

custody and guardianship

Presentation on

Best interest of the child

Individual interest versus institutional interest

- . **Sri Lanka** is a signatory to the crc and ratified the same in the Parliament I wish to be mindful of the provisions of the same.
- **I wish to advise myself of article 3 of the United Nations convention on the Rights of the Child.** Article 3 states as follows:
  - **1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.**
  - 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
  - 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children **shall conform with the standards established by competent authorities**, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.
- parties are advised to be cautious, **the Court will consider the best interest of child and not the benefit or the interest of the adult parties**

Kiran V. Bhaskar vs. State of Haryana and Ors. (31.08.2021 - PHHC) :  
MANU/PH/0693/2021

- Parminder Kaur Brar Vs. State of Punjab and others' decided on 17.12.2020 this Court, while noticing that the petition for issuance of habeas corpus for custody of child or repatriation of child in case of inter country child removal involves difficult questions, observed as under:-
- Vivek Singh Vs. Romani Singh: MANU/SC/0156/2017 : 2017 (1) RCR (Civil) 1063, in cases of this nature while a child, who ideally needs the company of both the parents, feels tormented because of the strained relations between the parents, it becomes, at times, a difficult choice for the court to decide as to whom the custody should be given
- **. The children are not mere chattels: nor are they mere play-things for their parents** as observed by Hon'ble Supreme Court in Rosy Jacob Vs. Jacob A. Chakramakkal: MANU/SC/0260/1973 : (1973) 1 SCC 840 and in deciding the question of their custody paramount consideration is their welfare. However, at times the prevailing circumstances are so puzzling that it becomes difficult to weigh the conflicting parameters and decide on which side the balance tilts."

# provision cannot supersede the paramount consideration

- 9. Section 6 of the Hindu Minority and Guardianship Act, 1956 constitutes the father as the natural guardian of a minor son. **But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. As the matters are presented to us today, the boy, from his own point of view, ought to be in the custody of the mother.**
- 10..... The boy is a British citizen, having been born in England, and he holds a British passport. It cannot be controverted that in these circumstances, the English Court had jurisdiction to decide the question of his custody. **The modern theory of Conflict of Laws recognizes and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result in encouraging forum -shopping.** Ordinarily, jurisdiction must follow upon functional lines.
- That is to say, for example, that **in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the Courts of that state to assume jurisdiction to enforce obligations which were incurred therein by the spouses**

## Lahari Sakhamuri Vs. Sobhan Kadali: MANU/SC/0382/2019 : 2019(7) SCC 311

- :-
- " The expression "best interest of child" which is always kept to be of paramount consideration is indeed wide in its connotation and it cannot remain the love and care of the primary care giver, i.e., the mother in case of the infant or the child who is only a few years old.
- The definition of "best interest of the child" is envisaged in Section 2(9) of the Juvenile Justice (Care & Protection) Act, 2015, as to mean "the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identify, social well-being and physical, emotional and intellectual development."49.
- **The crucial factors which have to be kept in mind by the Courts for gauging the welfare of the children equally for the parent's can be inter alia, delineated, such as**
- **(1) maturity and judgment;**
- **(2) mental stability; (3) ability to provide access to schools; (4) moral character; (5) ability to provide continuing involvement in the community; (6) financial sufficiency and last but not the least the factors involving relationship with the child, as opposed to characteristics of the parent as an individual.**
- Kiran V. Bhaskar vs. State of Haryana and Ors. (31.08.2021 - PHHC) : MANU/PH/0693/2021

# Civil Appeal No. 3559 of 2020 titled as Smriti Madan Kansagra Vs. Perry Kansagra decided on 28.10.2020

- "11.3. To decide the issue of the best interest of the child, the Court would take into consideration various factors, such as
  - age of the child;
  - nationality of the child;
  - whether the child is of an intelligible age and capable of making an intelligent preference;
  - the environment and living conditions available for the holistic growth and development of the child;
  - financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor;
  - and future prospects of the child."
- Kiran V. Bhaskar vs. State of Haryana and Ors. (31.08.2021 - PHHC) :  
MANU/PH/0693/2021

- . The welfare of the child is not to be measured by money only nor merely physical comfort. **The word 'welfare' must be taken in its widest sense.** The moral or religious welfare of the child must be considered as well as its physical wellbeing. Nor can the tie of affection be disregarded. (Per Lindley, L.J. in McGrath, (1893) 1 Ch 143).
- **Welfare is an all-encompassing word.** It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained.
- However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents. (Per Hardy Boys, J. in Walker Vs. Walker & Harrison (1981) New Zealand Recent Law 257.)

