

JONATHAN CURLE  
versus  
KRYSTAL MAVONNE CURLE.

HIGH COURT OF ZIMBABWE  
UCHENA J  
HARARE 5, 19 July and 12 September 2013.

### **Opposed Application**

*T Magwaliba*, for the Applicant  
*Adv Fitches*, for the Respondent.

Uchena J. The applicant a Canadian citizen who is also a permanent resident in Zimbabwe and the respondent an American citizen who is also a permanent resident in Zimbabwe but has abandoned that status, married each other in America after which they came to live in Zimbabwe on resident permits. They were blessed with 3 children Arielle Nikole Curle born on 27 February 1999, Keith Richard Curle born 10 September 2000 and Ashley Elizabeth Curle born on 15 January 2003, whose custody they are now fighting over.

The dispute started when they as a family, visited the respondent's family in America in February 2010. They had return tickets showing an intention to return to Zimbabwe. The respondent changed her mind while they where in America and declared to the applicant her intention not to return to Zimbabwe. She hid the children's passports making it impossible for the applicant to come back to Zimbabwe with the children. She succeeded in depriving him of the company and companionship of herself and the children. He came back to Zimbabwe without his wife and children. He took legal action to facilitate the return of his children to Zimbabwe. He sought and obtained a Hague Court order from the Superior Court of The State of California In and For The County of Siskiyou. A Hague order is an order sought, against the contravention of article 3 of the The Hague Convention on The Civil Aspects of International Child Abduction which provides as follows;

“The removal or retention of a child is to be considered wrongful where;

- (a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

- (b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

The children are citizens of both America and Canada. Keith Curle is a citizen of Zimbabwe by birth, and a citizen of both Canada and America by decent. They were however staying in Zimbabwe with their parents. The family left this country intending to come back. They bought return tickets which The Hague Court found to be evidence of their intention to come back to Zimbabwe. The respondent retained the children in America by hiding the children’s passports, which The Hague Court correctly, found to be a wrongful retention of the children from Zimbabwe the country in which they were habitually resident. She was ordered to retain the children to Zimbabwe were the issue of interim custody was to be determined. In complying with the order she brought the children to Zimbabwe where she voluntarily handed them over to the applicant at Harare International Airport. All the Hague Court had ordered her to do was return the children to Zimbabwe where they were habitually resident. She could have opted to stay with the children in Zimbabwe.

The respondent has filed for divorce in the Superior Court in California in the United States of America. The divorce case will be heard on 25 October 2013. Subsequent to the granting of the Hague Court order which ordered the respondent to bring the children to Zimbabwe the country of their habitual residence, both parties filed applications for the custody of the minor children. The applicant made this application to this court. The respondent applied to the Children’s Court in terms of section 5 of the Guardianship of Minors Act [Cap 5:08.] She however withdrew her application giving way to this application.

Each party, through his or her counsel urged this court to grant the children’s custody to him or her. Both parties put themselves forward as the better custodian of the minor children.

This court has to determine which parent is the better interim custodian. I say interim custodian in view of the pending divorce proceedings which will finally determine the issue of custody. Interim custody should not affect the current best interests of the children. The interests of the children at this stage are best served by an order which does not unnecessarily

interfere with their education. The order to be granted should avoid disrupting their present circumstances unless it is in their interest to do so. The children are staying in good and stable accommodation with the applicant. The respondent did not state how she intends to accommodate them if they are placed in her custody. She however in her opposing affidavit indicated that she prior to bring them back to Zimbabwe in compliance with the, Hague Court order was staying with them in her parents' home which she was sharing with her parents. The size of that accommodation was not disclosed leaving the space available to the children if they are to go back into that home unspecified.

The children are doing well at school in Zimbabwe. That however is not a decisive factor as they were equally doing well at the school they attended in America. This leaves the issue of their education neutral apart from the undesirability of unnecessarily moving them from one country to another when the issue of their final custody will be determined in the near future. The decisive factor is the nearness of the pending divorce. It is in my view prudent to let that court decide which parent should finally have custody. The present circumstances of the children are safe and seem to be providing them a decent home and environment. They were placed into those circumstances by the respondent who brought them to Zimbabwe and surrendered them into the applicant's custody. She chose not to be with them in Zimbabwe. They were therefore not unlawfully taken from her custody, which would have justified an urgent restoration of custody to her as the mother.

