Preliminary Year

Sri Lanka Law College

Law of Persons

iGuide

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Independent Law Student Movement

Reviews, responses and criticism
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Marriage

The General Law of Marriage in Sri Lanka is governed by the **Marriage Registration Ordinance of 1907.** This Ordinance applies to marriages Tamils, and persons of other religions and communities while those governed by Kandyan Law could choose to be governed by either General Law or Kandyan Law. This Ordinance does not apply to marriages between those to whom Muslim Law applies.

1. Registration of Marriages

The registration of marriage is not mandatory under the ordinance. However it is the best evidence to prove that a marriage between two particular people had existed. The law also recognizes a rebuttable **presumption** of marriage by habit and repute. When a man and a woman are living in cohabitation, the law presumes that they are living together in consequence of marriage unless the contrary can be proven. It is under this presumption that customary Buddhist, Christian, Hindu and Muslim marriages are recognized as valid even though the marriage has not been registered.

- ***Tisselhamy v Nonnohamy***
  Parties were dead and there was no evidence of marriage ceremony but the Supreme Court presumed the existence of an availed marriage on the evidence that the parties had cohabited together for a very long time and aware in marriage "publicly and on a big scale".

- ***Kandiah v. Thanagamany***
  Held: Cohabiting for a long period of time is irrelevant if no evidence is forthcoming with regards to the performance of customary rites at the time of marriage.

2. Prohibited Age of Marriage

Section 15 of the Marriage Registrations Ordinance of 1907 was repealed and substituted by Section 02 of the Marriage Registration Amendment Act No. 18 of 1995.

"No marriage contracted after the coming into force of this section shall be valid unless both parties to the marriage have completed eighteen years of age."

3. Prohibited Degrees of Marriage

Section 16 of the Marriage Registrations Ordinance of 1907: Under Roman Dutch Law/general law, it is prohibited to contract marriage between persons closely related by blood or by affinity due to the following reasons:

- Blood relations (Consanguinity) - Prohibited due to moral grounds.
- Affinity (Between those closely related by marriage)

- Such a marriage would cause unwanted tension between families.

The prohibited degrees of marriage have also been set out under Section 16 of the Marriage Registrations Ordinance. *[Refer]*

Section 17 of the Marriage Registrations Ordinance states that marriage of persons within prohibited degrees of relationship an offence.

"Any marriage or cohabitation between parties standing towards each other in any of the above-enumerated degrees of relationship shall be deemed to be an offence, and shall be punishable with imprisonment, simple or rigorous, for any period not exceeding one year."

4. Second Marriages

Section 18 of the Marriage Registration Ordinance and Section 6 of the Kandyan Marriage and Divorce Act states that second marriage without legal dissolution of first marriage invalid.

"No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void."

However, under Muslim Law, a man is permitted to marry 4 times provided that he is able to fulfil his matrimonial duties.

- ***AG v Reid***

  Held: A man who had contracted a marriage under the general law could unilaterally convert to Islam and contract a second marriage under Muslim law.

Exceptions:

- ***Abeysundere v Abeyseundere***

  A man was charged with the offence of bigamy for marrying another woman while married to his wife under the general law. At the Magistrate Court he stated that he and his new 'wife' converted to Islam before they got married and as such the Muslim law which permits polygamy applied to them. When the case finally went to the Supreme Court, it was decided that the man was bound to monogamy by his marriage under the general law and his second 'marriage' was invalid notwithstanding the conversion to Islam.

  Held: A person who had a previous marriage under general law could not by unilateral conversion to Islam set aside his antecedent statutory liabilities and obligations incurred by reason of the first marriage.

- ***Katch Mohomed v Benedict***

  Held: A married Muslim man who registers his second marriage with a Sinhalese woman under the general law, commits the offence of bigamy. Thus a person who gives up the faith cannot enjoy the practices of Muslim Law.

5. Consent to Marry

Section 22 of the Marriage Registration Ordinance states, that the minimum age of marriage for both men and women, is 18 years. A subsequent provision enabled minors to marry with the consent of their parents. However, if the parents unreasonably oppose the marriage, the court may overrule the refusal to give consent and authorize the marriage.

