

Re: MARIA ELENA FALAHEE (an infant)

[HIGH COURT, 1998 (Scott J) 16 October]

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Family Jurisdiction

Family- infant child of unmarried foreign nationals- application for interim custody- principles applicable. High Court Act (Cap 13).

B

The father of an infant child who was in the care of her mother on board an ocean going yacht in breach of a court order sought interim custody of the child. The High Court granted the order sought and explained the principles upon which the Court acts in such cases.

Cases cited:

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B v B [1940] Ch 54
McKee v McKee [1951] AC 352; [1951] 1 All ER 942
Re: L (minors) [1974] 1 All ER 913
Re N (an infant) 40 FLR 35)

Application for interim custody of a child in the High Court.

D

W. Clarke for the Applicant
D. Sharma for the Respondent

Scott J:

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In this matter the Applicant, Thomas Michael Falahee (the father) seeks an order that the interim custody of a child Maria Elena Falahee (the child) aged approximately 18 months, be awarded to him to enable him to accompany the child back to Hawaii.

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The proceedings were commenced by Petition dated 8 October 1998 purportedly filed to commence a matrimonial cause within the meaning of the Matrimonial Causes Act (Cap 51). In view however of the definition of such causes contained in Section 2 (1) of the Act and the jurisdictional limitation imposed on parties not domiciled in Fiji by Section 11 (2) of the Act I was satisfied that this procedure was incorrect and that the provisions of the Act did not apply.

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At the first hearing of the Application *ex parte* I explained my thoughts to Mr. Clarke who then prepared a Notice of Motion for the issuance of a writ of *habeas corpus ad subjiciendum* which was filed on 9 October. Having read the affidavit filed in support of the petition I issued the writ on 9 October.

On 13 October, the Respondent Maria Linda West (the mother) appeared together with the child. The father was also present. I adjourned the hearing of the matter to 14 October to enable the mother to obtain legal advice. The child's passport was handed to the Chief Registrar.

On 14 October, both parties re-appeared with the mother now represented by Mr. D. Sharma.

In preliminary discussions both Counsel agreed that:

- i) in the absence of specific applicable local legislation this Court is exercising jurisdiction ultimately derived from the prerogative of the Crown as *parens patriae* conferred through Sections 18 & 22 of the High Court Act (Cap. 13)(see Re N (an infant) 40 FLR 35);
- ii) that the welfare of the child is the paramount consideration whatever order may have been made by a Court of any other country of which the child was a national but giving due weight to the view of any such Court (see McKee v McKee [1951] AC 352; [1951] 1 All ER 942 and re B's settlement, B v B [1940] Ch 54); and
- iii) that Section 34 (6)(d) of the Constitution of Fiji 1997 is also relevant.

From the evidence of the father and mother a number of uncontested facts emerged.

The parties began living together in about May 1996. In April 1997 the child was born but thereafter unhappy differences arose between the parties. In about May 1998 the mother told the father that she wished to visit her family in Tahiti. She proposed to go with friends on their yacht the "Ishi" and to take the child with her.

The father was unhappy about the proposed trip and was also anxious about his parental rights to the child given that he and the mother had not married. He commenced proceedings for a paternity order in the Hawaii Family Court of the First Circuit.

On 29 May 1998 the Court delivered Judgment by consent. A copy of the Judgment was produced as Exhibit 1. The Court awarded joint legal custody of the child to both parents. Physical custody was awarded to the mother with reasonable visitation rights to the father. An important provision of the Order for the purposes of this application was entitled "Relocation". The parties agreed "not to remove the minor child from the City and County of Honolulu for the purposes of relocation without 60 days advance written notice to the other party. (Mother) may take the minor child on an extended vacation for up to 45 days each year".

On about 2 June 1998 the mother left Hawaii on board "Ishi" with the child. The father told me that the mother had taken the child with his consent but on the clear understanding that they were going to Tahiti whence they would

return by air within the 45 days period specified in the Consent Order.

A The mother told me that special arrangements for the safety and welfare of the child were made on the "Ishi". Safety nets were installed and an extensive store of medicines and other medical equipment were acquired. Additional water and baby food were also taken on board. Although only 55 feet long the "Ishi" provides comfortable and private accommodation for the five adults aboard, 4 males, the mother and the child.

