1969 *Present :* Samerawickrame, J.

M. FRUGTNIET, Petitioner, *and* H. EDWIN FERNANDO and 2 others, Respondents

S.C. 449/66.—Application for a Writ of Habeas Corpus to produce the body of Angeline Frugtniet of 156/2 Deans Road, Maradana

Habeas corpus—*Application made by mother in respect of her child while father is still alive—Considerations applicable—Importance of child's welfare.*

Under the Roman-Dutch law the father and the mother are entitled to the custody of the children of their marriage, and the father has a preferent right, But if the father fails or neglects to concern himself with the care of his children. the mother is entitled, by reason of her natural guardianship, to apply for a writ of *habeas corpus* in respect of a child who is in the custody of a third party. In such a case, however, if the child had been handed over to the third party by the mother herself on the understanding that it would not be claimed back, the welfare and happiness of the *corpus* is the paramount consideration and the mother's natural right is not sufficient *per se* to entitle her to claim back the child.

APPLICATION for a writ of *habeas corpus.*

S. Kanagaratnam, for the petitioner.

H. Rodrigo, for the respondents.

Cur. adv. vult.

August 2, 1969. SAMERAWICKRAME, J.—

The petitioner has made this application for a writ of habeas corpus seeking to have the custody of her daughter Angeline Frugtniet restored to her. The corpus Angeline had been handed over to the first and second respondents in May 1965, by one Gibbs with whom the petitioner was living, with the consent of the petitioner. The learned Magistrate to whom this petition was referred and who has heard evidence, in his report to this Court, states " There is no doubt that when the corpus was given over to the respondents on 15.5.1965 it was on the understanding that she would not be claimed back at any time. "

The petitioner married one Anselm Joseph Frugtniet and there were 7 children of the marriage. About 3 or 4 months after the corpus Angeline was born, Frugtniet had deserted the petitioner. The petitioner herself had been in destitute circumstances and had sought employment as a domestic in various houses. Her husband appears to have handed over the children, including Angeline, to various persons for purposes of domestic service. In the year 1963, the petitioner had met Gibbs who was himself a divorcee and had commenced to live with him in Badulla. In 1965, Gibbs was unemployed. He and the petitioner were unable to provide for the corpus Angeline and they had accordingly handed over Angeline to the 1st and 2nd respondents. Gibbs had obtained employment at Kadawata shortly before this application was made and had come with the petitioner to live in a house on the land of which he was in charge. Thereafter the petitioner appears to have got back her elder daughters Millie and Yvonne and thereafter sought to get back Angeline. One son Anselm has been handed over to police inspector Samath. That boy has been well looked after by Samath and remains with him. Another son Carlo had been handed over to Venerable Medagamuwa Gnanalankara Thero and has been ordained a Bhikku and given the name Sumangala Thero. During the course of the proceedings in the Court below, as a result of persons interested in this case visiting him and making representations to him, this son had given up his robes and left the temple.

The 1st and 2nd respondents who had taken over the corpus Angeline with the intention of bringing her up as their own child had apparently grown quite fond of her and refused to hand over Angeline to the petitioner and the petitioner has accordingly made this application.

The person who is entitled to the legal custody of Angeline is her father Anselm Joseph Frugtniet. He is apparently unconcerned about the welfare of his children. According to the petitioner he had placed a number of children in unsuitable homes where the children were treated badly.

Under the Roman Dutch Law both the father and the mother are entitled to the custody of the children of the marriage and though the father has a preferent right, in a case like this, where the father fails or neglects to concern himself with the care of his children there is no reason why the petitioner should not be entitled to obtain custody by reason of her natural guardianship, if she can make out a case for such custody.

The petitioner stated that Gibbs was a superintendent on an estate getting a salary of Rs. 300. The estate was a fairly large one and a house had been put up on it and they live in it. From the evidence of Gibbs it transpires that he is in charge of 7-8 acres of high land and

10-12 acres of paddy land and that he is living in a temporary shed made of zinc sheets put up on that land. The Venerable Medagamuwa Gnanalankara Thero who had occasion to visit Gibbs and the petitioner stated that they were living in circumstances of extreme poverty. There are living with them, in addition to petitioner's two elder daughters, her three children by Gibbs.