6. Null and Void Marriages

A marriage would be regarded as "null" or as not valid in the following situations:

I. If the marriage was contracted when one or both parties contracted a second marriage while already married.
II. If one or both parties failed to give fully informed consent to the marriage due to reasons such as insanity, intoxication, misrepresentation, fraud, duress etc.
III. If the marriage is within the prohibited decrees of relationships.
IV. If one or both parties are below the marriageable age.
V. If the proper procedure of a marriage ceremony were not followed. ie:

registration *[See **Wijegunawardena v Garcia Catherina**]*

A "voidable" marriage would be considered valid marriage until a decree of annulment is made. A marriage would be considered voidable in the following instances:

I. If either party was impotent at the time of the marriage and therefore the marriage was not consummated.
II. If, at the time of the marriage, either party was incapable of sustaining a normal relationship due to a psychiatric illness, personality disorder, or sexual orientation.
III. Duress
IV. Mistake
V. Prenuptial sturprum (this refers to such instances where the wife was pregnant with another man's child when she entered into nuptials with her husband ignorant of her preganancy) *[See **Navaratnam vs. Navaratnam**]*

7. Putative Marriages

A putative marriage is a marriage that does not have any legal standing but was entered into in good faith by at least one party involved. While a putative marriage may look like a legal and marriage and the parties involved may act like it is a legal marriage, the marriage may in fact be invalid due to reasons such as one spouse still being legally married to another. In a putative marriage one spouse may have been falsely led to believe that the marriage was legal, in which case that spouse may obtain putative status. This spouse is referred to as the putative

spouse. In cases such as this only the putative spouse or the spouse that was misled is protected.

The putative spouse has the opportunity to sue for damages. However if both spouses claim putative status and prove that the marriage was entered in to in good faith contrary to a false belief or a technicality, then the marriage can be validated with the removal of that technicality.

[See ***Fernando v. Fernando*** ***70 NLR 534*****8.**

8. Promise of Marriage

A promise to marry will not be a contract unless both parties have explicitly promised to marry each other. A promise to marry which had been made by a minor may be voidable at the request of the minor. A minor may sue for damages on such a promise to marry but may not be sued upon even after they have come of age.

The basis of a promise of marriage is offer and acceptance. Both parties must be in clear understanding that there was an offer of marriage made. The acceptance of the offer must be made within a reasonable period of time and does not necessarily have to show a formal acceptance of the offer but could be implied through the promisee's behaviour.

A promise to marry made under the following situations would be considered invalid:

a) A promise made under duress
b) A promise made by fraudulent inducement
c) A promise made by fraudulent concealment of fact

A "promise to marry" has been defined in the case law given below.

- ***Belling v. Vethacan***

  An implied promise to marry was gathered from a letter written in the context of a previous oral promise.

- ***Cooray v. Cooray***

  A marriage settlement which contained a statement that a marriage between the parties has been arranged and is shortly to be solemnized constituted a promise in writing. Thus if a promise to marry is implied from language used in a letter or document, that amounts to a promise in writing.

- ***Udalagama v. Boange.*** The writing must;
  a) Contain an express promise to marry

  Or

b) Confirm a previous oral promise to marry.

A confirmation of a subsisting oral promise of marriage is sufficient. § But writing which evidences a previous oral promise is insufficient.

Held: That is necessary to differentiate between writing which contains a promise to marry and writing which could be said as corroborating a previously made oral promise of marriage.

9. Breach of a Promise of Marriage

An unwillingness to comply with the marriage with no reasonable cause given would constitute a breach of a promise of marriage. A mere postponing of the marriage with plans to go through with the marriage at a later date cannot constitute a breach of promise of marriage, unless no justifiable reason for the postponement can be given. The only sanction that can be given for a breach of a promise of marriage is damages.

Section 20 of the Marriage Registration Ordinance provides that

(1) No suit or action shall lie in any court to compel the solemnization of any marriage by reason of any promise or contract of marriage, or by reason of the seduction of any female, or by reason of any cause whatsoever.
(2) No such promise, or contract, or seduction shall vitiate any marriage duly solemnised and registered under this Ordinance.
(3) Nothing herein contained shall prevent any person aggrieved from suing for or recovering in any court damages which are lawfully recoverable for breach of promise of marriage, for seduction, or for any other cause.

