

**MOIRA RUTH DAVIES (in her capacity
As mother, custodian and guardian of three minor children
A L D (date of birth 4 March 1989), R S L D (date of birth
22 August 1991), J A A D (date of birth 5 May 1995)**

versus

BENJAMIN JOSEPH DAVIES

And

CARMELITA FAITH DAVIES

And

HOPE DAVIES

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 16 SEPTEMBER 2004

Adv T Cherry for applicant
G Nyoni for the respondents

Urgent Chamber Application

Point in Limine

NDOU J: There are quite a number of cases involving these parties – see HC 2531/04; HC 2711/02 and HC 2894/04. All these cases centre around the estate and minor children of the late Andrew Keith Davies – who died as a result of a motor car accident on 28 July 2002. At the time of his death the late had been married to the present applicant for fourteen years. Prior the death the marriage of the late and the applicant was facing challenges and difficulties resulting in divorce proceedings being instituted. Before the divorce was finalised the applicant took the minor children out of the jurisdiction of this court. The late Davies was aggrieved by this conduct of the applicant. He instituted proceedings to bring back the children to Zimbabwe in terms of Child Abduction Act [Chapter 5:05]. The minor children were consequently

brought back to Zimbabwe. During the divorce proceedings and the application pursuant to the provision of Child Abduction Act, *supra*, the late Davies was represented by *Advocate Cherry* and in the present applicant was on the other side. In this application *Advocate Cherry* has been instructed to represent her by Messrs, Calderwood, Bryce Hendrie & Partners Legal practitioners. Both applicant's legal practitioners and herself were well aware of *Advocate Cherry's* involvement in the above mentioned cases on behalf of the late Davies. They, nevertheless, instructed him to act on behalf of the applicant. The respondents object on the basis of the conceived conflict of interest. Reliance was placed on the case of *Pertsilis v Calcaterra & Anor* 1999(1) ZLR 70(H) and cases cited therein. The facts of that case are distinguishable from the present one. *Advocate Cherry* acted for the late Davies and not any of the present respondents. The applicant has instituted these proceedings in her capacity as the custodian parent and is acting on behalf of the minor children in terms of section 5 of the Guardianship of Minors Act [chapter 5:08]. She is acting as an agent of the children in their suit against their uncle, aunt and grandmother (respondents). The minor children and the respondents are contextually the parties in this application. The issue in this application should not be confused with the issues in the other cases. The issues involved in these cases differ materially. My ruling on the point in *limine* in *casu*, will not necessarily be an indication on how this court will determine a similar point in the other cases. The welfare principle applies to the facts of this application but will not necessarily do so in the other cases. In this case the interests of the minor children will be decisive – *Fortune v Fortune* 1955(3) SA 348(A); *Short v Naisby* 1953(3) SA 572(D), *W v W* 1981 ZLR 243; *Nugent v Nugent*

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1978 RLR 66; *De Montille v De Montille* HB-6-03; *De Montille v De Montille* HB-20-03; *Kuperman v Posen* 2001(1) ZLR 208 and *Makumbe v Chikwenhere* HB-42-03.

This application, as I understand it, seeks to bring to the attention of this court as the upper guardian of all minor children, conduct of the respondents which is detrimental to the welfare of the minor children. This conduct is attributed to the respondents. She is acting as an informant of the upper guardian. The application seeks an interlocutory order to deny the respondents contact with the children without the consent or authority of the applicant. As far as Mr *Denbury* is concerned, it was submitted that he acted for the second respondent some fourteen or so years in a totally unrelated matter. It has not been shown that that matter had any bearing on the present matter. It has not been alleged that by acting for second respondent several years ago Mr *Denbury* may have received confidential information or instructions which may be of use to the applicant. There is no basis for conflict of interest shown – *Watson v Gilson Entprs & Ors* 1997(2) ZLR 318H.

On the question of urgency, I agree that ideally, a legal practitioner, other than Mr *Denbury* should have certified the urgency. As alluded to above, the paramount interests of the minor children take precedence. The allegations in this matter require urgent attention.

For these reasons I am of the view that I should not allow these perceived procedural and legal technical issues to work against the welfare of the minor children. In any event I do not see what prejudice there will be bearing in mind that I will interview the children individually and in private. This crucial part of the proceedings cannot be influenced by *Advocate Cherry's* involvement as counsel for the late *Davies* or Mr *Denbury's* dealing with the second respondent in a totally

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unrelated matter. The respondents, in any event, have dwelt at some length with the merits of the other cases, and not the welfare of the minor children. Whilst I accept in their favour that they relate well to the children from correspondence filed of record in the opposing papers, I cannot lose sight of the fact that such relations are usually dynamic. They may have related well in the past but that does not mean that that is the case at the time of this application. It is for this reason that the views of the minors should be heard before I can determine what is in their best interests especially in circumstances where the relations of the adults are unhelpful.

From the foregoing, I accordingly dismissed the point in *limine* and order that the application be considered on its merits.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Majoko & Majoko, respondent's legal practitioners