## 1. TOOLS AND TECHNIQUES FOR SPEEDY DISPOSAL OF MATRIMONIAL AND OTHER MATTERS PENDING IN FAMILY COURTS

The Constitution of India, through its Preamble, has guaranteed to its citizens 'Justice'—economic, political and social. But even after 70 years of independence, achieving substantive justice for the vast majority of the citizens has remained a distant dream. In the specific area of justice delivery system, India is faced with several problems relating to large backlogs and pendency of cases. At present, there are more than 22 million cases pending in various courts across the country. Parties seeking matrimonial relief often get trapped in the vicious battle for years with no relief in sight. **Right to life enshrined in our constitution over a period of time has extensively developed and includes many facets. It will not be an exaggeration to say denial of speedy justice particularly in the matrimonial matters amounts to violation of right to life.**

The Family Courts, albeit set for the specific purpose of speeding up matrimonial cases and unburdening the Civil Courts are plagued with the same problem. Scarcity of judges, long adjournments and unnecessary delay by litigants and their lawyers are the primary causes of case pendency in Family Courts. The speedy disposal of Court business is a matter which requires the earnest attention of every judicial officer as justice delayed amounts to denial of justice.

Some of tools and techniques that can be employed for the speedy disposal of cases in the Family Courts are elaborated hereunder:

1. The Covid-19 Pandemic induced Lockdown can be taken advantage of by Family Courts across the country wherein matters awaiting final hearings can be taken up via Video Conferencing or E-courts in the way the various High Courts and Supreme Courts are taking up urgent matters. The parties can email written submissions and the parties or their legal representative can be allotted a specific period of time to argue the matter. Since the functioning of the Family Courts has come to a complete halt, the Presiding Officers will have sufficient time to dispose

off a lot of cases before the lockdowns are lifted and courts resume their normal functioning.

2. The proper despatch of Court work depends not merely on the ability of an officer, but also to a large extent on the personal attention paid by him/her to its adjustment and control. Amongst the important matters, which should receive the personal attention of the Presiding Officer is the cause diary. The practice of leaving the fixing of dates to the clerical staff, leads to abuses and results frequently in confusion of work. The fixing of an adequate cause list which can be got through without difficulty during the Court hours requires some intelligence and forethought, and unless the officer pays personal attention to the matter and fixes the list with due regard to the time likely to be taken over each case, there is risk of a considerable number of cases being postponed from time to time with consequent delay in their disposal and inconvenience to the litigant public.
3. Orders for the issue of notice to parties and summonses to witnesses are given without specifying the date by which process-fees must be paid into Court. Two days should be the usual time allowed. On failure of service, orders for the issue of fresh process are given without ascertaining the cause of the failure of the service and fixing the responsibility therefore. Documents, instead of being accepted either with the plaint or at the first hearing, are accepted at every stage of the case
4. Witnesses, who are present in Court are often sent away un-examined on all kinds of inadequate pretexts. The Presiding Officer shall ensure that the date which has been set for the examination of witness shall be adhered to strictly and no adjournments shall be granted unless it is absolutely necessary. A Court should not adjourn any case for more than three months. If for any reason the diary for the next three months is full, a request for the transfer of some cases to some other court should be made to the District Judge.Another problem that is often faced at the evidence stage is that the same is not recorded day to day and is taken in **driblets.**

5. Delays also occur frequently when the parties are in Counselling/Mediation as the litigants tend to take the mediation casually thereby delaying the time taken to come to an amicable resolution. Courts should insist on submission of reports and awards by the Counsellor/Mediator, within a reasonable time and should not grant adjournments without satisfying themselves that the Counsellors/Mediators are doing their duties and that sufficient cause has been shown for the grant of an adjournment. It will be found useful to make a part of the Counsellor/Mediator fees depend upon punctual submission of his/herreport, and to make this fact clear in the courts order and the letter of request to the Counsellor/Mediator.
6. The Principal Judges should set annual targets and action plans for the Family Courts to dispose of old cases and maintain a bi-monthly or quarterly performance review to ensure transparency and accountability.
7. There needs to be a Mechanism in place to monitor progress of cases from filling till disposal, categorise cases on the basis of urgency and priority and also grouping of cases.
8. Shortage of judges is no doubt a factor responsible for pendency but at the same time, it is found that some courts have been functioning and performing better in the same conditions. The court models of such courts should be adopted wherever possible. This underscores the need to understand that existing capacity has to be better and fully utilized rather than solely concentrating on developing additional capacity.
9. Modernisation, computerization and technology – court automation systems, e-courts, digitization of court records, access to information about cases, if possible, could be made available to litigants and advocates.
10. There is a need to frame strict guidelines for grant of adjournments especially at the trial stage. Long cross examinations should be discouraged and timeframe should be given for conducting cross examination, also stricter timelines for cases.
11. The Presiding Officers should allow waiver applications if he/she is convinced that all criterion have been met. This will ensure that the

parties willing to end their marriage after coming to an amicable resolution don't have to wait for an additional 6 months which shall also reduce the pendency in the Family Courts.

12. Unavoidable adjournments and unnecessary extensions to file Replies and Written Statements should be avoided at all costs.
13. The Presiding Officers should make all endeavours to make mediation and counselling available via Video Conferencing to cater to the couples who are facing matrimonial discord during the nationwide lockdown.
14. Mediation, counselling, chamber hearing of the parties by respective judges and mediation & counselling not only between parties but also between family members of respective parties.
15. Trials to be time bound and evidence to be confined to substance. As per mandate of Section 15 of the Family Courts Act. Wherever possible LC be appointed to conduct trials immediately after interim order if any or after completion of pleadings. Court should keep a watch on regular intervals wherever trials are conducted by LCs.
16. Lok Adalat- pending matters may be sent to Lok Adalat as one does not know when the hammer works.
17. Awareness of prons and cons of litigation and mediation- parties shall be made aware about the above and their own decisions in counselling or mediation.

**IMPEDIMENTS/SOLUTIONS**

A. Long dates of hearing- give short dates in the matters.
B. Less number of judges and staff
C. Routine transfer of judges.
D. Lack of proper training of judges with respect to their own conduct as a family court judge.
E. No chamber hearing of parties.
F. Administration work of family court judges.
G. Short tenure of family court judges. Frequent transfer. Tenure of service be fixed.
H. Appoint judges who have inclination or work experience in family law, they should be aware of latest law on the subject.

I. Appointment of law researcher and interns in family court. They can help judges.
J. Organisation of seminar.
K. Time bound Trial( chief and cross examination) of matters.
L. Online order sheet of the matters with consent of parties.
M. If the high court does not grant stay, it should then direct trial court to proceed in the matters.
N. Encourage use of online portal of family courts.
O. Mutual consents matter shall be given to MM or civil judges for recording of statements to save the time.
P. Provide more space to family courts.

As pendency strikes at the heart of speed of disposal of the cases, remedying the pendency problem can help fasten the process of disposal of cases which would help people evade the wrath of the judicial process as 'justice delayed is justice denied'.

**Ekta**

**Question No.2- In what manner and to what extent the procedure in family courts can be evolved for speedy disposal of cases? Explain with reference to the relevant provisions of Family Courts Act and Rules.**

1) **Role of Conciliators in expedious disposal**
   **Section 9 (1)** of the Family Courts Act states as follows:-

"*in every suit or proceedings, endeavour shall be made by the family court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceedings and for this purpose a family court may, subject to any rules made by the High Court, follow such procedure as it may deem fit*"

**Section 6 (1)** of the Family Courts Act states as follows:-

"the State Government shall, in consultation with the High Court determine the number and categories of counsellors, officers and other employees required to assist a family Court in the discharge of its functions and provide the family court with such counsellors, officers and other employees as it may think fit."

The purpose of the enactment appears to be to avoid contested litigation and to bring about a speedy resolution of the dispute.

From the above mentioned sections a clear indication is made about the appointment of the counsellors. But there is no provision in the Act for the appointment of conciliators as such. It is often seen that the counseling work which ideally has to be assigned to a conciliator is performed by the Judges themselves. The Act is not very clear on this important point. There is wide inconsistency in the procedures adopted for appointment of counsellors, qualifications and remunerations, the role and position awarded to them and the counselling techniques adopted by individual counsellors.

The model of Japan can be taken into consideration. In Japan, conciliation connected to the court is known as public sector conciliation. It includes a conciliation committee consist of a judge and two counsellors, one of whom is a woman. A private sector conciliation is on the other hand is not connected with the court and is purely voluntary and unconnected with the process of the court. Family courts in India do not contemplate institutionalised conciliation either connected with the court or disassociated with the court.

