

Best Interest through Lens of Shared Parental responsibility; A New Model for Child Custody Determinations in Sri Lanka

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Abstract

Breakdown of the family is very much traumatic for children of a family. In order to assure a safe and a protected future for children, maintenance of “best interest of the child” concept, in custody disputes is paramount importance. Therefore, this paper analyses and discusses the literature, case studies, books, and models from different countries on shared custody, with main objective of exploring whether the shared custody practice is a feasible solution in Sri Lankan context. As such the study mainly follow the qualitative research approach.

The paper discusses merits and demerits, as well as some obstacles for different models of custody arrangements in several jurisdictions. Among several models practiced around the world, the study has identified the shared custody arrangement is the most favourable solution for the best interest of the child in a parent’s separation or divorce. In addition, the study documents the circumstances that the shared custody arrangement can be made and proposes a new model for custody determinations in Sri Lanka based on the presumption of shared parental responsibility.

Key words: Shared Custody, Best interest, child, parent, divorce

Introduction

Children are entitled to the love, care and the companionship of both parents during the marriage and even after the separation. Breakdown of the family, is very much traumatic for children. In order to assure a safe and a protected future, maintenance of ‘best interest of the child’ standard in a custody dispute, is paramount importance. Custody arrangement can be shared or sole custody. Literature documents that shared parentage systems are far better than sole custody arrangements. Accordingly, numerous countries throughout the world have moved away from sole custody schemes to shared custody arrangements and also some have introduced a rebuttable presumption of shared parental responsibility. Nevertheless, main objective of said reform is to utilize the wellbeing of the child as the benchmark to evaluate the most appropriate custody scheme, post-divorce.

The courts in Sri Lanka time to time have given recognition for the concept of father’s preferential right in custody disputes and also sometimes have deviated from that principle. Consequently, Sri Lankan courts now utilize the welfare of the child and the best interest of the child principles as the guiding norm, in awarding custody and access rights for each parent after a separation. However, there is no specific criteria which can be used to determine the best interest and the welfare of the child. There are no codified rules with regard to the way that the custody disputes should be handled, and the normal tendency of Sri Lankan courts are to grant the custody and the access rights to either parent, based on best interest standard.

Objectives

Given the above discussion, the main objective of this paper is to explore whether the shared parentage can be a suitable solution to custody disputes in Sri Lanka. Having this objective, this paper discusses different approaches of shared custody arrangements which is used by different jurisdictions to identify a new model for child custody determinations in Sri Lanka. Along these, the study also discusses the merits and demerits of shared custody, the important of having a shared parenting custody system and its effects on children life post devoced.

Methodology

Following the qualitative research approach , this paper reviews some past literature and books, analyses case studies and statutes in the area of child custody. In addition, the paper analyses and discusses models on shared custody from different countries with the aim of identifying a benchmark model that can be applied in Sri Lankan context to achieve best interest standards. Reforms to the Sri Lankan law is proposed in the light of analyzed case studies, academic expressions and identified best practices around the world to protect the interests of both the child and the adult.

Historical evolution

Traditionally under Roman Dutch Law, father was considered as the sole guardian of a child. Due to the fact that, mother did not have an independent legal status, all rights and the authorities were vested with the father of a family to deal with children’s life and properties. Therefore, custody of children mainly vested with father’s hand.

“Custody is that portion of the parental power which pertains to the personal life of the child. Spouses who live together, share custody, which then seldom attracts judicial attention” (Boberg, P.Q.R., 1977). In general, custody refers to the physical possession, control and the upbringing of the child. According to Roman Dutch Law principles custody of a child varies with the subsistence and non-subsistence of a marriage. When the marriage is subsisting, father enjoys a preferential right for custody of minor children who has born within the marriage. If

mother wants to get the custody, she has to prove that the best interest demands the custody to be given for herself. (*Ivaldy v. Ivaldy* (1956) 57 NLR 568, *Madulawathie v. Wilpus* (1967) 70 NLR 90, *Weragoda v. Weragoda* (1961) 66 N. L. R. 83).

In *Ivaldy v. Ivaldy* case H.N.G.Fernando Judge was of the opinion that it is the duty of the court to interpret the concept of the welfare of the child within the sphere of the preferential right of the father. By citing *Calitz v Calitz* (1939 Ad 56) the court declared that father's prima facie right has to be accepted, except in situations where can be established the danger to life, health and morals.

