CUSTODY DISPUTES BETWEEN PARENTS AND THIRD PARTIES - AN EVALUATION OF THE SRI LANKAN LAW -

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In custody disputes between parents and third parties the courts in Sri Lanka Lanka have consistently held that parents have a natural right to the custody of their children. What has been at issue in the courts is to what extent this right is inviolable. Some courts have tended to interfere with this right more readily than others on the basis that danger to the life health and morals are merely examples of the situations in which the court as upper guardian of minors can interfere with the natural right of a parent. The more conservative view has also been expressed in the Sri Lankan courts, i.e. that the court can only interfere with the parental right in a very narrow category of circumstances.

In an early case *In re the application of Aysa Natchia*[1] the petitioner a natural relative of a child brought a writ of habeas corpus against the defendant who had cared for the child ever since the death of her mother. The court found the petitioner to be a person in abject and squalid poverty utterly unable to main tain the child in comfort. In these circumstances it held that it would not misuse the right of habeas corpus "to take the child from a good and virtuous home and de liver it over to misery and want probably to vice and certainly to grievous temptations"[2]. In this case, however, the dispute was between a natural relative (not a parent) and a third party. Nevertheless, it lends support to the view that natural rights will be interfered with in the interests of the child.

In Sego Meera Lebbe v *Lebbe Marikkar*[3] the applicant a Muslim father claimed the custody of his three year old child who had been removed from his house by the child's maternal grandmother on the death of the mother of the child. Clarence J. held that there was no evidence that the privilege accorded to a maternal grandmother in Muslim law had ever been imported to Sri Lanka nor was there any evidence that if it had ever been part of the law of Sri Lanka that it had survived until the present day.[4] Thus, he had no hesitation in upholding the father's right to custody. Dias J found that the rule in Mohammadan low put forward on behalf the grandmother was opposed to all modern notions of the relationship between parent and child. He conceded however that if there was such a right that the court was bound to apply it since the Mohammedans are not bound by the General Law. In view of the fact that the law on this point

appeared to be confused he too upheld the right of the father against the grandmother. The court however did not raise the issue as to whether it could have interfered with the right of the maternalgrandmother if it was contrary to the interests of the child.

This issue however was raised in the case of *Mohamedu Cassim* v *Casie Lebbe*[5] where a father sought to recover a child from the maternal aunt of the child. The father alleged that she was married to a man who was not within the prohibited degrees of relationship to the child which factor precluded her from obtaining custody. He also contended that a female custodian in Muslim law could only have the custody of a girl until she reached the age of nine years and attained puberty, whereupon she reverted to the custody of her father. Lyall Grant J. held that the question raised in law was whether the Muslim law would be applied where it would lead to a different result to that which emanates from the application of the ordinary law of the land. In his view the fundamental principle which guides the court in dealing with the custody of children other than Mohammedans (i.e. the welfare of the child) was also applicable in the Muslim law. Thus the court was not compelled to order that a child be removed from the custody of a relative and awarded to the father where such a change would be detrimenrntal to the welfare of the child.

In all three cases the decision hinged not on the rights to custody accorded to persons under the Muslim law but on what was in the child's interest. In the first case this resulted in the upholding of the right of the third party to the custody of a child *vis* a *vis* a natural relative, in the sec nd, the father's rights were upheld against that of a maternal grandmother where.the court was clearly of the view that this would be beneficial. In the third case the maternal aunt was awarded custody where the court deemed it not in the interest of the child to award it to the father of the child.

In *Ran Menika* v. *Paynter* a mother sought the custody of a 13 years old illegitimate child whom she had placed under the control of the respondent who. was in charge of a Christian Mission school. The facts showed that the mother had almost immediately regretted her decision and had sought to regain custody There was no evidence of previous neglect and the only reason for placing the child in the respondents custody was to enable him to get free vocational training. The court held that it could not deprive the mother of her legal right to the custody of her child for the sole.reason that he would have greater advantages and a better start in life if given to the respondent. In the opinion of the court nothing could be said against the petitioner mother except that she had lived under the protection of two Europeons in succession by whom she had children.

