Documentation of Case Studies on
PARENTING AND CHILD CUSTODY IN NEPAL
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This study highlights a brief introduction on the ‘custody of the child’ along with its historical development. It introduces the practice of custody of the child in regard to legal provisions and in light of some judgements given by the Supreme Court of Nepal. The study is based on the analysis of seven cases decided by Patan High Court, Bhaktapur District Court, Baglung District Court, Kathmandu District Court, the then Janakpur Appellate Court and Morang District Court.

The cases of custody of the child dealt under various forms of case such as writ of habeas corpus and divorce. In some cases child was handed over to the mother where in some cases, child was also handed over to other than father and mother. Based on these case analysis, the study identifies the impacts of the legal provision, which mainly focus on the absence of legal recognition of principles of ‘best interest of the child’ explicitly in custody of the child. Despite that, the court has used these principles, but due to lack of set standard, discrepancies are found in the practice. It also provides the recommendation which focuses on legal reforms to be made with the practicalities in consideration.

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INTRODUCTION

Children have right to be raised in the environment for their overall development. After the breaking of a marriage and separation of a couple, the person who suffers the most is the child born out of the marriage. But protecting the welfare of the children is the primary factor of consideration when deciding which parent should get the custody of the children. The mother and the father of the child both have an equal right towards the custody of their children but who gets the custody is decided by the court. However, when the relationship between parents is not in the best and are going into separation, the right of child is put into jeopardy. But rights of the child should still be ensured when the parents are divorced or separated. Amidst this, parents tend to fight over the control over the child and various complex issues like maintenance fee, comes into play. Thus, it is necessary to determine who has the control over the child, who can make decisions related to child, financial responsibilities, etc., which is called as the determination of the ‘custody of the child’.

Black’s Law Dictionary defines the Custody as “the authority to make significant decisions on a child’s behalf including decisions about education, religious training and health care”. However, it is not inclined towards who can have control over the child, rather is about the protection of the child as a person, physically, mentally and morally.

1. BRYAN A. GARNER, BLACK’S LAW DICTIONARY (9th ed 2009).
Traditionally, father was considered to have the sole control over the child. In Roman Law, children were considered as the property of the father and mother were not provided any rights. However, this gradually changed, and the dimension shifted, giving preference to the mother, with the British Act of 1839. This Act stated that the mother should be given the custody of the child below 7 years and for the child above 7 years, mother should still be ensured the visitation rights. However, father was still considered to have the supreme control over the children. This was called as doctrine of the ‘tender years’ which rested on the idea that child to be handed to mother only during the tender years, till the child became old enough to be handed over to the father.

The shift from this paternal inclination is believed to have occurred due to industrial revolution and the increasing status of women. After industrial revolution, father used to be away for the work and mother was the primary care-taker. Freudian Psychoanalytic Theory pointed towards the mother’s love as strong attachment, also contributed to the shift. After that, with the research showing that both the parents have the connection to child and development of ‘best interest standard’, the idea of the joint custody developed. Today, international scenario also practices the same as Convention on the rights of the child states that the best interest of the child should be of paramount importance.

CUSTODY OF CHILD IN NEPAL

- National Code, 1963 in Chapter of Husband and Wife has dealt with the rights of the custody of the Child. No. 3 of the Chapter on Husband and Wife has given preference to mother, that if mother want to subsist the child, she should be able to subsist the child.
- Section 8 of the Children’s Act, 1992 has ensured the right to visitation of the parent who do not have physical custody over the child.
- National (Muluki) Civil Code, 2017. Section 115 of the Code states that in case of divorce, either mother or father shall have the custody over the child.
- Section 115(5) of National (Muluki) Civil Code, 2017 states that unless otherwise agreed, the responsibility of maintenance, education and health care of minor shall be as (a) Mother for below 5 yrs old; (b) Father for 5 yrs to 10 yrs old and (c) With whom the minor desires to live.
- Section 114 of National (Muluki) Civil Code, 2017 states that both the parents have the responsibility of joint care and support of children.
- Section 7 of the Act Relating to Child, 2018 has ensured that the parents shall borne the expense of the child as per their economic condition.
- Section 116 of National (Muluki) Civil Code, 2017 state that the one who has the custody over the child have the responsibility to provide the nutritious food, education, sports, entertainment and other necessities as per their economic condition and capability.
- Section 117 of National (Muluki) Civil Code, 2017 ensured the visitation rights to the parent who do not have the custody over the child.