It transpired in evidence that Angeline had never been sent to school; that she had not been vaccinated and that she was weak and anaemic and suffering from asthma at the time she was handed over to the respondents. It would appear that the father had taken the child over when she was quite young and handed her to one Mr. Abeynaike who in turn had handed her over to another person. The petitioner had obtained her custody from that person through the services of a Probation Officer. Even after the petitioner had received back Angeline, she does not appear to have been given any schooling.

The learned Magistrate in his report states "It is perfectly clear that the two respondents are very fond of the child and the child is equally fond of her foster-parents." Again, in his report, he states "From the evidence of the corpus it is very clear that she is happy and contented to be with her foster-parents, and is being looked after by them with great affection." The 2nd respondent stated in evidence that they treated Angeline as their own child and provided her with all the necessary comforts. As there was no birth certificate of Angeline which was available to them it was not possible to admit her to a school but she was given private tuition.

The petitioner's marriage to Frugtneit still subsists and she is living with Gibbs as his mistress. As learned Counsel for the respondents pointed out, she has no legal claim to be supported by Gibbs and in the event of his falling out with her, she would be left without any means. Her position is therefore, precarious. I am not satisfied that Gibbs himself is in receipt of an income of Rs. 300 per mensem as stated by the petitioner. Gibbs and the petitioner seem to be somewhat better off after Gibbs was placed in charge of a land of about 20 acres than they were before but they are still in very poor circumstances. The petitioner herself has been described by the learned Magistrate as a foolish, illiterate and garrulous woman and she appears to be absent minded. It is clear that apart from any support that she has from Gibbs, she is unable to support her children.

The two respondents appear to be very fond of the corpus Angeline and appear to have looked after her as they would a child of their own. They have no children of their own and it is clear that they cannot hope

to have any children now as the 2nd respondent is now 52 years old. They are in a position to give Angeline the necessary comforts and look after her future prospects in life.

It is very regrettable that questions were put to the petitioner in cross-examination which implied imputations against her and her elder daughter Millie. The petitioner, quite rightly, felt resentment and antagonism and refused a suggestion that she consent to the adoption of the corpus by the first and second respondents. While the petitioner's resentment is understandable, it is equally clear that her refusal stems from her feelings of pique and is not made in the interests of the welfare of the corpus.

In a case like this, the welfare and happiness of the corpus is the paramount consideration and to this consideration all others yield—vide *Mc Kee v. Mc Kee*.[1] There is also a finding of fact by the learned Magistrate that when Angeline was handed over to the respondents it was on the understanding that she would not be claimed back. In the case of *Samarasinghe v. Simon* [2], it was held that where a parent surrendered the custody of a child to another, the mere assertion of his natural right is not sufficient to entitle him to claim back the child and that the Court will not disturb the *status quo* unless there is good ground for doing so.

In his report, the learned Magistrate states that it would be in the interests of Angeline that she should have the companionship of her mother and her sisters and build up ties with members of her own family. While that is no doubt a consideration, I am satisfied, upon a review of all the facts of the case that it is in the interests of the corpus Angeline that she should remain with the first and second respondents. I do not think that it is in the interests of Angeline that she should be now handed back to her mother who is living not with her father but with a paramour and whose prospects are dependent upon the support of her paramour. It appears to me that her welfare and happiness would be best served by permitting her to remain with the respondents who are treating her as a child of their own and giving her the necessary comforts. The petitioner's application is therefore refused.

The petitioner as the mother of the corpus is entitled to reasonable access to the corpus. If the parties cannot agree upon access, the Magistrate is authorized to make such order as may be necessary in regard to it subject to review or other order that may be made by this Court.

Application refused.

[1] *(1951) A. C. 352.*

[2] *(1941) 43 N. L. R. 129.*