

# Exploring the Child Custody Laws in Sri Lanka; Balancing Parental Rights and Best Interest

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**Abstract**— *Modern legislation is heavily influenced by how parent-child relationships are shaped, and its fundamental objective is to act in the child's best interests while simultaneously respecting parental rights. The best interests of the child are taken into account as a primary factor when deciding on a custody arrangement. This research study examines the complex interplay between parental rights and the best interests of children within the framework of Sri Lankan child custody legislation. Examining how to achieve this challenging balance while safeguarding the well-being of children involved in custody disputes is another research challenge at hand. Also, it assesses how child custody laws affect parental rights and children's welfare and offers suggestions for a fair strategy.*

*To solve the research challenge, this study employs a qualitative research methodology to examine national legislation, judgments made by international courts, and pertinent textbooks.*

*The results imply that parental rights are recognized while the child's best interests are given priority under Sri Lanka's custody rules. The study emphasizes the necessity of both concepts coexisting peacefully and suggests adequate standards for determining the best interests of the child in custody disputes. Equal parental rights are observed, and it suggests creating a framework for promoting stable households. In conclusion, this study contributes to establishing healthy parent-child connections and defending the welfare of children involved in custody disputes by providing useful guidelines and examining pertinent legal frameworks.*

*the same way as it is used in other foreign jurisdictions.*

**Keywords**— child custody, parental rights, best interest

## I. INTRODUCTION

As stated in section 3 of the modified ordinance, all individuals who reach the full age of eighteen are deemed to have acquired the legal age of majority and therefore those under the age of 18 are subject to parental authority as minors. (Age of Majority Ordinance, 1989). Divorce may be extremely distressing for everyone involved, especially if there are minors, as parent-child interactions

are highly valued in Sri Lanka, where family ties are seen as being of the highest significance. In accordance with Roman-Dutch Law, the application of deciding custody relates to the issue can be brought in two scenarios where parties were living separately without getting a divorce and where parties obtained the degree of divorce. Further contemporary law evolves in South Africa highlighted the preferential rights of the father but in certain cases, they have departed from the notion and indicate the relevant parental rights over the children. However, over the years of legislative changes, lawmakers detected the "brutal indifference to the child's fate" and established the notion of the "welfare of minors" (goonasekara, 2002).

Since the major focus here is related to the custody issues of the parties who got a divorce, it may be granted either joint custody or sole custody, and given how traumatic family breakup is for children, it is essential to preserve the welfare of the child standard in custody disputes in order to ensure their safety and protection in post-divorce. Additionally, despite the fact that Sri Lankan courts currently rely on the "best interests of the child" as the primary consideration when deciding which parent should have custody and visitation rights after a divorce, there is no clear-cut way to figure out the concept of what the child's best interests are and its mostly depend on the circumstances.

Protecting children's welfare and fostering healthy parent-child interactions in the case of custodians depends on a comprehension of the consequences of child custody legislation. This study intends to provide light on how child custody rules affect parental rights and the welfare of the children engaged in custody proceedings in Sri Lanka and how to strike the delicate balance between both notions which aims to establish an atmosphere that nourishes the well-being of the children who are involved in a custody dispute and encourages their healthy growth.

## II. METHODOLOGY

This research paper will build upon the qualitative research approach that may be adopted into the local legal system to analyze and resolve the problem, taking into consideration the applicable legal standards, and

pertinent case laws. to the concerns that may develop in regard to this area of personal law. For executing research in the domain of child custody, current and pertinent domestic legislation, international case law decisions, and textbooks are utilized as primary sources while Journal articles, websites, and journal articles are used as secondary sources.

### III. LEGAL FRAMEWORK OF CHILD CUSTODY LAW IN SRI LANKA

In the context of custody, focusing on traditional Roman-Dutch law the father in his lifetime was granted the authority as the sole natural guardian of the children due to the fact that the mother didn't possess the necessary independent legal standing. "The term 'custody' means the legal right to control the actions of the child and to provide for his care and personal well-being" but here depending on the continuation or dissolution of a marriage affects who gets the custody of the children. (Benso,1989) Therefore in Sri Lanka, there are two main principles that govern how custody disputes between married individuals are resolved according to the Roman-Dutch law: first, the father is given preferential right for custody of the couple's minor children, and, in the event of termination of the marriage, second is that the spouse who is innocent is granted custody of the children (Dayarathna,2016). During this early particular period neither the legislature questioned the preferred rights of the father nor referred to the idea of the children's best interests since the civil procedure code states that the court is allowed to act as it deems "proper" in the circumstances.