More power shall be given to the conciliators is assisting the court in order to take decisions in family matters. Therefore institutionalization of conciliations in Public sector is necessary. Every family court should have a full-fledged counselling centre consisting of professionally qualified counsellors. All cases should be routed through this centre, in case the government feels that this would involve too much expense, then alternately, some NGOs may be identified for the purpose and they could be strengthened through appropriate funding. The family court should maintain liaison with these NGOs and keep effective channels of communication. This would be a positive step forward towards the institutionalisation of counseling.

2. **Procedure of Family Court**

There is a need to simplify the procedure followed in family courts and following steps can be considered for the same:

- the rules of procedure should be worded simply and should indicate the whole range of procedures which are understandable to a laymen from the commencement of an action to its conclusion, including means to enforce judgments and orders;
- pre-trial process such as pre-trial debate and reconciliation and settlement should be laid down, in order to clearly define the issues between the parties which may help in avoidance of frivolous litigation.
- free advice should be made available as to right of parties as well as their responsibilities and obligation and where children are involved,
- steps for immediate protection of their interest and rights should be taken, and
- issues should be determined without any prejudicial delay.
- The language, the conduct, documents and legal representation should be simple without any technicalities.

3). There is a lack of uniformity regarding the rules laid down by different states which in term also leads to confusion in the application of Family Courts. Merely passing a central legislation is not in itself a complete step therefore for implementation in its spirit, it is to be ensured that some level of uniformity is maintained, at least in the initial stages of its coming into effect. Further, the need to amend certain laws is also to be examined and implemented effectively in order to ensure that these courts do not face any hindrance in their working. These small steps, if examined and implemented within time, will go a long way to ensure that the Family Courts are successful, to a greater degree.

**Question No.3**

In a matrimonial suit for divorce filed by the husband on the ground of cruelty and desertion, the wife appears and admits desertion but makes counter allegation of cruelty.

a) Can the divorce suit be decreed on the ground of desertion on admission?
b) Will the situation be different if there is no allegation of cruelty by the husband?
c) Whether the limitation of cooling off period applies in such cases.

**Answer**

a) The Supreme Court has held in various judgments that a decree on admission under Order XII Rule 6 of the Code of Civil Procedure, 1908 is not a matter of right but rather a discretion of Courtwhich discretion must be exercised in accordance with knownjudicial canons[1].

   Under Section 23(i) of the Hindu Marriage Act, 1955 a court can grant relief to a party where it is satisfied that any of the grounds for granting relief exists, however it also includes a proviso that a party cannot take advantage of his or her own wrong for the purpose of such relief.
   Hence, while deciding an application for relief on the basis on admission, the Court has to make sure that the party seeking relief is not taking advantage of his/her own wrong[2].

   For example, in the present scenario, where the wife is compelled to leave the matrimonial home because her husband is physically violent towards her, wife admission is not unconditional and a decree of divorce cannot be passed on the basis of admission to desertion. In any case the issue of cruelty would establish that he is taking advantage of his own wrong because. It will amount to the husband taking advantage of his own wrong.

   To establish whether a party is taking advantage of his/her own wrong, the court needs to conduct a trial and it cannot pass a decree of divorce prior to that.

   Further, it may not be safe and correct to pass a judgment under Order12, Rule 6 of the Code when a case involves disputed questions of fact and law which require adjudication and decision[3].

   The allegations of cruelty made by the wife need to be taken into account by the Court as the petitioner cannot gain any advantage by reading a few lines of the

[1] S.M. Asif v. Virender Kumar Bajaj (2015) 9 SCC 287
[2] Meenal Nigam v. Ravi Kalsi 2015 (3) BomCR 826
[3] Express Towers P.TD and Anr. V. Mohan Singh and Ors. 2007 (97) DRJ 687 (DB)

written statement, as the written statement or any document sought to be relied upon for the purpose of judgment on admission is to be read as a whole[4].
It is also a well settled position of law that the CPC is not strictly applicable in family matters and the first and foremost approach of Family Courts is to preserve the matrimonial home[5].

b) In my opinion, the situation will not be different if the husband does not allege any cruelty as desertion in itself is a form of cruelty and being a separate clause under Section 13, HMA, it does not need to be corroborated with any other ground for divorce.

c) Limitation of cooling off period is not applicable in case of a contested divorce and hence, not relevant to the present question.

Relevant case law is attached herewith.

[4]Man Mohan Kohli v. Natasha Kohli 199 (2013) DLT 171

[5]The Family Courts Act, 1984, Section 4 (4) In selecting persons for appointment as Judges-
(a) every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected;

**Trisha**

**Q.4. Due to strained relations between the parents, a child who ideally needs the company of both parents feels tormented. The task is then on the court to decide as to whom the custody should be given. What are the various objective considerations to be kept in mind in awarding 'Shared Parenting' Orders. Discuss in the light of latest case laws on the point.**

**Answer:**

**Shared parenting-**The Hon'ble Supreme Court of India has held that Family courts should grant visitation rights in manner that a child is not deprived of love and care of either parent. This task is then on the court to decide as to whom the custody is given and who gets the visitation rights. The welfare of the child should be kept foremost in custody battles between separated parents.

According to **The United Nations Convention on the Rights of the Child**, the government is bound to respect the rights of the child whose parents have separated.

Currently, most courts hearing divorce cases end up granting custody of the child to the mother, especially if it is a girl. The father stands a better chance of getting custody if it is a boy and can prove to the court that the mother is incapable of looking after the child.

Granting custody to one parent may not be the best idea as it may not go well with the child who might miss out on the emotional security. Non-custodial parents ultimately end up getting visitation rights.

## Yashita Sahu Vs. State of Rajasthan and Ors. (2020)

In this judgment, Justice Deepak Gupta mentioned that,
*(Paragraph 17) It is well settled law by a catena of judgments that while deciding matters of custody of a child, primary and paramount consideration is welfare of the child.* ***If welfare of the child so demands then technical objections cannot come in the way.*** *However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the* ***best interest of the child.***

*(Paragraph 19) Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every reunion may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that* ***the court weighs each and every circumstance very carefully before deciding*** *how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to one parent the other parent must have sufficient*

***visitation rights*** *to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.*

*Also, if the parents are living in the same town or area, the spouse who has not been granted custody is given visitation rights over weekends only. In case the spouses are living at a distance from each other, it may not be feasible or in the interest of the child to create impediments in the education of the child by frequent breaks and, in such cases the* ***visitation rights must be given over long weekends, breaks, and holidays****. In cases like the present one where the parents are in two different continents effort should be* ***made to give maximum visitation rights to the parent who is denied custody.***
*The Judgment also mentions that, in addition to 'Visitation Rights', 'Contact rights' are also important for development of the child specially in cases where both parents live in different states or countries. The concept of contact rights in the modern age would be contact by* ***telephone, email*** *or in fact, we feel the best system of contact, if available between the parties should be* ***video calling****. With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible.*

**Jasmeet Kaur Vs. NCT Of Delhi (2019)**

In this matter, the wife prayed for sole and permanent custody of minor daughter and minor son. The court was of the opinion that the welfare of the children would lie in joint parenting by both the parents. The father of the children was living in the USA and hence, it would not be possible to do shared parenting if wife, who was living in India, retained the sole custody of the children. Hence, the children were directed to go back to the USA along with the mother where the mother shall have the custody of the children. The husband was entitled to meet the children and spend time with them as may be mutually agreed between the parties.

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**Hence, the factors which are taken into consideration while awarding shared parenting are–**

- Monetary inducement of the child must not be encouraged, the monetary inducements by father should operate against him. Emotional manipulation should also be noted and work against manipulations.
- If the parents are mature and ready to take the responsibility of the child.
- If both the parents are willing to reach a consensus for welfare of the child.
- If the parents are capable of jointly agreeing on a day-to-day plan to implement the scheme of joint parenting and willingness of parents to work with each other.
- If the child is comfortable around both the parents and his/her relation with each parent
- If the joint parenting is not causing harm to the education of the child and over all his/her mental and physical health.

- The wish of the child and views expressed by the child.
- However if co-parenting can not be arrived at, it is better to have one anchored parent ( usually mother) with visitation to the other side.

**Arpita**

**Question No. 5 :**

**What are the practical difficulties in execution of an order for grant of maintenance under section 125 Cr. P. C.? Discuss the available options in law before a family judge for the realisation of the maintenance amount awarded under section 125 Cr. P.C. with special reference to the case laws.**

Answer:

Difficulties faced:

Realization of the maintenance amount from the JD when he has no immovable or movable properties.

Filing of several execution petitions as the DH can only claim arrears of maintenance for 1 year.