In *Samarasinghe* v *Simon*[7] the child who was 10 years old at the time of the application had been placed with the respondents as an infant when the petitioner had lost his wife. The child was given on the understanding that it would not be

claimed back. The court found that the respondents had 'lavished every loving care and attention' upon the infant. When the father's circumstance improved he sought to regain custody of the child. He had already being successful with his three other children and this child alone remained outside the family unit which he had re-formed. Nihill J. held that there was no ambiguity as to the legal principles.which a.court had to bear in mind i.e. that the natural parent had a natural right to custody. But where there was surrender or abandonment of the child the mere assertion of the natural right was not sufficient. In such instances the 'touchstone' was what was in the best interests of the child and the *status quo* would not be interfered with unless there were compelling reasons to do so.

The court then went on to assess the medical testimony in this case. The opinions were strongly divided. Of the seven doctors testifying four veered to the view that a change in custody would be detrimental to the child. The other three took the view that it would be beneficial for the child to learn the truth and be brought up with its brothers and sisters. Two of these three doctors detected a fear complex in the child about the natural father but did not consider this to be significant in view of the facn that a fear complex was the easiest and simplest complex to get over. These doctors were more concerned with the child being an only child in its foster home. In their view an only child was a problem in child psychology.

Faced with this mass of contradictory medical opinion Nihill J. found that there were no medical factors which outweighed a compelling factor in this case i.e. that of letting the child grow up with its natural siblings and building up a relationship with them.

In *Endoris* v *Kiripetha*[8] the court once again emphasized that the natural parent has a right to the custody of a child and that those rights must prevail if they are not displaced by considerations relating to the welfare of the child which was the paramount consideration and to which all other considerations must yield. This however did not mean that a court would deprive a parent of the custody of a child for the reason only that it would be brought up better and have a greater chance in life if given to another. It was for the person seeking to displace the natural right of the parent to make out her case that the welfare of the child demanded it. There was no evidence that if the child was left in the father's custody that it would be dangerous to his life health and morals. Undoubtedly the child would be deprived of the love and care of its foster parents. In the view of the court however the resultant emotional upset was not something that the child could not get over and thus no case been made out for interfering with the natural father's right to custody.

In *Deutrom* v *Jinadasa*[9] a mother sought the custody of her illegitimate child from the child's aunt. The court held that the mother as the natural guardian of the child was entitled to the custody of the child unless it could be established that such custody would be dangerous to the life health and morals of the child. The evidence led established previous neglect and cruelty to her children. The mother's existence was nomadic and there was no evidence to show that she could support the child. In the light of these factors the court had no hesitation in depriving the mother of custody of the child.

In *Frugtneit* v *Fernando* [10] a mother sought the custody of the daughter who had been in the custody of foster parents for a significant period. The mother of the ehild had been deserted by her husband soon after the birth of the child. The husband had handed over all of the children of the marriage to various houses some of them totally unsuitable. After a lapse of time the mother sought the custody of the child. Samarawickrema J citing *Mckee* v *Mckee* [10a] held that the welfare and happiness of the child was the paramount consideration These acts revealed that the mother was living with a man who owed her no legal duty of support. Her position was therefore precarious. She was moreover living in considerable poverty and had five other children living with her, three by the present paramour and two by her earlier marriage. In these circumstance the court had no hesitation in holding that it was not in the interest of the child to be handed over to the mother despite the fact that she was the natural guardian of the child. The court also held citing *Samarasinghe* v *Simon* that where there was a surrender of a child that a mere assertion of the natural right was not sufficient and that the court would not disturb the *status quo* unless there was a good ground for doing so.