Following the case of *Calitz v Calitz (1939 Ad 56)* which the court upheld the father's rights, *Ivaldy v. Ivaldy (1956) 57 NLR 568* determined the legal position according to Fernando J. that In spite of the fact that the father currently has the priority right to custody in this scenario, if the mother convinces the court that the father is not acting in the child's best interests or welfare, the court may overlook the father's preferential rights. The court referred to the same application in the cases of *Weragoda v. Weragoda (1961) 66NLR 83*, *Padma Fernando v. T.S. Fernando (1956)58 NLR 262*), *Kamalawathie v. De Silva (1961)64 NLR 252* disregarding the father's preferential rights while weighing the interests of both parties and taking into account the father's behavior and best interests of the child. Preferential rights don't have much sway in situations where a couple decides to end their matrimonial union since in Sri Lanka, the court's ultimate focus is on the child's best interests. Therefore, any judicial redress depended on the facts and evidence that the parties presented to the court, whose parent should be granted custody of the children taking into account the welfare of the minor (Goonsekere.S., 2002).

However, there is a flaw in this situation since, unlike other nations, Sri Lanka didn't set a standard to measure at least include the relevancy in the exercise of discretion. With regard to this point Due to the fault-based nature of the Sri Lankan marriage dissolution system, the courts were not willing to ignore either the spousal fault or the child's best interests, thus they took both into account when determining which parent should be granted custody (Scharenguivel, S. 2001). Other than decisions like *Madulawathie v. Wilpus (1967) 70 N.L.R.90*, where the ability to offer material comfort to the children was revealed regarding the custody arrangement, Sri Lankan courts, in contrast to the McCall guidelines in South Africa, did not place much emphasis on a parent's ability to guarantee the welfare of the child. Concerned with the welfare of the kids, unlike Sri Lanka, South Africa after the landmark *J v. ([1969] 1 All ER 788 c)* refer case preserved the youngster's sense of security. Up until that point, Sri Lanka failed to recognize the risks associated with removing a child from one environment and placing him in another but relating to the aforementioned case the court held a sole need in a custody dispute is that the child's sense of security is guaranteed; before making any modifications in the child's life in *Jeyarajan v. Jeyarajan (1999)1 Sri.L.R.113*).

In certain custody issues in Sri Lanka, the preferences of the children involved in the matter are taken into consideration. However, this is a result of an English Law principle, according to which a father would not have access to habeas corpus procedures once the kid reached the age of discretion in order to compel the child to return.

Even though sole custody with access to the non-custodial parent's rights is common in custody disputes, no information on joint custody is currently available, which is unfortunate because the court has the authority to act as it sees fit. Sri Lanka is left with no alternative other than to take action based on the evidence that the parties have submitted and that the judge in court has acquired. The majority of the time, judges encounter youngsters in their hearing rooms, and occasionally, these types of insufficient evidence won't be sufficient to offer fair justice in the case. Ultimately, it can be observed that the best interests of the child shall be of the utmost significance, even as stated in Sri Lanka's draft constitution, which integrates concept 78 while discussing custodial affairs in the nation in accordance with Sri Lanka's international commitments (Scharenguivel, S. 2001).

### IV. PARENTAL RIGHTS IN CHILD CUSTODY

Focusing on Parental rights over minors has a considerable impact on custody decisions across the entire Roman-Dutch judicial system. Due to the fact that the idea of

parental authority grants the natural guardian the independent ability to manage the minor's property, custody disputes do not specifically address this issue since they are more concerned with the child's upbringing and education. The control, care, and education of the child are addressed in custody in accordance with *Nalia v. Herath* (54 NLR 473) case in general terms, and because the parental responsibility for the minor is with the natural guardianship, it is not affected by the current legal custody.

In terms of general law, as the father is acknowledged as the children's natural guardian, he is the one who has the main obligation to upbringing the children of the marriage. For this cause, he is entitled to superior major rights to decide on the custody, control, parenting, and education of the kid while the marriage is still in effect. According to the South African case of *Caliz v. Calitz* ((1939 Ad 56), Tindall A.J stated that ‘ ‘ the court has no jurisdiction where no divorce or separation authorizing the separate home has been granted, to deprive the father of his custody’’. This emphasizes the father's dominant position in terms of crucial decisions, including those involving the children's religious, educational, and other medical choices (De Soysa, S. (1994). Additionally, it refers to the power and authority given to the court as the primary guardian of minors in exceptional circumstances involving the minors' safety, health, or morality while ensuring the welfare of the child. Most nations, including India, England, and South Africa, eliminate the presumption in favor of the father's custody and establish that mothers can also be granted custody of minor children because the welfare of the child is developed within the concept of parental rights as the only valid consideration in custody disputes. In contrast to earlier rulings, the majority of recent cases in Sri Lanka have seen courts deny fathers the right to custody when the mother is properly qualified to act as the child's guardian (*Weragoda v. Weragoda* (1961) 66NLR 83, *Padma Fernando v. T.S. Fernando* (1956)58 NLR 262), *Kamalawathie v. De Silva* (1961 64 N.L.R. 90).

