1968 *Present :* **Weeramantry, J.**

PRECIA W. FERNANDO (*nee* Perera), Petitioner, *and*
DUDLEY W. FERNANDO and 2 others, Respondents

*S.C. 118 of 1968—Habeas Corpus Application*

Habeas corpus—*Custody of children—Rival claims of father and mother—Considerations applicable—Putative marriage—Children born of such marriage—Interim custody of them pending action for annulment of marriage—Which spouse is entitled to such custody ?*

In all questions of custody of children the interests of the children stand paramount. Questions of matrimonial guilt or innocence of a parent would not therefore be the sole determining factors in questions of custody, though they are not factors which will be ignored. The interests of the children being paramount, the rule that the custody of very young children ought ordinarily to be given to their mother ought not to be lightly departed from.

A marriage is null and void *ab initio* if it was contracted in consequence of a fraudulent misrepresentation by the wife that she was unmarried, when in fact she was already married. Assuming, however, that the husband is entitled to the custody of children born of the putative marriage, the Supreme Court will not necessarily grant him the custody in *habeas corpus* proceedings during the pendency of an action instituted by him in the District Court for the annulment of the marriage. In such a case, if the children are of tender years (e.g. 3 or 4 years old), their mother will be entitled to interim custody so long as she is shown to be fit to care for them. If she happens to be employed in England, an undertaking given by her that she will not leave Ceylon or remove the children pending the matrimonial action is sufficient.

APPLICATION for a writ of *habeas corpus*.

*K. Shinya*, with *Nimal Senanayake*, for the petitioner.

*Eardley Perera*, for the 1st respondent.

*Shiva Pasupati*, Crown Counsel, as *amicus curiae*.

*Cur. adv. vult.*

March 29, 1968. WEERAMANTRY, J.—

The petitioner in this case asks for the custody of her two minor children, the 2nd and 3rd respondents. The 1st respondent is the husband of the petitioner and the father of the two children. The marriage

between the petitioner and the 1st respondent took place in London on 13th June 1964 but the parties had been living together in London from early 1962.

The elder child was born on 4th November 1963, that is prior to the marriage, and the second child was born on 5th February 1965. There is no dispute as to paternity.

The 1st respondent on 14th February 1968 without notice to the petitioner left London by air for Ceylon with the 2nd and 3rd respondents, and the petitioner followed, as soon as she could make the necessary arrangements, on 2nd March 1968. The 1st respondent has thereafter filed proceedings in the District Court of Panadura for a decree of nullity based on an earlier marriage of the petitioner to one Navaratne, or in the alternative for a decree of divorce on the ground of constructive malicious desertion, and these proceedings are now pending.

The petitioner comes into this court on the basis that the removal of the children from the matrimonial home was without notice to her and that despite daily attempts by her on reaching Ceylon to obtain access to the children, the doors of the 1st respondent's house are closed on her, that a threatening attitude is adopted towards her by persons in this house on her visits there, that the 1st respondent goes into hiding at the approach of the petitioner and that she is not allowed to speak to or fondle the children although she sees them in the house.

It is the position of the 1st respondent that the petitioner prior to her purported marriage to him had been married to one Navaratne on 21st May 1949 and that she had had eight children by this marriage. The 1st respondent's position is that the fact of this marriage to Navaratne as well as the fact that there were eight children of that marriage had been concealed from him and that but for this suppression of fact by the petitioner he would not have married her.

In support of the contention that the petitioner has been guilty of fraud in suppressing the fact of her earlier marriage, the 1st respondent has produced, marked R2, the certificate of marriage relating to her marriage to Navaratne, and also R3, the certificate of her subsequent marriage to the 1st respondent. In R3 the petitioner has described herself falsely as a spinster and has given her name as Winifreda Perera, thus suppressing completely, at any rate as far as the registrar was concerned, the fact of her marriage to Navaratne.

If this be the correct factual position, the marriage between the petitioner and the 1st respondent would be a nullity, the ordinary consequence of which would be to render the children illegitimate, and to deprive the father of the right to custody.