In *Premawathie* v *Kudalugoda Aratchie*[10b] a mother sought the custody of her illegitimate child who had been in the custody of a third party for six years. Weeramantry J affirmed that by the principles of the Roman Dutch Law that the mother of an illegitimate child is the natural guardian of such a child. The court acting as upper guardian of minors could however deny the rights of a natural guardian in appropriate cases. A review of the decisions of the Sri Lankan courts for a period of a hundred years revealed that the right of a parent may be superseded by considerations relating to the welfare of the child. Weeramantry J distinguished the case before him from that of *Samarasinghe* v *Simon*. In that case the natural parent had shown an interest in the child throughout its period of stay with the foster parents. Moreover, he could offer the child a good home and the significant advantage that it would share that home with its brothers and sisters. In the case before him the parent had shown no interest in the child throughout its period of stay with the foster parents. Nor was she able to provide the child with an adequate home. In view of the courts finding that the natural and physical well being of the child would be jeopardized if it was handed over to the mother the court deprived her of the custody of the child.

Abeywardena v *Jayanayake*[11] represents a departure from the principles established by the long line of cases discussed above. In that case the mother of a child sought its custody from its foster parents. Nagalingam ACJ. held that under the Roman Dutch Law the natural parent has a right to custody and that this right could be terminated under the law only in well recognized and clearly defined circumstances. The mere delivery of a child by a natural parent to a third party did not entail any legal consequences. In the words of Nagalingam ACJ "if the parent had a right to hand over the custody of a child then that parent would have the undoubted right to resume the custody himself..." [12] He then went on to consider the effect of Part II of the Adoption of Children's Ordinance.[13] The provisions therein give legal recognition to the transference of a child in circumstances not amounting to adoption provided that a person who has such a child in his care custody or control had been registered as a custodian of that child[14] In view of the fact that the respondant's custody of the child was illegal and in contravention of the provisions of the Ordinance Nagalingam ACJ. held that it was not open to the court to grant the custody of the child to the respondent even if this was in the best interest of the child.

What the case suggests is that a technical violation of the Adoption of Children's Ordinance [15] prevents a court from awarding custody of a child to a person who has *de facto* custody of a child even if the court is of the view that such a course would be in the best interests of the child. It is submitted however, that this view of the Act is not tenable. The first part of the act deal with adoption proper. The second part of the Act visualizes a lesser institution than adoption i.e. that of being a registered custodian of a child. The duties cast on a registered custodian of a child are far less than those cast on a custodian parent under the Common Law. [16] Moreover a person registered as a custodian of a child cannot prejudice or affect the right that a natural parent or guardian has as regards the care custody and control of the child [17] There is nothing in the Act to suggest that the court acting as upper guardian of minors cannot grant the custody of a child to a person who had *de facto* custody of a child but had failed to register as custodian of such a child. Such an interpretation would constitute a serious erosion of the courts powers as Upper Guardian of minors.

Evaluation

In disputes between parents and third parties the Sri Lankan courts have consistently held that the natural parent has a natural right to the custody of a minor child. The courts have however, recognized that this right can clearly be inferfered with by the court acting as upper guardian of minors. An examination of the cases however reveals that the courts are only willing to exercise this jurisdiction in the more obvious cases e.g. where the natural parent cannot maintain a child or provide it with a home [18]. In English law by contrast the claim of the natural parent is primarily relevant not because of any vested right

in the parent but because it is part of the paramount consideration of the welfare of the infant that he should be with them and because they are normally the proper persons to have the upbringing of the child [19] The natural relationship that exists between parent and child and the resultant claims and wishes of the parents then, although taken into account yield to the paramountcy concept which means that the course which will be followed will be that which is in the interest of the child [20].

The conduct of a natural parent in Sri Lanka may result in him losing his rights to the custody of a child [21] In England however, it has been held that the question before the court is not what the "essential justice" of the case requires but what is in the best interest of the child [22] The courts moreover no longer feel bound to give the custody of a child to an unimpeachable natural parent [23] Nevertheless the concept of unimpeachability may have some place where a parent tries to recover a child from a stranger, [24] Clearly in Sri Lanka a third party is unlikely to succeed in a claim against a parent who has not fallen short of certain moral standards [25]

The emphasis on continuity is more apparent in the English cases than in the Sri Lankan cases. As early as 1900 Holmes J. stressed the importance of the period during which a child has been in the care of a stranger with these words,

