benefit of the children. Mediation rooms are also available for use by the mediators and parties during mediation.

A court Support Group has been formed to provide mediation and counselling services. It consists of 34 mediators, 9 lawyers, 15 professional social workers and counsellors and 10 court interpreters trained as mediators. Mediation is mandatory for all applications before the FC.

### **Denial of rights to migrant brides**

“Migrant Brides “refers to a growing group of Asian women from developing countries who migrate to marry. From 2000 to 2010, there was a 29 % increase in marriages of Singapore citizens to non- residents. Reaction to changes in gender roles in recent decades; Singaporean women have made great advances in the workplace and now form 44% of the resident workforce. House-work and traditional care roles have been outsourced to live –in domestic workers from developing countries. Now it appears that marriage itself is being outsourced.

Academics have observed that *“[t]he increasing proportion of Singaporean men seeking ‘foreign brides’ ... reflects the growing mismatch in marriage expectations between the two largest groups of singles: the independent –minded, financially well-resourced, graduate women with sophisticated expectations of marriage partners, and... blue- collars male workers... with a preference for women willing to uphold traditional gender roles and values.”*

Migrant Brides are perceived as unable to contribute to economic growth and as potential burdens on the State. Their husbands tend to be older and of lower income, which impedes their sponsorship of more permanent status for their wives. They are thus often denied Permanent Residency (“PR”) and citizenship. Instead, they are given Long Term Visit Passes (“LTVPs”), which must be renewed every year through their husbands' sponsorship. This results in a glaring incongruity: They are perpetually transient outsiders, even though they have acquired permanent links to

Singapore as wives and mother of citizens and they are disproportionately poor; they have no right to work in Singapore and no access to the welfare system. They are isolated and extremely vulnerable to domestic abuse due to the skewed power relations stemming from their dependency on their husbands to sponsor their temporary immigration status. Family Courts are not helping Migrant Brides, even though they are formally covered by the same legal provisions as Singaporean women.

## **DAY-2**

### **Session-5: Effective use of ADR methods in resolving family disputes (9:30 am to 10:30 am)**

**Chair:** Hon'ble Justice Prabha Sridevan

**Speaker:** Dr. Sudhir Kumar Jain

Welcome address of second day was given by Dr. Amit Mehrotra.

Dr. Amit Mehrotra shared a quote of former President Dr. APJ Abdul Kalam:

*“Where there is righteousness in the heart there is beauty in the character, where there is beauty in character there is harmony in home, where there is harmony at home there is order in the nation where there is order in the nation there is peace in the world.”*

Justice Prabha Sridevan highlighted the importance of Family Court judge and emphasised that they preside over the most important courts in India.

Justice expressed a quote:

*“Harmony at home leads to the advancement of the country and everything”*

The background of the Family Courts in India were discussed.

It was stated that family courts were established with the objective of amicable settlement of matrimonial disputes. The Law Commission in its 59<sup>th</sup> report speaks for creation of courts concerning family disputes with simplified procedure. Family Courts Act, 1984 enacted for speedy disposal of family disputes and to promote conciliation and settlement. It recognizes conciliation

for settlement of matrimonial disputes or initiate reconciliatory processes. It was stated that the conciliator plays pro-active role and encourages parties for resolution. Section 9 deals with duties of family courts to make efforts for settlement. It provides that in every suit or proceeding, endeavour shall be made by family courts in first instance, where it is possible to do so consistent with nature and circumstances of case, to assist and persuade parties in arriving at a settlement in respect of subject matter of suit or proceedings. It empowers family courts to adjourn proceedings due to reasonable possibility of settlement.

It was deliberated that the judicial officers should resolve the disputes not for saving the marriage necessarily but to ensure that each one who approaches the Court goes away with a certain peace of mind.

Justice shared her view that as human beings each side thinks that he/she is right and the other side is always wrong and the dispute has happened only because of the opposite side.

It was stated that usually it is presumed that judges are seen to delay the case, but many a times it is the litigant who pay their lawyers to delay the matter.

Importance of ADR was discussed during the discourse. It was stressed that through ADR mediators can resolve the dispute amicably as they can able to root out the differences through their skilled techniques.

It was stated that we all carry certain notion about right and wrong things. Sometimes judges catch the problem immediately but it does not happen in every case and as every case is an important a judge need to be very cautious and careful in handling the cases.

Dr. Sudhir Kumar Jain furthered the discussion on how ADR can be used to impart timely justice.