According to the rule established by the court, a wife shared parental authority with her husband throughout his lifetime and might proclaim the rights against a third party, but she only succeeded as the child's natural guardian after his passing. This reflects the mother's inadequate rights, and the court also ruled that she needed an appointment to deal with a minor's property or take money from the child's debtor. Also When naming a guardian through a will or joint deed, the father can deny the mother the ability to represent the kid in court proceedings and take over custody of the child's possessions by designating himself. Even in the instance of tacit emancipation of a child, a mother's assent only counts when she takes on legal guardianship following the passing of the father, and in the event that there are conflicting views between the parents about the marriage of the minor, only the father's viewpoint matters. This blatantly demonstrates gender inequality, where the status of the male parent is superior to that of the female

parent. However, when considering the welfare of the child once again, a mother is crucial since "maternal deprivation" can result in long-term harm to children, especially young children. As a result, current Sri Lankan law, while acknowledging the preference rights of the father, should consider whether the child's welfare would be negatively impacted by the separation from the mother or not.

The preferred rights of the father in custody are typically unaffected by *de facto* separation, with the exception of cases when the separation is the result of a legally binding agreement to live apart. Since the relevant custody agreements are contained in the notarial document related to the aforementioned situation, both parties are legally obligated to abide by them. However, under the ruling in the *Webber v. Webber* (854 So. 2d 13 ) case, the father has the right to choose the location of the marital home but is not permitted to bring the children to live there. The custodial rights may also be terminated for any further unreasonable behavior.

According to Roman-Dutch law, when a marriage is dissolved, the father's preferential rights are automatically eliminated, and the welfare of the child is the only factor that should be taken into account when determining custody arrangements. In such cases, the issue of custody can be resolved by mutual agreement. Normally, the family law courts would have the authority in this situation, but under English law, a father could file a habeas corpus petition challenging the lower court's decision in cases where the custody issue was uncontested in the matrimonial action and the lower court had not yet issued a custody order to the court of appeal. It is important for family law courts to have the sole authority to ensure the welfare of the child, but since the decision of custody depends on whether the marriage continues, appellate courts should not exercise this while the matrimonial action is ongoing. In this situation, an interim order can be obtained from the same court to make the final decision for the matrimonial action.

In the event that one parent is granted custody, the other parent has the right to visitation, and even the custodial parent cannot object to it unless the court orders otherwise. Regarding the other related rights that pertain to parenting, parents have the power to name guardians for the minor children's property, manage the assets of the minor, receive and invest the minor's money, and choose the minor's religious upbringing. Unfortunately, there is still a disparity in parental rights between mothers and fathers in this situation.

#### V. ‘ ‘THE BEST INTEREST OF THE CHILD’ ’ AS THE PARAMOUNT CONSIDERATION

Referring to the United Nations Convention states that Article 3 requires that the child's best interests be taken into account when making choices that have an impact on the child ((CRC, 1989). Article 9 states that every child has the

right to live with their parents unless doing so would be detrimental to them, and it emphasizes that this right includes the right to have contact with both parents. While Article 18 of the convention outlines the shared parental responsibilities for the kid, Article 10 deals with family reunification. So it is obvious that the convention was created with the child's best interests in mind. Additionally, Article 5(b) of the Convention on the Elimination of All Forms of Discrimination Against Women refers to the idea of the best interest of the child, and Article 23 of the International Covenant on Civil and Political Rights states that Provisions shall be made in cases of the dissolution of marriage regarding the custody of the child taking the best interest of the child into consideration. Therefore, this underlines the concept of "best interest of the child" referring to the children's legal rights *vis a vis* to the parents(Martinez, G. J. (1982).