Execution when the husband is living abroad, or is a foreign citizen and there are no details of his movable and immovable assets or name and place of his employer etc.

There are two options for the recovery of the arrears of maintenance

1. Section 125(3) Cr.P.C.

> (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or

until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

2. Section 128 Cr.P.C. deals with "Enforcement of order of maintenance". According to this Section, the following are the conditions for enforcement of the order of maintenance:

- Copy of order under Section 125 is given to that person free of cost in whose favour it is made. In case the order is in favour of children, then the copy of the order will be given to the guardian of children.
- If any Magistrate has made an order under Section 125, then any Magistrate of India can enforce this order where that person lives who has to give maintenance.
- The Magistrate has to satisfy two conditions before enforcement of order:

1. Identity of parties, and
2. Proof of non-payment of allowances.

Under section 128 Cr.PC there is no provision providing for limitation as it is specified in 125(3) Cr.P.C.

**A. The Magistrate can also pass order for arrest even if the execution is filed under 128 CrPC**

**V.B.Kamalanathan vs K.Jayasree 2017(4) MLJ(CRL) 631**

If there is any default is compliance of the maintenance for several months without sufficient cause, certainly, the learned Magistrate can invoke the provision of Section 125(3) of the Code issued warrant of imprisonment even though petition was filed under Section 128 of the Code.

**B. Insistence on filing successive execution petition**

**Shantha @ Ushadevi & Anr vs B.G.Shivananjappa AIR 2005 SC 2410**

The Hon'ble Supreme Court held that the limitation of 1 year under Section 125(3) cannot be applied. It must be borne in mind that Section 125 Cr. P.C. is a measure of social legislation and it has to be construed liberally for the welfare and benefit of the wife and daughter. It is unreasonable to insist on filing successive applications when the liability to pay the maintenance as per the order passed under Section 125(1) is a continuing liability.

**C. Attachment of JD's movable and immovable properties.**

In the event, the Court has the details of all the properties of the parties it can, in the case of non-compliance /or any default in the payment of maintenance, immediately issue warrants of attachment of properties of the JD. In case there are no properties, the Court is well within the power to issue arrest warrants against the JD.

In case husband is a government employee, the court at the time of deciding the maintenance, may pass a direction for deduction of the maintenance amount from the husband's salary into the wife's account for recover the sum.

**D. Penalty if there is any default in monthly payment**

**Gaurav Sondhi vs Diya Sondhi 120 (2005) DLT 426, 2005 (82) DRJ 295**

The matrimonial courts should follow the following procedure while granting interim maintenance/maintenance:

(i) Whenever maintenance/interim maintenance is ordered, the Court will direct that it will be paid on or before 10th day of every month unless the Court finds that the nature of the employment of the husband and his manner of income makes such monthly payments impractical. In such a situation appropriate orders may be passed which shall take into account the circumstances of the husband which warrant departure from the time bound monthly payment directions contained in this order. ;

(ii) whenever the wife has a bank account and indicates it, such payment may directly be deposited in such bank account every month before the 10th day of the month.

(iii) The payment shall be made to the wife/child and in case of any difficulty in receiving or tendering the payment, it should be made through counsel. The order of deposit in Court needlessly makes it difficult for the wife to withdraw sums from the registry of the concerned court, apart from adding unnecessary burden to the Court's registry. If for good reasons upon finding difficulty in payment to a wife and her counsel the deposits in Court are made such deposits should be in the name of the wife by a draft/crossed cheques, which may be retained on the court file for retrieval by the wife without the time

consuming process of deposit in the Court account and subsequent withdrawal by the recipient;

(iv) In case there is first default for payment of maintenance, the Court may condone it. However, in case of second default without justification, it will be open to the Court to impose a penalty up to 25% of the amount of monthly maintenance awarded;

(v) In case there is third or fourth default, the penalty may go up to 50% of the monthly amount of maintenance upon the court finding that the default was not condonable or contumacious in nature.

(vi) The Court must ensure that the orders of maintenance are not a mere rhetoric and are meaningful and effective and give real sustenance and support to the destitute wife and/or the child.

(vii) In case interim maintenance is being paid and adequate litigation expenses have been awarded to the wife, it should be ensured that the written statement/reply is filed within a reasonable time.

(viii) However, in judging the nature of default the relative affluence of the husband and the regular nature of his occupation and income will be taken into account. Obviously husbands having irregular employment and/or daily wages or those having casual employment would be entitled to have their defaults viewed more liberally.

## E. ENFORCEMENT OF MAINTENANCE ORDER AGAINST THE HUSBAND IS LIVING ABROAD, OR IS A FOREIGN CITIZEN

In case of any default and deliberate non-appearance of the husband, the Court may issue arrest warrants against the Husband which is to be executed through the MEA.

**THE MAINTENANCE ORDERS ENFORCEMENT ACT, 1921** (An Act to facilitate the enforcement in India of Maintenance Orders made in reciprocating territories and vice versa)

Section 5. Transmission of maintenance orders made in India. Transmission of maintenance orders made in India. Where a Court in 4*[India] has, whether before or after the commencement of this Act, made a maintenance order against any person, and it is proved to that Court that the person against whom the order was made is resident in a reciprocating territory, the Court shall send to the Central Government, for transmission to the proper authority of that territory, a certified copy of the order.

Section 8. Enforcement of maintenance orders. Enforcement of maintenance orders. (1) Subject to the provisions of this Act, where an order has been registered under this Act in a High Court, the order shall, from the date of such registration, be of the same force and effect, and all proceedings may be taken thereon as if it had been an order originally obtained in the High Court in the exercise of its civil jurisdiction, or in such Civil Court subordinate to that High Court as may be named by the High Court in this behalf, and that Court shall have power to enforce the order accordingly. (2) A Court of summary jurisdiction in which an order has been registered under this Act or by which an order has been confirmed under this Act, and the officers of such Court, shall have such powers and perform such duties, for the purpose of enforcing the order, as may be prescribed.

**Rytim**

**Q. 6. What are the principles for computation of maintenance under Section 125 Cr. P.C.? How will the quantum of maintenance vary in case the competent court has awarded maintenance under the Domestic Violence Act and under Section 24 of the Hindu marriage Act**.

MAINTENANCE DEFINED

The term maintenance has not been defined in the Code of Criminal Procedure, 1973. The definition, however, can be derived from the Hindu Adoptions and Maintenance Act, where maintenance has been defined as the "provision for food, clothing, residence, education and medical attendance and treatment. In the case of an unmarried daughter, it also includes all reasonable expenditure of an incident to her marriage[1]"

In the context of the definition provided in the Hindu Adoptions and Maintenance Act, the Supreme Court has held that maintenance necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed. The concept of maintenance must, therefore, include provision for food and clothing and the like and take into account the basic need of a roof over the head[2].

To expound the concept of maintenance under Section 125 of the Cr.P.C, the Supreme Court has relied on the ambit and scope of sustenance. In the case of Bhuwan Mohan Singh v. Meena[3] it has been held as follows:

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[1]Section 3(b), Hindu Adoptions and Maintenance Act, 195
[2]*Mangat Mal* v. *Punni Devi*, (1995) 6 SCC 88.
[3](2015) 6 SCC 353.

"*Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the Court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible*."

**INGREDIENTS OF SECTION 125**

The following categories of persons can claim maintenance under Section 125 of the Code of Criminal Procedure, 1973:

1. Wife

   The term wife means a legally wedded wife[4]. This view has now been diluted to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time[5]. The explanation to section 125 brings within purview of the termwife" a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried"

[4]SavitabenSomabhaiBhatiya v. State of Gujarat (2005) 3 SCC 636
[5]Chanmuniya v. Virendra Kumar Singh Kushwaha, (2011) 1 SCC 141

2. Child

   Male and female children, irrespective of whether they are born inside or outside the legally valid marriage of the father and mother, can claim maintenance. They must be minors to claim maintenance. They may be married or unmarried.

   Adult children can claim maintenance from their father only if they have a physical or mental abnormality that makes them unable to maintain themselves. An adult unmarried daughter can claim maintenance from her father.

   Married minor girls can claim maintenance from their parents till they turn 18 if their husbands do not have sufficient means to maintain them. However, married adult girls cannot claim maintenance from the parents.

3. Parent

   A father or motherunable to maintain himself or herself

   Conditions for Grant of Maintenance Under Section 125

   Person from whom maintenance is claimed must have the ability to pay maintenance. Ability means being employed, owning land, having a source of income or having a healthy body capable of work. Further, The person must have neglected the claimant or refused to pay maintenance.Persons claiming maintenance must be unable to maintain themselves. If a person is healthy, adequately educated or capable of pursuing gainful employment no maintenance is given. The mere fact that the wife is earning does not disentitle her from claiming maintenance. The question is whether she is able to maintain the same standard of living that subsisted prior to the neglect or divorce with her own earnings without having to depend on another.

