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RECENT TRENDS IN THE LAW RELATING TO PARENT AND CHILD*

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This paper deals with some of the recent trends in the law relating to children discernible in our general law and the law of other jurisdictions which are of relevance to the Sri Lankan lawyer. The changes in this area of the law have on the whole been slow and less dramatic than in other areas of the law. Nevertheless significant changes and departures from the Roman Dutch Law have taken place and it is those that will be commented on in this paper.

Parental Custody

Custody in a legal sense embodies a wide range of rights or a 'bundle of rights'. It includes the right to physical possession and the right to control the day to day life of the child. Determining the lines which the child's secular and religious education should take, consenting to the type of medical treatment he should receive and disciplining and corrrecting the child are the other incidents of parental custody. What is significant in the modern law is its emphasis on the notion that these rights are not absolute and that they are subject to the scrutiny of the courts. The crucial issue is as to when judicial intervention is justified. Is it called for only very exceptionally eg. where there is an abuse of parental rights or can a court interfere when a parent's decision is unreasonable or does the law go further and say that interference is justified when the custodian parent's decision is contrary to the interests of the child?

Some examples may be cited from the law relating to access. The issue is when a court ought to interfere with the custodian parent's regulation of access. One view that has been expressed is that the right of access must be enjoyed in a manner which the custodian parent does not object to and that unless the conditions laid down by the custodian parent whittle down to a nullity the right of access judicial intervention is not called for[1]. This view perceives the courts function as extremely limited ie. that of intervening in very exceptional circumstances. The second view sees judicial intervention as justified even if the non-custodian parent's right of access has not been rendered nugatory, if it can be shown that the custodian parent had been inspired by an ulterior motive.[2] This view then visualizes judicial interference where the conditions imposed by the custodian parent are not sincere but motivated by a desire to defeat the applicant's right of access. The third view sees judicial intervention as justfiable where the access proferred by the custodian parent falls short of what is reasonable in the circumstances.[3] According to this view the aim of the right of access is that of preserving the parent child relationship. Where the conditions laid down by the custodian parent thwart this aim

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1. *Vucinovich* 1944 WLD 143.
2. *Jooste v Terblanche* 1957 (1) PH B4(0).
3. *Marais* 1960 (1) SA 844 (C).

judicial intervention is justified. More recently the courts have held that judicial interference is justified when the interests of the child demands such interference.[4]

The later decisions demonstrate that the early attitudes of non-interference with the custodian parent's rights have given way to intervention when the interests of the child demands such interference. Judicial attitudes undoubtedly have been influenced by changing social attitudes which emphasize the importance of the formative years of a child's life.

Where a custody dispute arises the Roman Dutch Law principles that the father has a preferential right to the custody of a minor child during the subsistence of the marriage and that the innocent spouse has a right to the custody of a minor child on divorce have given way to a best interests standard. In 1939, the Appellate Division in South Africa declared that under the Roman Dutch Law the rights of the father were superior to those of the mother but that it was possible to mitigate the severity of this rule by interfering in exceptional circumstances.[5] In 1956 in *Ivaldy*[6] H.N.G. Fernando J. following *Calitz* v *Calitz* in South Africa held that the father was the natural guardian of his children and that where there was no decree of divorce or separation, the court had no jurisdiction to deprive the father of his custody except on special grounds such as danger to life health and morals. *Ivaldy* represents the high water mark of the preferential right of the father in Sri lanka. In *Fernando* H.N.G. Fernando J once again held that the father had 'a fundamental right' to the custody of his children during the subsistence of the marriage. The question before the court in a custody dispute in his lordship's opinion was whether this right could be overriden on the ground that it would be detrimental to the 'life health and morals' of the child. These cases then emphasize the Roman Dutch Law principle that the father has a preferential right to the custody of the minor children during the existence of the marriage. The best interests standard however is manifested in the later cases. Thus in *Weragoda*[7] where a mother sought the custody of her nine year old son, Sansoni J. held that a court must decide who is to have the custody of the child having taken into account all the presumptions and the counter presumptions of the case but bearing in mind that the paramount consideration is the welfare of the child. In *Fernando*[8] in 1968 Weeramantry J. observed that both the modern Roman Dutch Law and the English Law were agreed that the paramount consideration in custody disputes was the welfare of the child. The Roman Dutch Law had thus moved away from considerations such as punishing the guilty spouse and the preferential right of the father. Thus applying a rule commended, in his words 'both by law and human experience' namely that the custody of young children ought to be given to their mother, in the absence of overriding considerations he awarded the custody of the two children aged five and three to the mother. The more recent cases too stress