National Code, 1963 in Chapter of Husband and Wife has dealt with the rights of the custody of the Child. No. 3 of the Chapter on Husband and Wife has given preference to mother, that if mother want to subsist the child, she should be able to subsist the child. However, in case of the consent of the parties, either father or mother can subsist the child. Moreover, the Muluki Ain also has ensured the ‘right to visitation’ for the parent who do not subsist the child. This shows that the code has given preference to the established that the mother shall have the primary and first right over the children. Furthermore, to some extent it has also realized the need of the other parents to the children as well as the right of the other parent towards the children as it has ensured the ‘right to visitation’.

Furthermore, Section 8 of the Children’s Act, 1992 has also ensured the right to visitation of the parent who do not have physical custody over the child. In the case of Dr. Alokraj Chalise v. Siru Chalise, when father of the child filed a writ of habeas corpus against the mother, the court held that the writ of habeas corpus cannot be issued against the mother. It has further been affirmed in Bibek Chalise v. Satyawati Chalise, child with mother cannot be termed as illegal detention. In these kinds of case, the Supreme Court of Nepal affirmed the general belief that the mother has the first priority over the child. In these cases, no further analysis has been made on what is the ‘best interest’ of the child. The assumption is made that as long as the child is with the mother, that is the best interest of the child.

There are also cases where the Supreme Court of Nepal has analyzed if mother has carried out negligence in taking care of the children in Atul Sah v Mallika Sah. Furthermore, in the case of Shova Shrestha v Maya Tamang, mother was the plaintiff who filed the case against the father and the one who father had trusted the child with. In this case, the court did not go with the assumption that the mother is the first priority. Here, the case considered where the child’s happiness lies. During the process, the court asked the child on his preference to which he replied that he was happy with the person whom his father has trusted and, child’s education was also provided properly by the respondent. Thus, the court held that it cannot be called as an illegal detention. This judgement is different from other judgement where the court has held that if mother wants, the child should be left with mother. Thus, the court’s approach shows that the court has deviated from the general assumption in certain scenario where the court found that the child’s happiness lies somewhere else than the mother.

In the case where mother is not present, which in this case is, where mother is in foreign country and cannot take care of the child, the court has given the custody to the father. This rests on the general practice that if not mother, then father shall have the custody. This is evident from the case of Bishwaraj Panta v. Rita Dhakal.

Currently, the provisions relating to the custody of child is dealt in National (Muluki) Civil Code, 2017. Section 115 of the Code states that in case of divorce, either mother or father shall have the custody over the child:

a) For child below 5 years old, regardless of mother’s marriage, mother shall have the custody over the child

b) For child above 5 years old, except in case of mother’s remarriage, the custody of the child to be handed to mother in case she wants. However, if mother is already married, then she does not have obligation to take the custody of the child.

9. NKP 2053, Part 3 Decision Number 6162.
10. NKP 2061, Decision Number 7389, No. 6
11. NKP 2068, Decision Number: 8674.
12. NKP 2071, Decision Number 9219, No. 8
13. NKP: 2067, Decision Number 8376, No: 5
c) In cases other than a) and b), father shall have the custody.

These provisions also reflect that the mother shall have the first right to the custody of the child and when mother do not want to take the custody of the child, then only father shall have the custody of the child. The code also has recognized the custody agreement between the parents.

d) For the child above 10 years old, the opinion of the child can be asked.