In a breach of a promise of marriage, the plaintiff can claim damages for the injuries to their emotions and health, as well as any injury that might have been caused to their reputation due to the breach of the promise of marriage. The plaintiff may also recover any financial loss that they would have incurred due to the breach as well the loss of advantages they would have been able to gain had the marriage taken place.

- ***Wijeweera v Nanayakkara;***

  Confirmed the judgement given in Udalagama v. Boange *[supra]:* For a party to recover damages on the ground of breach of promise to marry, it is necessary to have a written promise of marriage or an oral promise of marriage later confirmed in writing with the intention to be bound by the promise thereafter. This case also shows that in granting damages the court considers the behaviour of the innocent party. Here the innocent party had been party to a previous marriage which was voided and later became the concubine of the defendant. Damages reduced from the requested Rs. 20,000 to Rs. 1,000.

10. Consequence of Marriage

In the early Roman-Dutch law imposed certain legal disabilities on women, thus reducing her status to one that is considerably inferior to that of her husband. Given below are some such laws that were imposed on married women.

Contractual Rights

i. Under early Roman-Dutch Law:
   a. The wife did not have any right to enter into contracts without the permission of her husband.
   b. She could not sue or be sued without making her husband a party to the action.

ii. Under Section 05 of the Married Women's Property Ordinance:
   a. The rights of the married woman were increased.
   b. It removed the marital power exercised by the husband.
   c. In turn it removed all disabilities that had been imposed on a married woman.
   a. Married women can enter into a contract independently sue or be sued without the husband being party to the contract.

Property Rights

i Under early RDL
   a. The Roman Dutch concept of communal property was applicable in Sri Lanka.
   b. All the property of the husband and wife became common property belonging to them both after the marriage.
   c. This property is considered joint property after the marriage takes place therefore both spouses can claim ownership on the joint property.
   d. Even a spouse who has contributed nothing to the joint property could claim ownership of that property.
   e. The husband had the power of management and administration over the marital property.
   f. The wife could not separate her own property without the husband's consent.

iii. Under the Matrimonial Rights and Inheritance Ordinance:
   a. The joint marital property system was abolished.
   b. The wife could now claim ownership of her own property separately.
   c. However she could not separate her property without her husband's consent.

iv. Under the Married Woman's Property Ordinance:
   a. Power over the marriage no longer lay with the husband.
   b. Married women can alienate property without husband's consent
   c. The wife could own her own separate property.
   d. The wife can deal with immovable property without the husband's consent.

Divorce

The laws pertaining to divorce in Sri Lanka are governed by the Marriage Registrations Ordinance and the Civil Procedure Code. The three grounds for divorce under Section 19(2) of the Marriage Registration Ordinance are as follows:

a) Adultery
b) Malicious Desertion
c) Incurable Impotency at the time of marriage

Adultery

Adultery is defined as having a sexual relationship with a person who is not your spouse during the time of marriage. This is not an offence under the Penal Code but is a matrimonial offence under the Marriage Registration Ordinance. The wronged party in the marriage can file action for damages against the adulterous spouse and the other party involved in committing the adultery. The other party must always be named as a 'co-defendant' in such an action with the exception of the situations given below:

a. Where the other party was a prostitute
b. Where the other party was unaware that the adulterer was married

In cases of Adultery the courts require proof beyond reasonable doubt that such an act had been committed as well as the date and place at which the act took place. (Section 602 of the Civil Procedure Code)

- ***De Silva v De Silva***

a. Injury – damages for the feelings and serious hurt to marital/family life.
b. Value of Spouse
    i. Pecuniary loss – damages for loss of support and/or housekeeping of wife.
    ii. Loss of consortium – damages for loss of moral character, affection and other duties of a spouse.

In this case it was held that the value for the loss of consortium was reduced to zero because there was constant fighting and physical abuse. The pecuniary loss was also zero as the wife was of no value to the business or housekeeping.

- ***Jayasinghe v Jayasinghe***

Held; a divorce could not be obtained on the basis of adultery because even though the wife had been living in adultery, no adultery could be proved beyond a reasonable doubt after the date on which the husband forgave her.

Malicious Desertion

Malicious Desertion has been defined as the act of a husband or wife, in leaving a consort, without just cause, for the purpose of causing a perpetual separation.

