

In the Court of the Additional District & Sessions Judge,
01st Court, Alipore, South 24-Parganas.
Present: Sarajit Mazumdar [J.O Code: WB00646]
CNR No: WBSP01-007319-2024
Act VIII Case No.115 of 2024

Order No.12 dated 25.03.2025

Today is fixed for further hearing of the application u/s 6 (a) of Hindu minority and Guardianship Act read with section 12 (1) and 25 (1) of the Guardian and Wards Act, 1890.

Both the parties are represented through their respective learned advocates and on their behalf lawyers' hazira are filed.

The application u/s 6 (a) of Hindu minority and Guardianship Act read with section 12 (1) and 25 (1) of the Guardian and Wards Act, 1890 is taken up for hearing.

Heard the learned advocate for the petitioner who submits for interim custody on the ground that Ward is a female child only of one year one month. In surrogacy the right of mother is like that of natural one. She was disassociated for dialysis of her mother. Even bad character mother will not be dis-entitled. In support of his contention he referred the decision of the Hon'ble High Court, Delhi reported in 2024 SCC on-line Del 678.

Learned advocate for the O.P raises objection on the ground that the child never stayed under the care and custody of the petitioner. If the custody of the child is handed over it would be no way beneficiary for the Ward. The Ward was released from hospital on 05.11.2024. Petitioner left the matrimonial home on 15.02.2024. Application is filed on 07.06.2024. During this period the petitioner took no step for custody of her daughter. The welfare of the child is the determining factor. According to him in a similar case Hon'ble Supreme Court of India confirmed the custody of the father of a child of one and half year. In support of his contention he referred the decision of the Hon'ble Supreme Court of India published in AIR 2019 SC 2318. He further submits that the O.P has mother and sister, who are capable to look after the ward even in his absence.

In reply learned advocate for the petitioner submits that the above decision relied upon by the O.P is not at all applicable the fact being altogether different. In the above referred decision mother succumbed to her illness. But here both the parents are alive. According to him aunt and grand mother cannot substitute of mother.

Perused the case record including the application and written objection. Considered.

Admittedly both the parties are married second time. Here the petitioner is not the biological mother but surrogate mother.

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In the referred decision the tug of war was between sisters and brothers of the mother on the one hand and father on the other hand. But here surrogate mother is claiming custody of the ward against surrogate father. Factual aspect being altogether different, I am of the humble view that the above referred decision of Hon'ble Supreme Court of India has got no direct bearing with this case.

It is fact that the ward is a girl child, but she being only of less than one and half year, sex cannot be determining factor here at this stage. Child being a baby is not in a position to express its intelligent preference. It is true that the right of surrogate mother is like that of a biological mother. It is also settled law that the custody of the ward below five years to be ordinarily with the mother. The word 'ordinarily' used in Section 6 of the Hindu Minority and Guardianship Act, 1956 is meaningful. The word ordinarily signifies in my humble view not under all circumstances. From the materials on record at this stage it cannot be said even prima facie that surrogate father is unfit for the custody. There is considerable delay, in seeking the custody of the ward who is less than one and half year, by the petitioner. From the annexure relied upon by the O.P it apparently seems to me that petitioner on 19th February, 2024 does not want the custody of the ward, though it may be an expression influenced by touchyness.

Taking all these together, I am of the humble view that it would no way be beneficial for the ward if the custody is handed over to the petitioner at this stage rather it may have adverse impact upon the baby.

Hence, it is

ORDERED

that the application u/s 6 (a) of Hindu minority and Guardianship Act read with section 12 (1) and 25 (1) of the Guardian and Wards Act, 1890 is dismissed on contest without cost. Diary is congested.

Fix 11.06.2025 for hearing.

Typed to the dictation directly;
corrected on the system.

Sd/-Sarajit Mazumder
Additional District and Sessions Judge
01st Court, Alipore,
South 24 parganas.

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