ROBERTETTA JOHNSON, et al., Appellant, *v.* RADEAL FADEL, Appellee.

APPEAL FROM RULING OF JUSTICE.

Argued April 27 and 28, 1976. Decided June 17, 1976.

1. Award of a child to custody is controlled by paramount consideration of the facts and circumstances affecting the welfare of the child.
2. To invoke habeas corpus proceedings for the custody of a child, the applicant must show a *prima facie* right to custody.
3. The father of an illegitimate child cannot institute habeas corpus proceedings without first having legitimized the child.
4. Cancellation of a decree of legitimization divests the father of the right to custody of his child.

The appellant instituted habeas corpus proceedings while proceedings for cancellation of the legitimization of the child of petitioner and respondent were pending. The trial judge ordered the child produced in court by the father within 14 days. The respondent sought a writ of certiorari from the Justice in chambers. The writ was granted, and the respondent wife appealed.

The Court incorporated the opinion of the Justice and held that the judge was premature, for until the cancellation proceedings were concluded the right to custody of the child by the father was not determined. The Court also said that the order should not have been issued by the trial court before a hearing. The child was placed in custody of the mother. Ruling *affirmed.*

M. Fahnbulleh Jones for petitioner. *Emmanuel Berry* and *Edward Carlor* for respondents.

MR. JUSTICE HORACE delivered the opinion of the Court.

This case grows out of habeas corpus proceedings instituted in Criminal Court "B," Criminal Assizes, First Ju-

dicial Circuit Court, Montserrado County, by Robertetta Johnson, purported attorney-in-fact for Beatrice Lang, against Radeal Fadel for the custody of their child, who is at present in the custody of the father.

The child, the subject of the habeas corpus proceedings, Nadia Fadel, was born out of wedlock to Beatrice Lang, a Liberian citizen, and Radeal Fadel, a Lebanese national. Sometime after the child's birth, the father, obviously with the mother's consent, petitioned the Monthly and Probate Court, Montserrado County, for legitimization of the child and by decree of said court it was duly legitimized.

After her legitimization, the father decided to send the child to his parents in Lebanon for, as he claimed, education and proper care and upbringing. It appears that the mother agreed, as it was brought out in the argument before us; both parents wrote the Minister of Foreign Affairs of Liberia for the issuance of a passport for the child to facilitate her travel to Lebanon. Although counsel for the mother in his argument denied that she had any part in obtaining a passport for the child to travel abroad, we think it inconceivable that the Ministry of Foreign Affairs would issue a Liberian passport to such a child without some contact with the mother who is a Liberian, the father being an expatriate who under the Constitution is incapable of obtaining Liberian citizenship.

Sometime after the child was sent to Lebanon, the mother, having by this time married another man, was able to go to Lebanon where she saw her child, and apparently being dissatisfied with her condition, by power of attorney duly executed, probated, and registered in Liberia, authorized Robertetta Johnson to institute cancellation proceedings for fraud against Radeal Fadel, father of the child, to cancel the decree of legitimization, that legitimized the subject child.

While the still-undetermined cancellation proceedings were pending, Robertetta Johnson allegedly upon instruc-

tions of Beatrice Lang instituted habeas corpus proceedings against the child's father for custody of the child. The habeas corpus petition stated in substance that the child was not attending school in Lebanon, and was being ill-treated; that her stay in Lebanon under such conditions was fraudulent and contrary to human decency, restraining her liberty, and estranging her from affectionate contact with her natural mother.

Returns were filed by respondent in the habeas corpus action, in which he first attacked the authority of the petitioner in said action for bringing the proceedings, stating that the power of attorney held by Robertetta Johnson was to institute cancellation proceedings and not habeas corpus. He also denied that the child was not attending school and was being mistreated and gave notice that at the trial he would produce pictures of the child to substantiate his allegations. We would like to mention here that during argument before us, a copy of a power of attorney from Beatrice Lang to Robertetta Johnson to institute an action of habeas corpus was shown us, although no copy of such power of attorney was attached to the returns in the certiorari proceedings. Perhaps the reason for not making profert of same was due to the fact that it was executed out of Liberia and was neither probated nor registered.