In the case of *B v K 1983 (1) ZLR 212 (HC) GROSSMAN AJ* at page 214 A-B said;

“Transient difficulties relating to the general blossoming into adulthood of children should not per se suffice to have the status quo altered, otherwise the ridiculous and quite undesirable situation would arise that children would be shuttled back and forth between Elicits depending on the adolescent needs of the moment.”

Children should not be exposed to the whims of their divorcing parents. They should be allowed to live normal lives while their parents settle their differences through the courts. I appreciate that the American court which granted The Hague order deferred to this court determining the issue of interim custody. This is because its jurisdiction was limited to granting an order for the children to be returned to the country of their habitual residence. I am, however of the view that these children have been exposed to the acrimony generated by their parent's pending divorce. Their passports were hidden leading to their unlawful retention in America leading to the Hague order. Their return to Zimbabwe in terms of a

Hague Court order was subjected to derogatory public debate as demonstrated by the documents attached to the applicant's application. Their maternal grandfather in whose house they will stay if I grant their interim custody to the respondent was involved in that public debate. It is not in the children's best interest to grant an interim custody order which will expose the children to venomous attacks on their father, his country of permanent residence and judicial decisions on their custody. Their best interest will be served by an order which will insulate them from the aforementioned debates.

Mr *Fitches* relied on the provisions of s 5 of the Guardianship of Minors Act [Cap 5:08], when he submitted that the respondent is entitled to custody on separation. Section 5 provides as follows;

- “(1) Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made under section *four* or this section or by a superior court such as is referred to in subparagraph (ii) of paragraph (*a*) of subsection (7).
- (2) Where—
- (a) the mother of a minor has the sole custody of that minor in terms of subsection (1); and
  - (b) the father or some other person removes the minor from the custody of the mother or otherwise denies the mother the custody of that minor; the mother may apply to a children's court for an order declaring that she has the sole custody of that minor in terms of subsection (1) and, upon such application, the children's court may make an order declaring that the mother has the sole custody of that minor and, if necessary, directing the father or, as the case may be, the other person to return that minor to the custody of the mother.”

The facts of this case do not justify the invocation of the provisions of s 5 (1) and (2), because the children were not unlawfully taken from the respondent. She voluntarily handed them to the applicant who is doing his best to look after their material and educational interests. The applicant was the one who applied for custody of the children in terms of section 4'(1) (b) of The Guardianship of Minors Act, which provides as follows;

- “(1) The High Court or a judge thereof may—
- (a) -----; or
  - (b) on the application of either parent of a minor whose parents are divorced or are living apart; if it is proved that it would be in the interests of the minor to do so, grant to either parent the sole guardianship, which shall include the power to consent to a marriage, or sole custody of the minor, or order that on the predecease of the parent named in the order, a person other than the survivor shall be the guardian of the minor, to the exclusion of the survivor or otherwise.”

The facts referred to above supports his application. He applied for custody pending the finalisation of divorce proceedings in the Superior Court of California. He offered the respondents access to the children. The order sought as already said takes care of the interim best interests of the minor children. It is not in the best interest of the children to disturb their current settled life when the divorce proceedings which will finally settle the issue of custody is about to be heard. The issues of custody will then be properly ventilated as parties will be able to lead *viva voce* evidence which can be tested through cross-examination.

Each party sought costs against the other. This is a case involving a custody dispute between the children's parents who are both expected to desire the company of their children. Therefore each party was entitled to apply for and defend the granting of custody to the other. I am therefore satisfied that each party must bear his or her own costs.

In the result it is ordered that;

- (1) Pending finalisation of the divorce proceedings pending in the Superior Court of California in the matter of *Krystal Curle v Jonathan Curle* SCCV FL 11 – 00767, custody of the three minor children of the marriage namely Arielle Nikole Curle born on 27 February 1999; Keith Richard Curle born on 10 September 2000; and Ashley Elizabeth Curle born on 15 January 2003 be and is hereby granted to the applicant with respondent having rights of access to the minor children upon prior consultation and agreement with applicant, provided the access is to be exercised in Zimbabwe;
- (2) Respondent be and is hereby ordered not to remove the minor children from Zimbabwe without a prior written consent having been obtained from the applicant or without an order of court to that effect having been obtained.
- (3) Each party shall pay his or her own costs.

*Messrs Linda Chipato*, applicant's legal practitioners for the  
*Messrs Scanlen & Holderness*, respondent's legal practitioners.