I. Computation of Maintenance Under Section 125 of the Code of Criminal Procedure,1973

1. A primary consideration while adjudicating upon the quantum of maintenance under Section 125 is the ability of the Respondent to make maintenance payments. Ability is not restricted to the sources of income of the Respondent during the litigation but the potential of the Respondent to make such payments. In this regard the Supreme Court has held as follows:

   "*In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodied. There is no escape route unless there is an order from the Court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds.*"[6]

   Relying upon the above proposition, the Court has held that a mere plea of the husband that he does not possess ay source of income does not absolve him of the moral duty to maintain his wife in presence of good physique along with educational qualification.[7]

2. The court must also consider the earning capacity and capability of the wife/spouse seeking maintenance.

A. In Mamta Jaiswal v. Rajesh Jaiswal[8], the Madhya Pradesh High Court has laid down that maintenance amounts are not to be considered as a 'dole'. As spouse cannot be allowed to sit idle while waiting for a sum to be awarded to him or her.

B. In a similar vein, the Delhi High Court in Sanjay Bharadwaj v. State[9] has held as follows:

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[6]Id.
[7]Reema Salkan v. Sumer Singh Salkan (2019) 12 SCC 312
[8] II (2000) DMC 170
[9]Crl.M.C.No. 491/2009

"*Under prevalent laws i.e. Hindu Adoption & Maintenance Act, Hindu Marriage Act, Section 125 Cr.P.C - a husband is supposed to maintain his un-earning spouse out of the income which he earns. No law provides that a husband has to maintain a wife, living separately from him, irrespective of the fact whether he earns or not. Court cannot tell the husband that he should beg, borrow or steal but give maintenance to the wife, more so when the husband and wife are almost equally qualified and almost equally capable of earning and both of them claimed to be gainfully employed before marriage."*

Thus, the Court while adjudicating on maintenance claims must strike a balance between the abililty of the applicant spouse to pay and the capability of the Respondent spouse to earn.

3. Certain cases develop various criteria to be considered by the Court while fixing maintenance. While these are not strictly within the purview of Section 125 they are applicable to the adjudication of such claims given that all maintenance provisions are beneficial legislations enacted to alleviate the duress of the financially disempowered. In the case of Section 125 it is specifically the wife, child or the parent as enumerated hereinabove.

A. In the case of Jasbir Kaur Sehgal v. District Judge, Dehradun[10], the Supreme Court while adjudicating on an application under Section 24 of the Hindu Marriage Act, 1955 has held as follows:

*"No set formula can be laid for fixing the amount of maintenance. It has, in the very nature of things, to depend on the facts and circumstances of each case. Some scope for leverage can, however, be always there. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is*

[10](1997) 7 SCC 7

*obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case"*[11].

B. In the case of Bharat Hegde v. Saroj Hegde[12], a Division Bench of the Delhi High Court has laid down a slew of criteria to be considered by the Court while determining maintenance claims. This case was once again in the context of maintenance of section 24 of the Hindu Marriage Act, 1955. The Judge, commenting upon the tendencies of the litigants to conceal and embellish, fleshed out 11 factors to be considered by the Court. The relevant portion of the judgment is reproduced hereinbelow:

"*Unfortunately, in India, parties do not truthfully reveal their income. For self-employed persons or persons employed in the unorganized sector, truthful income never surfaces. Tax avoidance is the norm. Tax compliance is the exception in this country. Therefore, in determining interim maintenance, there cannot be mathematical exactitude. The court has to take a general view. From the various judicial precedents, the under noted 11 factors can be culled out, which are to be taken into consideration while deciding an application under Section 24 of the Hindu Marriage Act. The same are:*

*"1. Status of the parties.*
*2. Reasonable wants of the claimant.*
*3. The independent income and property of the claimant.*
*4. The number of persons, the non applicant has to maintain.*

[11]Paragraph No. 8
[12]2007 SCCOnLineDel 622

*5. The amount should aid the applicant to live in a similar life style as he/she enjoyed in the matrimonial home.*

*6. Non-applicant's liabilities, if any.*

*7. Provisions for food, clothing, shelter, education, medical attendance and treatment etc. of the applicant.*

*8. Payment capacity of the non applicant.*

*9. Some guess work is not ruled out while estimating the income of the non applicant when all the sources or correct sources are not disclosed.*

*10. The non applicant to defray the cost of litigation.*

*11. The amount awarded u/s. 125 Cr.PC is adjustable against the amount awarded u/s. 24 of the Act."*[13]

4. What thus emerges is that there is no straight jacket formula to arrive the quantum of maintenance and the Court will have to compute a figure based on the facts and circumstances of each case. This has not precluded the courts from attempting to arrive at various approaches of arriving at maintenance.

A. In the case of Dr.KulbhushanKumar v. Smt. Raj Kumari and Anr[14] the Supreme Court upheld the decision of the High Court to award the wife 25 percent of the husband's free income and 15 percent to the daughter in a suit filed under the Hind Adoption and Maintenace Act. Relying on the said decision the Court in Kalyan Dey Chowdhury Vs.RitaDey Chowdhury Nee Nandy[15] upheld a high court order granting 25 percent of the husband's income as maintenance to the former wifeunder the Hindu Marriage Act, 1955.

B. In the case of Annurita Vohra v. Sandeep Vohra[16] Justice Vikramjit Sen of the Delhi High Court has arrived at the concept of a Family Resource Cake which is to be distributed amongst the members of the family. It has been held as follows[17]:

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[13]Paragraph No. 8 at Page 113
[14](1970)3 SCC 129
[15]AIR2017SC2383
[16]**2004 SCC OnLine Del 192 : (2004) 74 DRJ 99**
[17]Paragraph 2 at Page 101

*"the court must first arrive at the net disposable income of the Husband or the dominant earning spouse. If the other spouse is also working these earnings must be kept in mind. This would constitute the Family Resource Cake which would then be cut up and distributed amongst the members of the family. The apportionment of the cake must be in consonance with the financial requirements of the family members, which is exactly what happens when the spouses are one homogeneous unit.*

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*In my view, a satisfactory approach would be to divide the Family Resource Cake in two portions to the Husband since he has to incur extra expenses in the course of making his earning, and one share each to other members*"

C. Justice Sanjeev Sachdeva of the Delhi High Court has in the case of Babita Bisht v. Dharmender Singh Bisht[18] applied the principle of apportionment holding that the Respondent will be entitled to retain two parts of his income after making the mandatory statutory deductions and one part of the same would be payable to the wife[19]. The Appellant in this case was awarded 30 percent of the husband's gross income as maintenance[20].

5. Another aspect which the court considers is the lifestyle and status of the parties during the subsistence of the marriage or during the period of cohabitation.

A. In the landmark decision of Chaturbhuj v. Sitabai[21] the Supreme Court has laid down the test to claim maintenance under Section 125 of the Code of Criminal Procedure as follows:

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[18] 2019 SCC OnLine Del 8775
[19]Paragraph No.12
[20]https://www.barandbench.com/news/maintenance-wife-income-husband-delhi-hc
[21](2008) 2 SCC 316

"*In an illustrative case where the wife was surviving by begging, it would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 CrPC. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In Bhagwan Dutt v. Kamla Devi [(1975) 2 SCC 386 : 1975 SCC (Cri) 563 : AIR 1975 SC 83] it was observed that the wife should be in a position to maintain a standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 CrPC*".

B. The Delhi High Court has developed the concept of an Affidavit of Income and Assets in Kusum Sharma v. Mahinder Kumar Sharma[22]. The exhaustive format prescribed by the Court envisages a full and fair disclosure of the income and assets of the parties to assist the Court in arriving at a conclusion about the lifestyle and status of the parties.

II. <u>Variation of Quantum of Maintenance in case there is another order of Maintenance</u>

1. The general position is that the remedies of maintenance run parallel to each other and can be pursed independently. It has been held with respect to Section 488 of the Old code (para materia to Section 125 of the Code of Criminal Procedure, 1973) that while the remedy prescribed under the said section is civil in nature, the findings of the

[22]**(2018) 246 DLT 1**

magistrate are not final and the parties can legitimately agitate their rights in a civil court even after the order of the Magistrate[23].

2. Various High Court judgments have held that maintenance under Section 125 can be granted in addition to an order passed under the DV Act.

A. In the case of Rajat Johar Vs. Divya Johar[24] a Single Judge of the Delhi High Court has held that

"*the monetary relief as provided under the DV Act is different from maintenance, which can be in addition to an order of maintenance under Section 125 of Cr.P.C. or any other law, and can be granted to meet the expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence*."