Section 115(5) states that if the husband and wife who is separated as per the law having a minor, the maintenance, education and health care of such minor will be according to the agreement concluded between them. However, in the absent of such agreement, the minor shall be under the mother's custody (in case minor is below 5 years of age), shall be under father's custody (in case minor is of 5 years of age or above 5 years but below 10 years old) and the minor shall be under the mother's or father's custody with whom the minor desires to live (in case of the minor having attained 10 years of age).

National (Muluki) Civil Code, 2017 also has ensured in Section 114 that both the parents have the responsibility of joint care and support of children. Section 7 of the Act Relating to Child, 2018 has also ensured that the parents shall borne the expense of the child as per their economic condition.

Under Section 116 of National (Muluki) Civil Code, 2017, the one who has the custody over the child have the responsibility to provide the nutritious food, education, sports, entertainment and other necessities as per their economic condition and capability. Thus, even though there are no explicit grounds to assess the capability or the best interest of the child, the ability to meet these can also be taken as the reference for the assessment.

The visitation rights have also been ensured in Section 117 of National (Muluki) Civil Code, 2017 to the parent who do not have the custody over the child. In case it is found that allowing voting right has the negative impact on the child, then it cannot be decided unilaterally to not let them meet the child. Rather a court order can be given in such case.

Even though legal provisions do not mention the ‘best interest’ standard, the court’s practice show that the ‘best interest’ of the child has been used by the court to analyses who has the custody over the child. In Harikrishna Subedi v. Shrijaya Karki,14 when the grandfather had the custody over the child and mother took the child to meet with her, the writ of habeas corpus was filed against her. The Supreme Court held that the habeas corpus cannot be issued against the mother. The court also discussed on

14. NKP: 2076 Decision Number 10391, No.11
what can be considered as the ‘best interest’ of the child. Paragraph 7 of the judgement states that child’s circumstance has to be of paramount importance rather than other’s and best circumstance of the child, personal situation and circumstance of the child along with the psychological state and report of the child should be taken into consideration.

Even though Nepal do not explicitly mention the ‘best interest standard’, it is being used by the court. But Nepal do not have any uniformity on what grounds shall be assessed to determine the best interest of the child and when the best interest of the child has to be assessed by the court during the determination of the custody of the child. In determination of best interest of the children, parents’ wishes is not everything as most of the time parents’ wishes are driven by the other factors that child’s interest like revenge, etc. But there is no clear criteria on what can be considered as best interest of the child in Nepal which can help in avoiding such scenarios.

Indian practice show that the paramount consideration is the ‘welfare of the child’ where they grow in balanced manner. The desire of the child, availability of the conducive and appropriate environment to child has to be assessed. Furthermore, the comparisons have to be made by the court to assess with whom the child have greater welfare.

Section 8 of the Children’s Act, 1992 has also ensured the right to visitation of the parent who do not have physical custody over the child. In the case of Dr. Alokraj Chalise v. Siru Chalise, when father of the child filed a writ of habeas corpus against the mother, the court held that the writ of habeas corpus cannot be issued against the mother. It has further been affirmed in Bibek Chalise v. Satyawati Chalise, child with mother cannot be termed as illegal detention. In these kinds of case, the Supreme Court of Nepal affirmed the general belief that the mother has the first priority over the child. In these cases, no further analysis has been made on what is the ‘best interest’ of the child. The assumption is made that as long as the child is with the mother, that is the best interest of the child.

Facts

This case is about the claim of custody of a child to the grand-mother. Nilam Subedi, applicant and mother of the child is living in Canada. Applicant has claimed that after the birth of her daughter in April, 2013, the relation with her husband was not that harmonious. Thus, she has been living with their parents and daughter was also being raised there. During this time, the father used to come to meet his daughter. When he visited her on 18th February, 2021, he took his daughter without notifying them and did not return her even when asked for several times. When Laxmi Subedi, the child’s grandmother went to get her, he did not allow her to meet despite hearing the granddaughter’s plea to meet her. When a police complaint was attempted to be filed, the police denied helping in family matters.