The preferential right is not that much significant when the common matrimonial home has been terminated and in such a situation, court is vested with powers to decide the issue of custody, solely in the interest of the child (Goonesekere.S., 2002). Accordingly, in a nullity or a divorce proceeding or in a judicial separation, either party who prove before the court, of the fact that giving custody to the father or to the mother is in the interest of the child will be awarded the custody of minor child (*Kamalawathie v. De Silva* (1961) 64 NLR 252, *Weragoda v. Weragoda* (1961) 66NLR 83, *Padma Fernando v. T.S. Fernando* (1956) 58 NLR 262). In *Jeyarajan v. Jeyarajan* (1999) 1 Sri.L.R.113 case, a problem arose with regard to a custody of a minor child. In this case the applicability of Roman Dutch Law principles, English Law principles, father's preferential right to custody and the modern approach of the predominant interest of the child was taken into consideration by the courts in Sri Lanka. On the basis that the sole criterion in a custody case is that the child's sense of security should be ensured, the court look for cogent and logical evidences prior to make changes in the life of the child.

Several researchers and authors are on the view that a fundamental change to the existing custody law should be introduced by the legislature by enacting a separate statute (Bromley., 1976). For examples, in Australia, South Africa and in England, it has been done through the introduction of a statute. When applying presumptions and counter presumptions in a separation, Courts as the upper guardian have to bear the welfare of the child principle in minds. Parental power continues, even the custody of the child has been awarded to one parent, based on either preferential right or the best interest principles. When one parent has been awarded the custody of the child, the non-custodian parent may claim the reasonable access to the child during the lifetime, based on the fact that he/she shares the parental power with the other parent. This parental right of access can be asserted, unless the court, in awarding, has decided to deprive the access rights of the non-custodian parent (Goonesekere, S., 2002)

In *Kamalawathie v. De Silva*, Tambiah J (1961) 64 NLR 252, declared that "The respondent is ordered to hand over the

corpus to the petitioner but the petitioner should grant reasonable access to the 1st respondent to see the child. The terms and conditions of access to the corpus should be determined by the Magistrate and, for this purpose, the record will be sent up to the Magistrate". In *Fernando v. Fernando* (1956) 58 NLR 262 case and in *Madulawathie v. Wilpus* (1967) 70 NLR 90 case, Siva Supramaniam J. declared that "If the petitioner wishes to have access to the child, the 1st respondent will make suitable arrangements for that purpose. If the parties cannot agree on these arrangements, it will be open to the petitioner to make an application to the Magistrate who will give necessary directions after hearing both parties". In *Rajaluxumi v. Iyer* (1972) 76 NLR 572 case Sri Lankan courts recognized the right of the non- custodian parent's reasonable access, based on the fact that natural ties cannot be denied unless it 'll be a harm for the child. Even the Indian Supreme Court has held that, the concern of the best interest of the child can supersedes even the statutory provisions in a custody dispute (*Mausami Ganguli v. Jayant Ganguli* (2008) 7 SCC 673).

Towards "Best interest and welfare of the child"

Article 3 of the United Nations Convention on the Rights of the Child (CRC, 1989), states that every child has the right to have their best interest to be taken into account as the primary consideration in all actions or decisions that affect him or her, and the public and private sectors have to implement all decisions which affect children based on this concept. The Convention tries to emphasize the best interest concept throughout its provisions. Article 9 of the Convention declares that every child has the right to live with their parents and in a separated family, children have the right to be in contact with both the parents unless it is bad for the child. Article 10 of the CRC deals with family reunification. Moreover, CRC states that responsibilities to bring up children is a shared responsibility which lies with both the parents (Article 18) and what is best for the child is the sole test which must be used in it. CRC point out that all the rights enshrined in the Convention are based on the child's best interest and no right can be compromised by a negative interpretation.

The Convention on the Elimination of All Forms of Discrimination against Woman (CEDAW), Art 5(b) enshrines the concept of the child's best interest. International Covenant on Civil and Political Rights, 1966 states that provisions must be made to protect children, especially in a situation where the marriage is dissolved (Article 23(4)).

CRC does not offer a definition for the best interest standard and it depends on the circumstances of each case. According to UNHCR (United Nations High Commissioner for Refugees), the formal Best Interest Determination (BID) is a formal process with specific procedural safeguards and documentation requirements that is conducted for certain children of concern to UNHCR, whereby a decision- maker

is required to weigh and balance all the relevant factors of a particular case, giving appropriate weight to the rights and obligations recognized in the CRC and other human rights instruments, so that a comprehensive decision can be made that best protects the rights of children.

