

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**



IN THE MATTER OF: JAYDEN TYLER HOMAN AN INFANT
IN THE MATTER OF: AN APPLICATION FOR CUSTODY
IN THE MATTER OF: SECTION OF THE LEGITIMACY ACT
CHAPTER 52 OF THE LAWS
OF ZAMBIA

BETWEEN:

ROHANNA MYRA DEBRAH PETERSON

APPLICANT

AND

ROLAND HOMAN

RESPONDENT

Before Honourable Mr. Justice M.D. Bowa on 17th of April 2020.

For the Applicant: Mr. R Peterson of Chibesekunda and company

For the Respondent: No appearance

JUDGMENT

Cases referred to:

1. *Robert Simeza vs. Elizabeth Muzeche SCZ No 23 of 2011*
2. *Re O(infants) (1971) 2 ALL ER P744*
3. *Stoyke v Stoyke SCZ appeal No. 67 of 1998*
4. *J v C (1969) 1 ALL ER 788*

Legislation referred to:

1. *The High Court Act Order 30 rule 11*

2. *Legitimacy Act Cap 52 of the Laws of Zambia s 14*

Other material

1. *Un Convention on the Rights of the child Article 3.*

The Applicant commenced this action by originating summons on 20th August 2019 seeking the following.

- i. *An order that she be granted sole custody and parental responsibility over and in respect of Jayden Tyler Homan until such time as the said Jayden Tyler Homan attains maturity, and*
- ii. *Any other relief the court may make.*
- iii. *That the costs be in the cause*

The application was supported by an affidavit sworn by the Applicant. She deposed that she is the biological mother of the named Jayden Tyler Homan as confirmed by the birth certificate marked "**RMDP1**." Further that she is an accountant and entrepreneur and has established an accounts advisory firm called Out Resources Business Support Limited in which she is also director. The firm employs 6 people.

She deposed further that she resides at plot 34 Magoye Road Kalundu Lusaka where she has lived for the last 5 years with her son and mother Deborah Jones. The house has four bedrooms, two bathrooms and ample space for her son. She added that in addition to her mother, there are two household helpers both of whom have been employed by the family from before Jayden's birth and whom are known to him. Exhibited "**RMDP3**" is confirmation of her accommodation status. It was averred further that Jayden was born on the 2nd March 2009 at Victoria Hospital in Lusaka and his father is Rowland Homan a Zimbabwean National.

The Applicant informed the court that her son has at all times resided only with her. She undertook to make provision for all that may be necessary to properly maintain her son as she is solely responsible for his well-being on all fronts including financial, emotional and physiological needs. The court further learnt that Jayden is currently enrolled as a student at the British International Primary School. Exhibited "**RMDP5**" is a copy of a recent report and other school documents.

The Applicant disclosed further that Jayden has not been the subject of an adoption or of an application for an adoption order. Further that Jayden's biological father does not now nor has he in the past had any dealings with the child. Therefore that if the adoption order is made in pursuance to the application, her preference would be that her son Jayden Tyler Homan should be known as Jayden Tyler Homan Petersen.

The Respondent did not file an affidavit in opposition. I am satisfied that service of process was done by substituted service as per affidavit of service dated 15th of November 2019. I allowed the Applicant to proceed with the application in the absence of the Respondent in terms of Order 35 rule 3 of the High Court rules.

Counsel for the Applicant Mr. Peterson submitted that the application was made pursuant to Order 30 rule 11 (e) of the rules of the High Court Cap 27 of the Laws of Zambia as read with section 14 of the Legitimacy Act Cap 52 of the Laws of Zambia. He submitted that Order 30 rule 11 (e) of the High Court Rules vests this court with jurisdiction to determine applications relating to the guardianship and maintenance for advancement of infants. In

addition, that section 14 of the Legitimacy Act further confirms the jurisdiction of the High Court to make any order as it may think fit relating to the custody of an infant. Counsel relied on the affidavit in support dated 20th August 2019. He added that the facts and exhibited documents disclosed in the affidavit in support show that it is in the interest and welfare of the child that the order for custody and parental responsibility be granted to the Applicant.

Learned counsel submitted further that the test set out in section 14 of the Legitimacy Act is that the welfare of the child is the paramount consideration. I was referred to the case of **Robert Simeza vs. Elizabeth Muzeche¹** in which the Supreme Court confirmed that it is a principle of law that in determining applications to do with infants, if the courts were to err it should be on the side of infants. That in the same case the court recognized that of the welfare of the child is that of access to education and accommodation.