- ***Silva v Missinona***

Malicious desertion is a "deliberate and unconscious, definite and final, repudiation of the obligations of the Marriage state, and clearly implies something in the nature of a wicked mind.

The following two factors are required when proving malicious desertion:

a. Factum – Act of desertion
b. Anumum – Intent to terminate the marital relationship

Malicious Desertion can be separated into 2 main categories; Simple Malicious Desertion and Constructive Malicious Desertion.

i. Simple Malicious Desertion

This is where one spouse leaves the other spouse and the marital home with hopes of terminating the marital relationship.

- ***Attanayake v. Attanyake***

Defendant left the plaintiff with her mother and later wrote to the mother accusing the plaintiff of adultery and stating that he wants to end marriage. Held; Simple malicious desertion.

ii. Constructive Malicious Desertion

This is where one spouse ill-treats the other and behaves in such a manner which causes the other to leave the matrimonial home.

- ***De Mel v. De Mel***

Husband falsely accused his wife of adultery and ordered her to leave, refusing to reconcile unless she gave written confession. Held; Constructive malicious desertion.

- ***Vanbon v. Vanbon***

Wife refused to have any sexual relations with her husband and refused to do housework. Held: living under one roof may still amount to malicious desertion.

Exception

- ***Weatherly v. Weatherly***

Wife refused sexual relations but performed all other duties.
Held; It is not sufficient to constitute desertion.

Incurable Impotency

The impotency must be incurable at the time of marriage. Section 19(2) of the Marriage Registration Ordinance does not allow divorce to be obtained on the ground of incurable impotency after the marriage was contracted. This is grounds for divorce as well as obtaining a decree of nullity. Incurable impotency can be defined as an inability to have sexual intercourse with another. Inability to bear children however, is not a ground for divorce.

- ***Fernando v Peiris***

Wife filed for malicious desertion and also cited incurable impotency. Plaintiff proved that defendant failed to have sexual intercourse with her because medical evidence proved that she was a virgin. Accordingly the court held that as the defendant failed to consummate, the marriage was dissolved.

- ***Gunathillake v Milli Nona***

Husband filed action on the ground that at the time of solemnisation of the marriage, the wife was incapable of entering into the contract of marriage by reason of incurable impotency. Medical evidence proved that the wife was a virgin and so the court issued a decree for dissolution.

Judicial Separation

In addition to the grounds of divorce under the Marriage Registration Ordinance, ***Section 608(1) of the Civil Procedure Code*** also states that a plaintiff may apply for a separation *a mensa et thoro* (from bed and board).
The grounds for obtaining a judicial separation are as follows:

i. Where co-habitation with the defendant is dangerous and intolerable
ii. Where the defendant's conduct is unlawful and cruel
iii. Where sexual offences are common on the part of the defendant

- ***Wijesinghe v. Wijesighe***

Mental cruelty will suffice as a ground for judicial separation.

- ***Appuhami v. Julihami***

Communication of a venereal disease on purpose was held to be grounds for judicial separation as an intolerable and dangerous living situation.

Section 608(2) of the Civil Procedure Code states that either spouse can apply for a decree of divorce:

a. After a period of two years following that of judicial separation
b. Even if no application was made for judicial separation but there was a separation for 7 years.

Section 608(2)(b) of the Civil Procedure Code introduces a new ground for divorce based entirely on marriage breakdown rather than matrimonial fault.

[See ***Muthuranee v. Thuraisingham*** *and* ***Tennakoon v Tennakoon*** *]*

Legitimacy of Children

Roman Dutch law attempts to protect marriage and legitimacy of children born within a marriage. The law presumes that the children born to a married woman are legitimate and the husband of a married woman is the father of children born to that woman during the time of the marriage.

An illegitimate child can be defined as a child whose parents were not legally married at the time of his/her birth. However, there can be instances where the husband denies the paternity of the child even though the child was born during the continuance of a valid marriage. But in terms of section 114 of the Evidence Ordinance there is the presumption of legitimacy that such child is the legitimate child of the man.

Under common law, a child was considered to be illegitimate if the parents were not married at the time of birth, even if the parents were later married. Similarly, a child born of an annulled marriage is also considered illegitimate because an annulled marriage is void from the beginning. A child born of a bigamous marriage would also be considered illegitimate.