4. *Segal* 197(4) SA 317(C). *Dunscombe* v *Villiers* 1982 3 SA 811 (DCLD).
5. *Calitz* 1939 A.D. 56.
6. 1956 57 NLR 568.
7. (1961) 59 CLW 59.
8. 1968 70 NLR 584.

that in custody disputes during the subsistence of the marriage the paramount consideration is the welfare of the child.[9] However these cases appear to give greater weightage to the preferential right of the father than the *Fernando* case and hold that a wife who seeks to deprive her husband of custody must prove that the interests of the child requires it. Nevertheless they clearly hold that the welfare of the child is the paramount consideration.

The other Roman Dutch Law principle namely that the custody of the minor children ought to be given to the innocent spouse, too, also gave way to the best interests standard in Sri Lanka. Whilst the principle in *Ivaldy* v *Ivaldy* [10]was whittled away gradually, the decision in *Cook*[11] was changed as a consequence of provisions which were introduced in the Civil Procedure Code. The Civil Procedure Code of 1889 with its heavy English Law intonations expressly enacted that upon separation, divorce or pending such actions that the court may make such orders relating to custody as it thinks 'proper'.[12] The Administration of Justice Law which replaced the Civil Procedure Code re-enacted that in any matrimonial action that the court may make such order that it deems 'proper' with respect to the custody of the minor children of the marriage[13]. In 1977 the Civil Procedure Code of 1889 was reintroduced with amendments. In relation to the custody of children however the provisions remain unchanged. The effect of the provisions is to vest in the courts unfettered discretion in relation to the custody of minor children whose parents have been divorced or judicially separated or who are in the throes of being divorced or judicially separated. Thus the courts have been able to determine matters relating to custody unhampered by any presumption or rule known to the Roman Dutch Law which may have hindered the application of the best interests standard.

Parental Support

Parental Support in the modern law is premissed upon the elements that the parental obligation is owed to both legitimate and illegitimate children, that it is common to both parents and that it must be rendered in a manner compatible with the resources of the parents. Some of these notions were unknown or only partially developed in the Roman Dutch Law. Changing social attitudes and moraes account for the law as it exists today. Thus the modern law draws no distinction between the legitimate and the illegitimate child in relation to the parental duty of support. In terms of the Sri Lankan legislation a father must maintain both his legitimate or illegitimate child unable to maintain itself. The law however safeguards the alleged father of an illegitimate child

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9. *Madulawathie* v *Wilpus* (1967) 70 NLR 90, *Rajaluxmi* v *Sivananda Iyer* (1972) 76 NLR 572 and *Karunawathie* v *Wijesuriya* 1980 (2) SLR 14.
10. See footnote 6.
11. 1937 AD 154.
12. Civil Procedure Code. No. 2.
13. Law No. 25 of 1975 Section 630(2).

from being foisted with paternity on the sole evidence of the mother by requiring corroboration of the mother's statement.[14]

Changing social attitudes are also reflected in the law's attitude to what constitutes maintenance for minors. Whatever the position was in classical Roman Dutch Law it is accepted that support in the modern law extends to medical care, education and all that a child requires for its proper support.[15]

Whilst a Sri Lankan court has yet to consider whether support includes an university education the trend in other systems with Roman Dutch origins is to clearly hold that an university education comes within the ambit of the parental duty of support if their resources are sufficient and if the child would profit from such an education.[16]

