IN RE REGINA CHIMHANZI
(For appointment of Susan Chimhanzi as guardian of her two minor children)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE January 14, 2011

Chamber Application

MTN Chingore, for the applicant

CHITAKUNYE J: The applicant is the natural mother of two minor children who shall herein be referred to as A and B. The biological fathers of the children are unknown. The applicant has approached this court seeking an order that her sister Susan Chimhanzi be awarded custody and sole guardianship of the two minor children purportedly in terms of s 9(1) of the Guardianship of Minors Act, *Chapter 5*:*08*, herein after referred to as the Act. In an earlier application Susan Chimhanzi had been cited as the applicant. After I queried the appropriateness of the application especially as it was made in terms of s 9(1) of the Act, the name of the applicant was changed to that of the present applicant.

The basic facts are that the applicant gave birth to the two minor children. The biological fathers of the children disowned the children before birth. Even after birth they denied paternity. The applicant lives in Wedza and is not gainfully employed. Her sister, Susan has been supporting her in raising the children. Susan moved to the United Kingdom sometime ago and is employed there. She has since acquired citizenship of the United Kingdom. Susan has now asked for custody and sole guardianship of the two minor children. She wishes to take the children to the United Kingdom. The basis for the applicant seeking to divest herself of the guardianship of her children is the financial hardships and promises of better life for her children in the United Kingdom.

As was the case when the application came in the name of Susan, the question is: is this application properly before me in terms of s 9(1) of the Act?

Section 9 of the Act provides for the appointment of Guardian by the Children's Court. Subsection (1) thereof states that:

> "Without prejudice to the rights, powers and privileges of the High Court as upper guardian of minor children, and the Master in terms of s 74 of the Administration of Estates Act [*Cap 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."

It is clear to me that an application in terms of s 9(1) of the Act is for those circumstances where the minor child has no natural guardian or tutor testamentary. In *casu*, the minor children have a natural guardian in the form of their biological mother. On that basis this application cannot succeed.

In the event that the applicant is desirous of divesting herself of her guardianship of her children this court has held that a proper inquiry and investigation ought to be made. Guardianship cannot be divested of the natural guardian and vested in favor of a third party on the mere say-so in an affidavit. The Children's Act Chapter 5:06 provides a clear procedure to be followed. Where however one opts to approach the High Court an inquiry is still necessary.

In *re Maposa* HB 115/07, CHEDA J had occasion to deal with a similar situation. In that case an aunt applied to be appointed sole guardian of a minor whose mother had died but the father was alive. The father had, as in this, consented to the aunt being appointed sole guardian. It was again a case of the aunt wanting to take the minor out of the country. After a careful consideration of the case the honorable judge held that:

> "While the guardianship of a minor child can be granted to one parent to the exclusion of the other, the courts should be slow in granting that status to a third party. The reason is that, the court being the upper guardian of all minors, it should grant guardianship and order subsequent removal from its own jurisdiction only after serious considerations of the circumstances surrounding such application. While the best interests of the child are the first and paramount considerations, they are not the sole consideration in the determination of the suitability of an applicant for guardianship. Other considerations come into play. The wishes of an unimpeachable parent undoubtedly stand first. Although in *casu* the minor's father expressed wish was in favor of guardianship by the applicant, the applicant still had to satisfy court of her suitability as a new parent. She should satisfy the court that she was in a position to adequately look after the child and was a fit and proper person to adopt the child. In that regard the child's welfare should not be measured only by money or physical comforts, but by all factors that will affect its future. The court should not rely on the applicant's ability to support the child by her mere say-so in an affidavit; she must go further and convince the court by authentic documentary proof of her capacity to do so…".

In *Musonza* v *The Master of the High Court* HH 89-07 GUVAVA J had occasion to deal with another case of a similar nature. The applicant was a nurse working in the United Kingdom. She sought to be granted guardianship of her late sister's minor child with the intention of taking the minor with her to the United Kingdom. The father of the minor child

was alive and employed in Zimbabwe. The father consented to being divested of his rights of guardianship in favor of the applicant. At p 3 of her judgment GUVAVA J stated that:

> "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 who should be appointed as guardian. In the case of *In re Gonyora* 2001 (2) ZLR 573 it was held that in making the appointment of guardian 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 one of the parents is alive."

This court as upper guardian of all minor children may intervene even where a nature guardian is alive in circumstances that justify that he/she be divested of the rights of guardianship. In such instances an inquiry is still necessary. It is only after such inquiry that court may divest a nature guardian of the rights of guardianship.

In *Musonza* v *the Master supra* (at pp3-4*)* the honorable judge went on to say that:-

> "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 divested of his guardianship. Thus in my view, an inquiry seeking to divest one parent of guardianship in favor of another or 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. These issues relate to controlling his estate and assisting them in litigation among other duties. 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 *casu* the applicant's reason for seeking to be divested guardianship of her minor children is her inability to adequately cater for the children. Susan Chimhanzi in her supporting affidavit confirms the same. She wishes to be appointed guardian because she is better resourced than her sister Regina. Apart from her word that she is able to look after the children because she is employed, there was no other evidence to support her assertion. No inquiry was made on her suitability to take on all the duties and responsibilities of a guardian imposed by law.

It is my view in the absence of a proper inquiry into why the applicant should be divested of guardianship and why it is deemed Susan is suitable to be awarded custody and sole guardianship this application would still not succeed.

Accordingly the application is hereby dismissed with no order as to costs.

Chingore & Associates, applicant's legal practitioners