With regard to Matrimonial Disputes it was stated that little quarrels between young couples sometimes assume serious matrimonial disputes. The disputes arise due to the difference in the ideologies, emotions, ego the parties possess, social compulsions and personal responsibilities of parties. It was emphasised that in the old times, the matrimonial disputes were resolved with the intervention of elderly persons of the family but at present this concept is diminishing due to the nuclear family set-up.

The causes of the matrimonial disputes were discussed during the discourse. Ego/Pride of the spouses, Behavioural Disorders, difference in perception, Self –Interests of Parties, Incompatibility, Psychological Problems, Adjustment Expectations, Medical Reasons are some of the major causes that are emphasised for matrimonial dispute.

### **Mediation in Matrimonial Disputes:**

S.89 of the Civil Procedure Code, 1908 and the concept of the Arbitration and Conciliation Act, 1996 was discussed by the speaker. It was emphasized that the cases which do not require full and complete trial would be disposed to the satisfaction of the parties through ADR process. It was stated that if there are lot of cases pending, one cannot give time and justice to all. The formal legal methods till today are expensive and complicated. Thus, with the introduction of section 89 of the Civil Procedure Code, 1908, negotiation, mediation and conciliation developed as informal methods of justice dispensation. It was stressed that whatever may be the ground for family dispute, it should always be resolved amicably through a peaceful mode or method.

It was further stressed that section 89 of the Civil Procedure Code, 1908, deals with resolution of disputes by ADR including mediation. It is emerging as effective and workable mechanism for disputes resolution. It is an efficient, speedy, convenient and less expensive to resolve a dispute with dignity and mutual respect. It is voluntarily, flexible, non-adjudicatory, party centred and structured negotiation process in which a neutral third party assists parties in amicable resolution of disputes by using communication and negotiation techniques.

Parties retain right of self-determination. It is an informal, private and confidential. It addresses factual/legal issues and underlined causes of a dispute. The goal to find a mutual acceptable solution satisfying needs, and interest of parties. It is a pragmatic remedy in matrimonial disputes involving emotions, sentiments, social compulsions and responsibilities of parties besides unique nature of matrimonial laws. It is different in its form and contents from others disputes and it resolve matrimonial disputes to satisfaction of parties despite failure in conciliation and also resolves entire range of matrimonial disputes.

It was emphasised that mediation is very prevalent and practiced form of dispute resolution mechanism as most of the family disputes are not suitable for Lok Adalats. Mediator assists parties by facilitating communication. It was stated that mediation facilitates mutually acceptable

agreement satisfying everyone's interests. Mediation changes disputes from "win-lose" to "win-win". There is always a win-win situation in mediation and it helps in amicable settlement of disputes.

Attributes of a Mediator as a facilitator was discussed. It was stated that mediator should be the master of communication. He should be an active listener and should use neutral language. It was suggested that mediator should not have any emotional attachment with the parties.

Mediation Process were discussed which includes Introduction: Neutrality and Rapport Building, Joint Session: Relevant Information, Single Sessions: Anger Management and Flexibility and Agreement: Contents and Language.

The chart attached below was discussed that shows the statistics of the matrimonial cases disposed of by means of ADR techniques:

<b>Matrimonial Case</b>	<b>Referred Cases</b>	<b>Settled Cases</b>	<b>Not Settled</b>	<b>Success Rate (%)</b>
<b>Divorce Petitions</b>	2747	1283	1458	46.71
<b>Complaints under Section-125 of Criminal Procedure Code, 1973</b>	3577	2109	1465	58.96
<b>Bails Applications under Section-498A of the Indian Penal Code, 1860</b>	21850	10608	11778	48.55
<b>Restitution Of Conjugal Right</b>	954	493	455	51.68
<b>Domestic Violence</b>	7865	3884	3974	49.38
<b>Custody Matters</b>	465	224	240	48.17

### **Judicial Decisions**

It was emphasized that The Supreme Court recognizes mediation as an effective method of resolution which allows parties to explore possibility of mediation and the family courts to make efforts for mediation despite failure in conciliation. Various landmark cases were discussed during the discourse:

*K. Srinivas Rao v. D.A.Deepa*, (2013)5SCC226: The Supreme Court emphasizes relevance of mediation in matrimonial disputes including complaints u/s 406/498A IPC. It was observed that purely a civil matrimonial dispute can be amicably settled by directing the parties to explore the possibility of settlement through mediation. The courts have always adopted a positive approach and encouraged settlement of matrimonial disputes. The Supreme Court further observed that though offence punishable under section 498-A of the Indian Penal Code, 1860 is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. It was emphasised that if there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest.