Section 112 of the Evidence Ordinance states that the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that

(i) that man had no access to the mother at any time when the child could have been begotten
or
(ii) that he was impotent

i. Lack of physical proximity

If the spouses were not in geographical proximity to each other at the time of conceiving the child, then there is no proof of access and the children conceived at the time cannot be considered at legitimate.

• ***Perera v Podi Singho***

A husband, in order to rebut the Section 112 presumption should prove that he was at a place so distant that it was physically impossible for him to have intercourse with his wife that he was in jail, a lunatic asylum or something of that kind.

• ***Sopi Nona v Marsiyan***

A husband must prove that he was in a lunatic asylum, was beyond seas, or placed in circumstances of such physical restraint as it rendered it impossible for him to have access to his wife.

ii. Lack of moral access

There should be actual intercourse between the spouses and not just an opportunity for intercourse.

- ***Jane Nona v Leo***

  Overruled the decision in Sopi Nona and held that the phrase "access" should be interpreted to mean actual intercourse and not the opportunity for intercourse.

- ***Kanapathipillai v Parpathy***
  In this case the plaintiff was separated from his wife and was living 4 miles away with another woman when the children in question were conceived. Even if the spouses were in proximity, no access may be proved by evidence that the relationship between the spouses was such that sexual relations were not likely to have taken place.

iii. Lack of Personal Access

Even if there was a personal relationship between the spouses which made sexual intercourse probable, the presumption that the parties had sexual intercourse can be rebutted by evidence that they did not have intercourse

E.g. DNA or blood tests

Standard of Proof of Legitimacy

- ***Persona v Babonchi Bass***
  It should be proved beyond reasonable doubt that the husband had no access to the wife at the relevant time.

- ***Kanapathipillai v Parpathy***
  "Cogent evidence"

- ***Samarapala v Mary***
  Cogent evidence equated to evidence as laid beyond reasonable doubt

- ***Alles v Alles***
  The time period of conception is determined according to medical evidence regarding the necessary period of gestation. In this case expert medical witnesses concluded that a gestation period of 229 days was insufficient to produce a fully developed child.

Admission of Blood Tests – ***Baby 81 Case***

Inheritance

An illegitimate child is entitled to inherit property through the will of a deceased parent under the Wills Ordinance of 1844. However there is no provision for intestate succession right of an illegitimate child to inherit the intestate property of their natural father. Section 33 of the Matrimonial Rights and Inheritance Ordinance provides that, an illegitimate child may inherit the property of their mother but not of the father and also an illegitimate child is not permitted to succeed to the estate of any relative on the maternal side other than the mother herself. This is justified based on the principle of *pater est quem nuptiae demonstrant (*the father is he who is married to the mother) and the principle that a mother makes no bastard.

Koronchihamy v Angohamy

The Supreme Court held that an illegitimate child could not inherit from the father

Adoption

Adoption is the method where a relationship between a parent and child who are not biologically connected to each other is created by an artificial mechanism. The Sri Lankan law on adoption is derived from English law and Kandyan law. The concept of lawful adoption of children was introduced into general law with the passing of the **Adoption of Children Ordinance No. 24 of 1941**. In Sri Lanka there are many restrictions when it comes to the adoption of children.

Who may be adopted?

Section 2(1) of the Ordinance states 'Any person desirous being authorized to adopt a child may make an application to the court.
Section 17 – Interpretation "Child" – A person under the age of 14 years.

Therefore only a child under the age of 14 years can be adopted.

Section 3(6) – The child in respect of whom an adoption order is granted should be a resident of Sri Lanka.

Section 3(5) – When adopting a child over the age of 10 years, the consent of the child should be obtained.
Section 4(b) – Allows the court to consider the views of a child below 10 years depending on the maturity of the child.

Who can be eligible to adopt a child?

Section 3(1) of the Ordinance states that *an adoption order shall not be made* in any case where-

a. the applicant is under the age of twenty-five years, or
b. the applicant is less than twenty-one years older than the child in respect of whom the application is made:

Provided, however, that where the child in respect of whom an application is made is

(i) a direct descendant of the applicant; or
(ii) a brother or sister of the applicant by the full or the half-blood or a descendant of any such brother or sister; or
(iii) the child of the wife or husband, as the case may be, of the applicant by another father or mother, the court may, if it thinks fit make an adoption order, notwithstanding that the applicant is less than twenty-one years older than the child.