- In such a case the court need not resort to an elaborate inquiry into the merits of the paramount welfare of the child but leave that inquiry to the foreign court by directing return of the child.
- Be it noted that in exceptional cases the court can still refuse to issue direction to return the child to the native state and more particularly in spite of a pre-existing order of the foreign court in that behalf, if it is satisfied that the **child's return may expose him to a grave risk of harm.**
- This means that the courts in India, within whose jurisdiction the minor has been brought must "ordinarily" consider the question on merits, bearing in mind the welfare of the child as of paramount importance whilst reckoning the preexisting order of the foreign court if any as only one of the factors and not get fixated therewith.
- In either situation-be it a summary inquiry or an elaborate inquiry-the welfare of the child is of paramount consideration.
- Thus, while examining the issue the courts in India are free to decline the relief of return of the child brought within its jurisdiction, **if it is satisfied that the child is now settled in its new environment or if it would expose the child to physical or psychological harm or otherwise place the child in an intolerable position or if the child is quite mature and objects to its return.** We are in respectful agreement with the aforementioned exposition.
- Kiran V. Bhaskar vs. State of Haryana and Ors. (31.08.2021 - PHHC) : MANU/PH/0693/2021



In Criminal Appeal No. 127 of 2020 titled Yashita Sahu Vs. State of Rajasthan and others decided on 20.01.2020 Hon'ble Supreme Court has observed as under:-

Kiran V. Bhaskar vs. State of Haryana and Ors. (31.08.2021 - PHHC) : MANU/PH/0693/2021

- 18. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, our experience shows that more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to the custody of the child. The court must therefore be very vary of what is said by each of the spouses.
- 19. **A child, especially a child of tender years requires the love, affection, company, protection of both parents.** This is not only the requirement of the child but is his/her basic human right
- Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents
- **. A child is not an inanimate object which can be tossed from one parent to the other.**
- **Every separation, every reunion may have a traumatic and psychosomatic impact on the child.**
- Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents.
- if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents.
- **It is only in extreme circumstances that one parent should be denied contact with the child.** Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child.
- Courts dealing with the custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.

# Kiran V. Bhaskar vs. State of Haryana and Ors. (31.08.2021 - PHHC) : MANU/PH/0693/2021

- Prateek Gupta Vs. Shilpi Gupta and others: MANU/SC/1537/2017 : (2018) 2 SCC 209 following its earlier judgment in Nithya Anand Raghavan Vs. State of NCT of Delhi MANU/SC/0762/2017 : (2017) 8 SCC 454 Hon'ble Supreme Court held as follows:-
- "32. **The gravamen of the judicial enunciation on the issue of repatriation of a child removed from its native country** is clearly founded on the predominant imperative of its overall well-being, the principle of comity of courts, and the doctrines of "intimate contact and closest concern" notwithstanding
- **Though the principle of comity of courts and the aforementioned doctrines qua a foreign court from the territory of which a child is removed are factors which deserve notice in deciding the issue of custody and repatriation of the child, it is no longer res integra that the ever overriding determinant would be the welfare and interest of the child.**
- In other words, the invocation of these principles/doctrines has to be judged on the touchstone of myriad attendant facts and circumstances of each case, the ultimate live concern being the welfare of the child, other factors being acknowledgeably subservient thereto.
- Though in the process of adjudication of the issue of repatriation, a court can elect to adopt a summary enquiry and order immediate restoration of the child to its native country, **if the applicant/parent is prompt and alert in his/her initiative and the existing circumstances ex facie justify such course again in the overwhelming exigency of the welfare of the child**, such a course could be approvable in law, if an effortless discernment of the relevant factors testify irreversible, adverse and prejudicial impact on its physical, mental, psychological, social, cultural existence, thus exposing it to visible, continuing and irreparable detrimental and nihilistic attentuations.
- On the other hand, if the **applicant/parent is slack and there is a considerable time lag between the removal of the child from the native country** and the steps taken for its repatriation thereto, the court would prefer an elaborate enquiry into all relevant aspects bearing on the child, as meanwhile with the passage of time, it expectedly had grown roots in the country and its characteristic milieu, thus casting its influence on the process of its grooming in its fold."

