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FAMILY COURT OF AUSTRALIA at MELBOURNE

In the Marriage of DING

Fogarty J

26 February 1976 — (1976) 25 FLR 311; 9 ALR 542; [1976] FLC 75,111 (¶90-023)

FAMILY LAW – CUSTODY – APPLICATION FOR CUSTODY – HUSBAND DESIROUS OF TAKING MALE CHILD OF THE MARRIAGE TO MALAYSIA – WIFE PERMANENTLY IN AUSTRALIA – EXERCISE OF DISCRETION – WHETHER COURT SHOULD ORDER THAT THE INTERIM CUSTODY OF THE CHILD BE GRANTED TO THE WIFE: *FAMILY LAW ACT* 1975, S39(4).

W. sought custody of two children of marriage – she was born in and was an Australian citizen living permanently in Australia. H. was born in Malaysia, was a Malaysian citizen and lived there. Older child was born in Malaysia and remained in Sarawak when the wife left the husband.

HELD:

1. It is established that it is only in exceptional circumstances a Court should make an order relating to the custody of a child who is not within the jurisdiction, particularly so if the child is in a country where the order of an Australian Court would not be enforced. That is, *prima facie* orders ought not to be made which are incapable of enforcement. In the present case, an order made by the Family Court would not be entitled to any automatic recognition or enforcement in the Courts of Malaysia.

2. Whilst exceptional circumstances are required, each case depends upon its own particular facts and the ultimate criterion is the welfare of the child.

3. The exceptional circumstances in the present case were that the child in question was an Australian citizen and had real connections with Australia, and his sister and his mother were both living in Australia permanently. In addition there was some evidence that it was the intention of both his parents to return to live permanently in Australia, and that the husband and father had decided not to comply with that original arrangement.

4. Further, the fact that there was evidence based upon a telegram recently received from the husband indicating an intention by him to unilaterally change the nationality of the son Adam to Malaysian.

5. The effect of any such change would be a significant change so far as the child was concerned and was sufficient justification for the making of the order.

FOGARTY J: ... The authorities would appear to establish fairly clearly that it is only in exceptional circumstances that a Court should make an order relating to the custody of a child who is not within the jurisdiction, particularly so if the child is in a country where the order of an Australian Court would not be enforced. That is, *prima facie* orders ought not to be made which are incapable of enforcement. That seems to be the position here, that is, an order made by this Court would not be entitled to any automatic recognition or enforcement in the Courts of Malaysia.

In this regard, reference might be made to such cases as *Knipe v Alcock* [1907] VicLawRp 106; (1907) VLR 611; *Szintey v Szintey* (1956) 73 WN (NSW) 330, and *Harris v Harris* (1959) 2 All ER 318, p322.

However, those cases also indicate that whilst exceptional circumstances are required, each case depends upon its own particular facts and the ultimate criterion is the welfare of the child, as to which see *Re P* (1964) 3 All ER 977 and Toose Watson and Benjafield at p512. In this case it was argued by Mr Dwyer that although the order was not enforceable in Malaysia and the child was not within Australia, I ought to make an order for two reasons.

First, because one could anticipate that some 'respect' could be given by the appropriate Malaysian

authorities to an order made by a properly constituted Court in this country, and secondly that in any event there were exceptional circumstances in this case which justified the making of the order.

I would not have regarded the first of those two matters as of sufficient weight, but I do feel that this is a case where there are sufficiently exceptional circumstances to justify me in making the interim order which is sought.

These exceptional circumstances appear to me to be that the child in question is an Australian citizen and has real connections with Australia, and his sister and his mother are both living here now permanently. In addition there is some evidence that it was the intention of both his parents to return to live permanently in Australia, and that the husband and father has decided now not to comply with that original arrangement.

Further, and I consider critical to this matter, is the fact that there is evidence based upon a telegram recently received from the husband indicating an intention by him to unilaterally change the nationality of the son Adam to Malaysian.

The effect of any such change would be a significant change so far as the child is concerned – changing his nationality perhaps completely, and fundamentally altering his connection and relationship with the two countries, namely Australia and Malaysia. It appears to me that that is a change which ought not be made without serious consideration and if an order of this Court can be made which may assist in preventing that being done without careful examination by the Malaysian authorities, that appears to me to be a sufficient justification for the course which I propose to adopt.

For these reasons I propose to make orders adjourning the proceedings and granting in the meantime interim custody of the two children to the applicant, Mrs Ding. I will also give directions to the service of the papers.