An option for adopting a shared parentage system in Sri Lanka

Child custody arrangements are changing throughout the world. Several countries in the world are moving away from sole custody arrangements to shared parentage systems. Numerous countries adopt wide variety of approaches in post-divorce custodial arrangements. Some countries have move towards shared parentage systems apart from sole custody arrangements. It is a debatable issue whether shared parenting can better served children, in a divorce situation.

Children are entitled to be bond with father as well as the mother, rather than living under sole physical custody and sole legal custody arrangements. On the other hand, shared custody helps to reduce the unfriendliness between the parents. There are so many criticisms for awarding the custody to one parent. It is an acceptable fact that if there is a history of abuse or continuous quarrels between parents, sole custody can be the best answer, after a divorce. Gender based stereotypes have now become outdated concepts and the judges should be given the discretion to decide the most appropriate custody arrangement. A number of jurisdictions have identified that some form of shared parenting and shared decision making, with or without equal time spending is a viable method of determination of custody.

There are different shared parenting systems across the world and the term-shared custody is applied by different jurisdictions in different ways. Some countries throughout the world separately apply joint physical custody and joint legal custody and some countries apply a combination of both. Joint custody has many forms and it is difficult to define precisely (Van Heerden et al Boberg's Law of Persons and the Family (1999) (2nd edition) 551).

In a joint physical custody order, child can reside with and under the supervision of both the parents. Under a joint legal custody order, both parents have the joint responsibility for care and control of the child and the right and the responsibility to joint authority to make decisions which affects the child even the child resides with one parent. Even though there are different shared parenting systems, the sole basis for all, is the child's best interest. However, the way they apply this standard varies from country to country.

Australia is on the presumption that shared parenting is in the best interest of the child. (Australia Family Law Act, 1975, S.61 (D)(A). Accordingly, there's a presumption that, joint custody is in the best interest of a minor child.

However, in UK and in South Africa there's no such a presumption for or against joint custody (UK Children's Act 1989 S.8,11(4), South Africa Children's Act No.38 of 2005 S.22,23.30).

Parental responsibility started with the birth of a child and it is an ongoing responsibility of both the parents even they are separated due to various issues. The birth of shared responsibility concept goes align with this concept. Courts in England have the discretion to issue a sole residence order with contact order agreement or a shared residence order (Children Act of 1989, section 8).

Section 11(4) of the UK Children Act, declares that "where a residence order is made in favour of two or more persons, who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned". In custody matters, the court uses the best interest standard in determining the validity of a shared residence order. Children's welfare is the court's paramount consideration. The ambition of issuing the Children Act 1989 UK and the introduction of the welfare test is to make the welfare of the child as the key consideration of determining custody disputes (Children Act (1989) ch,41 section 1(3)).

Section 8 (1) of the Act defines the meaning of a contact order, residence order, prohibited step order and a specific issue order. According to section 11 (4) "where, a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households and sometimes it may be few hours or may be to live with either parent half of their time.

In *Re AR (A child Relocation)* (2010) EWHC 1346 Mostyn J states that shared residence should be the rule not the exception. This idea was disapproved by Lord Neuberger in *T v. T* (2010) EWCA civ 1366. In this case it was held that when deciding the most appropriate residence order, the court must treat the child's welfare as its paramount consideration.

In *Holmes-Moorhouse v Richmond Upon Thames* (2009)1 FLR 904 HL the court declared that "this means that the court must choose from the available options the future which will be best for the children, not for the future which will be best for the adults".

In *D v D* (Shared residence Order) (2001)1 FLR 495, the Court of Appeal stated that, it is not necessary to show the exceptional circumstances which was existed to grant a shared residence order and also declared what is required is to demonstrate that the shared residential order is in the interest of the child and in accordance with the requirements of S. 1 of the Act.

In *Re F* (Shared Residence Orer) (2003)EWCA Civ 592(2003)2 FLR 397 the court is on the view that if the homes offered by each parent was of equal status and importance to a child, an order for shared residence could be valuable. In a recent decision, *T v. T* (2010) EWCA Civ

1366 Black LJ stated that “That, in my view is to go too far. Whether or not a joint or shared residence order is granted depends upon a determination of what is in the best interests of the child in light of all the factors in the individual case. However, it has certainly been established that it is not a pre-requisite for a shared residence order that the periods of time spent with each adult should be equal and nor is it necessary that there should be cooperation and goodwill between them and shared residence orders have been made in cases where there is hostility”.