In the case of *Rea v. Rea* (195 Or. 252, 245 P.2d 884 (1952) Chief Justice Brand attempted to explain the term "best interest of the child" and quoted " A wise appraisal of the character, fitness, emotional stability, affection, hostility, or motive, of the parties to a contested divorce case, who are competing for the custody of a child, or a like appraisal of the inner attitude of the child itself, requires more than can generally be made to appear on the printed page" (Banta, R. T. (1968)). However, The United Nations Convention on the Rights of the Child defines the best interest of the child as being determined by the circumstances or the situations of the child.

From a South Asian perspective, this idea originated in the colonial legal tradition and was eventually established as a child-centered standard during the post-independent era. Due to the colonial British administration being based on English law and the applicable law to the country, the concept entered Sri Lanka through the influential combination of Roman-Dutch law and English law. Due to the fact that in early English legal cases, the father's parental rights were given the most attention since the best interests of the child were recognized in connection to those rights, which were wholly developed by the court without any other legal intervention. The landmark decision of *Calitz v. Calitz*((1939 Ad 56)establishes that the court has the power to intervene in parental rights on the grounds that doing so will protect children's lives, morality, and health, all of which demonstrate that the child's best interest comes first when considering parental rights. However, as a new trend at the time in Sri Lanka, the mother's custodial rights and the paramouncy principles of best interest have taken precedence over the fathers' preminent rights in cases where the court determines that the mother is in the best interest and she is qualified for the custodial rights following the case of *Fernando v. Fernando*((1956)58 NLR 262) quoted "there is a rule commended by law and ordinary human experience that the custody of very young children ought ordinarily to be given to the mother". Regardless of whether there is a legal separation or divorce,

recent instances have shown that the child's best interests are prioritized over the parents' preferences when there is a disagreement over a marriage.( goonasekara S, 1994)

Additionally, with regard to the child custody issue, the court observes the concept of "age of discretion" in reference to the wishes of a boy age 14, and a girl who is in the age of 16 but regrettably, there are no proper guidelines in place to address the issue. By Article 27(2) the Sri Lankan constitution mentions the progress of women and children through the directive concept of state policy proclaiming to promote the best interest, same as the constitutions of Bangladesh and Pakistan quoting that " promote with special care the interest of children and youth, so as to ensure their full development..."

In some situations, the parents may not always be the ones seeking custody; instead, a third party may be involved. In this situation, the court also takes into account the best interest principle and gives custody while taking into account all the evidence. (Banta, R. T. (1968) Most of the time, a stranger cannot obtain custody of a child over the biological parents unless they can demonstrate that they are unfit to do so, and *Fisher. V. Fisher* (133 Or. 318, 289 P. 1062 (1930) quoted that " against third persons, the natural rights of the parents prevail unless it is clearly shown that the welfare of the child demands that it be taken from them". Therefore, it is evident that the best interests of the children are the paramount priority here, regardless of the circumstances.

## VI. DISCUSSION

After thoroughly comprehending the ideas of parental rights and the best interests of the child, it is crucial to maintain a suitable balance between the two notions In order to reach the desired result. Here, it can be seen that the court adopts the stance that, while focusing on natural parental rights, the issue pertaining to the best interests of the child must be decided within the parameters of parental rights. Simply put, parental rights shouldn't be restricted merely because the notion of best interest is given priority because it would be unfair. According to the researchers' widely accepted assessment, the rights of the father will prevail in this case if the petitioner seeking to oust those rights makes a strong enough argument and the consideration relating to the child's best interests does not supersede it. (goonasekara S, 1994)

The access privileges that parents have with respect to non-custodial parents help to clarify this point. Since parental authority is important, it is also claimed that non-custodial parents have the right to reasonable access to their children during a custody dispute. In this situation, the mother is given legal custody; nevertheless, the father retains access rights to the kid as the child's natural guardian and when the father is granted custody, the mother may continue to access the child on the grounds that she shares parental authority. This demonstrates that even though one parent was granted custody under the best interests analysis, the

parental rights balance still favors the non-custodial parent. On the other hand, in this situation, if the custodial parent didn't defend the best interest or his or her parenting authority in a good manner again for the best interest, the parental rights might be terminated considering the same notion. In both of these cases, the rights and welfare of the parties are balanced. Unless there is a significant risk that the children's interests will be materially damaged, natural relationships should not be wholly dismissed and rejected.

Similar events occur even in cases of *de facto* separation or matrimonial litigation due to allowing the other parent to have reasonable access to the child because the parental role of legal guardian continues even after custody has been granted. It also safeguards parental rights while weighing the child's best interests.