When the habeas corpus case was called for hearing by Judge Napoleon B. Thorpe, Circuit Judge, presiding over Criminal Court "B" of the Criminal Assizes of the First Judicial Circuit, Montserrado County, petitioner protested against proceeding with the case without the respondent producing the child as he had been directed to do by the writ of habeas corpus, citing as his authority the pertinent section of the Civil Procedure Law, Rev. Code 1:16.51, as well as *Benedict* v. *McGill,* 1 LLR 26 (1864), *Wanney* v. *Massaquoi,* 10 LLR 241 (1949), and *Okagbare* v. *Okagbare* 13 LLR 593 (1960).

Respondent in the habeas corpus case countered peti-

tioner's submission with the contention that because the child was beyond the jurisdiction of the Court, that is, in Lebanon, and because of the conflict in the Middle East, and the difficulty in getting in and out of Lebanon, it was impossible to produce the child, and cited as his authority the Civil Procedure Law. Rev. Code 1:16.60.

The trial judge, after hearing argument, ruled that the submission made by the petitioner was in order and that the child should be produced in court within fourteen days.

Thus the matter stood in the trial court, when respondent in the habeas corpus proceedings filed a petition before the Justice in chambers for a writ of certiorari, to correct what he considered the erroneous ruling of the trial judge. The relevant portion of the petition alleged substantially that: (1) petitioner is the natural father of the child in question; (2) that the judge who authorized the issuance of the writ of habeas corpus had overlooked the fact that the purported attorney-in-fact who had instituted the habeas corpus action had no authority to do so, her authority being limited only to instituting cancellation proceedings; (3) that the trial judge without passing on the issues of law raised in his returns in the habeas corpus proceedings improperly and imprudently ruled that the child must be produced in court within 14 days; (4) that the mother of the child being without the territorial limits of the Country without any known address, the welfare of the child being of paramount concern, it would be wrong and against the said child's welfare and interest to give her in custody to an attorney-in-fact of the mother, as against the natural and legal father. Moreover, that the petitioner who is engaged in a commercial business in the City of Monrovia, and who has a mother and father living in Lebanon with whom the subject child and another child of Liberian motherhood two years older, are living, is not only capable but is actually taking care of his children, which he would have proved if a

hearing had been had of the habeas corpus proceedings.

The respondents in these proceedings contended in their returns that: (1) the question of Robertetta Johnson's capacity to sue in the court below should have been averred negatively; (2) that the trial judge's ruling that the child in question be brought to court is strictly in conformity with the statute; (3) that factual issues are raised in the petition which should be resolved by production of evidence; (4) that this Court having in several opinions expressed disfavor in hearing cases piecemeal, the ruling of the trial judge to produce the child before going into the merits of the habeas corpus proceedings was in error.

After hearing argument, our distinguished colleague, Mr. Justice Wardsworth, in an able and comprehensive ruling, reviewed the statutory as well as common law principles relating to habeas corpus proceedings concerning an adult prisoner, as distinguished from those relating to a child. Here is what he said with respect to this as well as to some other aspects of the issues involved:

> "When the case was called for hearing, the petitioner below, now respondent, argued that the child which is the res of the proceedings must first be produced in court. The respondent below, now petitioner, reported that the child is in Lebanon during the Middle East struggle and disturbance in that country, for which reason the Government of Lebanon has for more than two years embarked on disallowing visas and also the issuance of passport to any minor child; thus he, petitioner, prayed to be excused by the court, for he was without the power to produce the child; the court must continue the hearing until the merits of the case prove that the child should be produced according to law. The law relied on by respondent below states:
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> " 'If the defendant reports under oath to the court or judge that the prisoner named in the writ is not in his custody or power to produce and was not so at the time of the service of the writ, he shall be excused for not

producing the prisoner unless the court or judge shall, on hearing, order him to produce the prisoner.' Rev. Code 1:16.60.

"In spite of this, the trial judge ruled that 'the submission of petitioner is quite in order and despite the child being in Lebanon and in school, the strong and powerful writ of habeas corpus can bring her here,' this is a supreme disregard of the welfare of the child, with the implication contrary to law, that the rights of the parents supersedes the welfare of the child; and that the powerful writ of habeas corpus can bring the minor child regardless of the difficulties involved and the perils to the child's life and welfare.