"If a boy has been brought up from infancy by a person who has won his. love and confidence, who is training him to earn his livelihood and separation from whom would break up all the associations of his life no court ought to sanction in his case a change of custody" [26]

The emphasis on continuity in the English courts is the result of modern medical thinking that has emphaized the severe psychological harm, that is likely to be caused by separating a child from a person who has performed the riole of a parent (whether he be a natural parent or not.) Awareness of these "ill effects is now part of the general knowledge of English judges" [27] In Sri Lanka the notion of continuity has received some emphasis where a natural parent who claims custody can only offer a totally different type of environment to that which the *de facto* custodian had provided [28] or where there is some marked flaw in the charactor of the natural parent claiming custody, [29] Where the natural parent who is seeking the custody of the child is not in any sense of the word 'unsuitable' the courts have been less inclined to stress the importance of continuity. Thus in *Samarasinghe* v *Simon* [30] the court emphasized that the child if restored to the natural parent would grow up with its siblings and form a relationship with them. The degree of emotional shock to the child by being uprooted from its foster parents however, received less attention. Seven doctors testified in court; four were of the opinion that removal of the child would have some adverse effects. Of the other three two detected a fear complex in the child about its removal from its present home but were nevertheless of

the view that the child should be restored to the natural parent where. it would grow up amongst its brothers and sisters rather than be brought up as an only child by its foster parents, Only one of the doctors did not detect a fear complex in the child and was of the opinion that there would be no ill effects caused to the child by it being removed from its foster parents. A court sensitive to the emotional dilemma that can be caused to a child who is uprooted from persons who have played the role of natural parents would surely have taken a more coutious stance in the light of the contradictory medical opinions. In *Endoris* v *Kiripetha* [31] the lower court had stressed the relationship between the child and the foster mother and refused to hand over the child to the natural parent. The Supreme Court however, took the view that a person seeking to displace a natural parent must establish danger to life health and morals. On the question of emotional deprivation the court held that at the age of eight years the resultant emotional upset was not something which the child could not overcome. It would seem then that the notion of continuity is stressed in a particular category of cases but not in others. Thus where the natural parent can offer a stable home the fact that a child has been in the continuous care of a third party for many years is often disregarded and the child restored to the natural parent generally, on the basis that it would be advantageous for the child to form a proper relation ship with its natural brothers and sisters.

The wishes of the child in English Law are considered by the court as a part of the court's investigation as to what is in the interest of the child. The English courts have shown an awareness that the wishes expressed by a child may in fact be a reflection of the wishes of one of the parents assiduously instilled into the child.[32] Even if the court is satisfied that the child has expressed views which are genuinely his own if they are manifestly contrary to his long term interest the court may feel justified in disregarding them[33]. In Sri Lanka by contrast rules of thumb appear to be utilized by some courts in determining whether the wishes of a child are relevant or not. Where the child has reached a certain age i.e., the age of discretion, the courts have generally given effect to these wishes without adequate inquiry as to whether this is in the long-term interest of the child or not[34a]. They have however stressed that the childs wishes ineed not necessarily be adhered to where they are clearly not in the child's interest. In *Gooneratnayake* v *Clayton* (340) for instance Fisher C.J. stressed that where a girls surroundings were undesirable her consent to remain there saw immaterial.[34b]

As in England the Sri Lankan courts have emphasized that a third party's ability to provide greater material advantages is not a factor that will influence the court in its decision relating to the child's custody.[35] Where a parent or a natural relative does not have the means to support a child however, the court may well deprive him or her of custody for the inevitable consequence would be to reduce the child to misery and want.[36] Where a mother has no means of her own and is dependent on a man to whom she stands in a lesser relation-

ship than a wife, the courts have been reluctant to award her the custody of a child by a prior union becacause of the possibility of her being left in the future with no means to support the child.[37] Thus the courts have clearly not equated material advantages with welfare. Yet where a parent's means falls below a certain minimum this will almost certainly result in the court depriving the natural parent of custody.

