

P. I. JALAL



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JUSTICE DEPARTMENT,
NUKU'ALOPA, TONGA.

IN THE SUPREME COURT OF TONGA
DIVORCE JURISDICTION
NUKU'ALOPA REGISTRY

Divorce Case No. 39/88

B E T W E E N:

TEPOLA LOLOHEA BAILEY - Petitioner
(Nuku'alofa)

-v-

- 1. PETER LEONARD BAILEY - Respondent
(North Vancouver/Canada)
- 2. KATHLEEN LUDY - Co-Respondent
(Kitimat/Canada)

J U D G M E N T

This application is to determine whether Peter Bailey ("Father") or Tepola Loloheta Bailey ("Mother") should have custody of their children Charles Ashton Bailey, now aged 9, and Alice Josephine Bailey, aged 8. Father is 47, English, now living in Canada. Mother is Tongan, aged 42.

Father & Mother lived together in Honolulu and Canada from 1976. They were married in Canada in 1982. The children had already been born and were legitimated by the marriage. Differences arose between Mother & Father and in 1985 Mother, without warning, left Canada with the children for Tonga. They returned to Canada & lived together as a family from May 1987 to September 1987, when Mother & children returned to Tonga, this time by agreement. They have been in Tonga ever since. Father has regularly sent money for their maintenance. Mother has now commenced divorce proceedings and Father has travelled from Canada to see the children & seek to gain custody of them.

After the final breakup of the marriage, Father began to live with another lady, but that relationship has now ceased. He now lives on a boat in British Columbia. He is self employed. He is a trained and experienced teacher. He says that if given custody he will take up teaching again so that his free time will coincide with that of the children;

that he will rent a small house, & will probably employ a maid. He has obviously given much thought to the interests and needs of the children. He offers them the experience of occupations which he enjoys - camping, sailing, fishing, painting, sculpting and crafting in silver. He also offers a superior standard of living, material comforts and education. As a teacher he would earn \$42,000 p.a. He frankly acknowledges that he cannot replace their mother.

Father does not go to church, although he has taught in Anglican schools in England and New Zealand when he used to attend. He would take the children to church but not to one of fundamentalist beliefs such as they now attend at S.D.A. church. He feels strongly that such teaching is wrong.

Mother works as a secretary for the S.D.A. church & earns \$125 per fortnight. She lives in a compound of houses belonging to the S.D.A. Church. She has a flat with 2 small bedrooms, a kitchen & a bathroom. It is clean and reasonable considering her income. In the same compound are a number of other families and children of similar ages to Charles & Alice. They attend the S.D.A. Church, which Mother regards as important. She acknowledges that Father loves the children, but would not even agree to staying ~~over~~ in Canada. She fears that they would not be properly looked after, and that they would not be returned. I do not believe that either of those fears is justified.

She also feels that Father is over-familiar with their daughter. This, I think is based on a difference in culture. In European families it is common place for fathers to kiss & cuddle their daughters. It is not done in Tonga. I draw no conclusions adverse to Father over this.

Charles misses Canada in some ways. Alice seems to have settled well in Tonga. They attend Tonga Side School which is English-speaking. Mother hopes to take them to USA in 2 or 3 years (she has relatives there) where they would receive a better education.

There are the relevant facts. I have avoided consideration of the events leading up to breakdown of the marriage. It serves to purpose to open old wounds & it throws no light on the present issues.

The considerations to be borne in mind when considering custody were clearly summarised by Tapou J in Muller v. Muller (79/86 and appeal 1/86). The welfare of the children is the first & paramount consideration. All other considerations must be taken into account and weighed in the balance against that test. Often that means no more than that the Court must decide between options which are far from perfect & which each contain disadvantages, & choose the least harmful. That is the position here.

To those considerations I would add that brothers & sisters should not be parted unless there are compelling reasons to do so.

In my view each parent would provide plentiful love and adequate care. Father offers a better material standard, & possibly a better education later.

His plans are necessarily hazy. I would not expect him to commit himself to a new house unless he knew that the children were coming to him.

Mother offers continuity of care, a mother's love, & the possibility of education in USA.

I do not place much weight on material standards, provided that basic needs are met, which they clearly are. The children have spent most of their lives in Canada, but have now lived in Tonga without a break for over a year, and are settling down. A change in Custody would cause yet another upset in their short lives. So would a change of church, though less at their ages.

Balancing all these considerations, I conclude that it would be in the best interests of the children for them to remain with their mother. They are still too young to be separated from her without serious detrimental effect. Custody is awarded to the mother.

The Mother's objections to access are genuinely felt but in my view unjustified. It is very much in the interests of the children to maintain contact with their father. I award him reasonable access - If he is able to meet the expense and to provide proper accommodation in Canada, he should be allowed staying access, but circumstances are not yet right where I would make such an order.

Custody of the 2 children is given to the mother, with reasonable access to the father.

Colaker
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(Chief Justice)

22 December 1988.

Peter L. Bailey. c/o 39 Dancrest Drive. Scarborough, Ontario.
Canada.