"Though 'habeas corpus' is a writ of high prerogative, strong and powerful, of ancient origin in common law, its judicial implementation with respect to the award of custody of a minor child is controlled by paramount consideration of the facts and circumstances affecting the welfare of the child. *Okagbare* v. *Okagbare* 13 LLR 593 (1960). A writ of habeas corpus for the production of an adult prisoner is distinguishable from that for the award of custody of a minor child, the primary consideration of the former being the relief from the physical restraint of liberty imposed without due process of law, while that of the latter is the granting of better available conditions of custody in the best interest of the child and not a relief from custody per se, since a child must be in the custody of some competent person. The test for the child's benefit being not only the financial and legal consideration but also the comparative moral, educational, and social conditions of the party to be awarded the child's custody. In fact the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to due consideration. *Daniels* v. *Daniels,* 16 LLR 58 (1964).

"And another point of consideration is that to invoke the aid of habeas corpus the applicant must show that he has a *prima facie* legal right to the custody of the child; since the child's welfare is the primary consideration, one who is not related to the child cannot bring such a proceeding without first averring a *prima facie* legal right to such custody. Thus, it is said that the father of an illegitimate child cannot institute a habeas corpus proceedings without first having legitimized the child. 39 AM. JUR. 2d, *Habeas Corpus,* § 118 (1968). The trial judge, therefore, also erred in not first disposing of the issue as to the legal rights of the attorney-in-fact under the power of attorney to institute the habeas corpus proceedings.

"Under our law the father is the proper custodian of the children in the absence of proof of his legal disability, *Benedict* v. *McGill,* 1 LLR 26 (1864); and, further, it has been held in several cases that where a divorce suit is pending before a court of competent jurisdiction over the parties and subject matter, and which has the power to settle the issue of the custody of the child, another court will not interfere with the possession of the child. 39 AM. JUR. 2d, *Habeas Corpus,* § 92 (1968).

"The underlying principle therein is that the determination or decree awarding the custody is to be recognized though it may not be regarded as an absolute controlling factor. The pending cancellation proceedings of the decree of legitimization, though not a divorce suit *per se,* has the same effect as a divorce suit for that matter. For without doubt the cancellation of the decree of legitimization of the child would divest petitioner, respondent in the court below, of any legal rights to the custody of the child, while sustaining the mother of the illegitimate child as the proper custodian. On the other hand, if the decree is affirmed, the petitioner, respondent in the court below,

would have been considered the legal custodian of his legitimized child in the absence of any legal disability or incapacity on his part. I, therefore, opine that the trial court should have recognized the issue pending in the Probate Court unless some clear, undoubtful facts and circumstances affecting the welfare of the child were shown. In the case at bar I do not conceive that any such facts and circumstances were shown; even the trial judge did not indicate in his ruling that he was convinced to that effect. The interference with the issue of the custody of the child by means of habeas corpus while it was pending in the Probate Court of competent jurisdiction was premature and unreasonable.

"Therefore, in view of the foregoing, the ruling of the trial judge is hereby reversed; that until and unless the cancellation proceedings are disposed of and that adverse circumstances and conditions are positively shown to exist for the child in question, custody of said child should be suspended in these proceedings; the petitioner is ordered to retain the custody of the child without further interference."

We are in full accord with the ruling of our colleague in chambers.

But, more than that, we would like to emphasize that the trial judge committed reversible error when he, in disregard of the clear language of the statute, without a *"hearing"* [emphasis supplied], Rev. Code 1:16.60, ruled that the child must be produced in court within fourteen days. It was the court's duty to hear and/or investigate the truth or falsity of the allegations made in the returns of the respondent in the habeas corpus proceedings and the resistance to the submission of petition in said proceedings when the case was called for hearing, before entering any ruling on the question of the production of the child in court, before going into the merits of the habeas corpus proceedings.

It is our holding, therefore, that the ruling of the Justice reversing the ruling of the trial judge in the habeas corpus proceedings be and the same is hereby affirmed; and the Clerk of this Court is hereby directed to send a mandate to the court below that until the cancellation proceedings now pending in the Probate Court are finally disposed of, the petitioner in these proceedings retain the custody of the child in question without further interference. Costs disallowed. It is so ordered.

Ruling affirmed.