B When the "Ishi" eventually arrived in Tahiti the parties spoke by telephone. The father told me that the mother had told him that she did not want to come back to Hawaii and that she would try to cash in the airline tickets which the father had sent out and which were awaiting her collection. The father had then allowed the 45 day period to elapse before consulting his lawyer.

C On 1 October 1998 after Notice of Hearing had been sent to the mother who had still not returned, the Family Court in Hawaii made a further Order, a copy of which was produced as Exhibit 2. The father was awarded temporary legal and physical custody of the child and a bench warrant was issued against the mother. Upon information being received that the "Ishi" was now moored at the Royal Suva Yacht Club the father instructed his legal advisers to commence the present proceedings.

D Both the father and mother put their case with frankness and sincerity. It is a tribute to them that the hearing proceeded without rancour and indeed with a display of goodwill and cooperation, particularly in the task of tending the child who was present almost throughout the hearing.

E The father's case was that he was concerned for the wellbeing of the child who in breach of the Order of the Hawaii Court had spent the last 4 months living unsuitably and at risk of accident or ill-health on board an ocean going yacht. He had been deprived of his legal visitation rights and there was no guarantee when or indeed whether the child would ever be returned to Hawaii.

F While he acknowledged that the mother was the child's primary carer he sought an order allowing him to take the child back to Hawaii. There the Hawaii Court could make whatever Orders were necessary and appropriate in the circumstances.

G The mother on the other hand stressed the dependency upon her of the child at the still tender age of 18 months. The child was still being partly breast fed. She acknowledged that she had knowingly breached the Court's Order of 29 May but thought that the father would overlook the breach and forgive her. She never expected it to come to this. She and the child were both very happy on board "Ishi" and she wanted to continue her once in a lifetime adventure, sailing on to Vanuatu and then around Australia. As both her mother and her other daughter live in Hawaii her general plan was to return there in about March or April 1999.

In his oral submission Mr. Clarke suggested that the mother's first priority

was not the welfare of the child but the continuation of her voyage. He emphasised the breach of the Hawaii Court's Order, the risks to the child inherent in the voyage and the absence of any guarantee that the child would eventually return to Hawaii.

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Mr. Sharma, who also filed a helpful written submission, suggested that given the age of the child the paramountcy of its interest indicated that it should stay with its mother who alone could provide the necessary love and care. The working father could obviously not look after her on his own and such support as he might obtain from his relatives would only be short term. He also stressed that the Court should not punish the mother for breach of the Hawaii Court's Order.

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At the conclusion of the hearing on 14 October I delivered a brief interim ruling. I did so because I believe that difficult human questions such as these should be resolved as swiftly as possible; delay only prolongs the trauma which is suffered by the parties.

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I awarded interim custody to the father and ordered the child's passport to be handed to him. I expressed the hope that the father and child would return to Hawaii as soon as possible and that the mother, to whom a ticket would be provided by the father, would accompany them either at the same time or as soon as possible. In my opinion the interests of the child would best be served by returning her to the jurisdiction of the Family Court of the First Circuit of Hawaii.

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In reaching my conclusion I was particularly assisted by the consideration of similar issues raised and examined by the English Court of Appeal in Re: L (minors) [1974] 1 All ER 913.

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Although I would not characterise the present case as one of kidnapping I believe the general conduct of the mother is of major relevance. Mr. Clarke told me that having come to know her over the last few days he had formed a very favourable impression of her. I am bound to say that from my more limited perspective I agree. But a mother's pleasantness of character and capacity for love and care for her child do not alone provide a basis for finding oneself satisfied with the arrangements proposed. I do not think gallivanting about the South Pacific in a yacht in breach of a Court's Order and with apparently no funds is in the best interests of an 18 months old child. Mothers of very young children, especially if they are single parents, unavoidably have to temper their plans by the need to provide a safe and secure and suitable environment for their offspring. While I accept that the mother no longer wishes to live with the father I do not accept her argument that it was necessary to leave Hawaii in order to effect a separation from him.

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This child who is only very temporarily in Fiji is a US citizen with US parents. I am satisfied that her future is best considered in detail and determined by that Court to which jurisdiction both the parents and the child have hitherto to

been subject (see Re: L (minors) at page 926).

A *(Interim custody awarded.)*