Applicant’s claims

Applicant claims that since father is unemployed and lives in a remote area, he is unable to provide the daughter with the nutritious food and quality education which is certain to push the daughter’s future to darkness. Thus, keeping in the best interest of the child, applicant claims the daughter’s custody to be handed over to grandmother, who lives in Chitwan.

Respondent’s claim

Respondent i.e., father claims that he was the one who financed Nilam’s foreign arrangements. He also denied that he is unemployed and claimed that he has been involved in the profession. Furthermore, he claims that he has been providing the daughter with all the needs as per his economic condition, which is in alignment to the obligations set out in Act relating to Children, 2018. Furthermore, he claims that since the child could not live with her mother since birth and it would not be in the best interest of the child to separate her from father also. Thus, he claims custody of the child to him.

In this case, applicants as well as respondents have rested their claims on ‘best interest of the child’. The difference is that applicants are inclined to the reasoning that since the father’s economic condition is not good, it would be in the best interest of the child to let her stay with her grandmother. Whereas father claims that he has been fulfilling the needs as per his economic condition. His main reasoning is that a child should not be deprived of father’s love and care, and thus, it is in the best interest of the child to be given custody to him.

The main concern that the court needed to decide on this case was to determine what is to be considered as the best interest of the child.

Decision

The custody was handed over to the father of the child. Also, since the mother is in Canada, the child’s grandmother can meet with the child and provide her with necessities without affecting her interest and study, and in coordination with the teacher of the child.
Reasons behind the decisions

1. Respondent has been fulfilling all the needs of his daughter to ensure the overall development as per his economic status. Thus, he has been fulfilling his responsibility. So, it is in the best interest of the child to hand it over to her father.

2. Child also gave a statement in the court stating that she wants to live with her father.

Analysis of the Case

In this judgement, the court rested on the reasoning that since the mother was not present in Nepal, she could not provide proper care to the child, the custody of the child was handed over to the father. The court believed that at least the child should be with a parent and that is the best interest of the child. Comparing this case with the case of Shova Shrestha v Maya Tamang, the discrepancies of the court practice, is evident. In this case, the Supreme Court of Nepal had held that even when the father had left the child with another person, the custody was not provided to the mother who had promised to stay in Nepal. Rather child was asked who he was happy with and if the education and health care was provided or not by the person who the father had trusted the child with. However, in this case the court clearly stated that in the absence of the mother, father shall have the right over the child. The court did not ask if the child was happy with the grandmother and if the grandmother was doing the right job in ensuring the right to health and education of the child. Thus, when diverting against the primary rule of ‘presumption of mother’s custody’, the court’s practice is not consistent.

In this case, even though the court ensured based on the written statement of the respondent that he has been providing for the child as per his economic condition, other factors like child’s natural environment, school, relation with grandmother, who can better provide for the child was not assessed.

Furthermore, this case gives rise to a question on custody of the child. Can a mother who have the custody of the child leave the child under the care of parents or not? Shall it be considered as the negligence in the part of the mother? Does the general rule of ‘presumption of maternal custody’ not apply if the mother is not physically present with the child? As per this case, it says that mother shall not be given custody in case she is not present with the child. So, in her absence, father shall be given the custody.

This case also points to an issue with the ‘general presumption rule’ i.e., should the ‘best interest of the child’ not be assessed when the presumption is accepted. In the absence of the provision in the code, there is no any legitimate obligation to assess this. However, this might expose the child to less welfare by blindly following the ‘presumption rule’.

Furthermore, this case has affirmed that rather than higher economic condition, the need of parent’s care is important. As the court did not handover the custody to the grandmother, who could provide better care than the father, economically. It shows that the court does not rest completely on economic status of the custodian. However, the major factor that is considered is whether the custodian has provided for the child as per his economic condition or not.