Kiran V. vs. State of Haryana and Ors. (31.08.2021 - PHHC) : MANU/PH/0693/2021

- 22. In addition to 'Visitation Rights', 'Contact rights' are also important for development of the child specially in cases where both parents live in different states or countries.
- The **concept of contact rights** in the modern age would be contact by telephone, email or in fact, we feel the best system of contact, if available between the parties should be video calling.
- With the increasing availability of internet, video calling is now very common and courts dealing with the issue of custody of children must ensure that the parent who is denied custody of the child should be able to talk to her/his child as often as possible.
- Unless there are special circumstances to take a different view, the parent who is denied custody of the child should have the right to talk to his/her child for 5-10 minutes everyday.
- This will help in maintaining and improving the bond between the child and the parent who is denied custody.
- If that bond is maintained the child will have no difficulty in moving from one home to another during vacations or holidays.
- **The purpose of this is, if we cannot provide one happy home with two parents to the child then let the child have the benefit of two happy homes with one parent each."**

Kiran V. Bhaskar vs. State of Haryana and Ors. (31.08.2021 - PHHC) :  
MANU/PH/0693/2021

- 26. The consistent view of this court is that if the child has been brought within India, the Courts in India may conduct (a) summary inquiry or (b) an elaborate inquiry on the question of custody.
- In the case of a **summary inquiry**, the Court may deem it fit to order return of the child to the country from where he/she was removed unless such return is shown to be harmful to the child.
- In other words, even in the matter of a summary inquiry, it is open to the Court to decline the relief of return of the child to the country from where he/she was removed irrespective of a preexisting order of return of the child by a foreign Court.
- In an **elaborate inquiry**, the Court is obliged to examine the merits as to where the paramount interests and welfare of the child lay and reckon the fact of a preexisting order of the foreign Court for return of the child as only one of the circumstances.
- **In either case, the crucial question to be considered by the Court (in the country to which the child is removed) is to answer the issue according to the child's welfare.**
- That has to be done bearing in mind the totality of facts and circumstances of each case independently."

# Nithya Anand Raghavan Vs. State of NCT of Delhi (SC): MANU/SC/0762/2017 : 2017(3) R.C.R.(Civil) 798

- "24..... **The Court has noted that India is not yet a signatory to the Hague Convention of 1980 on "Civil Aspects of International Child Abduction".**
- As regards the non-Convention countries, the law is that the court in the country to which the child has been removed must consider the question on merits bearing the welfare of the child as of paramount importance and reckon the order of the foreign court as only a factor to be taken into consideration, unless the court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare.
- In exercise of summary jurisdiction, the court must be satisfied and of the opinion that the proceeding instituted before it was in close proximity and filed promptly after the child was removed from his/her native state and brought within its territorial jurisdiction, **the child has not gained roots here** and further that **it will be in the child's welfare to return to his native state** because of the **difference in language spoken or social customs and contacts to which he/she has been accustomed or such other tangible reasons.**

W.P.(Crl.) 374/2017 and Crl. M.A. No. 2007/2017

Decided On: 16.11.2017

Appellants: **K.G.**

**Vs.**

Respondent: **State of Delhi and Ors.**

**Hon'ble**

- Criminal - Habeas Corpus - Production of person - Present writ petition is filed seeking issuance of a writ of Habeas Corpus for production of his minor daughter - Whether petitioner has made out a case for grant of writ of habeas corpus - Held, best welfare of the child would lie in living with both his/her parents - Parents should contribute to the upbringing of child in all spheres of life - Child should receive emotional, social, physical and material support - In a vitiated marriage, there is bound to be impairment of some of the inputs which are essential for the best interest of child - **Court should endeavor to arrive at an arrangement to achieve the best interest of child** - Respondent is directed to return to USA with the minor child - Disposed of. [144]