In this regard, that the affidavit in support in this case shows that the Applicant has been solely responsible for all aspects of the child's welfare including education, financial and psychological

needs. In addition that the exhibits show that the Applicant is capable of continuing to take care of the welfare of the child. He submitted further that in the exhibited school report marked “**RDMP5**” the teachers recognize that the infant has sufficient parental oversight, love and care so as to encourage his emotional and physical growth. Conclusively, counsel submitted that the Applicant had satisfied the requirements of section 14 of the Legitimacy Act and prayed for an order set out in the originating summons which was that the Applicant be granted sole custody and parental responsibility for the concerned infant until such time that he attains the age of majority and that costs be in the cause.

I have carefully considered the application before me. The application is brought pursuant to Order 30 rule 11 of the High Court rules as read with section 14 of the Legitimacy Act Cap 52 of the Laws of Zambia. For ease of reference Order 30 rule 11 provides:

***“11 the business to be disposed of in chambers shall consist of the following matter in addition to the matter which under any other rule or by statute or by the law and practice for the time being observed in England and applicable to Zambia may be disposed of in chambers.*”**

(e) Applications as to the guardianship and maintenance or advancement of infants.”

Section 14(1) of the Legitimacy Act provides as follows.

“14 (1) the High Court may upon the application of either parent of an illegitimate infant, make such order as it may think fit relating to the custody of such infant and the right of access thereto of either parent.

Evidently from the above provision, an application can be made by either father or mother so it would not necessarily be conclusive as often believed that the custody of a minor automatically lies with the mother of a child. ***In RE O (infants)***² the court ruled that;

“There is no rule that little children should be with their mother, any more than there is a rule that boys approaching adolescence should be with their father, it depends on what is proper in each individual case”.

What is of paramount importance is where the best interest of the child lies. Zambia is a State party to the UN Convention on the Rights of the child. Article 3 of the Convention provides;

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative qualities or legislative bodies, the best interest of the child shall be a primary consideration.”

This provision has clearly been domesticated in amongst other legislation, section 14 (2) of the Legitimacy Act which provides that:

***“14 (2) Where upon the hearing of an application under this section, the custody of an illegitimate infant is in question, the court, in deciding that question, shall regard the welfare of such infant as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father in respect of such custody is superior to that of the mother, or the claim of the mother superior to that of the father.*”**

What amounts to the best interest of the child then becomes a matter of fact on a case by case basis.

In **Stoyke v Stoyke**³ the Supreme Court held that in considering the welfare of children it is not the monetary or physical comfort that should be paramount but rather the moral and religious welfare of the children and their physical wellbeing. In **J v C**⁴ the court proposed a wider definition of what amounts to welfare of a minor to extend and not limited to the age and sex of the child.

The law settled, there is no question that the matter before me was rightly commenced by originating summons as the application

relates to the guardianship and maintenance or advancement of an infant. The affidavit in support of the application discloses that the subject is an illegitimate child having been born of unmarried parents on the 2nd of March 2009. This squarely brings the application within the ambit of section 14 of the Legitimacy Act.

The affidavit reveals that the Applicant has been solely responsible for the care and maintenance of the child from his birth. I am satisfied that she has provided secure accommodation for the child and is catering for his educational and psychological needs. The Respondent did not file any opposition to the application so there is no evidence suggesting that perhaps the best interest of the infant are better secured by placing custody in his hands or at the very least that I grant joint custody.

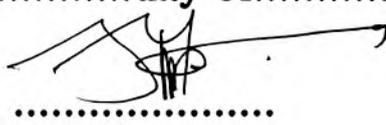
I am therefore satisfied that the best interest of the child and his welfare at this point lie in formal custody being granted to the Applicant as prayed. I accordingly grant sole custody and parental responsibility of the named Jayden Tyler Homan to the Applicant. Granted the evidence that the infant's father has not been involved in the child's life, he may should he decide to surface, apply to the

court for the review of the order to include an order for reasonable access to the child pursuant to section 14(3) of the legitimacy Act.

I note that the affidavit in support included a plea that the child's names be changed to include "Peterson" as the last name. This is beyond the scope of what is anticipated in the law used to move the court and I do not see how that will enhance the child's welfare. I would accordingly decline to award this request which was in any event not included in the prayers in the originating process nor persuaded by counsel in his oral submissions and prayer before court.

I make no order as to costs.

Dated at Lusaka this.....day of.....2020

Ar *April*


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JUDGE