Mr. Eardley Perera for the 1st respondent points out, however, that the rule that a marriage which is null and void *ab initio* has none of the consequences of a valid marriage is subject to exceptions in the case of a putative marriage, that is a marriage which is null and void but solemnised with the prescribed formalities and contracted by both or one of the spouses in good faith. Thus if it be correct that the first respondent was unaware that the petitioner had been married earlier, and entered into his marriage with the petitioner in good faith, such a marriage would be a putative marriage as the 1st respondent would have been ignorant of the impediment to his marriage.[1] It would appear that both according to the old Roman-Dutch authorities and according to the modern law the children of a putative marriage are considered legitimate [2], and further that the innocent spouse is entitled to apply to Court to have the children declared legitimate. The legal position of such a child *vis a vis* the innocent parent is thus not different from that of any other legitimate child.[3] Mr. Perera submits on this basis that although the marriage between the parties was a nullity his client was entitled to all the rights over the 2nd and 3rd respondents which he would have had in case the children had been legitimate.

The deception alleged is however denied by the petitioner who states that the marriage to Navaratne and the fact that children were born of that marriage were circumstances well known to the first respondent at the time of the marriage. The petitioner states further that the truth of this statement is borne out by the circumstance that although the elder child's birth was registered with the father's name as Navaratne, the registration was subsequently altered by substituting the name of the 1st respondent as the father. She states that this was done upon the basis of affidavits filed by both the petitioner and the 1st respondent and that therefore the 1st respondent at any rate at the time of the affidavit knew of such marriage and nevertheless continued to live with her on the same basis as before. She submits that the second child was born in these circumstances. However no evidence has been placed before me in regard to the date of that affidavit and I am therefore unable to arrive at a definite conclusion in regard to the question of the 1st respondent's knowledge of the earlier marriage. We are left then with an allegation by the 1st respondent of deception, which allegation is contradicted by the petitioner. I will for the purpose of this order nevertheless assume, without in any way deciding upon the matter, that the 1st respondent was the innocent party and that the law in regard to putative marriages therefore entitled the first respondent to the right to custody which he would have had in the case of legitimacy.

However, even if this be assumed, the further question must be considered whether this right is to yield in the present case to the

[1] *Hahlo. South African Law, Husband & Wife, 2nd ed., p. 479.*

[2] *Hahlo, ibid p. 480.* [3] *Hahlo, ibid p. 481.*

circumstance that the children are of the ages of three and four, and that children of such tender years are ordinarily entitled to a mother's comfort and care.

It has been urged against the mother that she is guilty of a serious and fraudulent suppression of fact, a contention which will no doubt be examined in detail in the District Court proceedings. For the purpose of a free investigation of this matter in the District Court unfettered by any views which this court may express, I have not acceded to a suggestion by the 1st respondent's counsel that there should be an examination and cross-examination of parties so that this court could arrive at its conclusions on this matter. The learned District Judge will therefore be free to adjudicate upon those questions of guilt and innocence which will to some extent weigh with him when he brings his mind to bear upon the question of permanent custody. I shall limit the scope of this inquiry to the ascertainment of the most suitable interim order which the interests of the children demand during the period between this order and the eventual adjudication upon custody by the District Court.

Apart from the circumstance of this alleged deception it has not been urged against the petitioner that she is now living in immorality or otherwise so conducting herself as to make her an unsuitable person to be entrusted with the custody of the two children. It is true the eight children by the marriage to Navaratne are alleged to be living in Ceylon and so is this Navaratne, but it is not contended that the petitioner is living with Navaratne or with these children. It must further be observed that the youngest of these eight children is now ten years of age and I do not think that the presence of those children in Ceylon is likely to take away from the care and affection a mother would ordinarily show to children so tender in years as the second and third respondents.

In this state of the facts what legal principles are applicable in determining the right to interim custody ?