Lahari Sakhamuri vs. Sobhan Kodali (15.03.2019 - SC) : MANU/SC/0382/2019  
Section 2(9) of Juvenile Justice (Care & Protection) Act, 2015

- Definition of "best interest of the child" was envisaged in Section 2(9) of Juvenile Justice (Care & Protection) Act, 2015, as to mean "basis for any decision taken regarding child, to ensure
- 1. fulfilment of his basic rights and needs,
- 2. identity,
- 3. social well-being
- 4. physical, emotional and intellectual development".
- Expression "best interest of child" which was always kept to be of paramount consideration was indeed **wide in its connotation** and it could not remain love and care of primary care giver, i.e., mother in case of infant or child who was only a few years old.

- The Appellant filed a Guardianship Petition which was rejected by the Family Court Under **Order VII Rule 11 of the Code of Civil Procedure** on the ground that the parties are nationals of the United States of America and the U.S. courts have intimate contact with the matter.
- It was observed the marriage between the parties took place in U.S.A. Out of the wedlock, one child was born in 2012 in U.S.A. and the second child was born in India. The Appellant came to India, just before the delivery of the said child. The High Court has affirmed the said order.
- 3.. We must remind ourselves of the settled legal position that the **concept of forum convenience** has no place in wardship jurisdiction. Further, the efficacy of the **principle of comity of courts** as applicable to India in respect of child custody matters has been succinctly delineated in several decisions of this Court. ...
- The invocation of **first strike principle** as a decisive factor, in our opinion, would undermine and whittle down the wholesome principle of the duty of the Court having jurisdiction to consider the best interests and welfare of the child, which is of paramount importance.
- If the Court is convinced in that regard, the fact that there is already an order passed by a foreign Court in existence may not be so significant as it must yield to the welfare of the child. That is only one of the factors to be taken into consideration.
- The interests and welfare of the child are of paramount consideration.



# Jasmeet Kaur vs. Navtej Singh (20.02.2018 - SC) : MANU/SC/0551/2018

- The principle of comity of courts as observed in Dhanwanti Joshi case [MANU/SC/0810/1998 : 1998(1) SCC 112], in relation to **non-convention countries** is that the Court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign Court as only a factor to be taken into consideration.
- While considering that aspect, the Court may reckon the fact that **the child was abducted from his or her country of habitual residence** but the Court's overriding consideration must be the child's welfare.
- **. In view of above, principle of comity of courts or principle of forum convenience alone cannot determine the threshold bar of jurisdiction.**
- Paramount consideration is the best interest of child. The same cannot be subject-matter of final determination in proceedings Under Order VII Rule 11 of the Code of Civil Procedure.

# Perry Kansagra vs. Smriti Madan Kansagra (15.02.2019 - SC) : MANU/SC/0220/2019

- Case Note:
- Family - Review jurisdiction - Report of Counsellor - Reliance thereto - Rule 8 of Family Court Rules; Section 6 of Family Courts Act, 1984 - Present appeal challenged final judgment passed by High Court allowing Review Petition preferred by Respondent by exercising its review jurisdiction - Whether High Court was justified in exercising review jurisdiction and setting aside earlier judgment –
- Whether High Court was correct in holding that, reports of Mediator and Counsellor in present case were part of confidential proceedings and no party could be permitted to use same in any Court proceedings or could place any reliance on such reports.