This is the writ filed by the father of the child against the child’s maternal uncle and grandmother for illegal detention of the child. This case represents the case where custody of the child has been discussed via the writ of habeas corpus.

20. NKP 2071, Decision Number 9219, No. 8
Fact
In this case, the mother of the child lives in Australia. In the meantime, the applicant claims that the child has been living with him since then and he has been bearing all the responsibilities and expenses of the child. However, respondents claim that the child has been with them ever since mother went to Australia and father i.e., applicant has not covered any expenses of the child. So, there is a contention in the facts. Furthermore, the applicant claims that the child was sent to the maternal home after they asked for her, but they could not be contacted ever since then. Even when he went to get her back, he was abused physically. Thus, the applicant claims that the custody of the child should be handed to him because the child is being kept in illegal detention, depriving him of the education and against the interest of the child.

Respondent claims that the condition of the applicant was not good as there were ill grandparents in the home. Thus, the child has been in the maternal home and all the expenses have been carried out by the mother. Thus, they claim that there has not been any illegal detention as they have kept the child with them on instruction of the mother of the child.

Decision
The court held that the maternal side of the child did not hold the child in illegal detention. The writ was repealed.

Reasons behind the decision
The court considered the facts like the child stayed with them since her mother left, the child did not care for the father and stayed with the grandmother when the child was brought to the court, the child being provided with everything considering the best interest of the child, to reach to the conclusion that there has not been illegal detention of the child.

Analysis
This case is similar to the case of Nilam Subedi et. al. v. Shambhu Raut Decision No: 165 Case No: 077-FJ-0042, High Court Patan. However, the outcome of the case is clearly different. In the Nilam Subedi case, the court gave the custody to the father as mother was not present in Nepal and by default, the custody would be handed to the father. The facts are also similar in this case. The mother is in Australia and the child has been staying with the maternal grandparents. In this case, the court did not find problem with giving the custody to the mother, even when she was not present in Nepal. This shows that even when the mother is not physically present, the custody of the child can be handed over to her.

The court in this case determined the custody based on two aspects;

a) When child was brought to the court, the child went towards the grandmother and did not care for the father. This was taken as the expression of the child’s preference.

b) The court also considered if grandmother provided everything necessary for the best interest of the child or not.

This surely is against the judgement which believed that child needs to be in physical custody of at least one parent. This is also against the general rule as laid out in the Section 115 of the National (Muluki) Civil Code, 2017 but the positive aspect about the judgement is that:

a) It considered the circumstance and desire of the child.
b) It also assessed if the custodian can provide the child with the necessities as per the Section 114(2) of the National (Muluki) Civil Code, 2017.

The ambiguity this case has shown is that the custody of the child is handed over to the mother or the grandparents. If it is grandparents, then can the custody of the child have handed over to the grandparents when father is present and is asking for the custody?

3. Samundra Shrestha v Jamuna Kumari Shrestha  
Case No: 072-DP-0032 Dec N: 127 Appellate Court Baglung

Fact

The case was filed by the father who claimed custody of the child. Applicant was an Indian army and he claims that he had been sending monthly expenses of Rs. 10,000 to the child. However, the child was taken away and the respondent i.e., mother of the wife was claimed to be staying in her parent’s home. The applicant has claimed that the respondent is unable to give proper care to the children. Respondent has been alleged for the violation of basic child rights for depriving them from the physical, psychological, social and emotional development, as she deprived him of meeting them and is herself not capable of providing for children. Thus, the applicant claims custody of the children.

Respondent claims that she has not done anything against the interest of the child as claimed by the applicant and applicant have not been able to substantiate these claims as well. Furthermore, sending monthly expenses continuously is a lie as he had sent money only for 4 months. Since then, respondent had been raising the child by herself. Respondent claims that it was the stunt to deprive her of alimony and custody rights. Thus, she claims before the court that the custody of the children should be given to her.

Decision

The custody of children to be given to the mother.

