

**IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA**

**ORIGINAL JURISDICTION**

<b>CASE NUMBER:</b>	21/LTK/0324
<b>BETWEEN:</b>	LEAH
<b>AND:</b>	SUMIT
<b>Appearances:</b>	<i>Mr. U. Koroi for the Applicant.</i> <i>Mr. J. Prakashan for the Respondent.</i>
<b>Date/Place of Judgment:</b>	<i>Tuesday 27 August 2024 at Suva.</i>
<b>Judgment of:</b>	<i>Hon. Madam Justice Anjala Wati</i>
<b>Category:</b>	<i>All identifying information in this ruling have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i>
<b>Anonymized Case Citation:</b>	LEAH v SUMIT – Fiji Family High Court Case number: 21LTK0324

**JUDGMENT**

**A. Catchwords:**

***FAMILY LAW – RECIPROCAL ENFORCEMENT - OVERSEAS CHILD ORDERS– interim orders made in one of the States in the United States of America – mother applies for registration of the said interim orders –an “excluded order” cannot be registered in Fiji whether it is from a reciprocating or a non-reciprocating jurisdiction – State in US not a reciprocating jurisdiction –further, it lacked jurisdiction to make the orders –child was not living in that State for that State to exercise jurisdiction over the child- child’s welfare and development evidence not available in court abroad – child lived exclusively in Fiji – Fiji has jurisdiction over this child to determine the appropriate parenting orders that ought to made.***

**B. Legislation:**

- 1. Family Law Act 2003 (“FLA”): ss. 147 and 148.**
- 2. Family Law Regulations 2005 (“FL Reg.”): Regs. 29 and 30.**

**Cause**

1. The mother of the child has applied for registration of the orders made by one of the States of the United States of America. The orders are in respect of a female child. She was born in April 2008. The parties are the parents of the child.
2. The registration application is in respect of the orders made on 22 June 2021 and 9 August 2021. The orders of 22 June 2021 reads as follows:

*(a) The mother shall have the sole authority to obtain the passport for the minor child without the signature or permission of or involvement of the father.*

*(b) When the borders of Fiji are open, the mother shall retrieve the minor child and return with the minor to the United States. The mother has relocated to another State in USA. The mother shall have custody of the minor child in the place she has relocated until the review hearing on 9 August 2021.*

*(c) It is anticipated that if the child returns to the United States in time to start school that the father will have the custody of the child until further order of the court and during the conducting of the custody evaluation with the mother receiving visitation pursuant to the relocation statute.*

3. The orders of 9 August 2021 reads as follows:

*(a) That when the borders of Fiji are open, the mother shall retrieve the minor child and return with the minor child to the United States. The mother has relocated to another State. She shall have custody of the minor child in that State until the review hearing which is set for 11.30 am on September 23, 2021. Either party may*

*request an expedited hearing before the Honorable Commissioner once the mother receives permission to travel to Fiji.*

*(b) The Court shall not make a decision at this point in the case about where the minor child will go to school. Neither party shall enroll the minor child in school until further order of the Court.*

*(c) The parties shall undergo a custody evaluation with Dr. X (name redacted) and the Court shall issue appropriate orders to that effect. The parties shall split equally the costs of the evaluation.*

*(d) Any prior orders of the Court not discussed in this order shall remain the orders of the Court.*

#### ***The Father's Position***

4. The father of the child has objected to the application for registration of the orders on the basis that the State in which the order was made did not have jurisdiction to make the orders as the child had always lived in Fiji and that the mother had left that State to live in another State. The father says that his counsel had raised this issue of jurisdiction in that State but his application was dismissed.
5. The father is also objecting to the registration on the grounds of the child's interest. He says that he has always been the primary caregiver. The child has a settled place in Fiji. She has no connection to the mother or the United States. He required the Court for a child interview to ascertain her wishes.
6. He says then when the child was born in April 2008, the mother was living in USA illegally. He continued to stay with the mother until 2009 for the daughter's sake.
7. In late 2009, the mother left him and the daughter. The mother started living in another relationship from which she has a child.
8. The father says that he left the United States in September 2009 and came to Fiji. He brought his daughter along with him. He stayed with his daughter at his parents place.

9. The father says that from 2016 till date, the mother had abandoned the child and not supported her in anyway. He has been the primary caregiver for the child since she was an infant.
10. The child has not known any other parent or home other than him and the home in Fiji. She is attached to her family and friends in Fiji. The orders granted abroad are in breach of the child's best interest and that this Court should not register the same for the benefit of the child.

***The Magistrate's Court Proceedings in Fiji***

11. In the Family Division of the Magistrates' Court, the parents had separately filed their applications. The father filed an application for residence of the child. Then the mother filed for residence and for all the orders she had obtained in the Court abroad. The mother's application was heard by the Magistrate's Court. The father's application was before the Registrar for compliance of the procedural aspects.
12. The Magistrate's Court found that the mother was seeking to enforce the orders issued in the United States on 22 June 2021. It said that the said orders could not be enforced because it was not registered in Fiji and that it ought to be under s. 148(1) of the FLA.
13. It was immediately after that that the current application was filed in this Court.