# Perry Kansagra vs. Smriti Madan Kansagra (15.02.2019 - SC) : MANU/SC/0220/2019

- Facts: Process of mediation was founded on element of confidentiality. Qualitatively, Mediation or Conciliation stand on a completely different footing as against regular adjudicatory processes. Instead of an adversarial stand in adjudicatory proceedings, idea of mediation was to resolve dispute at a level which was amicable rather than adversarial. In process, parties might make statements which they otherwise they would not have made while the matter was pending adjudication before a court of law. Such statements which were essentially made in order to see if there could be a settlement, ought not to be used against maker of such statements in case at a later point attempts at mediation completely fail
- 3. Complete adherence to confidentiality would absolutely be correct in normal matters where the role of the court is purely of an adjudicator. But such an approach might not essentially be conducive, when Court was called upon and expected to discharge its role in capacity as *parens patriae* and was concerned with welfare of a child. All custody and guardianship issues were resolved on touchstone or parameter of "best interest of child".
- In custody and guardianship disputes between two parties, a minor child was in a peculiar situation. At times, both sides were busy fighting legal battles and court was called upon in *parens patriae* to decide what was in best interest of child. In order to reach correct conclusion,
- court might interview child or might depend upon analysis of an expert who might spend some more time with child and gauge upbringing, personality, desires or mental frame of child and render assistance to the court. Element of confidentiality which was otherwise basic foundation of mediation/conciliation, to a certain extent, was departed from in Sub-rule (viii) of Rule 8 of Rules. .
- If reports of Counsellor touching upon home environment of parties concerned, their personalities and their relationship with their child or children would assist court in determining custody or guardianship issues, any technicality ought not to stand in way. Sub-rule (viii) of Rule 8 sought to achieve that purpose and made such material available for assessment of court. [26]

# Prateek Gupta vs. Shilpi Gupta and Ors. (06.12.2017 - SC) : MANU/SC/1537/2017

- Family - Custody - Validity thereof - Appellant was directed to immediately return child to custody and control of Respondent - Appellant filed petition before High Court seeking decree for restitution of conjugal rights between parties and for declaration that he was sole and permanent guardian of child - Present appeal filed against order whereby Appellant was directed to hand over custody of child to Respondent - Whether order of High Court directing Appellant to hand over custody of child to Respondent was maintainable Facts:
- Foreign Court being satisfied that it had proper jurisdiction over parties to the action before it and also being of the opinion that it was in the best interest of the child granted sole legal and physical custody of the child to the Respondent pending further orders of the Court.
- The Appellant was directed to immediately return the child to the custody and control of the Respondent. Appellant filed petition before High Court seeking a decree for restitution of conjugal rights between the parties and for a declaration that he was the sole and permanent guardian of the child. He also instituted a suit praying for a decree to adjudge the proceedings initiated by the Respondent in Foreign Court to be false, malicious, vexatious, oppressive and being without jurisdiction and also to declare the order with regard to the return of the child to the custody of the Respondent to be also null and void and not binding on him
- Present appeal filed against order whereby Appellant was directed to hand over custody of the child to Respondent. Held, while allowing the appeal: (i) Child had remained in the custody of the Appellant. To reiterate, no material had been brought on record, persuasive and convincing enough, to take a view that immediate restoration of the custody of the child to the Respondent in the native country was obligatorily called for in its interest and welfare.
- The High Court did not at all apply itself to examine the facts and circumstances and the other materials on record bearing on the issue of welfare of the child which were unmistakably of paramount significance and instead seemed to have been impelled by the principle of comity of courts and the doctrines of intimate contact and closest concern de hors thereto
- . The Appellant being the biological father of child, his custody of the child could by no means in law be construed as illegal or unlawful drawing the invocation of a superior Court's jurisdiction to issue a writ in the nature of habeas corpus. Dislodgment of the child as directed by the impugned decision would be harmful to it. Having regard to the nature of the proceedings before Foreign Court, the intervening developments thereafter and the prevailing state of affairs, it was held that the child, till he attains majority, ought to continue in the custody, charge and care of the Appellant, subject to any order to the contrary, if passed by a Court of competent jurisdiction in an appropriate proceeding deciding the issue of its custody in accordance with law. Order of High Court was set aside. [38]Disposition:

# V. Ravi Chandran vs. Union of India (UOI) and Ors. (17.11.2009 - SC) : MANU/SC/1826/2009

- Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Anr. MANU/SC/0689/1986 : (1987) 1 SCC 42 this Court held that it was the duty of courts in all countries to see that a parent doing wrong by removing children out of the country does not gain any advantage by his or her wrongdoing
- 9. In Re: H. (infants) (1966) 1 All ER 886 the Court of Appeal in England had occasion to consider a somewhat similar question. **That case concerned the abduction to England of two minor boys who were American citizens.** The father was a natural- born American citizen and the mother, though of Scottish origin, had been resident for 20 years in the United States of America. They were divorced in 1953 by a decree in Mexico, which embodied provisions entrusting the custody of the two boys to the mother with liberal access to the father. By an amendment made in that order in December 1964, a provision was incorporated that the boys should reside at all times in the State of New York and should at all times be under the control and jurisdiction of the State of New York.
- In March 1965, the mother removed the boys to England, without having obtained the approval of the New York court, and without having consulted the father; she purchased a house in England with the intention of remaining there permanently and of cutting off all contacts with the father. She ignored an order made in June 1965, by the Supreme Court of New York State to return the boys there.
- On a motion on notice given by the father in the Chancery Division of the Court in England, the trial Judge Cross, J. directed that since the children were American children and the American court was the proper court to decide the issue of custody, and **as it was the duty of courts in all countries to see that a parent doing wrong by removing children out of their country did not gain any advantage by his or her wrongdoing, the court without going into the merits of the question as to where and with whom the children should live, would order that the children should go back to America**

# V. Ravi Chandran vs. Union of India (UOI) and Ors. (17.11.2009 - SC) : MANU/SC/1826/2009

- , Willmer, L.J. while dismissing the appeal extracted with approval the following passage from the **judgment of Cross, J. [(1965) 3 All ER at p. 912.** (Ed. : Source of the second quoted para could not be traced.):
- **The sudden and unauthorised removal of children from one country to another is far too frequent nowadays, and as it seems to me, it is the duty of all courts in all countries to do all they can to ensure that the wrongdoer does not gain an advantage by his wrongdoing.**
- The courts in all countries ought, as I see it, to be careful not to do anything to encourage this tendency.
- **This substitution of self-help for due process of law in this field can only harm the interests of wards generally, and a Judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child.**
- With respect we are in complete agreement with the aforesaid enunciation of the principles of law to be applied by the courts in situations such as this.

- L. M. D. de Silva, K.C. (with him Dodwell Gunawardana and A. H. C. de Silva), for the respondents, was called upon to begin, in view of the Magistrate's recommendation in favour of the petitioner.-The child has been in the custody of the respondents from her earliest infancy. **There are no circumstances now needing any change, and the only ground for the present application is the assertion of a parental right.**
- It is, however, the welfare of the child which is the paramount consideration. If a parent surrenders his child to a foster-parent, it is necessary for the former to show strong ground for the existing relationship to be disturbed.
- Mathieson v. Napier [(1918) 119 Law Time., 18.]' is exactly in point.
- See also Rex v. Walker et al[ (1912) 28 T. L. R. 342.]. Thain v. Taylor [(1926) 135 Law Times 99.] can be distinguished because in that case there had not been and surrender. The ordinary rights of a father, apart from any question of surrender, are considered in an Menika v. Paynter[(1932) 34 N.L.R. 127]
- **As to how far the wishes of the child may be consulted see The Queen v. Gyngall [L. R. (1893) 2 Q. B. 232 at p. 250]' and Gooneratnayake v. Clayton[(1929).11 N.L.R. 132]**
- No good ground has been shown by the petitioner why the existing state of things should be disturbed.

# Samarasinghe vs. Simon et al. (11.12.1941 - SLSC) : LEX/SLSC/0008/1941

- N. E. Weerasooria, K.C. (with him E. F. N. Gratiaen and C. J. Ranatunge), for the petitioner.-
- Parental rights and liabilities, whether in English law or Roman-Dutch law, cannot be irrevocably surrendered or transferred-Vol. I. of Encyclopaedia of the Laws of England (3rd ed.), p. 166;
- Humphrys v. Polak 7[L. R. (1901) 2 K. B. 385]; Besant v. Narayaniah[(1914) 30 T.L. R..560] Lee's Introduction to Roman-Dutch law (3rd ed.), p. 42.
- . The two homes offered are equal. but ours has the additional advantage..tl1.at the child would have the company of her brother and sisters.
- Thain v. Taylor (supra) is more in point.
- regard to the rights and duties of a father in respect of his child, see In re Agar-Ellis [(1883) 53 L. J. Ch. 10 al p. 18.].
- .



- in cases of parental separation or divorce "best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care";
- "best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm"); § 26.10.100