Reasons behind the decision

a) Mothers have first right in the custody of the child. Thus, if the mother desires the custody of the child should be given to her as per the provision of National Code, 1963, Number 3(1) of Chapter on Husband and Wife.

b) Mother has been paying the fees for the school of the children based on witness statements.

Analysis

This also establishes the common statement in Nepal that the mother should have the first right over the child and in case she is willing, she should be provided with the custody. However, the court did not just hand the custody to the mother. The court also considered whether or not a mother can provide for her children. Thus, even though not explicitly, the best interest of a child has also been considered not only in terms of mother’s love but also in terms of her ability to provide for them.

This case shows that despite the general presumption rule of maternity in custody, the capability to ensure the best interest of the child also be checked. This also reflect that handing over the custody to the mother in itself cannot, ipso facto, be called as the best interest of the child as the court checked if the mother had paid the fee of the child or not. Thus, despite the legal provision which has given the rule of general presumption of maternity and does not deal with the requirement of necessity, the practice shows the need of assessment of the ‘best interest’ of the child.

This reflect the need in change in law as well.
Facts

The applicant is father of child who has claimed that after the divorce, respondent took the child with her without his notice. After that, she remarried twice and now has gone to Qatar, leaving the child alone. As per the applicant, he was also denied the right to visit, which is against the right ensured in Section 8 of Act relating to Children’s, Act, 1992. Later, it was found that the name as well as surname of the child was changed by mother. The applicant claimed that this act has violated the right ensured under Convention on the Right of the Child, 1989 which says that the best interest of the child should be considered. Thus, he claims the custody of the child.

Respondent argues that the allegations of remarriage are false and further claims that the applicant used to mistreat and threaten the respondent which is why they had to leave. Respondent has been covering the expenses of the child and in order to meet the expense she went to Qatar. This has been confirmed by the respondent’s witness as well. In regard to the allegation of not letting him meet the children, the respondent states that when he was allowed to meet with the child, he abused the child. Also, as there was an agreement between the parties during the divorce that the custody of child to remain with the mother and mother shall not receive alimony. Thus, the respondent pleas before the court to hand over the custody of the child to them.

Decision

The custody of the child was handed over to the father.

Reason

a) Number 3(1) of Chapter on Husband and Wife, National Code, 1963 states that after the mother, the father shall have the right to the child.

b) It is in the best interest of the child to hand over the custody to the father who is living in Nepal than to the mother who is outside the country.

Analysis

In this case, the court has approached the traditional and legal notion that in the case of absence of the mother, the custody shall be handed over to the child. However, current law does not mention that in the absence of the mother, the child can be handed over the father. Rather, it says that if the mother does not want the custody of the child, then father can have the custody of the child. Drawing from the legal provision, such interpretation which says that the custody to be given to father when mother is not present in the country is not possible. However, this can also be seen as the subtle practice of the ‘best interest’ standard when the custody is handed to the father to ensure that the child remain within the physical presence of at least one parent.

This case along with above mentioned case has shown that the court of Nepal has given importance to the need of ‘physical presence’ of the custodian with the child.

In this case, writ of habeas corpus was issued in the context of custody of a child. After conclusion that writ of habeas corpus is to be issued, the court also dealt on the matter of who should be having the custody of the child.
Facts
Applicants and the respondents have children one of 7 years old and another of 2 years old. For 4 years, they did not have harmonious relations as claimed by the applicant and applicant further claims that she was not allowed proper food and also was subjected to assault many times. Then, they left the house being unable to leave and have been staying with the applicant’s parents. Applicants have been working to ensure the proper raising to the children. However, in 20th March, 2013, when the applicant had gone to work, respondents came to the house and snatched the child away from her. They took away children without the notice of the applicant. Applicant filed the complaint to the police station in Dhangadi but the police was unable to find them yet. After that, the applicant filed the writ of habeas corpus and the court ordered the respondent to be present in the court with the children. Respondents were present in the court with children at the given time.