The concept of best interest serves as the foundation for parental rights with regard to children from non-marital relationships. Kandyan law, one of the indigenous systems of law in the nation, also explains that those children may be recognized as having legal rights belonging to their father's family. The mother would be the child's only guardian in this situation, even if the law recognizes the position of both parents. When there are valid grounds to deny the mother's parental right, the biological father may be granted custody in this scenario. However, the notion of the best interest is asserted on the grounds that he maintains contact with the kid, and balances his parental rights.

It is obvious that Sri Lanka recognizes the right to conscience and religion in accordance with Article 10 of the constitution and on the other hand here there is a parental right that may be identified as the ability to regulate religious upbringing, creating tension within the system. In this case, the notion of the kid's best interests emerges as a reference to the importance of age and maturity. It is explained that this concept may be put into practice after the child has reached the necessary level of maturity to recognize his or her own rights. However, this makes clear that in Sri Lankan law, the notion of the best interests of the child goes hand in hand with parental rights.

notably different from the other concerns, due to the fact that it involves children, Today's issue is extremely delicate, and even the legal system should exercise extreme caution when dealing with it. There is a significant risk that children may have conduct disorders, delinquency, impulsive behavior, and mental anguish as a result of dealing with this situation. Therefore, it's crucial to act in the child's best interests while simultaneously taking parental rights into account (Ali J, 2021). Furthermore, it should be highlighted that striking this equilibrium Some countries encourage shared parenting or joint custody, which is not generally mentioned in Sri Lanka, where both parents participate in decision-making and enjoy a large amount of parenting time. As long as it serves the child's best interests, this strategy acknowledges the significance of having healthy connections with both parents. Australia made significant

changes to the Family Law Act 1975's parenting law provisions in 2006 by establishing equal shared parental responsibility for parents and stating that, if it is safe for the child, equal involvement by both parents in the child's life following a separation is in the child's best interest. In the case of *Kastan v. Kastan* (1985)(3)SA235(C), the South African Court inserted shared custody provisions that the parties had agreed upon into the court order (Dayaratne K.N.T,2016)

Ultimately, it takes careful analysis of the particular circumstances of each case to strike a balance between the best interests of the child and parental rights. The objective is to establish custody agreements that place a high priority on the child's welfare while simultaneously acknowledging and honoring the rights and obligations of both parents.

## VII. CONCLUSION

The concepts of parental rights and best interest quickly spring to mind when discussing a country's child custody laws, and in order to create an efficient legal system both of these concepts must maintain a suitable balance with one another. The majority of jurisdictions across the world adhere to these principles as their main focus, and they occasionally add additional standards to increase efficiency. Therefore, it's vital to build them in a method that is acceptable to us since the court has the authority to impose comparable trends even in Sri Lanka. Since children are the focus of this discussion, sensitive measures should be required to safeguard them as required by national legislation.

## VIII. RECOMMENDATION

The fundamental goal of Sri Lanka's custody rules, which play a crucial part in achieving this goal, is to strike a careful balance between the best interests of the child and parental rights. Referring to the suggestions to strengthen the efficacy of Sri Lanka's child custody laws, maintaining a fair and balanced approach that emphasizes the kid's welfare while respecting parental rights and the necessary guidelines to evaluate the child's best interests is essential. *French v. French* (1971 (4) SA 298 ): The Foreign Case The sense of security, the fitness of the custodial parent, the financial consideration for the child's wellbeing, and the child's desires are the four criteria used to evaluate what is in the child's best interest (Clark, B. (1992). Additionally, the Washington Court added kid choice, age, sex, health, and parental fitness as factors in determining what was in the best interest (Zwink, W. E. (1970). Therefore in Sri Lanka, suitable guidelines that apply to all current scenarios must be developed.

Sri Lanka should enhance family advocacy or a court welfare officer for the independent presentation of the child, similar to the European jurisdiction. Due to this viewpoint, courts can determine what is genuinely best for children

without falling prey to the manipulation of lawyers. The Savithri Goonasekara analysis claims that Sri Lankan courts lack the authority to overturn previous legislation and that, in this situation, the country should put greater emphasis on interpreting recent rulings. Since judges have discretion when deciding on custody arrangements, taking into account the particular situation, issues like discriminatory unequal rights granted to both parents regarding custody should be addressed, and both parents should have equal rights over their children even in the case of custody.

Additionally, in order to avoid misunderstanding, the district court should have sole custody of all custody matters, and it should be made clear under what circumstances anybody may request a writ of habeas corpus from the higher court. As a last idea, shared parenting can be legally promoted in Sri Lanka, similar to that in South Africa. If it is in the children's best interests, this may strengthen parent-child connections and guarantee that youngsters gain from having both parents involved.

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