Above considerations clearly demonstrate that, each case is fact sensitive and the discretion is for the court to decide the best suitable residence order for the child, considering the welfare checklist. In most of the cases, UK courts are on the view that the relationship of children with each parent is the most important factor when deciding the suitability of a shared residence order. If there’s a strong relationship between each parent and the child and if parents have brought up the child together, rather than issuing a sole custody order, the most appropriate way is to issue a shared residence order.

Unwillingness of the parents to work cooperatively with each other and inability to take decisions cooperatively which affects children are some important factors that the family court has to consider in a custody dispute. In general, inability of the parents to take a decision cooperatively is a valid evidence before the court, not to issue a shared residence order.

However, in *Re W* (2009)2 FLR 436 the Court of Appeal held that the inability of the parents to work in harmony was not a reason to decline a shared order and also not a reason to issue an order. Moreover, the court was in the opinion that if one parent declines to work in harmony with the deliberate intention to marginalize the other innocent party, that can be a good evidence for the court to issue a shared residence order. In this case Wilson LJ declared that, “I should make it clear... that although... an inability of parents to work in harmony does not, by itself, amount to a reason for making a shared residence order, a possible consequence of their inability to do so, namely the deliberate and sustained marginalization of one parent by the other, may sometimes do so”.

Malicious intention to obtain a Shared Residence Order is another main factor which the court has to consider when determining the most appropriate custody order. Wilson LJ, in *Re K* (Shared Residence Order) (2008)2 FLR 380 declared that bad and the improper intention of the parent to disrupt the other parent’s role in the management of the child’s life, and in such a case the court has to allow a sole custody to one parent while granting a contact order for the other parent with limitations. The court further held that in an application for a shared residence, there’s a duty for the court to be in alert to identify the malign intention.

In 2006, Australia introduced major amendments to the parenting law provisions of the Family Law Act 1975 (Cth) (FLA), by way of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Shared Parental Responsibility Act came into effect on 1 July 2006). Division 2 of the Act deals with parental responsibility. One major reform was that the insertion of a rebuttable presumption that by giving equal shared parental responsibility for parents leads for the best interest of the child. The Shared Parental Responsibility Act was enacted to facilitate substantial, if not equal involvement by both parents in their lives post separation, if it is safe for the child.

Australian Shared Parental Responsibility Act provides an opportunity for the children to spend equal or substantial amount of time after the separation of parents. (The Family Law Amendment (Shared Parental Responsibility) Act 2006). Section 61 D of the Act deals with parental orders and parenting responsibility. The Act is based on presumption of shared parental responsibility, when making parental orders. Act states that when making a parenting order in relation to a child the court must apply a presumption that it is in the best interest of the child for the child’s parents to have equal shared parental responsibility (Family Law Act 1975(Cth) ss 61DA(1), 65DAC). If the parent has engaged in a family violence or child abuse then those evidences can be led to rebut the presumption. (Family Law Act 1975(Cth) s 61 DA (2), s 61 DA (4)). In such a case, the Act says that the presumption does not apply. If the presumption is not rebutted, the court has to consider to make an order for the child to spend equal time with both parents. (Family Law Act 1975(Cth) s 65 DAA. If equal time is not practicable and not for the best interest of the child, the court can order to make an order to spend substantial and significant time with both parents. (Family Law Act 1975(Cth) s 65 DAA (2)). Section 61 DA (4) of the Act specifically says that the presumption can be rebutted by leading evidences to satisfy the court that it would not be in the best interest of the child for the child’s parents to have equal shared parental responsibility for the child. Accordingly, section 60 CA states that, when deciding to make a suitable parenting order, court has to regard the best interest of the child as paramount consideration. Moreover, section 60 CC declares the way, which a court determines what affects child’s best interest. Section 60 CC (3)(a) requires court to consider any views expressed by a child in deciding the suitable parenting order. Section 60 CF and 60 CG gives power to the court to consider the existence of a family violence.

The objective of section 60 I of the Act is to ensure that all persons taking a genuine effort to resolve the family dispute resolution before applying an order for a parenting order in a Family Court under part VII of the Act.

Family Law Amendment (Shared Parental Responsibility) Act 2006 in Australia made a significant change in Australian child custody law by giving statutory

recognition for the presumption. These reforms mainly emphasize that the parents have to attend for a family dispute resolution, before filing a court application, except in certain circumstances, and also emphasize the need for both parents to be involved in children's lives after separation, by introducing a presumption in favour of equal shared parental responsibility with a less adversarial court process in children's matters (Section 62 B).