B. The High Court of Bombay in the case of Prakash Babulal Dangi vs. The State of Maharashtra and Ors[25]. held that maintenance can be awarded both under the DV Act as well as under Section 125 of Cr.P.C. The Court has held as follows[26]:

"*Now both the proceedings being independent, both the orders will stand independently and, hence, husband will have to pay not only the maintenance awarded under the Domestic Violence Act, which was of an interim nature and taking into consideration that maintenance only, the wife was awarded the maintenance under Section 125 of Cr.P.C. only from the date of the order. It has to be held that this order under Section 125 of Cr.P.C. stands independently and in addition to the maintenance awarded under the Domestic Violence Act.*

*It has to be held so in view of Section 20(1)(d) of the Domestic Violence Act, which clearly provides that in proceedings under*

[23]Nand Lal Misra v. Kanhaiya Lal Misra AIR 1960 SC 882
[24]2017 SCC OnLine Del 11790
[25]2017 SCC OnLineBom 8897
[26]Paragraph Nos. 7 and 8

*the D.V. Act, the Magistrate may direct the Respondent to pay the maintenance to the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under Section 125 of Cr.P.C. or any other law for the time being in force". Therefore, the power to award maintenance under D.V. Act is in addition to an order of maintenance under Section 125 of Cr.P.C. or any other law for the time being in force. Section 36 of the D.V. Act makes the things further clear by providing that, „the provisions of the D.V. Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force". Therefore, it follows that the amount of maintenance awarded under the D.V. Act cannot be substituted to the order of maintenance under Section 125 of Cr.P.C."*

C. The High Court of Punjab & Haryana in the case of Sanjay Gulati Vs. Harsh Lata[27], while deciding the question as to whether maintenance can be claimed by the wife under the DV Act, in view of the fact that she is already receiving maintenance under Section 125 of Cr.P.C. has been held that the provisions of DV Act are supplementary to the other laws[28]:

"*Therefore, the upshot of the discussion would be that the respondent wife would be entitled to claim maintenance under Section 20 of the Domestic Violence Act, even though she is already getting maintenance under Section 125 of the Code of Criminal Procedure. There is no requirement for the aggrieved person, the respondent herein, to file an application under Section 127 of the Code of Criminal Procedure seeking enhancement of maintenance and to prove that there are changed circumstances. An aggrieved person can institute a petition under the Domestic Violence Act, in addition to proceedings*

[27]MANU/PH/0323/2018
[28]Paragraph No. 13

*under Section 125 of the Code of Criminal Procedure. However, the courts, while deciding quantum of maintenance have to take into account the maintenance being awarded to the aggrieved person under other provisions of law, be it under Section 125 Code of Criminal Procedure, Section 24 of the Hindu Marriage Act or any other provisions applicable thereto, while awarding maintenance.*"

D. The Delhi High Court has in RD v. BD[29] has concurred with the view in the above judgments and has held that an order of maintenance under the DV Act or Section 24 of the Hindu Marriage Act, 1955 does not bar the Court from passing an additional order under Section 125 of the Code of Criminal Procedure, 1973[30]:

*"A careful perusal of Section 20 of DV Act shows that it provides maintenance to the aggrieved person as well as her children, if any, which would be in addition to an order of maintenance under Section 125 of the Code of Criminal Procedure or any other law for the time being in force. Further, Section 26 of DV Act stipulates that any relief available under Sections 18 to 22 of DV Act may also be sought in any legal proceedings before a civil court, Family court or a criminal court and such relief may be sought in addition thereto. Whereas Section 36 of DV Act clearly stipulates „Act not in derogation of any other law-- The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force."*

*A conjoint reading of the aforesaid Sections 20, 26 and 36 of DV Act would clearly establish that the provisions of DV Act dealing with maintenance are supplementary to the provisions of other laws and therefore maintenance can be granted to the aggrieved person (s) under*

[29] MAT.APP.(F.C.) 149/2018
[30]Paragraph Nos. 15-17

*the DV Act which would also be in addition to any order of maintenance arising out of Section 125 of Cr.P.C.*

*On the converse, if any order is passed by the Family Court under Section 24 of HMA, the same would not debar the Court in the proceedings arising out of DV Act or proceedings under Section 125 of Cr.P.C. instituted by the wife/aggrieved person claiming maintenance. However, it cannot be laid down as a proposition of law that once an order of maintenance has been passed by any Court then the same cannot be re-adjudicated upon by any other Court. The legislative mandate envisages grant of maintenance to the wife under various statutes such as HMA, Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as 'HAMA'), Section 125 of Cr.P.C. as well as Section 20 of DV Act. As such various statutes have been enacted to provide for the maintenance to the wife and it is nowhere the intention of the legislature that once any order is passed in either of the proceedings, the said order would debar re-adjudication of the issue of maintenance in any other Court."*

3. The amount of maintenance granted under section 24 of the HMA is adjustable against the maintenance granted under Section 125.

A. In the case of Sudeep Chaudhry v. Radha Chaudhry[31] it has been held as follows[32]:

*"The amount awarded under Section 125 of the CrPC for maintenance was adjustable against the amount awarded in the matrimonial proceedings and was not to be given over and above the same"*

B. In the case of Bharat Hegde v. Saroj Hegde[33] it was held as follows:

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[31] (1997) 11 SCC 286
[32] Paragraph No. 6 at Page 286
[33] Supra Note 8

*"The amount awarded u/s. 125 Cr.PC is adjustable against the amount awarded u/s. 24 of the Act."*

**Aashna**

**7. What is the difference in jurisdiction of the courts under the Guardian and Wards Act and Minority and Guardianship Acts in appointment of guardian of a minor?**

The Hindu Minority and Guardianship Act, 1956 (hereinafter 'HMGA') supplements and empowers the Guardians and Wards Act, 1890 (hereinafter 'GWA') and is an addition to it.

Therefore, there is no difference in the jurisdiction of the Guardians and wards act and the Hindu Minority and Guardianship Act in appointment of Guardian of the minor. The application for appointment of Guardian of a minor cannot be filed independently under the Hindu Minority and Guardianship Act, 1956. The territorial jurisdiction for both the acts will be as per section 9 of the Guardians and Wards Act, 1890 in relations to the issue of custody and guardianship of a child. Section 2 of The Hindu Minority and Guardianship Act, 1956 specifically states that the HMGA shall be in addition to and not in derogation of the Guardianship and Wards Act, 1890.

As per section 8(5) of the Hindu Minority and Guardianship Act, 1956 the Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the court in all respects as if it were an application for obtaining the permission of the court under section 29 of the guardians and ward Act and as per section 8 (5)a of the Guardians and wards act the proceedings in connection with the application shall be deemed to be the proceedings under that act within the meaning of section 4a.

**DIFFERENCE**

| Guardian and Wards Act | Hindu Minority and Guardianship Act |
|---|---|
| This act is applicable to everyone irrespective of their creed, caste or religion. | As per Section 3, this act is only applicable to the Hindus |
| This act is a secular law. | Whereas HMGA is personal law |
| Section 19 of the Act lays down that a father cannot be deprived of the natural guardianship of his minor children unless he has been found unfit. | Section 13 of the Act lays down that welfare of the minor is of paramount consideration and a father's right of guardianship is subordinate to the welfare of the child.<br><br>The position of adopted children is at par with natural-born children andas per section 6 (b),the mother is the natural guardian of her minor illegitimate children even if the father is alive. |
| Absence of maternal preference in the Guardian and Wards Act | Section 6 of the Hindu Minority and Guardianship Act postulates maternal preference. |

**TESTAMENTARY GUARDIAN**

**Guardians and Wards Act, 1890**

Power of the court to make order as to guardianship

Section 7 (2) lays down that an order under section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the court

As per section 7 (3) - Where a guardian has been appointed by will or other instrument or appointed or declared by the court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared have ceased under the provision of this act.

**Hindu Minority and Guardianship Act, 1956**

Natural Guardians of a Hindu minor

As per section 6 (a) of the HMGA, if the mother survives the father, she would be the guardian of her minor child and not the testamentary guardian.

Testamentary Guardians and their Powers

As per Section 9, the testamentary power of appointing a guardian has now been conferred on both parents. The father may appoint a testamentary guardian but if mother survives him, his testamentary appointment will be ineffective and the mother will be the natural guardian.