The educational advantages which the child may derive by being with a particular parent or a third party although taken into consideration in England has seldom being focused on in Sri Lanka.[38] There is however some data in support of the view that a court will not order a change in the custodial arrangements when the child's education will be interrupted at an important juncture as a consequence thereof.[39] The fact that a child has received a particular form of religious education and that a change of custody may entail a disruption of that education has been considered relevant in England.[40] The question does not appear to have arisen in a Sri Lankan court. It is submitted however, that this is a factor that must be taken into consideration.

It would seem then that many of the considerations that have appeared to the English judges as being relevant in custody disputes between parents and third parties have assumed relevance in the Sri Lankan courts too. While the decision in an English court hinges solely on the court's conception of what is in the best interests of the child the Sri Lankan courts have balanceed the claims of the natural parent on the one hand with those considerations relating to the interest of the child. The result has been a rather unhappy compromise at times and there is a crying need for legislative intervention in this area of the law. What is required is a clear policy statement as to the principle that should guide the court in custody disputes between parents and third parties.

1. 1860 -62 Ramanathan's Reports 130
2. at p. 130
3. (1889) 9 S.C.C. 42
4. However see In the re *Lebbe Marikkar* 1843) 1 MM.D. ι.S. and *Wappu Marrikkar Ummaniumma* (1911) 1 MM. D. R. 52
5. (1927 1 MM D. R. 102
6. (1932) 34 N.L.R. 1 7
7. (1943) 43 N.L.R. 129
8. (1968) 73 N.L.R. 20
9. (1970) 78 CLW 17
10. (1969) 72 N.L.R. 448

10*a*. (1951) A. C. 352

10 *b*. (1970) 75 N.L.R. 398

11. (1953 55 N.L.R. 54
12. at p 55
13. No. 24 of 1941
14. Ibid Section 19 and 20
15. No. 24 of 1941
16. See Section 21
17. Ibid. section 25
18. *Aysa Natchia* 1860-62 Rom Rep. 130, *Premawathie v. Kudalugoda Aratchie* (1970) 75 N.L.R. 398
19. *J* V. *C*. (1970) A.C. 668 at 724
20. In re *K* (1977) fam, 179 at p. 183
21. *Deutrom* v *Jinadasa* (1970) 78 CLW 17 *Frugneit* v *Fernando* (1972) 74 N.L.R. 448
22. *S* v *S* (1977) fam. 109
23. *J* v *C* (1970) A. C. 68
24. *S* v *S*. (1977) am. 109 at 115 – 116
25. *Endoris* v *Kiripetha* (1968) 73 N.L.R. 20
26. In re *O' Hara* (1900) I. R. 232 at 253
27. *J* v *C*. (1970) A. C. 668 at 726
28. *Premawathie* v *Kudulugoda Aratchie* (1970) 75 N.L.R. 398
29. *Deutrom* v *Jinadasa* (1970) 78 C.L.W. 17 *Pruigtnait* v *Fernando* (1972) 74 N.L.R. 448
30. (1943) 43 N.L.R. 129
31. (1968) 73 N.L.R. 20
32. In re *S* (1967) 1 WLR 396
33. Ibid
34. The *Queen* v *Jayakody* (1890) 9 SCC 148, *Gooneratnayake* v *Clayton* (1929) 31 N.L.R 132 *Hanifa* v*Razeek* (1958) 60 N.L.R. 287

34.*a* (1929) 31 N.L.R. 132

35. *Ran Menika* v *Paynter* (1932) 34 N.L.R. 127 *Premawathie* v *Kudulugoda Aratchie* (1970) 75 N.L.R. 398

For English Law see Re *McGrath* (1893) 1 ch. 143 per Lindley L. J.

36. In re the application of *Aysa Natchia* 1860-62 Ramanathan's Report 130
37. *Frugtneit* v *Fernando* (1969) 72 N.L.R. 448, *Deutrom* v *Jiunadasa* (1970) 78 CLW 17
38. For English Law see In re *S* (infant) (1967) (1) W.L.R. 396
39. In re*Evelyn Warnakulasooriya* (1955) 56 N.L.R. 525
40. In re *M* (infants) (1967) W.L.R. 1419