Decision
The court issued the writ of habeas corpus as it found the illegal detention based on following reasons and for the same reasons the custody of children was given to her.

• Under the Children Act, 1992, the right of children to nutritious food, basic health and social security has been ensured. This has been further ensured by the Interim Constitution 2007.

• Not only the child but also the mother has the right to provide the child with proper nutrition, to breastfeed her and also nutrition to her as per the Article 12(2) of Convention on Rights of Child.

• Furthermore, No. 3 of National Code, 1963 has laid down that the desire of mother shall be given priority in determination of the custody of the child.

Analysis
This case has added a new dimension to the custody of the child. The custody of the child is not only about the welfare of the child, but it also is associated with the right of mother to provide nutrition for the child and breastfeed them child, in case of infant child. This case has established that the infant child’s custody should be handed over to the mother. This aligns with the general rule.

Facts
Applicant and respondent got married with each other on 28th September, 2011 and a daughter was born on 25th November, 2012. After the fall down in the relationship, they got divorced on 16th September, 2019. Applicant claimed that before divorce even took place, the daughter was taken somewhere disregarding her studies as well and is not aware of where she was taken by the respondent. Later when the applicant found out that the respondent got married to another person and has been living in his house, but their daughter was not with her, he filed the case. The claim of the applicant was that the right of the child under the Constitution of Nepal to get all education, food, and overall development from the family along with other rights have to be ensured. He claims that he as a father has the right to do that under Section 114, 115, 125 and 126 of National (Muluki) Civil Code, 2017. He further claimed that the respondent did
not have the right to keep the child based on Section 115(1) (b) (c), 115(5) (b) and 155 of National (Muluki) Civil Code, 2017. For those reasons, he claimed that the custody of daughter has to be handed to him to ensure that all the familial, social, cultural aspects of life are taught to her.

Respondents did not come to the court on stipulated time. Later, it was found that the daughter was left with the respondent’s parents. Respondent did not even submit the written statement.

Decisions
The court gave the decision that the daughter should be with the father.

Reasons
a) Section 115 (1) (a) (b) and (c) of National (Muluki) Civil Code, 2017 show that the daughter should be with the father as the respondent had remarried. Since respondent did not submit the written statement and was absent in the court, it was assumed that the claims made by the applicant was accepted by the respondent.

a) The respondent is remarried in a relation where there is already a child of her husband. In such a scenario, she would not be able to contribute fully for the overall development of the daughter and thus, it would not be in the best interest of the child to hand over the custody to her.

Analysis
This case shows that in case if the mother is remarried the legal provision points to the father and the reasons laid out is why the mother who remarried cannot be given custody has been dealt in this case. It is found in the court that the mother who is married to another person and has a child in that relation may not be able to contribute in the overall development of the child. Thus, it is not considered the best interest of the child to hand over the custody of the child to the mother.

The court assumed the disinterestedness of the mother towards the custody of the child from her absence in the court proceedings. However, had the mother wanted to meet the child, what would happen to the custody of the child? Would a mother’s remarriage still be considered as against the best interest of the child?

Benu Kumar Basnet v. Sangita Dahal Bohora
Case No: 074-CP-1851 Decision No: 224, Morang District Court

Facts
Applicant and respondent got married on 6th February, 2013 and a daughter was born on 5th November, 2014. This case was filed by the applicant for the partition when she was mistreated by husband continuously in Nepal as well as Canada and even when she got back, her in-laws did not provide even her basic needs and did not let her stay in the house.

Respondents claimed that all the allegations made by the applicant were false and this case was filed after she got the permanent residence of Canada, to do whatever she pleases. Providing a partition share to her now would also undermine the child’s right in future which is why respondents claimed the case to be dismissed.

Decision
The court in this case gave the decision of the joint custody as per the claims made by the respondent.