A relatively modern phenomenon which has emerged is the maintenance agreement. At the point of a *de facto* separation or at the point of a divorce, parties to a separation or divorce may enter into an agreement regulating the financial aspects of their separation or divorce. Often such an agreement will have a clause or clauses relating to the children of the marriage. How then does the law protect children against inequitable financial arrangements that their parents may enter into? The Sri lankan courts like their counterparts elsewhere in the world have held that these agreements must conform with the Common Law obligation of support. A lesser financial undertaking will not absolve the parent from his obligation of support. *Nakamuttu* v *Kantan*[17] is representative. Grenier A.J. held that the obligation on the part of the husband to maintain his wife and children was a continuing obligation. Entering into an unconscionable bargain with the mother therefore clearly did not relieve him of the obligation. Even if a maintenance agreement is not unconscionable the courts have insisted that it must necessarily be capable of variation when circumstances change. Thus the Rhodesian Appellate Division has held that there was no doubt that a custodian parent could approach the court for an increase in maintenance if inflation or an increase in the cost of living made it impossible for him or her to maintain the child on the maintenance awarded.[18] The argument that inflation was a predictable phenomenon and that therefore a variation should not be allowed was categorically rejected by the court. In similar vein in the Transvaal in 1980 the court found that sufficient cause had been established for a variation of a maintenance agreement where the mother, a woman 'of no particular education or grasp' had entered into an agreement where the financial provisions relating to the children were inadequate.[19]

The current law relating to the maintenance of children therefore demonstrates that the modern law is equally concerned that both the legitimate and the illegitimate

14. Maintenance Ordinance No. 19 of 1889, section 6.
15. *Luciya* v *Ukku Kira* (1907) 10 NLR 225, *Rodrigo* v *Rodrigo* (1931) 33 NLR 383.
16. *Couper* v *Flynn* 1975 (1) SA 776(R).
17. 1908 1 SCD 48.
18. *Green* v *Green* 1976 (3)SA 316 (RAD).
19. Vedovato 1980(1) SA 772(T).

child are supported in a manner compatible with the resources of their parents. This is a departure from the old law where illegitimate children were treated differently to legitimate children. The modern law is also concerned with the adequacy of the support and support has much wider connotations today than under the previous law. Thus for example an university education may well come within the ambit of support today although it is doubtful that it would have been so considered under the old law.

Administering the Property of the Minor

The Roman Dutch Law recognizes that the administration of the property of a minor is as a general rule in the hands of its natural guardian the father,[20] that his rights are not unlimited but subject to well defined limitations[21] that they had to be exercised with due care[22] and that they were subject to the supervisory jurisdiction of the courts.[23] The modern law of Sri Lanka enshrines these basic premises of the Roman Dutch Law.

Nevertheless the law has not remained static. Changing economic and social conditions has led to some growth in the law. Yet as we shall see in some ways it has not kept abreast with developments elsewhere.

Whilst there are provisions in the Civil Procedure Code[24] and its predecessor the Administration of Justice Law[25] dealing with the appointment and control of curators, parents are considered natural guardians of their children and need not apply to be curators of their children's property. This has been seen as a concession to the concept of parental rights. The natural guardian being viewed as someone who ought to be entrusted with the minor's estate and who could be expected to look after it without the stringent control of the court.[26]

What duties then are imposed on parents dealing with the property belonging to their minor children? It is clear that a sale of immovable property requires the sanction of the court.[27] Such sanction will rarely be given and a sale will be allowed only where it is necessary [28]or perhaps where it is of 'benefit' to the minor.[29] The judicial policy underlying the cases on alienations of immovable property belonging to minors demonstrates the attitude that the courts do not encourage speculation and try to ensure