Therefore the age difference will not be applicable when,
(i) a brother or sister (ii) an aunt or uncle (iii) step parents makes an application to adopt their relations.

Section 3(2) states that, an adoption order shall not be made in any case where the sole applicant is a male and the child in respect of whom the application is made is a female, unless the court is satisfied that there are special circumstances which justify the making of an adoption order.

Ex: Court may permit a putative father who accepts the paternity of the child to adopt his daughter as the sole adopter.

Section 3(4) states that an adoption order shall not be made upon the application of one of two spouses without the consent of the other of them: provided that the court may dispense with any consent required by the preceding provisions of this subsection if satisfied that the person whose consent is to be dispensed with cannot be found or has been adjudged by a competent court to be of unsound mind, or that the spouses have been judicially separated by a decree of a competent court.

Similarly the Ordinance states that an adoption order shall not be made without the consent of the parent or guardian of the adoptee and in respect of a child over the age of 10 years without the consent of such child. An adoption order shall be made in favour of any applicant who is not a citizen of Sri Lanka and not domiciled or resident in Sri Lanka only if no other person who is a citizen of Sri Lanka and is domiciled and resident in Sri Lanka has applied to adopt the child.

Foreign Adoption – Allowed after the amendments of 1979 & 1992 to the Ordinance

Section 3(5)(A)(a) – Any person not domiciled or resident in Sri Lanka may make an application for adoption of a child in Sri Lanka.

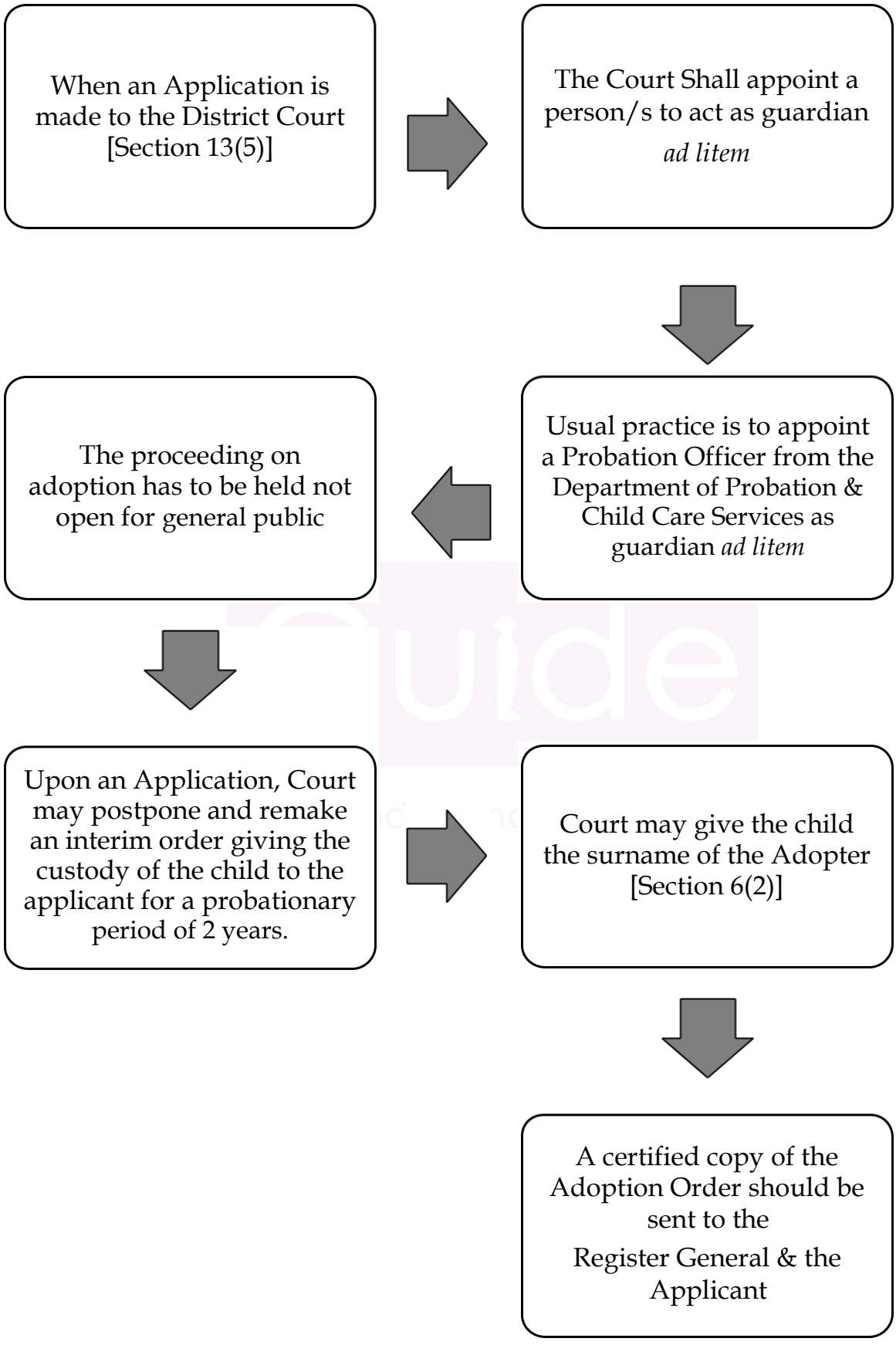
*If there is no other application by a Sri Lankan citizen domiciled and resident in Sri Lanka for the adoption of the same child.

