TABETH KUTSANZIRA

versus

MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE

GUVAVA J

HARARE, 27 July 2012

FAMILY LAW COURT

**Chamber Application**

*C. Kwaramba*, for the applicant

GUVAVA J: This is again another application which raises the issue of guardianship rights and the circumstances under which a parent may be divested of such rights. The application was initially allocated to CHATUKUTA J who raised a query with the legal practitioner on 28 December 2010. When this query was not responded to, she then referred the matter to the Family Court Division of the High Court on 18 October 2011. On receipt of the chamber application I then requested the Registrar to invite the applicant’s legal practitioner to come in so that I could discuss his application with him as he had not addressed the query raised. Due to an administrative mix up in the Registrar’s office the legal practitioner was only advised on 12 June 2012 and he promptly attended on 13 June 2012.

FACTS

 The applicant in this case is the mother and natural guardian of the minor child E.M. She seeks an order for the appointment of a curator *ad litem* in terms of r 249 of the High Court Rules 1972 as amended so that he can investigate and make recommendations in regard to the application by Shingirai Vaidah Mungadzi to be appointed guardian of the minor child. The applicant states that she is unemployed and her husband is currently serving a prison term (the length of the term of is not stated). She does not have the financial resources to look after the child. She states that Shingirai Mugadzi is the child’s aunt and has been providing financial support for the child for a long time. If she is awarded guardianship of the child she will be able to take advantage of her employment benefits such as medical and education allowances to maintain the minor child. The father of the child has also deposed to an affidavit where he supports the stance taken by his wife. They thus both seek to divest themselves of the parental rights to the minor child so that they may be conferred on the Shingirai Mungadzi. Whilst this is an application for appointment of a curator *ad litem* it is my view that the court in considering such an application must consider the merits of the main matter.

THE LAW

The law relating to rights of parents as guardians of children finds its origins in the Roman Law of *patria potestas*, which was an absolute right of control. This law is no longer in force and what has remained of it is the principle that the parents are the *legitimi tutores* of their children, in other words guardians by operation of law. (See E. Spiro “Law of Parentand Child” 4th ed at p 47) It is now settled that parental power consists of duties and rights which parents have in respect to their minor children. According to *Grotius*, children are from birth subject to the guardianship of their father (parent). In *Van Rooyen* v *Werner* (1892) 9 SC 425 the father or parent of a child is described as the natural guardian of his legitimate children until they attain the age of majority. Parents acquire parental power over a legitimate child at the time of its birth. It is considered by a number of authorities that the natural guardianship of parents is identical with parental power and I will therefore use the terms interchangeably. This power cannot be waived or abandoned in favor of someone else as this is considered to be contrary to public policy. Spiro states that the purpose of having public policy against transfer or delegation of parental power in favor of another is basically to protect the child from abuse which can occur should the parental power fall into the wrong hands. In this respect it is only allowed in very limited circumstances and normally, only after a full enquiry has been conducted so as to safeguard the interests of the minor child concerned.

Under the common law there are basically three categories which are recognized by law whereby guardianship or parental power may be lawfully transferred. These are adoption, *legimmatio per subsequens matrimonium* (which means that children whose parents marry after their birth become legitimated as a result of the subsequent marriage of their parents) and *venia aetatis* (which means grant by a sovereign or the courts of the status of majority to a minor). It seems to me therefore that guardianship cannot merely be transferred from one person to another if it does not fall under any of these categories. The willingness of the parents to give away their guardianship does not appear to have any significance in the ultimate decision by the court of whether or not to grant the guardianship of the minor child to another.

The facts before me do not show that this application would fall under any one of these categories. The applicant in the main matter has not sought to legally adopt the minor child nor has the court granted the minor child majority status. The applicant cannot claim under the second category which deals with children born out of wedlock.

Intervention by the legislature, through the Guardianship of Minors Act [*Cap 5:08*], whilst imposing on the father the duty to consult with the mother on questions on guardianship of their minor child and setting out the powers of this court relating to custody and guardianship of a minor where the parents are no longer living together, has not in my view altered the common law position especially relating to transfer of guardianship. The Act provides primarily for the situation where a minor has no natural guardian or tutor testamentary and sets out a procedure to allow a third party to be appointed as guardian in their stead. It should be noted that the procedure outlined in s 9 of that Act specifically requires that an inquiry be conducted to determine the suitability of the person who seeks to be appointed as guardian. In the case of *In re* *Gonyora* 2001 (2) ZLR 573 it was held that in making the appointment of guardianship the court must consider the minor child’s best interests. Although in this case the court was dealing with a child whose parents were deceased the same principles must be taken into account even in a case such as this where both parents are still alive.

 The High Court, as upper guardian of all minor children has in some instances intervened especially in circumstances where a minor child would effectively be without a guardian. In the case of *Ex Parte Sakota* 1964 (3) SA 8 the court appointed the applicant in that case guardian of the minor children of his brother. The children’s father had been convicted in the High Court of Yugoslavia of killing his wife, the children’s mother, and sentenced to 20 years imprisonment. The court had also made an order divesting him of natural guardianship over his children. The court found that it had the power to deprive a natural guardian of his rights and since the children now had no natural guardian, it was desirable that a guardian be appointed in South Africa where the children were residing.

The courts have also divested a parent of guardianship in cases where it has been established that to retain guardianship in the parent would pose a danger to the child. This point was emphasized in the case of *Van der Westhuizen* v *van Wyk* 1952 (2) SA 119 when it was held that a court cannot intervene with the guardianship rights of a parent unless there is danger to the child. It seems to me therefore, that the power to divest a parent of guardianship is a common law power which is exercisable by the courts very sparingly.

In the case of *In Re Maphos* HB 115/07 CHEDA J when faced with an application as in the present matter stated that this court must not readily grant guardianship to persons other than the minor children’s natural parents.

The inquiry into guardianship, like that of custody, cannot in my view, be one sided. In other words it is not only an inquiry into the advantages that will accrue to the child if its guardianship is granted to the applicant but also an inquiry into why the respondent must be deprived of his guardianship. Thus in my view, an inquiry seeking to divest one parent of guardianship in favor of another or of a third party must involve not only an inquiry into why and how the respondent parent must be divested of guardianship but also why the applicant is deemed suitable to be able to discharge those legal obligations that are imposed on natural guardians by law. An inquiry into guardianship is an inquiry into the suitability of a parent to discharge the legal obligations imposed by law on the guardian of a minor child. It is not an inquiry into issues like where the child will live or how and where it will be educated as those inquiries relate to issues of custody.

In my view the present application does not fall under any of the criteria discussed above. It seems to me that no basis has been laid out in this case for the parents to be relieved of their obligations. Although it is accepted that the father is in prison the mother is available. Poverty does not appear to be a reason to consider in order to divest a mother of guardianship. More importantly no investigation has been conducted as to the suitability or otherwise of the Shingirai Mungadzi to be a guardian of the minor child and for the court to satisfy itself that it is in the child’s best interest for the applicant to be appointed as guardian. In this day when there is rampant abuse of children by relatives and child trafficking it can only be in the best interest of any child that a proper inquiry is conducted in terms of the Childrens Act [*Cap 5:06*]. The process of adopting a child provides proper counsel to both the parents and the prospective adoptee of their rights and obligations in respect to the child

It is my view that it is unnecessary for a *curator ad litem* to be appointed in this case as it is incumbent for the Shingirai Mungadzi to proceed in terms of the Childrens Act. It is for these reasons that the application is hereby dismissed with no order as to costs.

*Mbidzo Muchadehama & Makoni*, applicant’s legal practitioners