JEAN FIONA MAGNUS

versus

NEIL ANTONY MAGNUS

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 6 September 2004

Urgent Application

Advocate *Gijima,* for the applicant
Mrs *Jarvis*, for the respondent

BHUNU J: The parties were once married in terms of the then Marriage Act. They were granted a decree of divorce on the 20th January 1999. Custody and access to the 3 minor children of the marriage namely:

1. N.P., born [day/month] 1996;
2. M.A., born [day/month] 1997; and
3. D.G., born [day/month] 1997

were to be regulated in terms of a consent paper. The consent paper awarded custody to the applicant with the respondent being granted reasonable access to the children.

On the 30th January 2004 the applicant was divested of her right to custody of the 3 minor children by a probation officer acting in terms of section 15 of the Children's Protection and Adoption Act [*Chapter 5:06*]. The minor children were then placed under the custody of the respondent and his current wife in terms of section 17 of the Act.

Section 17 of the Act requires the probation officer and respondent to bring the children before the juvenile court as soon as possible. The children have not been brought before the juvenile court since their placement under a place of safety. The explanation for the delay is that the authorities have deliberately decided to await the outcome of pending criminal proceedings

arising from the alleged assault, or abuse of the older child N..

I find that explanation to be entirely reasonable and in accordance with the best interest of the children. That approach strikes a balance among all the competing interests. It avoids condemning the applicant before she has been proven guilty while safeguarding the welfare of the children pending the outcome of the criminal proceedings. It also affords the respondent and his current wife the opportunity to come to the aid of his children as and when required to do so.

The effect of the placement of the 3 minor children under a place of safety was to divest the applicant of her parental rights under section 47 of the Act. The section provides that:

> "Subject to subsection (4) and (5) a parent or guardian of any pupil, child or young person who has in terms of this Act or any other enactment, been placed in a certified institution or training institute or in the custody of some person shall be divested of his right of control over and of his right to the custody of such pupil, child or young person, and those rights shall be vested in the management of the certified institution or training institute in which that pupil, child or young person has been placed or in the person in whose custody such pupil, child, or young person has been placed." (my emphasis)

The placement order of the 30th January 2003 remains unchallenged to date. It therefore remains firm and binding between the parties despite Mr *Gijima's* speculation that it might be invalid.

The placement order having been made by a government official in the course of duty should be presumed valid until such time it has been lawfully invalidated.

In this application the applicant seeks to bar the respondent from sending the 2 minor children M. and D. to L... Primary School where the respondent has placed them in boarding school at his own expense. She wants them placed at either H... primary School where they were previously or H... School where she has found them places. She however wants them to go to the school of her own choice at the respondent's expense.

As I have already pointed out the mere placement of the children in a place of safety automatically divested the applicant of her rights over the children and conferred them on the respondent and his present wife. One of

the rights she has lost is the right to control and to determine the 3 minor children's educational path or the schools which they are to attend. That right is now vested in the respondent and his wife.

That being the case the applicant by trying to choose schools for the minor children she is attempting to exercise a legal right which she does not have. That in itself is an exercise in futility.

Looked at differently the mere fact that the children were taken away from the applicant and placed in a place of safety means that the children are not safe in her custody.

The respondent has placed sufficient evidence before this court in the form of photographs and a medical report which tend to suggest that at least one of the children was severely abused while in the applicant's custody.

As if that was not enough the applicant is currently facing criminal charges arising from her alleged abuse of the child. Whether or not she will be acquitted is immaterial at this stage, suffice it to say that there is sufficient evidence to warrant prosecution. This means that there is a *prima facie* case against the applicant.

Viewed yet from another angle, the 3 children were placed under the care of the respondent and his wife. The applicant seeks an order against the respondent only. Even if I were to grant the order it would not achieve the desired results for the simple but good reason that it will not be binding on the respondent's wife.

In the final analysis I come to the conclusion that there is no merit in this application. It is accordingly ordered that the application be and is hereby dismissed with costs.

Gill, Godlonton and Gerrans, the applicant's legal practitioners
Atherstone and Cook, the respondent's legal practitioners