

(2003) 02 KL CK 0067

High Court Of Kerala

Case No: M.F.A. No"s. 638 and 907 of 2002 (C)

Merlin Thomas

APPELLANT

Vs

C.S. Thomas

RESPONDENT

Date of Decision: Feb. 18, 2003**Acts Referred:**

- Guardians and Wards Act, 1890 - Section 12

Citation: AIR 2003 Ker 232 : (2003) 3 RCR(Civil) 304**Hon'ble Judges:** K.A. Abdul Gafoor, J; K. Thankappan, J**Bench:** Division Bench**Advocate:** Elizabeth Mathai Idiculla and George Cherian Thiruvalla, for the Appellant; K.M. Joseph and Sabu George, for the Respondent

Judgement

Thankappan, J.

Both the appeals are filed against the order of the Family court, Kottayam at Ettumanoor in O.P. (G & W) No. 554/2000. The custody of a minor child, Arya Rose Mary, aged 6 years, is the subject matter of the Original Petition. The marriage between the petitioner and the respondent was solemnised on 11th February, 1995 at Cathedral Church, Changanacherry as per Christian rites. The child was born on 3-1-1996. The married life between the parties were happy for some time. The petitioner/husband is young and well educated and is working in the office of the Divisional Office, LIC of India, Kottayam. The respondent wife is also young and educated. Later, the marital relationship of the petitioner and the respondent became strained due to suspicious nature of the parties and even alleging mental disorder against each other. At last the respondent left the company of the petitioner and started living, with the child, in her parental house. Mediators including heads of religious institutions intervened and attempted to bring them together. All these attempts became futile. Later, the husband was forced to file O.P. No. 528/2000 before the Family court for a decree of restitution of conjugal rights and the Original Petition is pending. During the pendency of the said Original

Petition, counselling was conducted and it was ordered that both of them may be subjected to psychiatric counselling and treatment. As the petitioner was not agreeable for this, he filed O.P. No. 13762/2000 before this court and got a direction to the Family Court to consider and pass appropriate orders in O.P. (G&W) No. 554/2000. Subsequently during the pendency of O.P. No. 528/2000 the Family Court considered O.P. (G&W) No. 554/2000 and allowed the original petition on the following directions :

For better education of the child custody is given to the petitioner on 5 days in a week i.e.. Monday to Friday and custody given to the respondent on Saturday and Sunday. During summer vacation 1st half of the period custody given to the Respondent and the 2nd half given to the petitioner. The petitioner shall send the child in the house of the respondent in the F. N. of Saturday and the respondent shall return the custody of the child to the petitioner in the afternoon of Sunday at 5 P. M., so that the education of the child, its welfare could be protected. Hence, the petitioner and respondent have come up in appeal.

2. It was alleged in the petition that the respondent/wife is adamant and her brothers and other family members are not looking after the affairs of the child. If the child is allowed to stay with the respondent, it will spoil her life as the child will not get better education or proper care. The respondent/wife left the company of the petitioner only because of the instigation of her brothers and the alleged mental disorder of the petitioner/husband is baseless. It is alleged that the wife being the last among the 11 children of her family and the paternal family of the wife is almost like a joint family, the child will not get proper care even if it is allowed to stay with her mother. The Family Court found that the petitioner/father is well educated and well placed so as to look after the child. It is also found that for the welfare and care of the child the custody of the child should have been given to the petitioner /father on certain conditions.

3. We have summoned couple as well as the child. We have ascertained the desire of the child and also we have attempted to minimise the animosity of the husband and the wife taking note of pendency of O. P. No. 528/2000, for a decree of restitution of conjugal right, before the Family Court. But we could not be successful. Hence, we consider only the custody of the child for the time being.

4. This is a matter to be considered by this Court very cautiously. The consideration in ordering the custody of a minor child shall be the welfare of the child. The emotions of either of the parents does not have much weight. Children are like lighted lamps and they have to live like lamps with least scratch in their life. The children are like petals in a flower, least scratch will make crack in their hearts. The company, affection, protection, affinity and emotional console are required to a child. These are only consideration, but the paramount consideration is the welfare. The welfare means educational, economical, religious, mental or moral well-being. For ordering the custody of a minor child the court shall be guided not only with the

consistency of the law which governs the right of the guardian either natural or otherwise, father or mother but the education, character and capacity of the proposed guardian also be considered. Above all these aspects as it is held in [Rosy Jacob Vs. Jacob A. Chakramakkal](#), that the controlling consideration governing the custody of the children was the welfare of the children and not the right of their parents. In the case in hand the Family Court found that the petitioner husband, father, is well placed and is having a job in the L. I. C. of India and is capable to give better education to his child. It considered all these aspects and found ordering custody of the child to the petitioner/husband is better for the welfare of the child. It is also to be noted that the petitioner/father is the only son to his parents. Presence of the grand-daughter will also be a console to the old parents of the petitioner. At the same time considering the allegations now levelled against the petitioner as well as the mother in the proceedings pending before the Family Court, though it is a matter to be considered on evidence and whatever may be the outcome, now we are only concerned with the welfare of the child. We see that the order now made by the Family Court is in accordance with the principles enunciated by judicial pronouncements as well as the guiding principles contained in the provisions of the Guardians and Wards Act, 1890. But we cannot ignore certain facts, we have ascertained.

5. It is to be noted that the child is a girl child. The company of the mother is more affectionate and it will give certain protection to the child in developing her personality, intelligence and character. But at the same time it is a fact that the court below already found that the father is capable of protecting the interest of the child and the presence of the child in the paternal house will give some console to the old parents of the husband. We have assessed the wishes of the child in Chambers and we found that the child is very anxious to have the company of the father, the paternal grand parents as well as the mother. Hence, the order passed by the Family Court is modified to the extent that the custody of the child be continued with the respondent/mother provided the petitioner shall get the child every second Saturday and Sunday in every month and during a full vacation period, preferably X mas vacation.

6. With these modifications we dispose of both the appeals.