*B.S. Joshi & Ors. v. State of Haryana & Anr.*<sup>31</sup>: The Supreme Court held that complaint involving offence under section 498-A of the IPC can be quashed by the high court in exercise of its powers under section 482 of the criminal procedure code if parties settle their dispute.

*Gian Singh V. State Of Punjab & Anr.*<sup>32</sup>: The Supreme Court expressed that certain offences which overwhelmingly and predominantly bear civil flavour like those arising out of matrimony, particularly relating to dowry, etc. or the family dispute and where the offender and the victim had settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the high court may quash the criminal proceedings if it feels that by not quashing the same, the ends of justice shall be defeated.

The speaker, Dr. Sudhir Kumar Jain highlighted the role of lawyers. It was stated that lawyers advise and motivate the parties by highlighting benefits and they evaluate proposals/options by negotiating effectively. They overcome barriers in settlement. The speaker further stated that Delhi Dispute Resolution Society (DDRS) is a society set up by the Dispute Resolution Board of Delhi wherein before lodging or filing of a complaint, the parties approach the DDRS to resolve the dispute. It was stated that Empathy is very important and empathy is not to be confused with sympathy.

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<sup>31</sup> (2003) 4SCC 675

<sup>32</sup> (2012) 10SCC 303

It was emphasised that mediation not only reduces the burden of litigation but also cures the ripple effect of appeals and revisions. It does not consider what is right and wrong.

## **Session-6: Role of Couple Therapy in Resolving Family Disputes: Relevance and Importance (11:00 am to 12:00 pm)**

**Chair:** Hon'ble Ms. Justice Prabha Sridevan, Former Judge, Madras High Court

**Speaker:** Ms. Padmaja Ramadu

The Speaker began the session by discussing the impact on westernization on the Indian marriage system. Whole institution of marriage is seriously threatened these days. Westernization has brought a cultural Tsunami that has hit the institution of marriage. It was stated that if the same thing had happened slowly, it would have adapted slowly and steadily but the sudden advent has seriously threatened the institution of marriage.

It was stressed that there is a lot of cross-cultural confusion. At present young couples have no guidance as to what marriage is? In earlier generations they had role clarity as to what husband is supposed to do and what all is expected from the wife

It was stated that Electronic media has been both productive and destructive to the society. Unfortunately, the youngsters without understanding the depth of their own culture adopt western culture.

Various causes of family disputes were discussed which includes individualism, self-centredness, ego clashes and exposure to electronic media. Many cases of exposure through social media were emphasised. In one case husband was found chatting with another women on Facebook, the wife brought an action against the same which then major matter for dispute.

It was stated that many a times divorce petition filed on silly and flimsy reason also. A case was discussed were a youngster wanted to go for a divorce because her husband was not sophisticated enough as he used to drink water from the bottle in front of her relatives and whenever her relatives used to visit in the night he used to meet them wearing dhoti/lungi.

It was deliberated that today, since there is a culture of having nuclear family, there is nobody else to talk to and to discuss the problem with or to resolve the dispute. Each one of them perceives and upon perception they consider the other person wrong and then the ego comes and they question themselves as to why should I talk first? Nobody wants to take a step forward.

It was stated that while handling a couple dispute it is not handling two people but is handling of two families and timely intervention is very important to eradicate the immaturities.

It was found that usually the E.Q. (Emotional Quotient) levels are very low as compare to I.Q. (Intelligence Quotient) due to which differences and dispute between the couple arose. The role of the psychologist become very important in such cases.

It was stated that therapy is a process of healing through counselling. It helps the person to come out of depression and perceive the things in broader perspectives.

It was deliberated that according to psychology, women are better at multi-tasking. Innate qualities of masculine and feminine energy should complement each other and not compete with each other.

It was emphasised that sexual problem and conjugal cohabitation are the major problems and ground of disputes these days. It was stressed that holistic approach is needed by the judge, counsellor and lawyer and they need to act as a team.

It was stated that neutrality is very important. Even in couple therapy the message that “we are equal” should be imparted to the husband and wife.

The program concluded with the concluding remarks of Hon’ble Justice G. Raghuram, Director, National Judicial Academy. Hon’ble Justice emphasized that there is a need to nurture the family and we have to solve the problem to the extent we are capable of.

Dr. Amit Mehrotra, Assistant Professor National Judicial Academy expressed the gratitude towards the resource persons, participants and thanked the Director, National Judicial Academy Hon’ble Justice G. Raghuram for providing this opportunity to coordinate the conference.