***Law and Analysis***

14. S.148 of the FLA states that "*the regulations may make provision for an in relation to the registration in courts in the Fiji Islands of overseas child orders, other than excluded orders*".
15. An "*excluded order*" is defined in s.147 as:

*(a) An interim order; or*

*(b) An order made in favour of a person where-*

- (i) The order was made on the application of the person;*
- (ii) Notice of making the application was not served on any person; and*
- (iii) No other person appeared at the hearing of the application.*

16. Regulations 29 and 30 of the Family Law Regulations outlines the procedure for registration of overseas child orders from a reciprocating jurisdiction. The reciprocating jurisdictions are provided for in the Schedule to the Regulations.
17. The State in which the order was made in the United States of America is not a reciprocating jurisdiction. If the order was made in the reciprocating jurisdiction then the procedure in Regulation 30 of the Family Law Regulations ought to have been followed.
18. The mother did not follow that procedure. The reason is that she could not have sought for a registration of the orders through the Permanent Secretary of Justice. She did not have in her favour orders from a reciprocating jurisdiction. Her application would not have been accepted by the Permanent Secretary.
19. She therefore filed an application for registration of the orders in this Court. I treat her application as seeking leave to register a foreign courts order.
20. The order of 22 June 2021 is an excluded order. It was not a final order granting residence to the mother. It was made until the review hearing on 9 August 2021. The order of 9 August 2021 is also an interim order granting residence to the mother. It is not a final order.
21. The Family Law Act makes no provision for registration of interim orders. I therefore do not have any jurisdiction to register interim orders of either a reciprocating or a non-reciprocating jurisdiction.
22. In respect of whether the State abroad had jurisdiction to make the orders in respect of the child, I must first examine the law of that State. Only the father has provided to me the relevant law. He has provided to me a memorandum of his counsel filed in the Court abroad. The memorandum contains the relevant law.
23. The father had opposed the Court's jurisdiction abroad. Although his application was dismissed, I have to examine whether the Court abroad could make the orders it did in respect of this child.
24. The memorandum in respect of the law reads:

*“III. STATEMENT OF LAW*

*UC – Section 78B – 13- 201(1) states:*

*Except in circumstances implicating temporary emergency jurisdiction, a ...court can make an initial child custody determination only if:*

*(a) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or parent acting as a parent continues to live in this state;*

*(b) a court of another state does not have jurisdiction under Subsection (1) (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 78B-13-207 or 78B – 13 – 208; and*

*(i) the child and the child’s parents, or the child and at least one parent or a person a person acting as a parent have a significant connection with this state other than mere physical presence; and*

*(ii) substantial evidence is available in this state concerning the child’s care, protection, training, and personal relationships;*

*(c) all courts having jurisdiction under Subsection (1) (a) or (b) have declined to exercise jurisdiction on the ground that a court of this state is more appropriate forum to determine the custody of the child under 78B – 13 – 207 or 78B -13 – 208; or*

*(d) no state would have jurisdiction under Subsection (1) (a), (b), or (c)”.*

25. Fiji is the child’s home state. The State abroad is not the home state of the child. The State abroad had not exercised the jurisdiction in emergency to make interim orders in respect of the child. Only Fiji has jurisdiction to make orders in relation to this child. It has not declined to exercise jurisdiction over the child.

26. The evidence about the child's care, protection, training and personal relationships is available here in Fiji and not in the State abroad. The child has lived in Fiji exclusively since she was 17 months old. At the time the orders were made, she was 13 years old. The State abroad does not have any information about the child. The child does not have any connection to the State abroad. On what basis did it then exercise jurisdiction over the child? Even the mother had moved from that State to another State.
27. The child's primary caregivers were her father and her grandparents since she was 17 months old. Her grandparents have now died. The father is the only primary caregiver of the child now. The child also does not have any connection with the mother. The child has indicated to the Court here that she considers Fiji as her home and does not wish to leave Fiji for now. She wishes to stay with her father in Fiji. She wants to be educated here and not in United States.
28. In deciding the best interest of the children, it is very important to assess many factors outlined by the law. The glaring factors in this case would be to look at why a child should be removed from her settled environment and from her primary caregiver(s). It is also material that the child's wishes be taken into account. The court abroad did not consider any of these factors. It did not even have access to the child's wishes. I find the orders issued to be arbitrary and not in the interest of the child for it to be considered for registration on the basis of the child's interest.

***Final Orders***

29. In the final analysis, I dismiss the application for registration of the overseas child orders. Each party is to bear their own costs of the proceedings.

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***Hon. Madam Justice Anjala Wati***  
***27.08.2024***

**To:**

- 1. Reddy Law for the Appellant.***
- 2. Prakashan & Associates for the Respondent.***
- 3. File: Family I Case Number: 21/LTK/0324.***