Foreigners who wish to adopt Sri Lankan children are required to send in their applications to the Commissioner of Probation and Child Care Services. Foreign applicants cannot find children for adoption privately. The application should be accompanied by a Home Study Report in respect of the applicants from an institution recognized by the country of the applicants and authenticated by the qualified representative for Sri Lanka in that country. The applicants may come to Sri Lanka only after receiving the Commissioner's letter of allocation. The applicants are then taken to see their respective child at the children's home. The applicants thereafter institute court proceedings for the adoption.

The application to Court must be made jointly by husband and wife. After the adoption, copies of the adoption order can be obtained from court. The Certificate of Adoption should be attached to the application for the issue of a passport for the child.

Once an adoption order is made, the adopter becomes the "natural parent" of the adopted child. The original parents of the child will not have any rights to the child or child's matters thereafter.

The Procedure relating to Adoption in brief



Legal Consequences of Adoption

Section 6(3) – A valid adoption order confers on the adopted child that status of a child born in lawful wedlock of the adopter.

Section 4(a) & 6(1) – An adoption order has the effect of permanently depriving the natural parent of his/her parental right over the child.

Section 6(1) – The rights, duties, obligations and liabilities of the parent in relation to the further custody, maintenance and education are extinguished and transferred and vested in the adoptive parent.

If spouses jointly adopt a child, they become the lawful father and mother of the child for the purpose of custody, maintenance and access.

Adopted Child and Inheritance

Thought the adopted child is deemed in law for all purposes whatsoever to be the child born in lawful wedlock of the adopter, such child does not acquire all the rights of a natural child.

This is due to the fact that,

Section 6(3) limits the rights of the adopted child to inheritance and intestate successions in certain situations.

Section 6(3) (a) (i) – In the absence of an express intention, an adopted child cannot acquire any right in any property devolving on any child of the adopter by virtue of any instrument executed prior to the adoption.

Section 6(3) (b) – The adopted child has no right to testate or intestate succession on the basis of a representative of the adoptive parents.

Section 6(5) – An adoptive parent claiming through him/her cannot succeeded to the intestate property of an adoptive child.

However, Proviso to Section 6(5) – An adoptive parent claiming through him/her can succeeded to the intestate property of an adopted child, if such property was devolved on the adopted due to his status as an adopted child or has been transferred to the adopted child by the adopter or by his ascendant or descendent brother or sister of the adopter.

Adopted Child and Maintenance

Maintenance Act No. 37 of 1999 the right of an adopted Child [Section 2(2)],Adult Offspring[Section 2(3)] or Disabled Offspring [Section 2(4)] to claim maintenance from his/her adopted parents is recognized.

Custody

The principles of custody in Sri Lanka are governed by residual Roman-Dutch Law. The preferential custodial rights are given to the father but may be denied only in instances of danger to the "life, health and morals" of the children. A mother who seeks custody of her child therefore has the right to displace the father's right. Generally in fault based divorce cases the innocent party has an advantage when it comes to custody of the child. However, case law has reinforced that the child's welfare is of the utmost importance. Child custody issues are not only common in divorce actions but can also be found in actions regarding paternity, guardianship, termination of parental rights and juvenile delinquency.