**Ravi Avasthi**

**8. What are the major difference in procedure for adoption by Indian prospective adoptive parents living in India and inter country adoption? what are the eligibility criterion for prospective adoptive parents? Discuss with relevant provision of law and latest case laws.**

**Abbreviations:**

- AFAA: Authorised Foreign Adoption Agency
- AR 2017: Adoption Regulations, 2017
- CARINGS: Child Adoption Resource Information & Guidance System
- CARA: Central Adoption Resource Authority
- CCI: Child Care Institutions
- CMA: Civil Miscellaneous Applications
- CPC: Code of Civil Procedure
- CSR: Child Study Report
- CWC: Child Welfare Committee
- DCPU: District Child Production Unit
- GAWA: Guardians and Wards Act, 1890
- HAMA :Hindu Adoption and Maintenance Act, 1956(HAMA)
- JJ Act: Juvenile Justice (Care and Protection of Children) Act, 2015
- JJ Rule: Model Juvenile Justice Rule, 2016
- HSR: Home Study Report
- MER: Medical Examination Report
- MJC: Miscellaneous Judicial Case

• NOC: No Objection Certificate

• OAS: Orphan, Abandoned & Surrendered

• PAPs: Prospective Adoptive Parents

• SARA: State Adoption Resource Agency

• SAA: Specialized Adoption Agency

In India at present, the adoption takes place under Hindu Adoption and Maintenance Act, 1956(HAMA) and Justice Juvenile(Care and Protection Act, 2015 (JJA) and rules and regulations framed therein, namely, The Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (JJR) and Adoption Regulations, 2017 (AR 17).

**ELIGIBILITY CRITERIA UNDER JUVENILE JUSTICE ACT, 2015 (JJ ACT)**

- Eligibility of PAPs (Sec 57 of the JJ Act & Reg 5 of AR 2017)
  - A couple/single parent can adopt.
  - Single male not eligible to adopt a girl child
  - PAPs age eligibility criteria is defined
  - Minimum 2 years stable marital relationship is mandatory
  - PAPs with 3 or more children shall not be eligible to adopt a normal OAS child
  - Eligibility and suitability of the PAPs are ascertained through a Home Study by the SAA ( Sec 58(2) of the JJ Act & Reg 9(13) of AR 2017)
  - Court Procedure is defined in Sec 61 of the JJ Act & 12, 17, 55 of AR 2017
  - Post adoption Follow up of the adoptive family both in case of In-country and Inter-country is undertaken for 2 years by the SAA and the AFAA respectively (Reg 13 & 19 of AR 2017 respectively)

**ELIGIBILITY CRITERIA UNDER HINDU ADOPTION MAINTENANCE ACT, 1956 (HAMA)**

- Eligibility of adoptive parents (Sec 6 to 8 of HAMA)¬
  - Only a Hindu, Buddhist, Jain, or Sikh husband above the age of 18 can adopt under this act. The child, the giver and the taker has to be a Hindu (a Muslim, Christian, Parsee, Jews, any member of a scheduled tribe governed by their customary law cannot adopt) (Sec 2 of HAMA)
  - Only with the consent of his living wife (Husband is the adopter and wife is merely consenter)
  - A single female (unmarried, divorcee or widow) can also adopt (Sec 8 (c))
  - A person having a male child can not adopt a male child
  - A person having a girl child can not adopt a girl child
  - Age difference between the adoptive father and the adoptive girl child to be at least 21 years (Sec 11 (iii))
  - The child has to be below 15 years of age (Sec 10(iv) of HAMA)
  - Provision of payment or reward and any contravention shall be punishable (Sec 17 of HAMA)

**ROLE OF COURT IN ADOPTION UNDER HAMA**

- Adoption can be concluded through a registered Adoption deed subject to compliance with the provisions of the Act (Sec 16 of HAMA)
- Courts permission to adopt under this act is required only in the following cases (Sec 9(4) of HAMA):
- where both the father and mother are dead
- where both the father and mother have completely and finally renounced the world
- where both the father and mother have abandoned the child
- where both the father and mother have been declared to be of unsound mind by the court concerned
- where the parentage of the child is not known

- Valid Adoption cannot be cancelled (Sec 15 of HAMA)

While HAMA deals with adoptions within Hindus which includes (Sikhs, Jains, Buddhas,), the JJA is secular in nature and it covers persons of all religions and thus opens the doors of adoption to persons of other religions who otherwise had no provision of adoption in their personal laws. The JJA also allows inter country adoption, which option was otherwise not available.

Since there was no provision for adoption for Non-Hindus in India, they took recourse of Guardian and Wards Act, 1980(GAWA) and instead of adopting the child, took guardianship.

**SALIENT FEATURES OF HAMA & JJ ACT**

| **HAMA** | **JJ ACT** |
|---|---|
| Only for Hindus | Secular Act |
| Same sex children cannot be adopted | No such conditions |
| Children only up to 15 years of age can be adopted | Children up to 18 years of age can be adopted |
| Registered deed finalizes adoption, court permission required in some cases | Adoption order finalizes adoption, deed is not required |
| OAS children in SAA/CCI belongs to the State & cannot be adopted under HAMA. Such application should not be entertained by the courts | JJ Act provisions for rehabilitation of OAS children in the SAA/CCI and these children have to be placed in adoption under this Act |
| Suitability of the PAPs, sourcing of the child and the post-adoption follow up cannot be ascertained/ ensured for adoption under HAMA | Welfare & Best Interests of the Child is ensured due to the built-in mechanisms in the JJ Act |
| Courts may require services of Scrutiny Committee in case declaratory suit is filed for adoptions under HAMA | There is no requirement of scrutiny and the same has not been envisaged under JJ Act due to the built in scrutiny |

| | |
|---|---|
| | mechanisms. |
| Inter-country adoptions cannot be done under HAMA as these fall under private and direct adoption and is not supported by Hague Convention on Adoptions (Para 22 & 23 of Ch 6 of Hague Convention Information Brochure) | All Inter-country adoptions shall be done only as per provisions of this Act (Section 56(4) of the JJ Act, 2015) |

**Guardians and Wards Act, 1890 (GAWA)**

- Not an Adoption Law as it does not establish parent child relationship
- Establishes only a Guardian and Ward relationship only till the child attains the age of 18 years
- The cases applicable under GAWA may be admissible under Civil Miscellaneous Applications (CMA) or Miscellaneous Judicial Case (MJC)
- Eligibility for applying for guardianship order and the court procedure as per CPC, 1882 is defined under Sec 7 to 26 of GAWA.

**SALIENT ASPECTS OF GAWA**

- Guardianship petitions can only be filed by a person entitled as defined in Sec 8 of GAWA .
- PAPs are resorting to filing an application under GAWA for taking custody of OAS children with a view to undertake adoption under HAMA through a deed
- Rehabilitation of OAS children has to be as per the JJ Act 2015 and such petitions should not to be entertained
- In case of applicant being given guardianship under GAWA, the interest of the child cannot be ensured in the absence of proper eligibility check and follow up
- They have no legal rights and responsibilities towards each other as soon as the child attains majority (18 years)

**ADOPTIONS UNDER JJ ACT 2015 & ADOPTION REGULATIONS 2017**

**FUNDAMENTAL PRINCIPLES GOVERNING ADOPTION**:

- Adoption shall be resorted to right to family for the OAS children (Sec 56(1) of JJ Act).
- The child's best interests shall be paramount (Reg 3(a) of AR, 2017)
- The principle of placement of the child is in his own socio-cultural¬ environment (Reg 3(b) of AR, 2017)
- All adoptions shall be registered on CARINGS (Reg 3(c) of AR, 2017)
- Maintaining the confidentiality is mandatory (Sec 74 of JJ Act¬ & Reg 3(c) of AR, 2017)

**PROCESS OF ADOPTION UNDER HAMA**:

- Application:

  Make application to Child Welfare Agency. Registration can be done either by Adoption Coordinating Agency(ACA) found in each State's capital city, or an agency certified by the Central Adoption Resource Authority(CARA)

- Preliminary Interview:

  The agency then conducts a preliminary interview with the adopting couple in order to understand their intention and motivation behind adoption.

- Filing Petition:

  After short listing the child, they file the petition at the court of apt jurisdiction, where court hearing takes place regarding adoption (the court is required to dispose of the adoption case within two months).

- Court Decree

  Once the court issues the decree the adoption is finalised.

**MAJOR DIFFERENCE**

**From the combined reading of Section 59(1) & (2) of the JJ Act, 2015,** it emerges that:

- Firstly, Indian or non-resident Indian prospective adoptive parent shall have preference over the others PAPs for inter country adoption.

- Secondly, children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority whereas there is no such conditions for the intra country adoption.

**Minor differences**

- From the combined reading of Section 59 (3) and (4) it emerges that PAP interested in adoption has to apply to the authorities concerned of their own country for adoption from India and the authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India whereas in India it is the local agency of the district concerned who prepare home study report.

