1955 *Present:* **Fernando A.J.**

IN RE EVELYN WARNAKULASURIYA

Habeas Corpus *Petition No. 424—M. C. Hatton*

Habeas Corpus—*Custody of child—Parent's right thereto—Factors for consideration—Adoption of Children Ordinance, 1941—Children and Young Persons Ordinance of 1939, ss. 31, 35.*

Petitioner claimed the custody of her daughter (1st respondent) aged 15. The 2nd respondent, the Mother Superior of a Convent, claimed no right to custody, but her position was that the girl was placed at the Convent by her father in order to prevent contact between the girl and the petitioner and that the girl herself wished to remain at the Convent.

Held, that the child's own wishes were by reason of her age and education worthy of consideration and that the Court should be guided by the test whether a change in the *status quo* would be prejudicial to the interests of the child. In such a case the question of registration under the Adoption of Children Ordinance did not arise. Moreover, sections 34 and 35 of the Children and Young Persons Ordinance recognized that the parent's right to custody was not absolute and enabled a Court to deprive a parent of this right if, for reasons specified in those sections, the parent was unfit to exercise care and guardianship over the child.

APPLICATION for a writ of *habeas corpus*.

D. S. Jayawickreme, Q.C. with *K. C. de Silva* for the petitioner.

J. A. L. Cooray for the respondents.

Cur. adv. vult.

January 3, 1955. FERNANDO A.J.—

In this application, the petitioner claims the custody of her daughter Evelyn (1st respondent) who is now 15 years of age. The 2nd respondent, the Mother Superior of St. Gabriel's Convent, Hatton, claims no right to custody, but her position is that Evelyn was placed in the Convent by her father in order to prevent contact between Evelyn and the petitioner and that the girl herself wishes to remain at the Convent. I have not therefore to examine competing claims to the custody of Evelyn but only to consider whether the petitioner's lawful right to the custody of her daughter is to be overridden in favour of Evelyn's wishes.

The evidence *of the petitioner* establishes certain facts which I will assume to be correct :—

(1) Evelyn, the eldest child of the petitioner and her husband Francis Warnakulasuriya, was born on January 1, 1940.

(2) Warnakulasuriya went abroad on war service about 1941 and returned only in 1945.

(3) In 1943, Evelyn was " handed over " to the Moratuwa Convent *at the request of Warnakulasuriya.*

(4) A second child was born to the petitioner in 1946 : Warnakulasuriya denied paternity of that child and filed divorce proceedings, citing one Paulu Fernando as co-respondent. He separated from the petitioner about two months before the birth of that child.

(5) At the same time, the girl Evelyn was removed from the Moratuwa Convent by the petitioner's mother and was handed over to Warnakulasuriya. Evelyn then lived with her father for some years and not with the petitioner.

(6) The divorce action was dismissed, apparently because Warnakulasuriya did not press it, on July 13th, 1949.

(7) On the same day, Evelyn was taken by her father to the Hatton Convent and has remained there ever since in the care of the nuns.

(8) Shortly after the dismissal of the divorce action, the petitioner applied to this Court for the custody of Evelyn from her husband ; and the matter was settled upon statements by both parties that they were reconciled. After this (January 1950), husband and wife lived together (he being away for long periods on business), but Evelyn was never brought back home even for a day.

(9) Warnakulasuriya died a violent death in December 1953, and Evelyn was with great reluctance brought to her father's funeral by the nuns. This was the first occasion after 1946 when the petitioner set eyes on Evelyn.

I need refer only to a few of the controversial items of evidence. In cross-examination the petitioner said :—" In those divorce proceedings he named a co-respondent. The name of the co-respondent is G. Paul Fernando. He alleged that the child that was born to me was G. Paul Fernando's child. He is also called Paulu. My mother did not object to my association with Paulu ". When the inquiry was resumed two months later, however, the petitioner said " I do not know Paulu. I deny

that my mother accused me of being friendly with Paulu ". This later statement is palpably false, and at least arouses suspicion as to the nature of the association between the petitioner and Paulu.