In *Goode & Goode* (2006) Fam CA 1346 the Family Court in Australia clearly clarified the changes which were introduced by the Shared Responsibility Act. In addition to the above requirements Australian courts have developed a detailed list of preconditions to grant a shared custody order such as geographical proximity, compatible parenting, child's adaptability, mutual trust and cooperation (Padgen and Padgen (1991) FLC 92-231)

There are arguments in favour of shared custody in India and they emphasize that Family Court judges do use this concept to decide custody disputes. In *KM Vinaya v. B Srinivas* (MFA No.1729/2011, Karnataka High Court, judgment dated Sept.13, 2013), the Indian court held that both parents are entitled to get the custody of children. In this case, court was given the custody of the child for both parents and the visitation right for one parent when the child is living with the other parent and each parent has to equally bear education and expenditure of the child.

In South Africa, the courts are reluctant to give effect to joint custody arrangements. In *Heimann v. Heimann* (1948)4 SA 926(W) and in *Edwards v. Edwards* (1960)2 SA523(D) the court held that there should be one parent who is directly responsible for child and child's affairs. However, there is a notable departure from this view with the enactment of the Divorce Act No. 70 of 1979(Section 6(3)).

In *Kastan v. Kastan* (1985)(3)SA235(C), the South African Court incorporated the terms of an agreement which the parties had reached, providing for joint custody into the court's order. However in *Schlebusch v. Schlebusch* (1988)(4)SA 548(E) case, the court held that Kastan judgement is not a departure from the existing principle and by the mere request of the parties the court cannot issue joint custody orders. In *Venton v. Venton* 1993(1) SA 763(D) and in *Pinion v. Pinion* (1994(2) SA725(D) cases the court again made an order appointing the parents as joint custodians of the two children. In *Venton* case the court made reference to the reports of the Family Advocate and identified that in the defacto situation the parties had acted as joint custodians. So the court awarded joint custody for the parties (Soyas, 1995).

According to section 6(1) of the Divorce Act 70 of 1979 in South Africa, a divorce decree may not be granted until the court is satisfied that the provisions made for the welfare of any minor or dependent child of the marriage are satisfied and if the Family Advocate has made an enquiry in terms of the Mediation in Certain Divorce Matters Act 24 of 1987, the court has considered the report and

recommendations of the Family Advocate. Moreover, the court can carry out any investigation which it thinks necessary and may order any person to appear before the court (Section 6(2) of the Divorce Act 70 of 1979). Section 6(4) of the Divorce Act 70 of 1979 grants powers for the court to appoint a legal practitioner to represent a child at divorce proceedings due to the reason that child has experienced many difficulties in a parental separation or in a divorce. The Mediation in Certain Divorce Matters Act 24 of 1987 provides for the appointment of one or more Family Advocates and also to appoint Family Counsellors to assist the Family Advocate.

Discussion

Parenthood has to be regarded as an important factor when considering the order which will better advance the welfare of the child. Parenting is a continuing and a shared responsibility even after a separation. The appropriateness of a sole custody and a shared custody order depends on the merits of each case. When determining a most suitable residence order, Family courts have to consider all factors, which affect the welfare of the child. The ideal for a child is to be with his/her both the parents. However, such a solution cannot be expected in a situation where the parents have been separated. Each and every custody dispute is fact specific and the distinction line between the sole and shared residence, is difficult to draw in a custody case.

In today's world, discussions are going on and even some jurisdictions have moved away from fault-based divorce to mutual consent of divorce. In such a situation it is timely important to think about a broad framework which can decide what custodial arrangement will work best for them.

If the history of the family shows that parents are relatively cordial, harmonious when managing student matters, joint custody can be very much suitable. If they were unable to manage their problems during the subsistence of the marriage and if parents don't trust them each other, joint custody would not be an appropriate solution. If the parents hate each other, moving children from one place to another will be painful for them. After the separation of the parents, there should be a safe place for children to continue their lives. Shared residency refers to the situation where the children reside with each separated parent at different times and allows alternate periods of residence and each parent has equal status of law.

Several researchers have found that shared care leads to emotional distress and psychological distress due to the ongoing conflicts of parents and have argued about the harmfulness that the shared care can cause for children due to the inter parental conflict. When parents can't take important decisions cooperatively, with a supportive intention, a shared parenting scheme will be a danger for the child's physical and emotional wellbeing (McIntosh, J

and Chisholm.R., 2007). Shared custody can be a risk factor especially for schoolchildren who is in a young age. If the distance of the move is longer, it will negatively affect the child physically and also psychologically. Moving between two homes is not healthy for a child. If the parents live in two different countries, the situation will become worse than the general. Some children are less adaptable than others. In such a situation, shared custody order will be harmful for their wellbeing. If the child is able to build up a positive relationship with both the parents in their respective locations and the parent's relationship with the child during the subsistence of the marriage are considerable factors for the court in a shared custody case.