Child custody does not only involve the physical custody and control of the child. It also involves the parental rights, privileges, duties and powers connected to child rearing. The procedure related to custody matters are set out in Sections 620,621 and 622.

Tsunami (special provisions) Act N0.16 of 2005

This act provides guidance on substantive and procedural issues relating to custody, guardianship and adoption of minors, who were destitute because of the specific natural disaster and has introduced the concept of foster care.

1. Preferential Right to Custody.

The preferential Right of a father depends on whether the couple are still married or not. Preferential right means, father has more rights over a child than the mother. Even when the parents are living separately without divorce, father's preferential right is available.

- Clatiz v. Clatiz

It was held that the father has a superior right to custody. The superior right can only be interfered in fairly stringent conditions such as danger to life, health and morals.

- Ivaldy v. Ivaldy.

The father gained custody of the child because they were not a divorced couple. This case followed the dicta in the Cltiz case. It was held that "When there is no divorce or separation, the court cannot intervene with the preferential right, unless there is danger to life, health and morals.

Exceptions

- Andrew Grieg (1859) 3 Lorenz Reports 149

The mother of four children ranging from ages 7 to 11 was awarded their custody. It was stated that the court has a wide discretion. The mother was given custody because it was decided that the children should not be deprived of her 'tenderness and care'

- Fernando v. Fernando 8 NLR 262

Custody was given to the mother because the father has no bond with the child and he was trying to gain the custody and then handover the child to an unmarried aunt.

- Weragoda v. Weragoda 59 CLW 59
  The court considered the past conduct of the father and gave the custody of 9 year old son to mother. It was held that "the paramount consideration is the welfare of the child"

- Kamalawathie v. De Silva

The mother was maintained by the father, thus she took the child and left. The father had no interest in visiting the child. Giving the father the preferential right was not in the best interest of the child. In such, mother should prove that the best interest of the child is not with the father.

- Fernando v. Fernando 70 NLR 534

The custody of very young children should ordinarily be given to their mother.

- Madulawathie v. Wilpus 70 NLR 90

Held that the burden is on the mother to prove that the interest of the child requires that the father be deprived of the custody. Unless she discharges that burden, the father is entitled to custody.
A mother sought the custody of her 5 year old daughter who was in the physical custody of the father. In this case court held that the fact that father cannot provide proper care since he was always away from the home was not supported. The court was influenced by the fact that the father was in a better position to provide educational needs of the child.

- Rajaluxmi v. Sivananda Iyer 76 NLR 572 Followed

the reasoning of Madulawathie v. Wilpus.
The father's rights were displaced in relation to his 9 year old daughter on the basis that it was not good for her moral wellbeing as he was living in adultery.
But the father was given the custody of his 11 year old son as he has given a preference to live with his father and the lower courts finding was that he was well looked after by the father.

- Jayrajan v. Jayarajan

The father's preferential right was not an absolute one. It could be interfered with any court. There were exceptional circumstances such as threats to life/health/morals of the child. Ultimately, the child's security was the deciding factor in giving custodial rights.

2. Custody and Third Parties

The natural parents of the child are given preferential right over parties.

- Endoris v. Kiripetta

The child was brought up by his aunt. His family then tried to obtain custody. Despite the child being able to have a better life with his aunt, custody was given to father.

Exception

- Premawatie v. Kadalugoda Aratchchi

The child was an illegitimate child. The mother showed no interest in the child and the child had been living with a third party for 6 years. The child was happy with the family that took care of him. Court granted custody to the third party as it felt it was in the best interest of the child.

3. Age of discretion

The English legal concept of age discretion states that at a certain age the child should have a right to voice his choice. The court takes the child's opinion into account when granting custody if the child is at an age where they can voice their opinions. In Sri Lanka the ages for children to voice their choices are;

(i) Boy - 14 years

(ii) Girl - 16 years

- Gunarathnayake v. Clayton

The court took the girl's opinion into account when deciding to retain custody with the school rather than granting it to the mother. The girl wanted to stay in the school hostel so the court took her view into consideration and decided in her favour/best interest.