An inquest was held upon the death of Warnakulasuriya, and a letter alleged to have been written by him to the Hatton Convent very shortly before his death was produced at the inquest. It contained the following statement. " This is to notify you that at any time in my absence, the next responsible person to my dear daughter Evelyn, is her grand-mother Madolena (mother of the petitioner) ". The petitioner admits that this letter (D4) is signed by her husband and that she herself presented a certified copy of the letter to the Mother Superior when she tried in 1954 to take Evelyn away from the Hatton Convent. According to the Mother Superior, Warnakulasuriya had made it quite clear to the nuns that the petitioner was to have no communication with Evelyn.

Evelyn's evidence is to the effect that she first saw her mother at her father's funeral in 1953, i.e., at the age of 14, and she has no earlier recollection of her mother. The father made regular visits to the Convent, and father and daughter used to communicate regularly by letters. She is quite certain that her father wished her to have no contact with the petitioner. Her desire to remain at the Hatton Convent springs mainly from her respect for the father's wishes ; in addition, she expects to sit for the S. S. C. examination in 1955, and is anxious to avoid interruptions in her studies. There is evidence to indicate that Evelyn will inherit some property on the death of her grand-father and/or uncle ; but in view of the special circumstance that she has lived away from home and family for so long, I think it is of particular importance that she receives as good an education as possible in order to fit herself to face the problems and difficulties which lie before her.

Aspersions have been cast against the character of the petitioner, and this principally in the evidence given by the petitioner's own mother. Although I do not agree with Mr. Jayawickreme that this evidence should be disregarded as unreliable, I find it unnecessary to take account of those aspersions. But, wherever the blame may lie, the fact is that the petitioner failed to maintain good or normal relations either with her husband or with her own mother. Evelyn said that on the first date of the inquiry, the petitioner said to her " I know what I will do when I get you ". I am not disposed to accept the petitioner's denial that she made such a remark.

I do not propose to refer, except briefly, to the principles which should guide a Court in determining whether a mother's undoubted right to the custody of a daughter of fifteen may be denied recognition. I can add nothing useful to Nihill J.'s observations on the law in *Samarasinha v. Simon* [1] where the authorities were comprehensively reviewed. Mr. Jayawickreme has relied strongly on the case of *Abeywardene v. Jayatilleke* [2]. It was there held that a person who has failed to register himself as the custodian of a child (under the Adoption of Children Ordinance, 1941) cannot claim to retain custody as against the parents of the child. That decision is not applicable to the present facts because I am here

[1] *(1941) 43 N. L. R. 129.* [2] *(1953) 55 N. L. R. 54.*

considering, not a claim by the 2nd respondent to the custody of Evelyn, but Evelyn's own refusal to live with her mother. Moreover, it does not appear from the judgment in that case what were the child's own wishes, and whether her wishes were by reason of age and education worthy of consideration by the Court. I propose therefore to guide myself by the test whether a change in the *status quo* would be prejudicial to the interests of Evelyn—a test recognised by Nihill J. and adopted by me recently in H. C. Application No. 1824, S. C. Minutes. Our Statute Law also recognises that the parent's right to custody is not absolute; Sections 34 and 35 of the Children and Young Persons Ordinance of 1939 enable a Court to deprive a parent of this right if, for reasons specified in those sections, the parent is unfit to exercise care and guardianship over his child.

The facts to which I have referred convince me that Evelyn's attitude is perfectly reasonable; she has no affection or respect for the petitioner who is virtually a complete stranger to her; her own father deliberately kept her away from contact with the petitioner; she is at present happy and in safe hands and anxious to honour her father's wishes; but for the misfortune of her father's untimely death, she would have remained in this Convent at his direction. On the other hand, I am not satisfied that the petitioner is worthy of her daughter's respect or affection or that she is genuinely concerned for the welfare of the daughter. In any event the petitioner's right to custody would be of no avail after 1955. I am of opinion that a change of custody will be prejudicial to the welfare and interests of the girl Evelyn. I would accordingly refuse the application with costs fixed at Rs. 157·50. I direct, however, that the Mother Superior must permit the petitioner to visit the girl once a month, and must deliver to the girl letters addressed to her by the petitioner; this direction will be effective only for the year 1955, and the matter of visits can thereafter be decided in accordance with the girl's own wishes. The Magistrate will please communicate this direction to the parties.

Application refused.