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20. Grotius 1.6.1 Van Leeuwen 1.13.1.
21. Grotius 1.8.6, Van Leeuwen, Censura Forensis 1.1.17.18, Voet 27.9.1 Van der Keessel Th 130, *Van der Byl* v *Solomon* 1877 Buchanan 25 at 27-28, *Skead* v *Colonial Banking Trust Co. Ltd.* 1924 TPD 497 at 502.
22. Van der Linden 1.5.3. Ex parte *Visagie* 1940 (TPD) 42 at 52-53.
23. Grotius 1.7.10, Voet 27.2.1, Lee 99, Spiro p. 4.
24. No. 19 of 1889.
25. No. 25 of 1975.
26. See Savitri Goonesekera, *Parent and Child* p. 272.
27. In re *Hider* 1876 3 S.C.C. 46, *Mana Perera* v *Perera Appuhamy* 1895 INLR 140, *Juwan Perera* v *Helena Hamy* 1901 2 Browne's Report 19 *Perera* v *Perera* 1902 3 Browne's Reports 150, *Mustapha Lebbe* v *Martinus* (1903) 6 NLR 364.
28. *Perera* v *Perera* supra.
29. *Mustapa Lebbe* v *Martinus* supra.

'safe keeping' of such property. Long leases and mortgages of a child's property have also come within the purview of the court. These transactions which may amount in the words of a Sri Lankan court to 'a *protanto* alienation' require the sanction of the court.

The controls over movable property by contrast are virtually non existent in the Sri lankan Law. This blanket distinction between movable and immovable property needs re-examination in the light of increasing economic importance attaching to movable property. Nevertheless it must be borne in mind that the law must be cautious about over regulating parental administration of property belonging to minors. It is clearly desirable that parents should administer the property of their children and not the courts.

The classical Roman Dutch Law imposed upon a natural guardian the obligation of investing the surplus income of the minor.[30] There appears however to be some uncertainity about the type of investments that a guardian could make. Did the investment have to be in government securities alone or were other forms of investment permissible? Some textwriters suggest that investments had to be in government securities. Others however state that other investments were permissible. There is in Sri Lanka a dearth of authority on the whole subject of the investment of a minor's funds. Yet the subject is one which the legal system must address its mind to and for which there is ample authority elsewhere. Principles that can be identified elsewhere are that investments must be made with 'safety and security'[31] and must avoid exposing the minor to 'commerical risk'.[32] Whilst the natural guardian's powers of investment are perhaps circumscribed the court acting as upper guardian can sanction investments in non-governmental securities. [33] However it is the natural guardian upon whom the responsibility lies for the safe investment of the minor's money. Special funds have been created in some jurisdictions for the purpose of investing money belonging to minors. The purpose of these funds is to create low risk medium return investments. However the ravaging effect of inflation and devaluation have led the courts of some jurisdictions to sanction other forms of investment. Investment in shares listed on the stock exchange are among those which have been recently permitted in the Cape.[34]

Judicial attitudes to investments are also demonstrated in the manner in which the courts have dealt with compensation awards paid to injured minors. Here the issue is how best the court can ensure that the damages awarded to the minor are invested so as to ensure the best return. The courts have recognized readily that parents may not be the best persons to deal with large compensation awards. Thus they have identified

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30. Grotius 1.9.11, Voet 26.7.10, Van der Keessel Th 153.
31. *Sackville West* v *Nourse* 1925 AD 516.
32. Cf Ex parte *Wagner* 1988(1) SA 790(C).
33. Ex parte the *Master* 1927 TPD 117, *Wood* v *Davies* 1934 CPD 250 at 55-56 Ex parte *Brink* 1948(4) SA 273(o).
34. Ex parte *Wagner* 1988(1) SA 790(C).

recognized investment companies[35] and firms of lawyer[36]s as appropriate bodies to be entrusted with the task of investing the money for the minor. The objectives of the courts are clear namely that of ensuring that the minor would receive the full benefit of the compensation paid.

What I have hoped to illustrate in the course of this paper is that the law in this area has not remained still. Developments in keeping with the prevailing social attitudes have taken place and it is hoped that where the law is found to be deficient or inadequate that the legislature and the judiciary will respond in what is after all perhaps the most important relationship in our society namely that between parent and child.

35. *Van Rij* v *Employers Liability Assurance Co. Ltd.* 1964(4) SA 737(C).
36. *Eblers* v *SARH* 1964 SA 737(c).