- The other difference is that under Section 58(3), the child begins to stay under pre-adoption foster care of the PAP as soon as the PAP accepts the child

**RELEVANT SECTIONS OF JJA,2015**

Section 58.

1. Indian prospective adoptive parents living in India, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child, may apply for the same to a Specialised

Adoption Agency, in the manner as provided in the adoption regulations framed by the Authority.

2. The Specialised Adoption Agency shall prepare the home study report of the prospective adoptive parents and upon finding them eligible, will refer a child declared legally free for adoption to them along with the child study report and medical report of the child, in the manner as provided in the adoption regulations framed by the Authority.

3. On the receipt of the acceptance of the child from the prospective adoptive parents along with the child study report and medical report of the child signed by such parents, the Specialised Adoption Agency shall give the child in pre-adoption foster care and file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

4. On the receipt of a certified copy of the court order, the Specialised Adoption Agency shall send immediately the same to the prospective adoptive parents. Evaluation of functioning of structures. Adoption. Eligibility of prospective adoptive parents. Procedure for adoption by Indian prospective adoptive parents living in India. 78 of 1956.

5. The progress and wellbeing of the child in the adoptive family shall be followed up and ascertained in the manner as provided in the adoption regulations framed by the Authority.

Section 59.

1. If an orphan or abandoned or surrendered child could not be placed with an Indian or non-resident Indian prospective adoptive parent despite the joint effort of the Specialised Adoption Agency and State Agency within sixty days from the date the child has

been declared legally free for adoption, such child shall be free for inter-country adoption:

Provided that children with physical and mental disability, siblings and children above five years of age may be given preference over other children for such inter-country adoption, in accordance with the adoption regulations, as may be framed by the Authority.

2. An eligible non-resident Indian or overseas citizen of India or persons of Indian origin shall be given priority in inter-country adoption of Indian children.

3. A non-resident Indian or overseas citizen of India, or person of Indian origin or a foreigner, who are prospective adoptive parents living abroad, irrespective of their religion, if interested to adopt an orphan or abandoned or surrendered child from India, may apply for the same to an authorised foreign adoption agency, or Central Authority or a concerned Government department in their country of habitual residence, as the case may be, in the manner as provided in the adoption regulations framed by the Authority.

4. The authorised foreign adoption agency, or Central Authority, or a concerned Government department, as the case may be, shall prepare the home study report of such prospective adoptive parents and upon finding them eligible, will sponsor their application to Authority for adoption of a child from India, in the manner as provided in the adoption regulations framed by the Authority.

5. On the receipt of the application of such prospective adoptive parents, the Authority shall examine and if it finds the applicants suitable, then, it will refer the application to one of the Specialised Adoption Agencies, where children legally free for adoption are available.

6. The Specialised Adoption Agency will match a child with such prospective adoptive parents and send the child study report and medical report of the child to such parents, who in turn may accept the child and return the child study and medical report duly signed by them to the said agency.

7. On receipt of the acceptance of the child from the prospective adoptive parents, the Specialised Adoption Agency shall file an application in the court for obtaining the adoption order, in the manner as provided in the adoption regulations framed by the Authority.

8. On the receipt of a certified copy of the court order, the specialised adoption agency shall send immediately the same to Authority, State Agency and to the prospective adoptive parents, and obtain a passport for the child.

9. The Authority shall intimate about the adoption to the immigration authorities of India and the receiving country of the child.

10. The prospective adoptive parents shall receive the child in person from the specialised adoption agency as soon as the passport and visa are issued to the child.

11. The authorised foreign adoption agency, or Central Authority, or the concerned Government department, as the case may be, shall ensure the submission of progress reports about the child in the adoptive family and will be responsible for making alternative arrangement in the case of any disruption, in consultation with Authority and concerned Indian diplomatic mission, in the manner as provided in the adoption regulations framed by the Authority.

12. A foreigner or a person of Indian origin or an overseas citizen of India, who has habitual residence in India, if

interested to adopt a child from India, may apply to Authority for the same along with a no objection certificate from the diplomatic mission of his country in India, for further necessary actions as provided in the adoption regulations framed by the Authority. Procedure for inter-country adoption of an orphan or abandoned or surrendered child.

Section 60.

1. A relative living abroad, who intends to adopt a child from his relative in India shall obtain an order from the court and apply for no objection certificate from Authority, in the manner as provided in the adoption regulations framed by the Authority.

2. The Authority shall on receipt of the order under sub-section (1) and the application from either the biological parents or from the adoptive parents, issue no objection certificate under intimation to the immigration authority of India and of the receiving country of the child.

3. The adoptive parents shall, after receiving no objection certificate under sub-section (2), receive the child from the biological parents and shall facilitate the contact of the adopted child with his siblings and biological parents from time to time.

Section 61.

1. Before issuing an adoption order, the court shall satisfy itself that — (a) the adoption is for the welfare of the child; (b) due consideration is given to the wishes of the child having regard to the age and understanding of the child; and (c) that neither the prospective adoptive parents has given or agreed to give nor the specialised adoption agency or the parent or guardian of the child in case of relative adoption has received or agreed to receive any payment or reward in consideration of the adoption, except as permitted under the adoption regulations framed by the Authority towards the adoption fees or service charge or child care corpus.

2. The adoption proceedings shall be held in camera and the case shall be disposed of by the court within a period of two months from the date of filing.

Section 62.

1. The documentation and other procedural requirements, not expressly provided in this Act with regard to the adoption of an orphan, abandoned and surrendered child by Indian prospective adoptive parents living in India, or by non-resident Indian or overseas citizen of India or person of

Indian origin or foreigner prospective adoptive parents, shall be as per the adoption regulations framed by the Authority.

2. The specialised adoption agency shall ensure that the adoption case of prospective adoptive parents is disposed of within four months from the date of receipt of application and the authorised foreign adoption agency, Authority and State Agency shall track the progress of the adoption case and intervene wherever necessary, so as to ensure that the time line is adhered to.

Section 63. A child in respect of whom an adoption order is issued by the court, shall become the child of the adoptive parents, and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, for all purposes, including intestacy, with effect from the date on which the adoption order takes effect, and on and from such date all the ties of the child in the family of his or her birth shall stand severed and replaced by those created by the adoption order in the adoptive family: Provided that any property which has vested in the adopted child immediately before the date on which the adoption order takes effect shall continue to vest in the adopted child subject to the obligations, if any, attached to the ownership of such property including the obligations, if any, to maintain the relatives in the biological family.

Section 64. Notwithstanding anything contained in any other law for the time being in force, information regarding all adoption orders issued by the concerned courts, shall be forwarded to Authority on monthly basis in the manner as provided in the adoption regulations framed by the Authority, so as to enable Authority to maintain the data on adoption.

Section 65.

1. The State Government shall recognise one or more institutions or organisations in each district as a Specialised Adoption Agency, in such manner as may be provided in the adoption regulations framed by the Authority, for the rehabilitation of orphan, abandoned or surrendered children, through adoption and non-institutional care.

2. The State Agency shall furnish the name, address and contact details of the Specialised Adoption Agencies along with copies of certificate or letter

of recognition or renewal to Authority, as soon as the recognition or renewal is granted to such agencies.

3. The State Government shall get every Specialised Adoption Agency inspected at least once in a year and take necessary remedial measures, if required. Court procedure and penalty against payment in consideration of adoption. Additional procedural requirements and documentation. Effect of adoption. Reporting of adoption. Specialised Adoption Agencies. Procedure for inter-country relative adoption.

4. In case any Specialised Adoption Agency is in default in taking necessary steps on its part as provided in this Act or in the adoption regulations framed by the Authority, for getting an orphan or abandoned or surrendered child legally free for adoption from the Committee or in completing the home study report of the prospective adoptive parents or in obtaining adoption order from the court within the stipulated time, such Specialised Adoption Agency shall be punishable with a fine which may extend up to fifty thousand rupees and in case of repeated default, the recognition of the Specialised Adoption Agency shall be withdrawn by the State Government.

**IMPORTANT CASE LAW**.

The case of UOI vs. Ankur Gupta alone to a minor extent refers to the issue in discussion.