The court has not explicitly referred to any reasons for giving the joint custody but states that it was reasonable to do so. Also, since the applicant could do anything with the partition share, it was reasonable for the daughter’s partition share to be separated and joint custody was given.
Analysis

This case shows that when there is a need to ensure that the child’s partition share is not misused, the court provides joint custody considering the best interest of the child. There are no any legal provisions on what the joint custody means and when it shall be provided by the court. Furthermore, there is no clarity on whether these joint custodies are limited to legal custody of physical custody. If this joint custody order incorporates physical custody also, then there is not demarcation of the time division. International practice show that the joint custody does not mean equal amount of time is divided between both parents. Rather the notion of the joint physical custody is to allow both the parents to be able to spend the substantial amount of time with the children. In case of joint legal custody, it is not necessary that the child is under the joint physical custody. Rather, even if the child is with one parent, the decision regarding the important aspects like health and education has to be taken together. This allows both the parent to be involved in the decision making in the child’s life. Thus, legal provision regarding the joint custody is necessary. Furthermore, the differentiation between the legal and physical custody is also necessary.

RECOMMENDATIONS

Following recommendations are made in regard to the legal reform in the area of parenting and child custody in Nepalese context:

1) The ‘best interest of the child’ should be explicitly referred in the legal provision, particularly dealing with the custody of the child.
2) The objective standard to test the ‘best standard of the child’ should also be laid out so that there are no discrepancies in determination of the ‘custody of the child’.
3) The gender biased narratives should be prevented from being interpreted. Rather, a ground for the objective judgments should be established. Thus, wide discretion should not be provided to the court. The discretion is indeed necessary as every case is different and ‘best interest’ of the child has to be decided on case-by-case basis. But the discretion should still be guided by some objective standards as laid in Indian Act like character and capacity of the guardian, nearness, etc.
4) In many cases it was seen that the custody of the child was given to someone other than mother or father. While doing so, the court practice is not consistent as analyzed above. However, that does not mean that there is no need of recognition of giving custody to someone other than mother or father. Since, there is a need, a clear provision has to be laid out along with the conditions, when such order can be given.
5) The court practice shows that the court has also given joint custody to both the parents. However, there is no legal provisions which deal with the ‘joint custody’. Thus, legal provision should clearly identify the order of the joint custody and when such order can be given.
6) The National (Muluki) Civil Code, 2017 has ensured that those having the custody should provide the child with the matters listed in Section 114 which include nutrition, health treatment, education, knowledge, sports, entertainment and other as found necessary. These provisions should also be amended to incorporate the notion of the providing the children in consistent with the ‘evolving capacity’ of the children as found in the CRC. Furthermore, best interest standard should also be incorporated here as mandated in Article 18 of the convention.
7) In regard to Section 115(3) of National (Muluki) Civil Code, 2017, the mandatory language should be used in the provision which ensures that court should ask the child of their opinion. Along with that, the provision should be amended to also add the terms that ‘such opinion should be given weight based on the age and maturity of the child’.
8) Provision of the speedy determination of the custody of the child and the expedite implementation of such decisions should be ensured by the legal provision.
REFERENCES

International Instruments

Constitution
• Constitution of Nepal

Domestic Legislation
• National (Muluki) Civil Code, 2017
• Act Relating to Children, 2018
• Children’s Act, 1992
• National Code, 1963

Foreign Legislation
• Victoria Act 1839 (UK).
• Guardian and Wards Act 1890 (India)
• Hindu Minority and Guardianship Act, 1956 (India).
• Dutch Civil Code Book 1 (Netherlands)
• Children and Parents Code (1949:381) (Sweden).

Books and Journals
MERO ADHIKAR
Know Your Rights

- Constitution and Federalism
- Legal Identity (Citizenship/Birth Registration)
- Human Trafficking and Safe Migration
- Sexual and Reproductive Health Right
- Social and Economic Rights
- Access to Justice and Legal Aid
- Sexual and Gender Based Violence
- International Human Rights Instruments
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