A parent having significant emotional and psychological problems to maintain a frequent contact with the other parent, will be a huge obstacle to offer a shared order (Stahl.P.M., 2013). In order to be more effective, prior to awarding a shared custody, the type of the parenting in which the parent is adopting for the child is important. If either parent is authoritative, there is a less possibility for the success of a shared order. Accordingly, the sensitivity of the parent to child's needs is paramount important when deciding the most appropriate custody arrangement (Stahl.P.M., 2013). Similarly, it is important to consider the history of parental conflicts and its effect on parents. Domestic violence is another important issue when declaring a suitable custodial plan. If the parents have unresolved disputes and conflicts, it may seriously affect the child's development and if so, they will not agree for a shared parenting system.

On the other hand, several researchers have found that shared parentage systems are more beneficial for parties than sole custody arrangements. In 1996, some researchers have found that children in shared parenting arrangements score higher grades than sole custody families (Buchanan, M.& Dornbusch., 1996). In a research done in 1989, has revealed that children in Shared Parentage families do better with regard to family relationships and self- understanding (Glover, R.& Steel, C., 1989)

There's an old saying that one size does not fit all. The ability of the parent to be a responsible father or a mother is the sole factor to be considered when awarding a shared parentage. Custody matters which comes before the court has unique characteristics. There's no a specific model and a line cannot be drawn in one place declaring what is the place in which the court can offer a shared residence order. The court has to do the best, when deciding the most suitable mode of custody, on case by case basis after a careful consideration of all relevant factors. It is the option for the parents to decide to or not to request a shared residence order and it is the duty of the court to award the shared order after a careful analysis of all the relevant factors case by case basis.

Recommendations to adopt a new model based on shared parenting

To shared custody be a viable option, divorcing parents have to mutually agree on the preferred custodial arrangement, without compromising the best interest of the child.

Legal presumption of shared parental responsibility should be given statutory recognition in Sri Lanka and it should be the benchmark of a custody dispute. The commonly used terminology in Sri Lanka in a custody determination should be changed by a statute. Custody and access terminology used in Sri Lanka have to be replaced with new concepts such as shared parental responsibility and shared parenting. The court should start with the presumption that, continuous contact and involvement of both father and mother with the child and child's life is vital, if there are no issues regarding physical and mental safety. Law has to presume that the shared parental responsibility is the most appropriate viable solution in a custody dispute while focusing parents into a constructive battle to come up with a cooperative parental plan. Statute should clearly mention the requirement of presenting a parenting plan before the court. It is important to include in the "parenting plan", each parent's responsibilities and rights for care, residence, contact, financial contribution and decision-making, with regard to children's matters, personal information, qualifications, employment and income of both parties. Mediation may be a device where the parents can be assisted in developing a child- focused parenting plan.

The Court should be the final arbitrator to decide whether to apply an equal time-sharing plan or not, and the most suitable residence arrangement on case by case basis. If it can prove any incident, which directly and negatively affect shared parenting presumption, the presumption has to be considered as rebutted and then judicial determination on the matter should be the final.

Literature on children and divorce suggest that it is in the child's best interest to have continuous contact with both parents after a separation (Kruger. JM., 2001). However, family violence situations have to be identified by courts as exceptions. Instead of appointing a primary care giver, shared parentage will enhance children's emotional wellbeing while allowing to have ready access to both parents, ultimately upholding the best interest standards. Raising the awareness of the general public through parenting education programmes to make parents aware of their own conduct during and after separation, impact of their separation for children has to be done in regional levels.

Conclusion

Several countries have adopted a presumption in favour of the shared custody and some countries choose shared custody as the most appropriate solution in a post-divorce context. Shared custody has more merits for the wellbeing of the child if can be adopted in a separation of parents Gender stereotypes and the patriarchal thinking work as

huge barriers to draw a presumption of shared custody. Sri Lankan courts have the discretion to make custody orders as the court deems proper according to the provisions in the Civil Procedure Code (Civil Procedure Code, No.2 of 1889(as amended) Section 620, 621, 622). On absence of violence and other barriers as discussed above, Sri Lankan courts have a responsibility to take shared parentage as the presumptive starting point in a separation of parents.

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