1. Hon'ble Supreme Court in Civil Appeal Nos. 2017-2020 OF 2019 (arising out of S.L.P.(C) Nos.1476-1479 of 2019) titled Union of India & Anr. Vs. Ankur Gupta & Ors. dated 25.02.2019 file:///C:/Users/Admin/Desktop/Family%20Courts/UNION%20OF%20INDIA%20&%20ANR.%20Vs.%20ANKUR%20GUPTA%20&%20ORS.%20_25-Feb-2019.pdf allowed the appeal of the CARA that challenged the decision of Division Bench of Karnataka High Court which took lenient view of Section 59(2) of the JJA, 2015. it was held as under "We have no doubt in the bonafide or the competence of respondent Nos.1 and 2 in their effort to take the child in adoption, but the statutory procedure and the statutory regime, which is prevalent as on date and is equally applicable to all aspirants, i.e., Indian prospective adoptive parents and prospective adoptive parents for inter-country adoption, cannot be lost sight. However, by

virtue of Section 59(2), the respondent Nos.1 and 2 can at best may be given priority in inter-country adoption, they being eligible overseas citizens of India and further due to consequences of events and facts as noticed above and disposed of the appeal by observing that ends of justice would be served if the The decision dated 27.02.2018 as communicated to the respondent Nos. 1 and 2 by e-mail dated 15.03.2018 is upheld and directed the competent authority to again notify the child Shomya legally free for adoption, which notification shall be issued within one week from today and in event, within sixty days from the date the child(Shomya) is declared as legally free for adoption is not taken by or adopted by Indian prospective adoptive 24 LatestLaws.com parents, the child Shomya shall be given in adoption to the respondent Nos.1 and 2 in inter-country adoption as sought by them.

2. Laxmi Kant Pandey v. Union of India & Ors.( *AIR 1984 SC 469)* https://indiankanoon.org/doc/551554/ is the most important case in the area of inter-country adoption. In 1982, a petition was filed under Article 32 of the Constitution by advocate Lakshmi Kant Pandey alleging malpractices and trafficking of children by social organizations and voluntary agencies that offer Indian children for adoption overseas. A relief was sought restraining Indian based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian children by foreign parents. The Supreme Court laid down detailed principles and norms to be followed for the adoption of children by the people overseas. Many examples and references were cited while 'discussing the issue, including the statutory provisions and the international standards. The Supreme Court of India has laid down that every application from a foreigner/NRI/PIO (as applicable) desiring to adopt a child must be sponsored by a social or child welfare agency recognized or licensed by the Government or a Department of the Foreign Govt. to sponsor such cases in the country in which the foreigner is resident and recommended to form Central Adoption Resource Authority. No application by a

foreigner/NRI/PIO for taking a child in adoption should be entertained directly by any social or child welfare agency in India.

Few years after Lakshmi Kant Pandey(AIR 1984 SC 469) judgment, a secular statute for adoptions was enacted.

3. In **PKH versus Central Adoption Resource Authority** (W.P.(C) 5718/2015 & CM APPLs. 28508/2015, 19662/2016) dated 18.07.2016, (http://www.hellocounsel.com/wp-content/uploads/2018/06/PKH-Versus-Central-Adoption-Resource-Authority-CARA.pdf) the Hon'ble High Court of Delhi held that CARA cannot assume parens patria jurisdiction in matters where the child is not covered under the JJA. In this the petitioner had adopted a child from someone known to her under HAMA and also obtained a decree from a civil court that adoption was valid. CARA refused to give NOC for getting the passport of the adopted child. CARA was directed to grant NOC. the para 91 of the judgment reads as under:

91. The survey of the domestic law and international conventions leads to the following conclusions:

a. As the adoption deed in the present case has been executed under HAMA, 1956, before the Act, 2015 came into force and the adoption deed has been held to be legal, valid and genuine by the Additional Civil Judge (Senior Division), Zirak in a civil suit filed by the adoptive parents against the natural mother, the adoption in the present case is governed by the Act, 2000 and not by Act, 2015.

b. The Act, 2000 read with the Rules, 2007 and the Guidelines, 2015 expressly lays down a procedure for adoption only in relation to a child who is an orphan or abandoned or surrendered, and does not cover inter-country direct adoption.

c. The Act, 2000 read with the Rules, 2007 and the Guidelines, 2015 provides that a child is surrendered when the parents wish to relinquish him/her to the CWC and a formal act takes place by which the child is surrendered by the natural parents to the CWC. Once the surrender is complete, the parents have no role in the future of the child and the CWC alone decides the best course for the child‟s future before the child is adopted.

d. A child given in direct adoption cannot be termed as a “surrendered child”, since there is no relinquishment of the child, by the parents to the CWC. e. The Supreme Court in Lakshmi Kant Pandey

(supra) as well as Anokha (supra) and the High Court of Delhi in Dr. Jaswinder Singh Bains (supra) and Swaranjit Kaur (supra) have categorically and conclusively held that all inter-country direct adoptions are outside the scope of the rules set out for adoptions under the Act, 2000 and the Rules/Guidelines framed there-under.

f. In view of the aforesaid binding precedents, there is no scope for incorporation of the concept of parens patriae in inter-country direct adoption cases under the Act, 2000, specially when the adoption deed has been declared to be legal, valid, genuine and binding by a competent court.

g. Rule 26 of the Guidelines, 2011 is a procedural provision and it does not advance the case of the respondent-CARA.

h. In view of CARA, Canada's approval for adoption and its favourable home study report as well as the decree of declaration passed by Additional Civil Judge (Senior Division), Zirak, this Court is of the opinion that the requirements of Articles 5 and 17 of the Hague Convention are satisfied in the present case.

i. Consequently, in cases of inter-country direct adoption like the present case, NOC from respondent-CARA is not required under the Act, 2000 and the Guidelines, 2011. j. The Regional Passport Officer/MEA cannot insist on issuance of an NOC by respondent-CARA before processing the petitioner's application for issuing a Passport to the adopted child.

4. Following the Laxmi Kant Pandey judgment, the Indian courts gradually broadened the scope of adopting child to other countries. In the later judgments, the courts have also interpreted the word ' custody' to make adoption easier. The Bombay High Court in **Re Jay Kevin Salerno** [AIR1988 BOM139] http://www.legalserviceindia.com/issues/topic1440-jay-kevin-salerno-case.html iterated that " where the custody of a child is with an institution, the child is kept in a private nursing home or with a private party for better individual care of the child, it does not mean that the institution ceases to have the custody of the child." Therefore it may be submitted that in the absence of any explicit legislation on the subject, the Supreme Court has played a pivotal role in regulating the adoption of tendered aged children to foreign parents. It has taken the help of various international guidelines and subject to Indian culture framed the rules thereof.

5. In the case of In re Rasiklal Chhaganlal Mehta v. Unknown (A.I.R. 1982 Guj. 193) https://indiankanoon.org/doc/764020/ the Supreme Court of India held that when a court is dealing with

inter-country adoptions, it must bear in mind the principles incorporated in the report of the European Expert Group on ICA organized jointly by the European Office of the Technical Assistant Administration, United Nations and International Social Service, before making an order in such a case. The Court must ensure in such proceedings that the adoption is legally valid as per the laws of both the countries, that the adoptive parents fulfill the requirement of the law of adoption of their country, that they have the requisite permission to adopt, if required, from the appropriate authorities in their country, that the child will be able to immigrate to the country of the adoptive parents and that he will be able to obtain the nationality of the parents. If these facts are not established, what will result is either an "abortive adoption" having no validity in either country or a "limping adoption", that is to say an adoption recognized in one country but having no validity in another, leaving the adopted child in a helpless condition. Such an unfortunate situation must, in any event, be avoided.

1. Laxmi Kant Pandey v. Union of India & Ors.( *AIR 1984 SC 469)* https://indiankanoon.org/doc/551554/

2. In re Rasiklal Chhaganlal Mehta v. Unknown (A.I.R. 1982 Guj. 193) https://indiankanoon.org/doc/764020/

3. in **Re Jay Kevin Salerno** [AIR1988 BOM139] http://www.legalserviceindia.com/issues/topic1440-jay-kevin-salerno-case.html

4. Union of India & Anr. Vs. Ankur Gupta & Ors. Supreme Court, Civil Appeal Nos. 2017-2020 OF 2019 (arising out of S.L.P.(C) Nos.1476-1479 of 2019) dated 25.02.2019 file:///C:/Users/Admin/Desktop/Family%20Courts/UNION%20OF%20INDIA%20&%20ANR.%20Vs.%20ANKUR%20GUPTA%20&%20ORS.%20_25-Feb-2019.pdf

**5. PKH versus Central Adoption Resource Authority** (W.P.(C) 5718/2015 & CM APPLs. 28508/2015, 19662/2016) dated 18.07.2016, (http://www.hellocounsel.com/wp-content/uploads/2018/06/PKH-Versus-Central-Adoption-Resource-Authority-CARA.pdf)

6. ADOPTION REGULATION 2017 (90 PAGES) http://cara.nic.in/PDF/Regulation_english.pdf