There can be no doubt that in all questions of custody the interests of the child stand paramount, a principle on which the English and the modern Roman-Dutch law are agreed. As Lord Simonds observed in *McKee v. McKee*,[1] it is the law of England (and, as he observed, of Canada, Scotland and most if not all of the States of the United States) that the welfare and happiness of the infant is the paramount consideration in questions of custody, and to this paramount consideration all others yield. The modern Roman-Dutch law likewise stresses this consideration in questions of custody and has " grown away from rules directed towards penalising the guilty spouse and towards a recognition of predominance of the interest of the child ". [2] This emphasis on the child's interests as being paramount no doubt obtains in our law [3] and

[1] *(1951) 1 All E.R. 942 at 948.*

[2] *per Schreiner J.A. in Fletcher v. Fletcher 1948 (1) S.A. 130 (A.D.) at 144.*

[3] *Karunawathie v. De Silva (1961) 64 N. L. R. 252 at 257 ; Weragoda v. Weragoda (1961) 66 N. L. R. 83 at 86.*

questions of guilt and innocence would not therefore be the sole determining factors in questions of custody, though of course they are not a factor which will be ignored.[1] This principle leaves me free to decide on interim custody without being obliged to investigate questions of matrimonial guilt or innocence as a preliminary to such order.

The interests of the children being then the paramount factor, there is a rule commended alike by law and ordinary human experience, which to a large extent will determine the matter before me. This is the rule that the custody of very young children ought ordinarily to be given to the mother, a rule which ought not to be lightly departed from.[2] It is no answer to this rule that the law ordinarily gives the father a superior right to custody[3] and it is too late in the day to urge that the father's right to custody is absolute and not to be interfered with.[4] As was observed in *Fernando v. Fernando* [5], " So long as the mother is shown to be fit to care for the child it is a natural right of the child that she should enjoy her mother's care and not be deprived of that right capriciously. " As was also pointed out in the last case referred to, " the very fact of the forced separation and the knowledge that the mother with whom the child had lived for a fairly long period can have no part to play in the child's future is at least likely to affect the mental health of the child ".

Overriding considerations taking their force from the mother's past character or conduct or from her inability to give the children a suitable home may no doubt in individual cases prevail over this principle, but no such circumstances have been alleged in this case.

While it is true that any order I may make is of a purely interim nature pending the order of the District Court, there is every possibility that the District Court trial may not proceed to a final determination for a considerable period and every possibility also of any order made in that trial being subject to appeal and its attendant delays. The present order may therefore well be operative for a considerable period which may extend over several months and possibly well beyond a year or two ; and in the lives of children of this tender age so long a separation from their mother ought not to be decided upon except for compelling reasons.

There is moreover a further feature in this case which simplifies a decision on the question of interim custody. This circumstance is the removal by the first respondent of the children from the common matrimonial home on February 14th 1968 without reference to the petitioner. The first respondent states that he did so upon his discovering that he had been deceived in regard to his marriage. Whatever may be his

[1] *Hahlo, South African Law of Husband & Wife, 2nd ed., p. 445.*
[2] *Hahlo, South African Law of Husband & Wife, 2nd ed., 446.*
[3] *Karunawathie v. De Silva, supra ; Weragoda v. Weragoda, supra.*
[4] See *Karunawathie v. De Silva, supra.*
[5] *(1956) 58 N. L. R. 262 at 263–4.*

reasons for resorting to this unusual piece of conduct and whatever his justification for his himself deciding to leave, he certainly had no right by such an act to deprive the mother of her two children without notice. I do not think that a parent should be permitted by a unilateral act of this nature, performed behind the back of the other parent, to gain any position of *de facto* advantage over the children which he would not have enjoyed but for such conduct. To do so would be to lend the encouragement of the courts to those who decide to take the law into their own hands.

There is before me the averment of the petitioner that on 15th February 1968, the day after the removal of the children, she took all possible steps through her solicitors in London to trace the first respondent and to prevent him from leaving the country with the 2nd and 3rd respondents, and that to this end she informed the Home Office and the police and had the children made wards of the High Court of England. This latter averment has been substantiated by the document P7 showing that these children became wards of court on 16th February 1968.

The petitioner further avers that as soon as she learnt that the first respondent had left London by air with the two children she made necessary arrangements to obtain leave of absence from her employer in London and arrived in Ceylon by air on 2nd March 1968. We have thus the uncontroverted fact that the children were on 14th February brought to this country suddenly by the father without notice to the mother and that she has apparently been so agitated by this removal that she has promptly taken every step within her power to recover the children.

