MARY LOUISE KAKOMA v BENSON CHITONDU KAKOMA (1979) Z.R. 17
(H.C.)

HIGH COURT
CULLINAN, J.
24TH JANUARY, 1979
1972/HP/D/50

Flynote
Family law - Custody - Jurisdiction - Child taken out of jurisdiction by wife - Whether court has jurisdiction to deal with custody - Custody to husband without prejudice to question regarding care and control.

Headnote
This was an application by the respondent to vary an order of custody. The parties were married in New Zealand, subsequently they came to Zambia where the child was born. The petitioner was granted a decree nisi of divorce and custody of the child. An application by the respondent to vary custody was dismissed. The petitioner without leave of court took the child out of the jurisdiction to New Zealand, hence this application. The court considered the issues of whether it had jurisdiction in the matter and whether the order it might make would have any effect.

Held:
(i) The court has inherent jurisdiction to deal with the custody of the child whose parent is a citizen of Zambia and who was born within its jurisdiction.
(ii) The order made by this court could be incapable of having any effect unless the court in New Zealand takes a similar view.
(iii) The proper course is to give the husband legal custody to enable him if he wishes to present his case in a New Zealand court on equal terms with the petitioner
(iv) The court can act irrespective of the fact that the courts of the country where the child is located may also have jurisdiction to make an order. It assumes that the other court will act in a reasonable manner both as to whether or not it chooses to make an order and as to what order it should make; and every effort is put forth on all sides to ensure that there should be no divergence between the line taken by this court and that taken or 40 likely to be taken by the other court.
(iv) Custody of the child granted to the respondent without prejudice to any question of care or control.

Cases referred to:
(1) Harben v Harben, [1957] 1 All E.R. 379.

(2) Ronalds v Ronalds (1875) L.R. 3 P.& D. 259.
(3) Hope v Hope (1854) 43 E.R. 534.
(4) Re Willoughby (1885) 30 Ch. D. 324.

(5) Wakeham v Wakeham [1954] 1 All E.R. 434.

For the petitioner: No appearance.
For the respondent: D.M. Lewanika, Shamwana & Co.

Judgment

CULLINAN, J.: This is an application by the respondent to vary an order of custody of the child of the family, a little girl Tanya Mulusa aged 9 years.

The parties were married in New Zealand. Subsequently they came to Zambia where the child of the family was born on the 14th March, 1969. The petitioner was granted a decree nisi of divorce on the 3rd September 1973, when she was also granted custody of the child. An application by the respondent to vary custody was dismissed on the 11th September 1975. The present application has been made by the respondent in view of the fact that the petitioner, without leave of the court, took the child out of the jurisdiction to New Zealand on the 5th November 1976.

The first question that arises is whether the court now has any jurisdiction in the matter. In the case of *Harben v Harben* (1), at p. 381 at F Sachs J., observed:

> "I doubt if I need say any more on the point of jurisdiction than to thank counsel for the wife for referring me to *Ronalds v Ronalds* (2), which to my mind makes it, by analogy, clear that jurisdiction exists to deal with the present issues by virtue of s. 26(1) of the Matrimonial Causes Act, 1950, (see now section 42 of the Matrimonial Causes Act, 1973) and to *Hope v Hope* (3), the leading authority on the inherent jurisdiction of the High Court to deal with the custody of any child who is a British subject whether by parentage or even (as is exemplified by *Re Willoughby* (4)), by virtue of having a British grandfather. This inherent jurisdiction exists even if the child is born out of allegiance, and it exists irrespective of where the child may be physically located at the relevant times."

In the present case although the petitioner is a citizen of New Zealand, the respondent is a citizen of Zambia and the child of the family was born within the jurisdiction. I am satisfied therefore as to my jurisdiction. The question arises however as to what effect any order of this court might have in the matter. In the case of *Wakeham v Wakeham* (a), p. 435 at A, Sir Raymond Evershed, M.R. said:

> "From the practical point of view, so long as the wife remains in the Union of South Africa it is clear that nothing effective could in any case be done by the husband unless he took proceedings in the courts of that country."

and again at p. 435 at H:

> "I confess that any view that we expressed would be largely futile,

p19

> because it would be incapable of being made effective unless the court in South Africa should take a similar view."

In *Harben* (1), Sachs, J., observed at p.381 at I:

". . . the court can act also irrespective of the fact that the courts of the country where the child is located may also have jurisdiction to make an order. It assumes that the other court will act in a reasonable manner both as to whether or not it chooses to make an order and as to what order it should make; and every effort is put forth on all sides to ensure that there should be no divergence between the line taken bythis court and the line either taken or likely to be taken by the other court. Whether or not this court makes an order in relation to a child outside the jurisdiction depends on the particular facts of the case, but of course, those facts have to be really exceptional before an order is made."

In *Wakeman* (5), the petitioner husband was granted a decree nisi and also legal custody of the two children of the family, one of whom, a five-year-old boy, had been taken by the respondent wife out of the jurisdiction to South Africa some three years earlier contrary to her promise to her husband in the matter. The order for custody was subsequently varied, the wife obtaining custody of the latter child. On appeal by the husband to the Court of Appeal, Sir Raymond Evershed M.R., observed at p. 436 at A:

"I think that the proper course is to let the original order in this respect stand, namely, to let the husband have the legal custody of the child, but to make it clear - and in the circumstances of this case I think it should be made clear by express statement in the order that the order as to custody is without prejudice to any question as regards the care and control of this child. If, then, the husband chooses to make an application to the South African courts, the matter will, no doubt, be considered by those courts on its merits, but the husband will not, at any rate, start with the unfair disadvantage that it would be said: 'The courts in England have said that the mother ought to have the legal custody of this child'."

Again, Romer, L.J., at pp. 436/437 at H said:

"We are now being asked to put the husband into a position in which he can approach, on terms of equality with his former wife, the South African courts if any question in regard to the welfare or control of the child comes up for determination. As the matter stands at the moment, the wife having the legal custody as well as the physical control of the child, I take the view that the husband would be gravely prejudiced, and in a difficult position in regard to the South African courts, if, in the face of that order, he made an application which he might well make to them on some matter affecting the child. Today we are merely removing that disadvantage and putting him on equal terms with the wife in any application that may be made. Counsel for the wife said that if we made the

p20

order which my Lord has indicated it would be giving the husband an advantage over the wife, but I do not take that view. The words which are to be put into the order, 'without prejudice to any question of care or control', will and plainly are intended to leave the matter open, and will no doubt, receive that interpretation in the South African courts."

In the present case an order for custody was made in favour of the petitioner; an application to vary

that order was subsequently dismissed. The situation has now altered however. The petitioner has taken the child of the family out of the jurisdiction without leave of the court. Mr Lewanika for the respondent submits that the petitioner is in contempt and should not be heard by this court - until she purges herself thereof. The petitioner's advocates in New Zealand have sent to the court an affidavit sworn by the petitioner: they subsequently addressed a letter to the respondent's advocates however, in which they indicated that they now consider that the petitioner is not amenable to the jurisdiction of this court, so that I can only regard her affidavit, which deposes to a belief in the authenticity of a threat to deport her from Zambia, as directed towards an attempt to explain such contempt.

I consider the circumstances of this case to be exceptional. I under stand that the respondent wishes to take the matter before the courts of New Zealand. In such circumstances I consider that the respondent should at least be put on equal terms with the petitioner. I propose to make an order in the form adopted by the Court of Appeal in Wakeham (5). I order therefore that the respondent be granted the custody of the child of the family Tanya Mulusa Kakoma without prejudice to any question of care and control of the said child.

Order for custody to respondent
