

IN RE PARSHOTAM

IN RE CHIBVEMBE

IN RE CHIDZIKWE

HIGH COURT OF ZIMBABWE
PATEL & GUVAVA JJ

Guardianship Review

HARARE, 29 October 2010

PATEL J: All of the three cases dealt with in this review involve the appointment of guardians to minor children by the same Provincial Magistrate in September and October 2009. Following jurisdictional queries raised in January 2010, the learned magistrate eventually responded on the 22nd of September 2010. There is no explanation for his inordinate delay in responding.

The Facts

In the *Parshotam* case, sole guardianship of the child was awarded to the natural mother who is living separately from the natural father. The latter had expressly consented to the award by way of a special power of attorney supported by his sworn affidavit.

In the *Chibvembe* case, guardianship of the minor was granted to her elder sister following the death of their mother. However, the mother's death certificate does not form part of the record. Moreover, there is no indication in the papers as to the whereabouts of the natural father or whether he is still alive.

In the *Chidzikwe* case, the learned magistrate awarded guardianship of the two minor children to their elder brother. The natural father is still alive and has consented to the application. However, there is no indication in the papers as to whether the natural mother is dead or alive or whether she has consented to the application.

Written Reasons

There is a preliminary aspect that needs to be addressed as a matter of general concern. The records *in casu* do not contain any reasons for the decisions made by the learned magistrate. It has been held by this Court that the record of proceedings of a juvenile court which is submitted to the High Court for review in terms of section 9(4) of the Guardianship of Minors Act [*Chapter 5:08*] must include written reasons for the court's decision. Without a record and written reasons for the decision, this Court cannot carry out its review powers to determine whether the decision and proceedings were in the best interests of the minor and in accordance with justice. See *In re Gonyora* 2001 (2) ZLR 573 (H) at 578.

Jurisdictional Competence

The Guardianship of Minors Act regulates the guardianship of minors generally. In terms of section 4(1)(b) of the Act, the High Court or a judge may, in the case of a minor whose parents are divorced or are living apart, grant to either parent the sole guardianship of the minor. Section 9 of the Act governs the appointment of guardians by the children's court. The relevant portions of section 9 provide as follows:

“(1) Without prejudice to the rights, powers and privileges of the High Court as upper guardian of minor children, and the Master in terms of section 74 of the Administration of Estates Act [*Chapter 6:01*], the children's court may, on application in terms of this section, appoint a fit and proper person to be the guardian of a minor who has no natural guardian or tutor testamentary.

(2) Where a minor has no natural guardian or tutor testamentary—

(a) a relative or person having the care and custody of the minor; or

(b) a probation officer;

may apply to the children's court by way of an application lodged with the clerk of that court for the appointment of a person as guardian of the minor, and such application may propose the appointment of a specified person as the guardian.”

It is manifestly clear from the foregoing provisions that section 9 only applies to **a minor who has no natural guardian or tutor testamentary**. The section simply cannot apply where a natural guardian, *i.e.* natural parent, is or may be still alive. In any such case, the matter must be dealt with by the High Court *qua* upper guardian of minor children. The Magistrates Court is a creature of statute and cannot assume or exercise any power or jurisdiction not specifically conferred by statute. As far as I am aware, there is no other relevant legislation on the subject.

It follows that the learned magistrate *in casu* fundamentally misdirected himself in purporting to award guardianship in all three cases. Moreover, each such appointment constitutes a nullity and anything done pursuant thereto has no legal force or effect.

In the result, the decision in each case is hereby set aside, in terms of section 9(7) of the Guardianship of Minors Act. The learned magistrate is directed to instruct the Clerk of Court to notify all three appointees accordingly and to advise them to apply to the High Court, should they wish to pursue the matter further.

GUVAVA J: I concur.