This is a most important circumstance which to my mind has an almost decisive effect on the question whether the parent who has so brought the children away from the mother is entitled to retain them pending final adjudication.

Considerable fears were expressed by learned Counsel appearing for the respondent in regard to the possibility of the children being surreptitiously taken away to England by the petitioner in the event of this court awarding interim custody to the petitioner. It was submitted that while the 1st respondent has no intention of returning to the United Kingdom, there was no guarantee that the petitioner would remain in this country whatever be her assurances in this regard. It was further submitted that there was no means available to this court of compelling obedience to any order this court may make restraining the petitioner from taking the children out of this jurisdiction, for it was her avowed intention at the commencement of this inquiry to revert to her employment under the London Transport Board in three weeks' time. It is true that in the course of these proceedings she stated quite categorically that if she were granted the custody of the children she would give an undertaking that she would not leave the country or remove the children.

Such a removal of the children, it was argued, could occur in breach of any undertaking given to this court, and would render nugatory all subsequent control by this court over the custody of the children. It was further submitted that it was not within the competence of this court to issue directions to the authorities responsible for the issue of passports and supervising departure from the country, and that even should such instructions be issued there was every possibility of their being lost sight of or suppressed.

This aspect of the matter caused me considerable anxiety for both parties hold Ceylon passports, the children are now resident in this country and there is a matrimonial suit now pending in the Ceylon courts. Further, the Ceylon courts are apparently the courts of the matrimonial domicile, considering that the husband has disavowed any intention of returning to the United Kingdom. It is therefore of the utmost importance that pending the divorce pooceedings the children should not be taken out of this jurisdiction and that any orders whether of this court or of the District Court should not in view of such a possibility stand in danger of being flouted. In view of the importance of these considerations I requested the assistance of Crown Counsel as *amicus curiae* on the resumed date of inquiry, and in response to this request Mr. Shiva Pasupathy, Crown Counsel, appeared at the inquiry. I appreciate very much the considerable assistance he has rendered to this court on the legal questions involved in any attempt at removal of the children.

On the resumed date of inquiry the petitioner produced an informative document, P4, in regard to Immigration and Emigration procedure in so far as concerns the entry of children to the United Kingdom. This document, issued by the British High Commission on 22nd March, indicates that under section 2 of the Commonwealth Immigrants Act, 1968, children under the age of sixteen now have the right of admission to the United Kingdom only if both parents are resident there or both parents are accompanying the children or one parent is accompanying the children and the other is already resident in the United Kingdom. A child may also be admitted to join one parent although the other is resident outside the United Kingdom if the parents' marriage has been dissolved and the parent in the United Kingdom has legal custody. Admission accompanying or to join only one parent in other circumstances is authorised only if family or other special considerations make exclusion undesirable.

The British High Commission states further that any application for a child to accompany or join one parent where the parents are divorced or have been granted a legal separation will be considered only when the parent making the application has satisfied the High Commission that the divorce decree or separation document as the case may be contains no stipulation that the child remains in Ceylon and further that proof has been shown that there is no overriding Ceylon law which might make the removal of a child in such circumstances subject to express

permission having been granted by a court of law. It is further stated that the onus is on the parent making the application for an entry certificate for the child to satisfy these requirements and that all such applications have to be referred to the Home Office in London for decision.

A document P5, from the Controller of Immigration and Emigration, was also produced by the petitioner to the effect that action is being taken to see that the two children do not leave Ceylon until the *habeas corpus* action is finally disposed of by the Supreme Court.

It would appear from this material that the removal of the children from the country and their admission to the United Kingdom would present insurmountable difficulties to the petitioner and that in any event the Department of Immigration and Emigration will await the orders of this court before it feels free to issue the necessary travel documents in respect of the two children.

Learned Crown Counsel has referred me to section 36 (1) (*e*) of the Immigration and Emigration Act (Chapter 351) which provides that regulations may be made in respect of the terms and conditions that may be attached to passports. In terms of this provision regulations have been made making it a condition of every passport, emergency certificate or identity certificate that the competent authority or the appropriate officer, as the case may be, may in his absolute discretion cancel or suspend a passport or emergency certificate or identity certificate or restrict its period of validity upon service of a notice that such action has been taken and the holder of such document is required to surrender it.

This is not of course a discretion which will be arbitrarily exercised, but one principle governing the grant of passports is that, broadly speaking, passports will not be granted if there is reason to believe that minor children are being taken out of the father's custody and without his consent.[1] Furthermore the passports of the two children are contained in the passport of the respondent. Any attempt on the part of the petitioner, therefore, to have the two children's names included in her passport or to obtain independent passports for the two children would have to surmount this additional difficulty.

Having regard to all these considerations I have little doubt that whether or not this court has power to issue directions to the Department of Immigration and Emigration in regard to the refusal of a passport, the Department will not issue such a passport having regard to the circumstances in which the parties are placed and having regard also to the fact that proceedings for the determination of the custody of the children are in progress. Should the Department by some oversight or some deception practised upon it so far depart from the terms of its letter P5 as to issue a passport to the children, it is clear that these

[1] *Mervyn Jones, British Nationality Law and Practice, p. 290.*

children will not in any event be allowed entry into the United Kingdom. It seems quite reasonable therefore to exclude the possibility that the children may be taken away from Ceylon without notice to the 1st respondent or in breach of any undertaking given to this court.

It was then contended on behalf of the first respondent that whatever may be the position in regard to the removal of the children there is every possibility that the petitioner may implement her earlier decision to return to London in three weeks' time and thereby leave the children stranded in this country. The simple answer to this contention is that should the petitioner choose to act so irresponsibly, she will forfeit all claims to the custody of the children, and her rights in this respect would probably be lost to her for all time. There will further be an automatic reversion of the children to the custody of their father. I do not think it conceivable that the children will be abandoned by their mother in such circumstances as to leave them destitute and without any attention whatsoever, having regard to the anxiety she has so far shown to regain their custody. There is moreover the fact that the divorce action in which the matrimonial rights of the parties will be finally adjudicated upon is pending, and the prejudice that will be caused to her by her so leaving and abandoning the children would be such that, apart from considerations of the welfare of the children, considerations of self-interest by themselves would render such a course on her part unlikely.

I have questioned learned counsel for the first respondent in regard to the facilities available to the 1st respondent for looking after these children, where the 1st respondent now resides. I am told that the 1st respondent lives with his mother and that she is at present looking after the children. It is said on behalf of the petitioner that this lady is elderly and not in the best of health. Apart from the 1st respondent's mother there would appear to be no female relatives residing with the 1st respondent who would be able to give to these children anything like a substitute for a mother's care and affection.

Having regard to all the foregoing circumstances I make order that the 1st respondent hand over the 2nd and 3rd respondents to the petitioner.

The petitioner through her Counsel has stated that she will continue to reside in Ceylon and I think that it would be appropriate also to insert a condition that the custody of the children will automatically revert to the father in the event of the mother leaving this country. She must also enter into a bond in a sum of Rs. 5,000 with one or two sureties that she will not remove the children from this country pending the determination of the divorce proceedings. This order must also be communicated to the Controller of Immigration and Emigration drawing his attention to the undertaking by the petitioner and requiring him to desist from issuing any passport to the two children as long as the divorce proceedings in case No. 11080 D.C. Panadura are pending.

There is the further question of access to the minors by the first respondent pending the final settlement of custody by the District Court. Feelings between the parties seem to be so strained that it is most undesirable that the father's right of access should be exercised in the house where the mother resides. I have therefore made inquiries from parties with a view to ascertaining whether there is a neutral place to which the children can be brought for the purpose of being met by the other parent and parties are agreed that the premises of the Dehiwela Catholic Church will be mutually acceptable for this purpose. I therefore make order that, pending the determination by the District Court of Panadura of the question of custody, the 1st respondent should have access to the children at the premises of the Dehiwela Catholic Church on any two days of the week to be notified by him to the petitioner two days in advance. It will be the duty of the petitioner to make the children available to the 1st respondent at the premises on these days at all reasonable hours.

*Application allowed.*